

January 10, 2011

Merlyn Hough
Agency Director
Lane Regional Air Protection Authority
1010 Main St.
Springfield, OR 97477

Re: J. H. Baxter Permit No. 200502

Dear. Mr. Hough:

This letter provides you with two requests from the Oregon Toxic Alliance and Rogue Group Sierra Club. First, we request that you provide a “Notice of Opportunity for Hearing” and “Notice of Rights and Remedies” regarding the issuance of the above referenced permit. Secondly, we request a contested case hearing on the Baxter permit. We request that you either provide the “Notice of Opportunity for Hearing” and “Notice of Rights and Remedies” or accept our request for a contested case hearing within 15 calendar days of receipt of this request.

1. Request that LRAPA Provide a “Notice of Opportunity for Hearing” and “Notice of Rights and Remedies” as required by LRAPA Rule 14-175 and ORS 183.415 Respectively Regarding the J.H. Baxter Permit Renewal (Permit No. 200502)

Oregon Toxics Alliance (OTA) and the Rogue Group Sierra Club (RGSC) are interested parties regarding the J.H. Baxter Permit Renewal (Permit No. 200502). Both parties made comments on the Draft Permit for J.H. Baxter and both parties attended the public hearing and made comments at the hearing.

LRAPA has failed to follow its own rules and the Oregon Administrative Procedures Act in issuing J.H. Baxter Permit # 200502.

LRAPA Section 14-175 - Contested Case Proceedings

According to LRAPA’s own rules, LRAPA is required to provide interested parties with a “notice of opportunity for hearing”. Once this “notice” is received, an interested party can then request a contested case hearing.

Section 14-175 clearly states the information that the “notice” must contain.

LRAPA provided no such notice once the decision was made to renew permit no. 200502. Therefore, OTA requests that LRAPA now provide the required notice.

In the case of the J.H. Baxter Permit, LRAPA failed to provide the public or interested parties with such a notice. This petition requests that LRAPA provide such notice to all interested parties, including the Oregon Toxics Alliance and the Rogue Group Sierra Club, within 15 calendar days of receipt of this petition.

Oregon Administrative Procedures Act

LRAPA is a “state agency” as defined by the Oregon Administrative Procedures Act (OAPA) (Oregon Revised Statutes, Chapter 183, et seq.)

Under ORS 183.415 persons affected by actions taken by state agencies have a right to be informed of their rights and remedies and are entitled to a public hearing. LRAPA provided no such notice to the public or to OTA, an interested party, and has therefore violated ORA 183.415.

Again, LRAPA has failed to provide the public, interested parties or those affected by its actions with notice of their rights and remedies, as required. This petition, requests that LRAPA provide such notice to all interested parties and those affected by its actions within 15 calendar days of receipt of this petition.

2. Appeal of the Decision to Renew J.H. Baxter Permit No. 200502 and Request for Contested Case Hearing

Please consider this letter a request for a contested case proceeding under ORS 183 and LRAPA Rules Section 14-175. This request is submitted by the Oregon Toxics Alliance and Rogue Group Sierra Club.

Oregon Toxics Alliance (OTA) and the Rogue Group Sierra Club (RGSC) are interested parties and hereby submit this petition to the Lane Regional Air Protection Agency (LRAPA) to institute a contested case proceeding under ORS 183. The subject of this petition is Permit No. 200502, issued to J.H. Baxter, Eugene Plant, 85 North Baxter Road, Eugene, OR 97402.

Oregon Toxics Alliance (OTA) and the Rogue Group Sierra Club submit that Permit No. 200502 constitutes an order issued by the LRAPA. We further submit that we have the right to petition the LRAPA Board for a contested case proceeding to determine the facts and the remedies regarding Permit No. 200502 in regards to meeting all the requirements of the Clean Air Act and the 1994 Executive Order 12898 on Environmental Justice, and to account adequately for public health concerns and procedural errors raised during the public comment period and during issuance and after issuance of the permit. It is our position that Oregon Toxics Alliance, its members

and residents in the neighborhoods located in West Eugene and Northwest Eugene and the Rogue Group Sierra Club and its members will suffer irreparable injury from the issuance of the permit and the operation of the and wood treatment facility.

OTA and RGSC made comments on the proposal to renew the permit, and thus have standing.

