



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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MAR 21 2011

OFFICE OF
WATER AND WATERSHEDS

Ms. Andrea Matzke
Department of Environmental Quality
Water Quality Division
811 SW Sixth Avenue
Portland, Oregon 97204-1390

Re: EPA Comments on Proposed Revisions to Oregon's Human Health Criteria and New and Revised Implementation Provisions

Dear Ms. Matzke:

I am writing to submit the U.S. Environmental Protection Agency's (EPA) comments on the Oregon Department of Environmental Quality's (ODEQ) proposed revisions to the State's human health criteria under the Clean Water Act (CWA) and new and revised implementation provisions. If adopted, this proposed rulemaking would revise the following sections of Oregon's water quality standards:

- Human Health Toxics Criteria (OAR 340-041-0033 and associated tables)
- Intake Credits (OAR 340-045-0105)
- Background Pollutant Allowance (OAR 340-041-003(6))
- Variances (OAR 340-041-0059)
- WQS and TMDL Regulations to Address Nonpoint Sources (OAR 340-041-0007(5), OAR 340-041-0061(11) and (12), OAR 340-042-0040, OAR 340-042-0080)

EPA fully supports Oregon's effort to finalize this rule and adopt revised human health criteria. Over the last several years Oregon has undertaken an extensive process to ensure the criteria are based on best available science, will protect the people of Oregon, and will address implementation concerns raised by stakeholders. The proposed criteria are based on data that clearly indicate higher levels of fish are consumed by some populations in Oregon and are established at a level that will protect all populations that consume fish from State waters, including Native Americans and high consumers. We appreciate the efforts of ODEQ to conduct an extensive review of local, national and international fish consumption rate studies and to employ the services of several of the area's top human health scientists to review the studies and recommend an appropriate rate that would be protective of the people of Oregon. We also appreciate your efforts to look seriously at the implementation of these criteria and address, to the best of your ability within the limits of State law and the Clean Water Act, the proposal and revision of several rules that will allow ODEQ flexibility in implementing the revised criteria. We believe that ODEQ has developed a high-quality set of rules that, with limited clarifications

and/or revisions, would be approvable and defensible under the Clean Water Act. As such, we encourage ODEQ to continue to move forward with the actions necessary to present a final rule to the Oregon Environmental Quality Commission (Commission) for adoption this summer.

The proposed revisions to the human health criteria will address EPA's disapproval action dated June 1, 2010, and our concerns regarding the protection of high fish consuming populations in Oregon. The proposed criteria are calculated consistent with EPA's 304(a) guidance for the development of human health criteria. Since local data indicates that some populations in Oregon consume more than the national average of 17.5 grams per day, ODEQ has conducted a thorough review of available data, consulted with local scientists, and engaged the public in a series of collaborative workshops prior to recommending to the Commission that a fish consumption rate of 175 grams per day be used to calculate Oregon's human health criteria. EPA informally reviewed the results of this work and supported this recommendation when ODEQ presented it to the Commission in October 2008. EPA continues to support the use of 175 grams per day as a fish consumption rate that is scientifically sound and protective of people who consume fish from Oregon's waters.

As you are aware, if Oregon does not adopt revised human health criteria pursuant to this proposed rule, EPA is obligated under the Clean Water Act to promulgate revised criteria for Oregon. We believe that the State is in the best position to adopt and implement water quality standards but remain prepared to move forward with a federal rule if the proposed criteria are not finalized. If we were required to take such an action, it is unlikely that the rule would contain any of the implementation provisions currently proposed in the State rule. In addition, EPA may take a more active role in reviewing NPDES permits to ensure that the federal criteria are appropriately being implemented.

Some stakeholders have suggested that the criteria should not become effective upon EPA approval but rather at some point in the future after ODEQ has completed additional work on implementation tools. While we understand that some uncertainty remains, we believe that the time used to discuss these proposals over the last two years has yielded a set of rule revisions and working knowledge of the draft provisions that can serve as a solid framework for implementing these criteria. All the information necessary to implement the proposed rules is currently on the table. Therefore, it is EPA's opinion that it is time to move forward in adopting and implementing the criteria. To allow additional delay through a change in the effective date could be problematic to EPA, would cause delay in EPA's CWA action on the criteria and may be inconsistent with the CWA requirement for states to have criteria protective of all uses.

Due to the stringency of the proposed criteria, much attention has been focused on the large number of pollutants where analytical methods are less precise than the criteria and how ODEQ proposes to implement these criteria in NPDES permits. EPA's review of ODEQ's proposed approach for addressing these criteria found it to be consistent with EPA guidance. We encourage ODEQ to continue to make a list of approved testing methods and quantification limits available to the public and to update the list as EPA's recommended analytical methods are updated and/or new analytical methods become available.

The proposed rule contains several implementation provisions, two of which are likely to require EPA approval under Section 303(c) of the CWA. EPA understands the need to have implementation tools available to assist in implementing water quality criteria and supports the use of these to the extent they are consistent with the CWA. We believe that ODEQ has undergone an extensive process of seeking input from all stakeholders, including the convening of a NPDES workgroup, in developing these provisions and has done an excellent job in sifting through the numerous comments and suggestions in coming up with final proposed rules that balance the need for flexibility with the needs to protect the State's waters and meet the requirements of the CWA. In our detailed comments, we have provided you with some additional recommendations that we believe would help to further clarify your rules or address areas that currently fall short of meeting CWA requirements.

