Board of County Commissioners
Multnomah County

501 SE Hawthorne Blvd., Suite 600
Portland, Oregon 97214

December 21, 2017

VIA ELECTRONIC SUBMISSION AT:
http://www.oregon.gov/deq/Regulations/rulemaking/Pages/ccleanerair2017.aspx

Oregon Department of Environmental Quality
Attn: Joe Westersund, Cleaner Air Oregon Coordinator
700 NE Multnomah Street, Suite #600
Portland, Oregon 97232

Re: Comments on Proposed Cleaner Air Oregon ("CAO") Rules

Dear Mr. Westersund:

Thank you for the opportunity to comment on the proposed Cleaner Air Oregon rules relating to industrial air toxic emissions throughout Oregon. These comments are submitted on behalf of Multnomah County Board of Commissioners and were adopted by a vote of the Board for submission to the Department of Environmental Quality (DEQ) on December 21, 2017, Resolution 17-xxxx.

In February of 2016, Oregon Department of Environmental Quality ambient air monitoring indicated dangerously high concentrations of cadmium, arsenic and other airborne toxic heavy metals pollution in Portland neighborhoods. These findings crystallized in the public's minds what had long been known by state and local agencies: Oregon air quality rules do not fully protect Oregonians from toxic industrial air emissions. In April of 2016, Governor Kate Brown tasked DEQ and the Oregon Health Authority (OHA) with the overhaul of industrial permitting rules, an effort called "Cleaner Air Oregon." Before the inception of Cleaner Air Oregon, the state had not taken action to regulate toxic air emissions that had long been monitored, studied, and well documented. In particular, Multnomah County participated in the Portland Air Toxics Solutions process previously initiated by DEQ, and in 2011 called on the state to adopt air

quality rules that would prioritize the protection of public health. Unfortunately, the state did not act on the County's recommendations.

In February 2016, we were all deeply troubled by new evidence that our communities are routinely subjected to unhealthy levels of air toxics being emitted in close proximity to dense urban neighborhoods. The release of data from the U.S. Forest Service moss study and subsequent air quality monitoring from DEQ showed the presence of heavy metals, and once again highlighted the need for air quality rules that prioritize public health. During this time of great public concern and uncertainty, Multnomah County pushed to make sure information was being shared with the public. In coordination with the DEQ, OHA, and Portland Public Schools the Multnomah County Health Department hosted three public forums at which over a thousand concerned residents showed up to get answers and voice their frustration with a broken system. Those voices have not been forgotten by the Board.

Cleaner Air Oregon is a major step forward in establishing health based rules for Oregon. Protecting public health, particularly for vulnerable populations, should be of paramount concern for State environmental regulators. All Oregonians have a right to breathe clean air. We believe this is a reasonable and achievable goal which has been achieved by other states and local jurisdictions; it should be the ultimate focus of regulators and industry in this program.

The Board believes that well crafted and implemented regulations will not hamper economic prosperity or progress. On the contrary, the health benefits of air quality protections will outweigh the financial cost to industry. This is illustrated by research conducted by the U.S. Environmental Protection Agency that showed a 30 to 1 public health benefit for 1990 Clean Air Act Amendments that limited air pollution through a technology-based approach. In addition, more than twenty other states, including California and Washington, have health based rules in place limiting air toxics. It is reasonable to expect that industry will adapt to these new standards as the rules phase in over time. Indeed, it is the quality of life that draws businesses and people to our state and constitutes one of Oregon’s most important competitive advantages. That quality of life advantage is jeopardized by inadequate air quality rules that endanger public health.

Multnomah County is the Local Public Health Authority. Because it is our duty to protect public health, we review these rules in an effort to provide constructive feedback as to how the rules can be improved. The Board believes that when government acts to protect the most vulnerable among us, the entire community is protected as well. In addition to the protection of public health, these rules must also meet the state's statutory standards of environmental justice by ensuring equal protections and enhanced outreach and engagement for underrepresented communities, including communities of color, low-income communities, tribal communities, and any other vulnerable populations such as children, the elderly, or people with disabilities.

Leading with these values, we call on DEQ to strengthen the draft rules to ensure that all Oregonians can safely breathe clean air, especially the most overburdened and vulnerable among us. Our broad concerns are as follows:

1. DEQ and the agency's policy and rulemaking body, the Environmental Quality Commission (EQC), have not met their statutory obligations to account for the environmental justice impacts of the proposed rules.
2. Program rules should be revised to eliminate loopholes and agency discretion that would allow greater risk to the public.

DEQ and the Environmental Quality Commission have not met their statutory obligations to account for the environmental justice impacts of the proposed rules.