Merits:

Environmental Justice:

JH Baxter is a chemical manufacturing and wood treatment facility. It emits many tons of hazardous air pollutants, criteria air pollutants and volatile organic compounds. Breathing vapors of the ammonia, naphthalene, creosote, coal tar, coal tar pitch, or coal tar pitch volatiles can cause irritation of the respiratory tract (United States Agency for Toxic Substances and Disease Registry). The International Agency for Research on Cancer (IARC) and EPA has determined that coal tar creosote is probably carcinogenic to humans. In animals studies have shown that when pregnant animals breathe creosote, it may cause harmful effects to the developing fetus. The EPA requires that spills or accidental releases into the environment of 1 pound or more of creosote be reported to the EPA. Other agencies, namely OSHA and NIOSH have set or recommended exposure limits to coal tar pitch volatiles. U.S. EPA designated priority pollutants for creosote compounds containing PAH compounds: naphthalene, phenanthrene, anthracene, fluoranthene, pyrene, benz[a]anthracene, benzo[a]pyrene, benzo[g,h,i]perylene. Many of these PAHs are known for their carcinogenic, mutagenic and teratogenic properties. People with asthma may be more sensitive to breathing these pollutants than others.

The JH Baxter facility has generated thousands of public complaints in recent years. Many residents have stated that they no longer bother to report nuisance odors to LRAPA because they believe the complaints have not improved air quality. The groups signing on to these comments are community-based groups speaking on behalf of their own members who live in west Eugene. On 9/28/2010, 25 out of 55 people interviewed by Oregon Toxics Alliance in a neighborhood near the facility voluntarily and without a prompt mentioned the "smell of creosote" or mentioned JH Baxter by name as the source of nuisance smells. Some of the 25 comments mentioned that things are better than many years ago, but that "creosote" or "chemical" smells continue to be a nuisance and a public health menace. Complaints from neighbors in past years demonstrate that nuisance odors, the experience of poor air quality and poor health outcomes were unacceptable at the previously permitted levels. Children at a nearby elementary school have also complained of foul smells when playing outside during recess, as reported by an instructional aide. An elderly couple are leaving west Eugene and seeking to move simply out of distress due to industrial air pollution. One mother stated that she is unable to take her children for bicycle rides in her neighborhood because of the overwhelming smell of chemicals in the vicinity of JH Baxters. Many residents feel that

their family members have become asthmatic after moving to a neighborhood near JH Baxter. These complaints illustrate the level of undue hardship, nuisance and medical expense incurred by these residents, particularly residents who are low-income, minority or elderly.

Under LRAPA Rules 42-0010, the agency states that “LRAPA does not intend to ... cause any undue hardship or expense to any permittee who wishes to use existing unused productive capacity; or create inequity within any class of permittees subject to specific industrial standards that are based on emissions related to production.”

Referring to the Agency’s stated intention, JH Baxter will be able to make the case that they can increase emissions at exponential rates all the way up to and (according to LRAPA Rule 34-035) above their assigned PSEL’s.”

This rule sacrifices public health to “undue hardships” and/or “inequity” for the polluter, in this case JH Baxter. However, Rule 42, as applied by LRAPA, can be understood to create undue hardship and inequity for the low-income, elderly and minority residents in the vicinity of JH Baxter. The organizations submitting this public testimony declare that the neighborhoods surrounding JH Baxter have higher percentages of low-income, elderly and minority residents than other areas in Eugene. Thus, Rule 42- 0010 sets up conditions to allow LRAPA to discriminate against residents by allowing JH Baxter to pollute up to and over PSEL’s, levels that we declare are arbitrary, not based on Best Management Practices, and not based on the facility’s historical production performance, and not based on a long history of community complaints. Breathing clean air, living without the foul air that aggravates respiratory distress, enjoying one’s property and community parks – these are all basic human rights that each and every resident deserves. The proposed permit denies these basic human rights as described below.

Nuisance

Baxter emissions are a nuisance as defined by Section 49-010. Numerous complaints have been received from local residents complaining about the odor emitted by Baxter. This odor constitutes a nuisance. Not only does the odor constitute a nuisance, but the underlying cause of the odor should also be considered a nuisance. Many have testified and complained that this odor and underlying cause substantially and unreasonably interferes with their use and enjoyment of real property, or the substantial and unreasonable invasion of a right common to members of the general public. People have the right to enjoy their personal property, their home, and the use of their yard. People have a right to breathe odor-free air while using public property such as school playgrounds, parks, bike paths and sidewalks. And, people have a right to breathe air that is not hazardous to their health.