ODEQ and the NPDES workgroup have spent considerable time discussing revisions to Oregon's variance policy. A variance is a very flexible tool that allows a state to address numerous situations in a variety of ways. Variances can be used to address situations where treatment technology is not currently available to treat an effluent stream or the effectiveness of that technology is unknown, the cost of treatment is economically unattainable, and where other sources are causing impairment to a waterbody and the discharger is a relatively limited source. A variance can be used as a stepping stone towards attainment of a water quality criteria and is not a permanent change to the water quality standard. EPA believes that the proposed variance policy is of high quality, addresses the issues outlined in EPA's current guidance and regulations, and is inclusive of requirements that entail recipients of variances to implement actions towards meeting the underlying water quality standard. As such, we believe this policy can serve as a strong foundation for future variances.

While no variance has been requested to date by a discharger in Oregon, the use of variances is not uncharted territory to either Region 10 or many states and regions around the country. Several EPA regions approve variances on a regular basis and do so with little to no delay to the state's processes. As NPDES permits continue to be written to attain more stringent criteria, EPA has seen, and expects to continue to see, an increased need for variances. Several states have already issued numerous variances and have indicated that the practical knowledge gained by the discharger, state staff and EPA staff increases over time, thus allowing for a more fluid and efficient process that does not delay permit issuance. EPA remains committed to work closely with ODEQ's permit and standards programs to ensure a similar outcome in Oregon. As you proceed with the first variances issued under this revised rule and/or a pilot variance, we are ready to commit the staff resources necessary to make these efforts successful.

Where multiple facilities of similar type are constrained in a similar manner, variances for multiple facilities could possibly be bundled together and use a similar justification, thus reducing the workload for all involved. If ODEQ identifies a situation where multiple dischargers face a similar problem, EPA remains open to exploring the most efficient process available to address these situations, including the bundling of variances or a multiple discharger variance.

ODEQ's proposal to apply the revised variance process for all criteria has also been a matter of concern to some stakeholders. EPA believes that it is preferable to have a single variance process that applies to all criteria in the State in order to provide for clarity and consistency. As each variance must be assessed for protectiveness, receive public notice and comment, and be approved by EPA prior to becoming effective, any issues relative to protectiveness of individual criteria that may not have been thoroughly reviewed during the workgroup process will be evaluated by ODEQ, available for public comment and reviewed by EPA on a case-by-case basis. We believe this provides opportunity for all interested parties to provide sufficient input into the process while maintaining clarity in the process.

ODEQ and the NPDES workgroup have also spent a considerable amount of time discussing potential approaches to address situations where a discharge is a relatively small contributor of a pollutant; yet, upstream pollutant sources impair the waterbody, thus, limiting the options available to a discharger. While this is a situation found throughout the country, due in part to the limited monitoring of many surface waters, an efficient way to address the situation has yet to be addressed by other states or by EPA on a national level. We applaud Oregon and its stakeholders for looking down the road and seeking to develop an efficient solution for a situation that could require significant resources for a minimal environmental benefit. Unfortunately, this has left ODEQ in a position of having to develop a rule that is unlike any other in the country and for which there is no model.

During the workgroup process we have struggled along with ODEQ staff and workgroup members to find a solution that was both consistent with the NPDES permit regulations and could be approved under Section 303(c) of the CWA. We commend ODEQ staff for their continued efforts to create a legally defensible provision. ODEQ staff have repeatedly presented options, listened to feedback, and revised the proposed rule language, up to the time of releasing this final proposal. We fully expect that similar consideration will be given to all comments received during this public notice period; that, ODEQ will continue to refine the provision prior to taking it to the Commission and will only recommend that the Commission adopt the rule if changes are made so that it is consistent with CWA requirements. Towards this end, our detailed comments provide specific suggestions for elements that would need to be addressed for this provision to be approvable by EPA.

The proposed rule and issue papers also address several issues that fall under the Clean Water Act but do not require EPA approval. This includes the adoption of an intake credit rule, discussion on how quantification limits will be used in permitting and clarifications to rule language addressing nonpoint sources through TMDLs and other implementation programs. We have reviewed these components of your proposal and fully support including these revisions in the final rule. The clarifications to the nonpoint source language and TMDL rule are timely and important in ensuring consistency in State regulations and in providing citizens with a clear understanding of ODEQ's role relative to implementing controls for these sources. Consistent with CWA requirements, ODEQ currently includes load allocations to nonpoint sources in TMDLs and makes those as specific to the source as data allows. Clarifying this in rule does not appear to change this practice or be inconsistent with the CWA. Therefore, EPA encourages ODEQ to move forward with these clarifications.

In closing, we would like to thank ODEQ and the Commission for the leadership you have shown in response to issues raised relative to the fish consumption rate used to derive Oregon's human health criteria for toxics. Oregon's work on the Fish Consumption Rate Review Project resulted in a solid foundation to support the development of human health criteria protective of consumers of fish caught in Oregon's waters by the general population as well as tribal and other subsistence fishers in the State. When adopted, this rule will serve as a solid example to other states in the Northwest and throughout the country as they address similar issues. Oregon's work will also serve as a framework for EPA Region 10 as we continue to work with other states and tribes in our Region to ensure that their water quality standards provide an appropriate level of human health protection to all of their citizens.

We have appreciated our work together throughout this process and remain committed to providing technical assistance as you finalize this proposed rule. We have attached detailed comments for your consideration. EPA also views the implementation of these criteria as a high priority and remains committed to assist you during the development of individual variances and on other concerns that may arise during the implementation of other tools contained in this rule.

If you have any questions concerning our comments or desire EPA's assistance, please feel free to contact me at (206) 553-4198 or Jannine Jennings at (206) 553-2724.

Sincerely,

A handwritten signature in black ink, appearing to read "David Croft" with a stylized flourish at the end.

Michael A. Bussell, Director
Office of Water and Watersheds

Enclosure:

cc: Neil Mullane, ODEQ
Jennifer Wigal, ODEQ
Debra Sturdevant, ODEQ