We acknowledge and appreciate DEQ's efforts to consider environmental justice within the CAO process. Several components of the proposed rules are noteworthy, including robust community engagement requirements as outlined in section 340-245-0250, and the novel Area Multi-Source Risk Determination as outlined in section 340-245-0090. The Area Multi-Source Risk Determination is particularly important because it creates a process for determining cumulative risk from stationary industrial sources of air toxics. Cumulative risk from industrial sources has the potential to create disproportionate impacts on vulnerable populations.

Despite these important program features, we recommend that DEQ explicitly outline the agency's statutory obligations under federal and state law (including Title VI of the Civil Rights Act of 1964, Executive Order 12898, and ORS 182.545) to account for the environmental justice impacts of the proposed rules. In a letter dated September 30, 2016, the Oregon Environmental Justice Task Force specifically requested that DEQ clearly state its legal obligation to ensure that the program does not disproportionately impact communities of color and low-income communities. These obligations should be clearly outlined in the rules and include a description of how the rules provide "equal protection from environmental and health hazards, and meaningful public participation in decisions that affect the environment in which people live, work, learn, practice spirituality, and play."[1]

The Oregon Environmental Justice Task Force's guidance document, *Environmental Justice: Best Practices for Oregon's Natural Resource Agencies,* states that "[e]arly, continuous, and meaningful public participation for all potentially affected communities will result in a more inclusive consideration of a broader range of perspectives, leading to more equitable and sustainable decision-making and reducing the likelihood of disproportionate impacts." To this end, we feel it necessary to point out that participation in a permitting process is complex and

[1] State of Oregon Environmental Justice Task Force, *Environmental Justice: Best Practices for Oregon's Natural Resource Agencies*. January 2016.

time consuming. Community members, particularly those from underrepresented and disproportionately impacted communities, are at a disadvantage during these proceedings because of the highly technical nature of permitting processes. Now more than ever, DEQ needs to meet the spirit of its statutory obligation pursuant to ORS 182.545 to fully staff and resource a Citizen Advocate position to ensure that underrepresented and disproportionately impacted communities have opportunities to meaningfully participate in critical permit and rulemaking processes that will affect their health and lives.

A CAO Citizen Advocate would enhance all program areas. The Area Multi-Source Risk Determination as outlined in section 340-245-0090, however, would benefit greatly from the enhanced community engagement that such a fully-staffed and resourced position would bring. The proposed rules do not contemplate a community process for the determination of a Multi-Source Risk Area, which could be considered a substantive deficiency in light of DEQ's statutory obligation pursuant to ORS 182.545. In addition to other analytical steps contemplated in the rules, DEQ should add a component requiring ground-truthing of potential cumulative risk areas through early, continuous and meaningful public participation for all potentially affected communities, especially underrepresented communities. We believe requiring targeted community engagement to the Multi-Source Risk Area determination process both meets the expectations of the state environmental justice statute and will also lead to more successful implementation of this program element.

Program rules should be revised to eliminate loopholes and agency discretion that would allow greater risk to the public.

On a variety of subjects the proposed rules provide either too much discretion to the agency or, in other areas of concern, limit the agency's ability to act, and as a result, create a greater public health risk. Specifically, (a) the implementation methodology unnecessarily limits the agency's ability to bring high risk facilities and Multi-Source Risk Determination areas into the program; (b) the risk action levels are set too high and do not provide adequate protection to public health; and (c)the Conditional Risk Level program element is overbroad and vague, thereby undermining confidence in the program and potentially exposing the public to unacceptably high risk levels.

a. In section 340-245-0040(1)(a), DEQ limits tier 1, the first round of companies that will be required to go through the CAO process, to "no more than 80 individual permitted existing sources." Limiting the tier 1 implementation to 80 facilities is an arbitrary cut-off and needlessly constrains the agency. Although we agree that DEQ should target the highest risk producing facilities (most polluting) first, and the tier system sets out a reasonable process to achieve this goal, we oppose limiting the number of facilities. Instead, the agency should establish a risk threshold based on the best available science

that will target the facilities that pose the greatest risk to public health, and bring those facilities into the program first.

Similarly, in section 340-245-0040(1)(d), DEQ limits tier 1 area multi-source risk determination to "no more than one area" within the first five years of the program. Given the importance of this program element to addressing environmental justice concerns of disproportionate cumulative risk, and the potential prevalence of such areas, particularly in metropolitan regions,one area multi-source risk determination should be considered the minimum, with no arbitrary limitation imposed on the number of such area designations. The agency should also include consultation with community members, particularly community members who have been most impacted by stationary industrial sources, in the process of making an area multi-source risk determination.

b. The risk action levels (RAL) are at the core of the Cleaner Air Oregon Program because they both quantify risk, and determine breakpoints for acceptable levels of risk posed by facilities. Establishing and enforcing health protective RALs is critical for the success of the Cleaner Air Oregon Program. It is our belief that the RALs outlined in 340-245-8010 Table 1 are not sufficiently protective of public health. Although inclusion of Permit Denial RAL is an important and valuable program feature, the very high Excess Cancer RAL of 500 and Non-Cancer Hazard Index RAL of 30 is an egregious example of how current RAL levels are not sufficiently protective. We agree that a Permit Denial RAL is needed, but the current RALs are set at dangerously high levels. The former director of the Louisville Air District, Art Williams, compared CAO RALs to "[S]etting the speed limit at 200 miles an hour."

