

Oregon Department of Environmental Quality

**Dec. 11-12, 2013**

Oregon Environmental Quality Commission Meeting

Rulemaking Action Item: #XX

**Corrections and Clarifications to Toxics Water Quality Standards**

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| **DEQ recommendation to the EQC** |

**DEQ recommends that the Environmental Quality Commission:**

Adopt the proposed PERMANENT rules in Attachment A as part of chapter 340 of the Oregon Administrative Rules.

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| **Overview** |

Short summary

DEQ proposes revisions to the water quality standards rules for toxic substances to correct and clarify the standards. Revisions to water quality standards require EPA approval before the revisions become effective for Clean Water Act programs. The proposed rules correct several toxic pollutant criteria that EPA recently disapproved and address other minor revisions to the Toxic Substances rule. EPA disapproved criteria for 11 pesticides based on potentially conflicting information in regards to how the frequency and duration components of these criteria are expressed. DEQ expects that clarifying this aspect of the criteria will lead to EPA approval of 36 pesticide criteria values associated with 11 pesticides. DEQ also proposes to correct an error in the expression of freshwater selenium criteria and is re-proposing freshwater and saltwater arsenic criteria and chromium VI saltwater criteria that were inadvertently left off the criteria table during a 2007 rulemaking. DEQ is also correcting typographical errors made during the 2011 Human Health Toxics Rulemaking. In addition, DEQ proposes to move all effective aquatic life criteria from Tables 20, 33A, and 33B into a new aquatic life criteria table, Table 30, and to refer to the new table in the Toxic Substances rule language. As a result, Tables 20, 33A, and 33B are no longer needed and would be repealed under this proposal. DEQ also proposes to delete aluminum from Table 30 to reflect EPA’s disapproval of the freshwater criteria for aluminum because the disapproval renders the criteria ineffective and there are no other criteria for aluminum. DEQ anticipates adopting revised freshwater criteria for aluminum in a future rulemaking process. DEQ anticipates that EPA will take action on the following water quality standard revisions proposed in this rulemaking before they become effective under the Clean Water Act: (1) revisions to pesticides and selenium criteria; (2) reinstatement of arsenic and chromium VI criteria and the associated conversion factors; (3) deletion of aluminum criteria; and (4) revisions to the Toxic Substances rule in OAR 340-041-0033. EPA will likely take an action on the editorial and formatting changes in this proposal, but not on the underlying criteria that were previously approved. Ultimately, EPA will determine which water quality standards it must formally approve or disapprove.

Brief history

On Jan. 31, 2013, EPA took action on Oregon’s aquatic life toxics criteria that the Oregon Environmental Quality Commission adopted and submitted to EPA in 2004. DEQ proposed these water quality criteria, which EPA recommended, to protect aquatic organisms such as fish, shellfish, and aquatic insects. The aquatic life toxics criteria for each pollutant typically have four values: acute (short-term) and chronic (long-term) values for freshwater protection, and acute and chronic values for saltwater protection. EPA approved 38 criteria values associated with 14 toxic pollutants and disapproved 45 criteria values associated with 16 toxic pollutants. EPA disapproved the freshwater acute criterion for cadmium based on findings in the National Marine Fisheries Service’s August 2012 Biological Opinion. EPA disapproved the ammonia criteria because new toxicity data showed that the criteria were not protective of mollusks. EPA also disapproved criteria associated with 14 other pollutants, including 11 pesticides, copper, selenium and aluminum, due to inconsistencies associated with EPA’s nationally recommended criteria. The Clean Water Act requires Oregon to fix the deficiencies identified in EPA’s disapproval action. If Oregon does not make these revisions, EPA is required to put in place its own regulations addressing the deficiencies. This rulemaking does not address the disapproval of the freshwater criteria for aluminum, ammonia, copper, and cadmium (acute criterion only). DEQ expects to address the more substantive issues for these pollutants in a future rulemaking.

Regulated parties

Regulated parties possibly affected by this rulemaking include industrial and municipal dischargers to waters of the state. Specifically, regulated parties include those industrial dischargers categorized as “primary dischargers” by the federal permitting regulations and required to monitor for toxic pollutants, and generally major municipal dischargers, those with an average dry weather design flow of more than one million gallons per day. Agricultural and forest activities are subject to Agricultural Water Quality Management Area Plans and Rules and the Forest Practices Act, respectively. Those laws require these nonpoint sources to meet all water quality standards.