Generic PSELS

The generic PSELs are arbitrary and capricious and have no basis in fact or law. Though PSELs are considered the main factor in limiting air pollution from the facility, LRAPA has set PSELs so high that it is likely that they will have no effect on the way that the plant is operated or on the way that pollution reduction or limitation is affected. The PSELs have no correlation to the annual output of the plant, nor other pollution controls that have been placed on the plant. Generic PSELs also violated the Clean Air Act.

The PSELs are illegal under Section 42.0043 of LRAPA Rules, as the increased numbers exceed those allowed by specific permit conditions. LRAPA, itself, told members of the public that emissions would be limited by pollution control equipment, but also stated that it is the PSEL's that ultimately determine the facility's emission limits. Thus, the PSELs must be set to the limits allowed by the pollution control technology and not in a generic manner.

Hazardous Air Pollutants

The LRAPA has not designated HAP standards in the Baxter permit, as required by Section 44 of the LRAPA rules. The final Permit does not list HAPs that are found in Section 129 of the FCAA. The final Permit does not set maximum emission standards for HAPs as required by Section 44 of the LRAPA rules.

The draft permit should include a chart detailing estimated HAP's emissions for phenol, O-cresol, M- Cresol, naphthalene, quinoline, biphenyl, dibenzofuran, pentachlorophenol, arsenic pentoxide, dioxin, chromium and methylene chloride. Naphthalene was detected in 100% of air samples, yet it is not addressed in the permit. JH Baxter must monitor naphthalene emissions and submit O&M Plans demonstrating how naphthalene emissions will be reduced over time.

Ammonia is used at the facility and is emitted to the air. The polluter should submit O&M Plans that specify a plan to reduce ammonia emissions.

Production Limits:

Condition 3(b) -- Production in 2002 was 745,000 cubes. Of that number, LRAPA has not specified how much was creosote and how much of that production figure was penta, ammonia or arsenic based. Until the historical production limits are understood by the public and the public is able to compare to the new limits, it appears that the 1,000,000 cubes limit does nothing to result in cleaner air and less emissions.

LRAPA shall not codify production levels until the public is able to see historical production for creosote and other wood treatment products and compare to the proposed production limits. Why were the production limits for creosote-treated wood not set at levels corresponding to fewer complaints? It appears that the 1,000,000 cube

limit is not much of a limit at all, in fact, it is a higher number than historical production. It is not a “backstop” as stated by the staff. The 1,000,000 cubes limit is arbitrary and capricious as it has not been shown to have a basis in historical production levels.

13(b) The permit must also specify how much wood is treated with non-creosote products per year. This will allow comparisons with new and old levels under the new permit.

Actual Air Monitoring

LRAPA has the authority to require actual air monitoring, under Section 40 of the LRAPA rules. Clearly, if any facility demanded air quality monitoring, Baxter is the one. Complaints of odor throughout the community, and unmonitored or unmodeled fugitive emissions demand that LRAPA require actual air monitoring. The monitoring units must be placed in such a way that they will accurately and reasonably display actual emissions. Monitors must be placed at the plant site in at least five locations and also in and around the neighborhoods. The decision *not* to monitor is arbitrary and capricious.

No monitoring or limit on emissions from drying yard logs (fugitive emissions)

LRAPA does not require monitoring or modeling of emissions from drying logs stacked in the yard. We believe that these emissions are significant. LRAPA rules define any emissions which do not pass through a chimney, stack or vent as fugitive. Thus, these emissions must be monitored and pollution control applied.

Operating and Maintenance Plan

Condition 24 & 25: The staff claims that new Operating and Maintenance procedures will reduce toxic emissions; however the public has no access to these O&M's, and cannot verify if emission will actually be reduced. The public can only evaluate the permit based on the PSEL, SER's and conditions. None of these three factors guarantee that emissions will be reduced and air quality improved. Hiding the Operating and Maintenance Plan is arbitrary and capricious and an abuse of discretion.

If you have any questions, please contact either Lisa Arkin at 541-465-8860 or Tom Dimitre at 541-890-5022.

Thank you very much.

Sincerely,

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