   Section 340-245-0005(1)(c) states the the purpose of the rules is to "[p]rioritize and protect the health and wellbeing of all Oregonians" and in section 340-245-0005(1)(d)(2) that "[t]he long-term goal of Cleaner Air Oregon is that the risk from all existing facilities be below 100 in 1 million and hazard index of 3 by the year 2030." These goals will not be met, however, if facilities are allowed cancer and non-cancer RAL of 500 and 30, respectively. Indeed, one facility allowed to operate at an RAL approaching 500 would subvert the goal of the program. To this end, we recommend that Permit Denial cancer and non-cancer RAL be set to 100 and 3, respectively, to be consistent with the purpose of the program.

   Other RAL values should also be revised downward to protect public health. For new sources the permit denial excess cancer RAL should be revised downward to no more than 25 because new facilities will be able to design pollution controls from the ground up, making the requirements easier to comply with when compared to retrofitting existing facilities, and because the permit denial RAL should be no greater than the RAL for

existing facilities. We also recognize the need for granting existing facilities more flexibility, making higher RAL values for existing facilities appropriate. The 1.5 fold increase in excess cancer RAL and up to 10 fold increase in non-cancer RAL values for existing facilities, however, is too high. DEQ should revise downward these RAL values to better protect public health and ensure that facilities that pose a risk to the community are brought into the program.

c. Section 340-245-0230 Conditional Risk Level Requirements needs modification to ensure that the process is based in science, protects public health, and meets the program goals of reducing risk to all Oregonians. As a starting point, DEQ should adopt language that clearly communicates its goals and processes with the public. We recommend that DEQ rename what is currently called "DEQ Director Consultation Risk Action Level" in 340-245-8010 Table 1 as "High Priority Source Risk Action Level" or "Conditional High Risk Permit" which would more clearly communicate to the public that such sources are emitting at an unsafe level, which is why they require special approval from the Director.

   Facilities that are granted a waiver under this program element are granted an ongoing permit to pollute at levels considered hazardous by the agency. In addition to the requirements for periodic TBACT review in section 340-245-0230(9), and lower permit denial RALs as described above, facilities granted a permit under this program element should be required to reapply for a permit, including completion of a comprehensive health risk assessment, under these rules every five years unless an risk reduction plan is submitted and approved by the agency that brings the risk bellow the applicable source RAL.

   Finally, regarding 340-245-0230(7)(b)(A), governing DEQ Director approval of a Conditional Risk Level that exceeds the applicable Director Consultation Risk Action Level, the consideration of public input and the factors set out in this section should be mandatory. Furthermore, at no point should political considerations supplant rigorous scientific evaluation when making the determination that the risk posed to the facility does not unreasonably burden populations living in close proximity to the facility. Finally, the approval of a conditional permit should not be left to the sole discretion of the director. Instead, the director should submit a report containing all relevant public input, scientific evaluation of risk, rationale for the decision, and director's recommendation to the EQC for final approval. This will ensure that the public has the opportunity to weigh in on the final decision during an open EQC meeting, and create a record of how and why a decision was made on a high risk permit application.

Thank you for considering our comments on the proposed rules for the Cleaner Air Oregon industrial air toxics program. While we acknowledge and appreciate the significant efforts DEQ

has made toward developing a health-based approach to regulating air toxic pollution, we continue to have significant concerns with the likely effectiveness and implementation of the CAO program. To address these concerns, we strongly encourage DEQ and EQC to:

1. Strengthen environmental justice protections by explicitly stating the agency's obligations and fully funding a citizen advocate position dedicated to the Cleaner Air Oregon program.
2. Eliminate loopholes and limit agency discretion that would allow greater risk to the public by reducing RALs for existing facilities and for Permit Denial RALs for both existing and new facilities, and by further constricting the circumstances under which a high risk facility is able to obtain a permit.

Please do not hesitate to contact the Chair's Office if you have any questions regarding these comments.

Sincerely,

Deborah Kafoury
Chair

Sharon Meieran
Commissioner, District 1

Loretta Smith
Commissioner, District 2

Jessica Vega Pederson
Commissioner, District 3

Lori Stegmann
Commissioner, District 4