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| **Statement of need** |

| **Proposed Rule or Topic** | **Discussion** |
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| **340-041-0033(1-5): Toxic Substances Rule** | |
| What problem is DEQ trying to solve? | Currently, Oregon’s water quality criteria for the protection of aquatic life reside in three tables: Table 20, Table 33A, and Table 33B. In 2004, the EQC adopted Tables 33A and 33B:   * Table 33A contains criteria more stringent or remained the same as previous criteria and became effective for NPDES permitting on February 15, 2005. * Table 33B contains criteria less stringent than previous criteria and therefore, would only be effective after EPA approval. * Table 20 contains criteria effective before the 2004 rulemaking and remained effective for all CWA programs, such as reporting to EPA on the condition of Oregon’s waters (i.e. sections 303(d) and 305(b)).   On Jan. 31, 2013, EPA took action on the 2004 criteria, thereby determining which new or revised criteria in Tables 33A and 33B are now effective under CWA authorities. Criteria that EPA disapproved automatically reverted back to any previously effective criteria contained in Table 20. Now that EPA has acted and it is clear which criteria are effective, there is no longer a need to have multiple tables showing different effective dates for the criteria. . DEQ proposes combining these effective aquatic life criteria into one table—Table 30—and delete Tables 20, 33A, and 33B. Proposed revisions to the Toxic Substances rule replace references to Tables 20, 33A, and 33B with references to Table 30. Other proposed changes to the Toxic Substance Rule are for clarification purposes.  In addition, the proposed Table 30 contains changes to correct problems that EPA identified in its January 2013 disapproval of 11 pesticides and the freshwater criteria for selenium. Specifically, DEQ proposes adding introductory text to Table 30 to more clearly state the alternate frequency and duration components of the pesticide aquatic life criteria (the basis for EPA’s disapproval) for 11 pesticides. DEQ proposes additional edits to the footnote associated with the pesticides for better clarity. To address EPA’s disapproval of the freshwater criteria for selenium, DEQ applied the conversion factors to convert selenium criteria expressed as total recoverable to a dissolved expression as intended in the 2004 rulemaking.  DEQ also proposes reinstating freshwater and saltwater criteria for arsenic and saltwater criteria for chromium VI. DEQ inadvertently omitted the criteria from Table 33B during a 2007 water quality standards rulemaking which made clarifying edits to Tables 33A and 33B. The arsenic and chromium VI criteria re-proposed here as part of this rulemaking are the same criteria that the EQC adopted in 2004. These criteria underwent Endangered Species Act consultation by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service and were not found to create jeopardy for any ESA-listed species. EPA did not take action on these criteria as part of its Jan. 31, 2013 action, but noted that the omitted criteria are consistent with EPA’s 304(a) recommendations and recommended that Oregon re-adopt these criteria.  The proposed footnotes and introductory language to Table 30 provide additional clarification to the criteria and definitions.  There are additional proposed minor clarifications to Table 40, which contains toxics criteria for the protection of human health.  DEQ proposes revisions to Table 33C, which contains water quality guidance values for toxic pollutants, to be consistent with Agency table formatting guidelines. Other revisions would rename Table 33C as Table 31 and remove arsenic guidance values which are unnecessary because Oregon has aquatic life criteria for arsenic. In addition, DEQ proposes a correction in a reference made in the table to Oregon’s Narrative Toxic Substances Standard. The correct reference is OAR 340-041-0033(2).  The Secretary of State Bulletin now allows tables to be attached to the Oregon Administrative Rules. Therefore, proposed changes found at the end of the Toxic Substances rule state that Tables 30, 33C, and 40 will be attached as PDF documents.  These proposed changes do not become effective until after EQC adoption and EPA approval. Upon EPA approval, the amendments become applicable for Clean Water Act purposes on April 18, 2014. |
| How would the proposed rule solve the problem? | Combining the aquatic life toxics criteria into one table will make it easier for DEQ staff, the public, and the regulated community to determine which criteria are effective.  In addition, the proposed changes to Table 30 reinstate the erroneously omitted arsenic and chromium VI criteria and respond to EPA’s disapproval of 11 pesticides and the freshwater criteria for selenium. Upon EQC adoption of the proposed revisions, DEQ anticipates that EPA will be able to promptly approve these criteria. |
| How will DEQ know the problem has been solved? | DEQ will know if the problems described above have been solved based on outcomes such as: the rules clearly identify and define Oregon’s aquatic life toxics criteria; there are fewer inquiries to DEQ staff to determine which aquatic life toxics criteria are effective or how to interpret the criteria; and EPA promptly approves the rule revisions it identifies as water quality standards. |
| 1. **340-041-0033(7) Arsenic Reduction Policy Rule** | |
| What problem is DEQ trying to solve? | The Arsenic Reduction Policy rule adopted by the EQC in June 2011 has several reference errors. The rule incorrectly references the Arsenic Reduction Policy as section 4, rather than section 7. This error occurred during preparation of the final rule when the Arsenic Reduction Policy was moved from section 4 in the proposed rule to section 7 in the final toxics rule. DEQ also corrected another reference error in 340-041-0033(7)(f). |
| How would the proposed rule solve the problem? | This proposal would correct references and provide clarification to the public and DEQ. |
| How will DEQ know the problem has been solved? | Not applicable. The proposed changes only correct or clarify reference errors. |
| **340-041-0009 Bacteria Rule** | |
| What problem is DEQ trying to solve? | The Bacteria Rule references Table 20. This proposal would delete references to Table 20 because DEQ proposes to remove Table 20 from the Toxic Substances rule. |
| How would the proposed rule solve the problem? | This proposal would reference the Toxic Substances rule in general to reduce future citation corrections if the table name changes again. |
| How will DEQ know the problem has been solved? | Not applicable. The proposed changes only correct or clarify reference errors. |
| **340-040-0020 Groundwater Quality Protection** | |
| What problem is DEQ trying to solve? | The Groundwater Quality Protection rules reference Table 20. This proposal would delete references to Table 20 because DEQ proposes to remove Table 20 from the Toxic Substances rule.  Additionally, there is a citation to Division 41 that no longer exists. The correct reference is to the same antidegradation policy described and referenced in OAR 340-040-0020; therefore DEQ proposes to delete the citation. |
| How would the proposed rule solve the problem? | This proposal would reference the Toxic Substances rule in general to reduce future citation corrections if the table name changes again. This proposal would also correct the citation error and provide clarification to the public and DEQ. |
| How will DEQ know the problem has been solved? | Not applicable. The proposed changes only correct or clarify reference errors. |
| **340-040-0080 Numerical Groundwater Quality Reference Levels and Guidance Levels** | |
| What problem is DEQ trying to solve? | The Numerical Groundwater Quality Reference Levels and Guidance Levels rules reference Table 20. This proposal would delete references to Table 20 because DEQ proposes to remove Table 20 from the Toxic Substances rule. |
| How would the proposed rule solve the problem? | This proposal would reference the Toxic Substances rule in general to reduce future citation corrections if the table name changes again. |
| How will DEQ know the problem has been solved? | Not applicable. The proposed changes only correct or clarify reference errors. |

Request for other options

During the public comment period, DEQ requested public comment on whether to consider other options for achieving the rules’ substantive goals while reducing negative economic impact of the rule on business.

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| **Federal relationship** |

*"It is the policy of this state that agencies shall seek to retain and promote the unique identity of Oregon by considering local conditions when an agency adopts policies and rules. However, since there are many federal laws and regulations that apply to activities that are also regulated by the state, it is also the policy of this state that agencies attempt to adopt rules that correspond with equivalent federal laws and rules..."*

Relationship to federal requirements

The proposed rules are not “different from or in addition to federal requirements” and impose stringency equivalent to federal requirements. The proposed rules would implement a federal requirement. The federal Clean Water Act requires states to adopt water quality standards to protect beneficial uses of the nation’s waters. The standards must be based on substantial evidence. DEQ must submit the proposed standards to EPA for approval after they are adopted by the EQC. DEQ has concluded that the proposed standards revisions meet federal requirements. DEQ has worked with EPA through the development of the proposed rules and we expect that EPA will approve the new and revised rules. Other revisions propose to correct errors or provide additional clarifications to the Toxic Substances Rule.

What alternatives did DEQ consider, if any?

The alternative to not pursuing these proposed amendments is that EPA would be required to put in place its own regulations addressing the deficiencies related to its Jan. 31, 2013 action on Oregon’s aquatic life toxics criteria submitted to EPA in 2004. In addition, the errors from past rulemakings would continue to persist in DEQ rules and complicate implementation of the toxics criteria. DEQ considered addressing EPA’s disapproval of the aquatic life toxics criteria associated with aluminum, ammonia, cadmium and copper as part of this rulemaking. However, the potential remedies to address EPA’s disapproval are more complex and will involve in-depth conversations with EPA, the National Marine Fisheries Service, interested stakeholders, and DEQ staff. DEQ did not want to delay and potentially confuse these complex issues with the straightforward corrections proposed in this rulemaking.

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| Rules affected, authorities, supporting documents |

Lead divisionProgram or activity

Water Quality Water Quality Standards and Assessment

Chapter 340 action

Recommendation Division Rule Title SIP/Land use\*

amend 041 0033 Toxic Substances Rule Land use

amend 041 0009 Bacteria Rule Land use

amend 040 0020 Groundwater Quality Protection Land use

amend 040 0080 Numerical Groundwater Quality Land use

\* SIP – This rule is part of the State Implementation Plan.

\* Land use – DEQ State Agency Coordination Program considers this rule, program or activity a land use program.

Statutory authority

ORS 468.020, 468B.030, 468B.035 and 468B.048.

Statute implemented

ORS 468B.030, 468B.035 & 468B.048.

Documents relied on for rulemaking [ORS 183.335(2)(b)(C)](http://www.leg.state.or.us/ors/183.html)

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| **Document title** | **Document location** |
| EPA Jan. 31, 2013 action letter on OR’s 2004 aquatic life criteria and associated documents | Hardcopies may be found at: DEQ Headquarters Office, 811 SW Sixth Ave., Portland, OR 97204  Electronic versions may be found at: <http://www.deq.state.or.us/wq/standards/toxics.htm#links> |
| DEQ response letter to EPA’s Jan. 31, 2013 action letter on OR’s 2004 aquatic life criteria | Hardcopies may be found at: DEQ Headquarters Office, 811 SW Sixth Ave., Portland, OR 97204  Electronic versions may be found at:  <http://www.deq.state.or.us/wq/standards/docs/toxics/ResponseLetterEPA.pdf> |
| OAR 340-041-0033  OAR 340-041-0009  OAR 340-040-0020  OAR 340-040-0080 | Hardcopies may be found at: DEQ Headquarters Office, 811 SW Sixth Ave., Portland, OR 97204  Electronic versions may be found at:  <http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_340/340_tofc.html> |
| Tables 20, 33A, 33B, 33C | Hardcopies may be found at: DEQ Headquarters Office, 811 SW Sixth Ave., Portland, OR 97204  Electronic versions may be found at:  <http://www.deq.state.or.us/wq/standards/toxics.htm> |

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| Statement of fiscal and economic impact [ORS 183.335 (2)(b)(E)](http://www.leg.state.or.us/ors/183.html) |

Statement of Cost of Compliance

Introduction

The revisions proposed in this rulemaking correct typographical errors associated with the aquatic life criteria and human health criteria that EQC adopted in 2004, 2007, and 2011, and are intended to address some of the issues identified by EPA in its Jan. 31, 2013 disapproval action. This proposal would also readopt freshwater and saltwater criteria for arsenic and saltwater criteria for chromium VI originally adopted by the EQC in 2004. DEQ inadvertently omitted these criteria in Table 33B during the 2007 water quality standards rulemaking. Despite this omission, these re-proposed criteria are not considered new water quality criteria for the protection of aquatic life and do not need to undergo an economic analysis because these criteria revisions were accounted for as part of the 2004 fiscal analysis. In addition, although the correction to the selenium criteria (i.e. expressed in the dissolved form) does result in slightly more stringent criteria, the expression of most metals to the dissolved form, including selenium, was accounted for as part of the 2004 rulemaking fiscal analysis. DEQ expects prompt EPA approval.

The 2004 rulemaking was comprised of a number of actions, including revising toxics criteria for aquatic life and human health. In 2007, DEQ proposed a number of corrections and clarifications, one which included revising Tables 33A and 33B to correctly show which of the toxic pollutants criteria could and could not be used for permitting until EPA approval. The 2011 rulemaking consisted of revising human health criteria based on a higher fish consumption rate, and also included the development of several permitting implementation tools.

DEQ determined that these clarifications and corrections are straight-forward and will result in minimal fiscal or economic impacts, if any. Any fiscal impacts related to changes to the aquatic life toxics criteria were accounted for as part of the 2004 DEQ rulemaking. For information on the fiscal and economic impact of revising toxics criteria in 2004, see Attachment F for Agenda Item B, Rule Adoption: Water Quality Standards, including Toxics Criteria May 20-21, 2004 EQC meeting at: http://www.deq.state.or.us/about/eqc/agendas/attachments/may2004/5.20.04.ItemB.AttchF.pdf.

DEQ anticipates these changes will provide a benefit to DEQ, the public, and to entities subject to toxics water quality criteria by reducing confusion over which criteria are effective and consolidating all effective aquatic life toxics criteria into one table (Table 30), rather than in the current three tables (Table 20, Table 33A, and Table 33B.). Correcting errors that occurred in 2004, 2007 and 2011 rulemakings will also provide greater clarification.

1. Impacts on general public

DEQ does not expect that the general public will incur direct or indirect fiscal or economic impacts as a result of the proposed revisions to the toxics water quality standards rules.

1. Cost of compliance on small businesses (50 or fewer employees). [ORS 183.336](http://www.leg.state.or.us/ors/183.html)

DEQ does not expect many small businesses to be affected by these rule revisions. Few small businesses are directly subject to toxics water quality criteria because most small businesses do not directly discharge wastewater to a waterbody. For those small businesses that do discharge to a waterbody and have toxics monitoring requirements (i.e. identified as “primary industries” by federal permitting regulations), or are subject to pretreatment requirements where the business discharges to a municipal wastewater facility, the proposed changes in this rulemaking do not impose new requirements.

Some small businesses may need to conduct minor recordkeeping activities to correctly reference the effective aquatic life toxics criteria (e.g. in discharge monitoring reports) if the EQC amends the proposed rules. DEQ expects the economic impact to be minimal.

Many farms, ranches, and small timber operations fall under the category of small businesses. Agricultural and forest activities are subject to Agricultural Water Quality Management (AgWQM) Area Plans and Rules and the Forest Practices Act, respectively, which require these nonpoint sources to meet water quality standards. These plans and rules already require and provide the mechanism for agriculture and small forest land owners to meet water quality standards and TMDL load allocations. This rulemaking does not change requirements in these plans and rules. Because this rulemaking only proposes clarifications and corrections to toxics regulations and tables, DEQ does not anticipate that this proposed rulemaking will have direct or indirect fiscal impacts or effects on small farms, ranches and small forest land owners.

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| a) Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule. | As part of its recordkeeping, DEQ does not track whether any of the entities subject to the proposed rule revisions are small businesses, therefore it is difficult to estimate businesses potentially affected.  The types of small businesses/industries holding  wastewater permits and may be required to monitor for toxics include, but are not limited to: smelting/refining operations, timber processing, wood products manufacturing, pulp and paper, retail operations, circuit boards, and petroleum hydrocarbon clean-up operations.  The Oregon Farm Bureau estimates that 97% of  Oregon farms and ranches fall under the category of small businesses based on the definition of small businesses being fifty or fewer employees. Other  types of businesses that could be subject to this rulemaking include nurseries, dairy and beef producers, fruit growers, and other food producers, industrial, and small forest land owners. |
| b) Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule. | No additional activities are required for compliance with the proposed revisions; however, some small businesses may need to conduct minor recordkeeping activities to correctly reference the effective toxics criteria following this rulemaking. |
| c) Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule. | The proposed rules do not require additional equipment or administration requirements. |
| d) Describe how DEQ involved small businesses in developing this proposed rule. | DEQ included the Association of Oregon Industries  (AOI) as part of the advisory committee that advised  DEQ on the cost of compliance for this rulemaking for small businesses. AOI’s membership includes large and small companies from all business classifications in Oregon. In addition, the Oregon  Farm Bureau was also part of the advisory committee and represents many farms and ranches that are considered small businesses.  DEQ discussed this statement of fiscal and economic impact and solicited input from the Oregon Farm Bureau during one workgroup meeting on July 11, 2013. The representative from AOI did not attend. DEQ incorporated the input into this analysis. |

3. Impact on large businesses (all businesses that are not small businesses under #2 above)

Large businesses that discharge to waterbodies are regulated under the Clean Water Act and are generally subject to toxics monitoring requirements. However, DEQ does not expect large businesses, such as pulp and paper or electronic processing types of industry, to incur measurable direct or indirect fiscal or economic impacts as a result of the proposed revisions to the toxics water quality standards rule. Some large businesses may need to conduct minor recordkeeping activities to correctly reference the effective toxics criteria following this rulemaking. DEQ expects the economic impact to be minimal.

4. Impact on other government entities other than DEQ

Generally, DEQ does not expect local governments, such as wastewater treatment facilities to incur measurable direct or indirect fiscal or economic impacts as a result of the proposed revisions to the toxics water quality standards rule. Most, if not all, major wastewater treatment facilities are subject to toxic pollutant monitoring requirements. Generally, minor wastewater treatment facilities (average dry weather design flow of less than one million gallons per day (MGD)) have much reduced monitoring and permitting requirements than major domestic sources. Some wastewater treatment facilities may need to conduct minor recordkeeping activities to correctly reference the effective toxics criteria following this rulemaking. DEQ expects the economic impact to be minimal.

5. Impact on DEQ

DEQ does not expect that it will incur significant direct or indirect fiscal or economic impacts as a result of the proposed revisions to the toxics rule. Although many DEQ programs use water quality criteria for toxics in various water quality programs (e.g. water quality assessment, Total Maximum Daily Load program, NPDES permitting, groundwater rules, clean-up program, etc.), this rulemaking does not propose new water quality criteria for protection of aquatic life or human health.

DEQ programs may need to conduct minor recordkeeping activities to correctly reference effective toxics criteria following this rulemaking. DEQ expects the economic impact to be minimal.

Advisory committee

DEQ established an advisory committee in January 2013 to provide input to DEQ on any potential fiscal impacts and benefits that may result from this rulemaking. The rulemaking was subsequently delayed and then re-initiated in May 2013. DEQ met with the advisory committee on June 25, 2013 and July 11, 2013. The committee includes eight members representing industrial, municipal, tribal and environmental organizations with an interest in actions related to developing or revising water quality standards for toxic pollutants. See the [Advisory Committee Charter](http://www.deq.state.or.us/wq/standards/docs/Charter.pdf) for more information.

DEQ sent the draft fiscal analysis to the committee on July 2, 2013 to prepare for the fiscal analysis discussion at the July 11, 2013 meeting. In compliance with ORS 183.333, DEQ asked for the committee’s recommendations on:

* Whether the proposed rules would have a fiscal impact,
* The extent of the impact, and
* Whether the proposed rules would have a significant impact on small businesses and compliance with ORS 183.540.

DEQ considered the committee’s comments on the fiscal and economic impact statement. The committee agreed that the fiscal and economic impact to the regulated community, including small businesses, was minimal, if any. This rulemaking focuses on addressing EPA disapproval of pesticide and freshwater selenium criteria, and other corrections and clarifications to the toxics rules. The remedy to address the pesticide disapprovals is the addition of clarifying language only. The underlying criteria do not change. To address EPA’s disapproval of the freshwater criteria for selenium, DEQ applied the conversion factors to convert selenium criteria expressed as total recoverable to a dissolved expression as intended in the 2004 rulemaking. The 2004 fiscal analysis included any potential fiscal impacts from the change of total recoverable metals expression to a dissolved expression. This rulemaking does not propose new toxics criteria or other requirements. For more information about the advisory committee discussion, see the [meeting minutes](http://www.deq.state.or.us/wq/standards/docs/Minutes071113.pdf).

Documents relied on for fiscal and economic impact

None.

Housing cost

To comply with [ORS 183.534](http://www.leg.state.or.us/ors/183.html), DEQ determined the proposed rules would have no effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached single-family dwelling on that parcel.

Fees

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| Land use |

*“It is the Commission's policy to coordinate the Department's programs, rules and actions that affect land use with local acknowledged plans to the fullest degree possible.”*

[ORS 197.180](http://www.leg.state.or.us/ors/197.html), [OAR 660-030](http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_tofc.html)

Land-use considerations

To determine whether the proposed rules involve programs or actions that are considered a *land-use action*, DEQ considered:

* Statewide planning goals for specific references. Section III, subsection 2 of the DEQ State Agency Coordination Program document identifies the following statewide goal relating to DEQ's authority:

**Goal Title**

5 Open Spaces, Scenic and Historic Areas, and Natural Resources

6 Air, Water and Land Resources Quality

11 Public Facilities and Services

16 Estuarial resources

19 Ocean Resources

* [OAR 340-018-0030](http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_340/340_018.html) for EQC rules on land-use coordination. Division 18 requires DEQ to determine whether proposed rules will significantly affect land use. If yes, how will DEQ:
  + Comply with statewide land-use goals, and
  + Ensure compatibility with acknowledged comprehensive plans, which DEQ most commonly achieves by requiring a [Land Use Compatibility Statement](http://www.deq.state.or.us/pubs/permithandbook/lucs.htm).
* DEQ’s mandate to protect public health and safety and the environment.
* Whether DEQ is the primary authority that is responsible for land-use programs or actions in the proposed rules.
* Present or future land uses identified in acknowledged comprehensive plans.

Determination

DEQ determined that the proposed rules identified under the 'Chapter 340 Action' section above **may affect** existing rules, programs or activities that are considered land-use programs and actions in OAR340-018-0030 or in the DEQ State Agency Coordination Program. However, while the water qualitystandards program in general could affect land uses, the proposed rule amendments do not.

These rule amendments propose to correct or clarify errors associated with past rulemakings, or provide additional clarifications, but the beneficial uses of State waters will not be changed and the water quality standards will continue to protect those uses. The proposed changes are adequately covered by the existing statewide goals.

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| Stakeholder and public involvement |

Advisory committee

DEQ met with an advisory committee and considered the committee’s recommendations on the fiscal and economic impact statement. The table below lists the members of the advisory committee.

**Roster**

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| Name | Representing | Contact Information |
| 1. Curtis Barton | Clackamas Water Environment Services | [curtisb@co.clackamas.or.us](mailto:curtisb@co.clackamas.or.us)  (503) 742-4615 |
| 2. Dianne Barton | Columbia River Inter-Tribal Fish Commission | [bard@critfc.org](mailto:bard@critfc.org)  (503) 731-1259 |
| 3. Kathleen Collins | U.S. Environmental Protection Agency | [collins.kathleen@epa.gov](mailto:collins.kathleen@epa.gov)  (206) 553-2108 |
| 4. Heath Curtiss | Oregon Forest Industries Council | [Heath@ofic.com](mailto:Heath@ofic.com)  (503) 877-3225 |
| 5. Mike Freese | Oregon Farm Bureau | [Mike@oregonfb.org](mailto:Mike@oregonfb.org)  (503) 399-1701 x308 |
| 6. John Ledger | Associated Oregon Industries | [johnledger@aoi.org](mailto:johnledger@aoi.org)  (503) 227-5636 |
| 7. Andrea Matzke | OR Dept. of Environmental Quality | [matzke.andrea@deq.state.or.us](mailto:matzke.andrea@deq.state.or.us)  (503) 229-5384 |
| 8. Kathryn VanNatta | NW Pulp and Paper Association | [kathryn@nwpulpandpaper.org](mailto:kathryn@nwpulpandpaper.org)  (503) 844-9540 |
| 9. Jennifer Wigal | OR Dept. of Environmental Quality | [wigal.jennifer@deq.state.or.us](mailto:wigal.jennifer@deq.state.or.us)  (505) 229-5323 |
| 10. Travis Williams | Willamette Riverkeeper | [travis@willametteriverkeeper.org](mailto:travis@willametteriverkeeper.org)  (503) 223-6418 |

EQC prior involvement

DEQ shared information about this rulemaking through a Director's Dialogue at the EQC meeting June 19-20, 2013. EQC members did not ask to participate in this rulemaking.

Public notice

The Sept. 1, 2013 *Oregon Bulletin* published the Notice of Proposed Rulemaking with Hearing for this proposed rulemaking. DEQ also:

* Posted notice on DEQ’s webpage <http://www.deq.state.or.us/regulations/proposedrules.htm>. on Aug. 14, 2013.
* E-mailed notice on Aug. 19, 2013 to:
* 3,900 interested parties through GovDelivery
* Key legislators required under [ORS 183.335](http://www.leg.state.or.us/ors/183.html). Key legislators included:
  + Senator Jackie Dingfelder, Chair, Senate Committee on Environment and Natural Resources
  + Representative Jules Bailey, Chair, House Committee on Energy and Environment
* Members of the advisory committee, including EPA

Public hearings and comment

DEQ held one public hearing in Portland. The comment period closed on Sept. 30, 2013 at 5 p.m. DEQ received a total of two public comments that were submitted through DEQ’s new online process. The new process allows any user to view comments submitted online. The summary of comments and DEQ responses section below lists all people who provided comments on this proposal, and addresses each public comment.

Presiding Officers’ Record

The presiding officer convened the hearing listed in the table below. There were no attendees; therefore, Andrea Matzke did not present the information on the proposed rules.

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|  | Hearing |
| Date | Sept. 18, 2013 |
| Time Convened | 6 p.m. |
| Time Adjourned | 6:30 p.m. |
| Address | 811 SW 6th Ave. |
| City | Portland |
| Presiding Officer | Aron Borok |
| Staff Presenter | Andrea Matzke |
| Attendees in person | 0 |
| Oral Comments | 0 |
| Written Comments | 0 |

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| Summary of comments and DEQ responses |

DEQ received a total of two public comments by the close of the public comment period. Both comments were supportive. DEQ’s response follows each comment.

1. **Comment** EPA supports the proposed changes to the rules and indicated that the revisions will address EPA’s disapproval of the aquatic life criteria for 11 pesticides and selenium. EPA did not have any other suggested edits or concerns.

**DEQ Response** DEQ acknowledges and appreciates EPA’s support and technical assistance during the development of this rulemaking.

2 Comment The representative from NW Pulp and Paper Association supports the rule amendments based on their understanding that there are no new substantive water quality criteria changes in the proposal.

**DEQ Response** DEQ acknowledges and appreciates NWPPA’s support and participation during the development of this rulemaking.

|  |
| --- |
| Commenters |

Comments received by close of public comment period

The table below lists two organizations that submitted comments on the proposed rules. Given the brevity of comments, the original letters are included below.

|  |  |  |
| --- | --- | --- |
| Commenter | Affiliation | Date Received |
| 1. Kathleen Collins | U.S. Environmental Protection Agency | 9/19/2013 |
| 2. Kathryn VanNatta | NW Pulp and Paper Association | 9/20/2013 |

Comments received after close of public comment period

No comments were received following the close of the public comment period.





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| --- |
| Implementation |

Notification

The proposed rules would become effective on April 18, 2014 if adopted by the commission and subsequently approved by EPA. DEQ would notify:

* Advisory committee members
* Interested parties through GovDelivery
  + - same list as the public notice period (i.e. water quality standards and human health toxics rulemaking lists)
    - will add the water quality permits list
* DEQ regional and water quality program and clean-up program staff

Systems

* Website – Will update the rulemaking and toxics websites with all applicable information (tables, fact sheets).

|  |
| --- |
| Five-year review |

Requirement ORS 183.405

The state Administrative Procedures Act requires DEQ to review **new** rules within five years of the date the EQC adopts the proposed rules. Though the review will align with any changes to the law in the intervening years, DEQ based its analysis on current law.

Exemption

The following APA exemptions from the five-year rule review apply to all of the rule amendments proposed here:

Amendments or repeal of a rule. ORS 183.405 (4)

**DIVISION 41**

**WATER QUALITY STANDARDS: BENEFICIAL USES, POLICIES, AND CRITERIA FOR OREGON**

**340-041-0033**

**Toxic Substances**

(1) Amendments to sections (1-5) and (7) of this rule (OAR 340-041-0033) and associated revisions to Tables 20, 33A, 33B, 33C, and 40 become effective on April 18, 2014. The amendments do not become applicable for purposes of ORS chapter 468B or the federal Clean Water Act, however, unless approved by EPApursuant to 40 CFR 131.21 (4/27/2000).

(2) **Toxic Substances Narrative.** Toxic substances may not be introduced above natural background levels in waters of the state in amounts, concentrations, or combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety, or welfare or aquatic life, wildlife, or other designated beneficial uses.

(3) **Aquatic Life Numeric Criteria**. Levels of toxic substances in waters of the state may not exceed the applicable aquatic life criteria listed in Table 30.

(4) **Human Health Numeric Criteria**. The criteria for waters of the state listed in Table 40 are established to protect Oregonians from potential adverse health effects associated with long-term exposure to toxic substances associated with consumption of fish, shellfish, and water.

(5) To establish permit or other regulatory limits for toxic substances for which criteria are not included in Table 30 or Table 40, the department may use the guidance values in Table 31, public health advisories, and other published scientific literature. The department may also require or conduct bio-assessment studies to monitor the toxicity to aquatic life of complex effluents, other suspected discharges, or chemical substances without numeric criteria.

(6) Establishing Site-Specific Background Pollutant Criteria: This provision is a performance based water quality standard that results in site-specific human health water quality criteria under the conditions and procedures specified in this rule section. It addresses existing permitted discharges of a pollutant removed from the same body of water. For waterbodies where a discharge does not increase the pollutant’s mass and does not increase the pollutant concentration by more than 3%, and where the water body meets a pollutant concentration associated with a risk level of 1x10-4, DEQ concludes that the pollutant concentration continues to protect human health.

(a) Definitions: For the purpose of this section (OAR 340-041-0033(6)):

(A) “Background pollutant concentration” means the ambient water body concentration immediately upstream of the discharge, regardless of whether those pollutants are natural or result from upstream human activity.

(B) An “intake pollutant” is the amount of a pollutant that is present in public waters (including groundwater) as provided in subsection (C), below, at the time it is withdrawn from such waters by the discharger or other facility supplying the discharger with intake water.

(C) “Same body of water”: An intake pollutant is considered to be from the “same body of water” as the discharge if the department finds that the intake pollutant would have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee. This finding may be deemed established if:

(i) The background concentration of the pollutant in the receiving water (excluding any amount of the pollutant in the facility's discharge) is similar to that in the intake water;

(ii) There is a direct hydrological connection between the intake and discharge points; and

(I) The department may also consider other site-specific factors relevant to the transport and fate of the pollutant to make the finding in a particular case that a pollutant would or would not have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee.

(II) An intake pollutant from groundwater may be considered to be from the “same body of water” if the department determines that the pollutant would have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee, except that such a pollutant is not from the same body of water if the groundwater contains the pollutant partially or entirely due to past or present human activity, such as industrial, commercial, or municipal operations, disposal actions, or treatment processes.

(iii) Water quality characteristics (e.g., temperature, pH, hardness) are similar in the intake and receiving waters.

(b) Applicability

(A) Site-specific criteria may be established under this rule section only for carcinogenic pollutants.

(B) Site-specific criteria established under this rule section apply in the vicinity of the discharge for purposes of establishing permit limits for the specified permittee.

(C) The underlying waterbody criteria continue to apply for all other Clean Water Act programs.

(D) The site-specific background pollutant criterion will be effective upon department issuance of the permit for the specified permittee.

(E) Any site-specific criteria developed under this procedure will be re-evaluated upon permit renewal.

(c) A site-specific background pollutant criterion may be established where all of the following conditions are met:

(A) The discharger has a currently effective NPDES permit;

(B) The mass of the pollutant discharged to the receiving waterbody does not exceed the mass of the intake pollutant from the same body of water, as defined in section (6)(a)(C) above, and, therefore, does not increase the total mass load of the pollutant in the receiving water body;

(C) The discharger has not been assigned a TMDL wasteload allocation for the pollutant in question;

(D) The permittee uses any feasible pollutant reduction measures available and known to minimize the pollutant concentration in their discharge;

(E) The pollutant discharge has not been chemically or physically altered in a manner that causes adverse water quality impacts that would not occur if the intake pollutants were left in-stream; and,

(F) The timing and location of the pollutant discharge would not cause adverse water quality impacts that would not occur if the intake pollutant were left in-stream.

(d) The site-specific background pollutant criterion must be the most conservative of the following four values. The procedures deriving these values are described in the sections (6)(e) of this rule.

(A) The projected in-stream pollutant concentration resulting from the current discharge concentration and any feasible pollutant reduction measures under (c)(D) above, after mixing with the receiving stream.

(B) The projected in-stream pollutant concentration resulting from the portion of the current discharge concentration associated with the intake pollutant mass after mixing with the receiving stream. This analysis ensures that there will be no increase in the mass of the intake pollutant in the receiving water body as required by condition (c)(B) above.

(C) The projected in-stream pollutant concentration associated with a 3% increase above the background pollutant concentration as calculated:

(i) For the mainstem Willamette and Columbia Rivers, using 25% of the harmonic mean flow of the waterbody.

(ii) For all other waters, using 100% of the harmonic mean flow or similar critical flow value of the waterbody.

(D) A criterion concentration value representing a human health risk level of 1 ? 10-4. This value is calculated using EPA’s human health criteria derivation equation for carcinogens (EPA 2000), a risk level of 1 ? 10-4, and the same values for the remaining calculation variables that were used to derive the underlying human health criterion.

(e) Procedure to derive a site-specific human health water quality criterion to address a background pollutant:

(A) The department will develop a flow-weighted characterization of the relevant flows and pollutant concentrations of the receiving waterbody, effluent and all facility intake pollutant sources to determine the fate and transport of the pollutant mass.

(i) The pollutant mass in the effluent discharged to a receiving waterbody may not exceed the mass of the intake pollutant from the same body of water.

(ii) Where a facility discharges intake pollutants from multiple sources that originate from the receiving waterbody and from other waterbodies, the department will calculate the flow-weighted amount of each source of the pollutant in the characterization.

(iii) Where intake water for a facility is provided by a municipal water supply system and the supplier provides treatment of the raw water that removes an intake water pollutant, the concentration and mass of the intake water pollutant shall be determined at the point where the water enters the water supplier’s distribution system.

(B) Using the flow weighted characterization developed in Section (6)(e)(A), the department will calculate the in-stream pollutant concentration following mixing of the discharge into the receiving water. The resultant concentration will be used to determine the conditions in Section (6)(d)(A) and (B).

(C) Using the flow weighted characterization, the department will calculate the in-stream pollutant concentration based on an increase of 3% above background pollutant concentration. The resultant concentration will be used to determine the condition in Section (6)(d)(C).

(i) For the mainstem Willamette and Columbia Rivers, 25% of the harmonic mean flow of the waterbody will be used.

(ii) For all other waters, 100% of the harmonic mean flow or similar critical flow value of the waterbody will be used.

(D) The department will select the most conservative of the following values as the site-specific water quality criterion.

(i) The projected in-stream pollutant concentration described in Section 6(e)(B);

(ii) The in-stream pollutant concentration based on an increase of 3% above background described in Section (6)(e)(C); or

(iii) A water quality criterion based on a risk level of 1 x 10-4.

(f) Calculation of water quality based effluent limits based on a site-specific background pollutant criterion:

(A) For discharges to receiving waters with a site-specific background pollutant criterion, the department will use the site-specific criterion in the calculation of a numeric water quality based effluent limit.

(B) The department will compare the calculated water quality based effluent limits to any applicable aquatic toxicity or technology based effluent limits and select the most conservative for inclusion in the permit conditions.

(g) In addition to the water quality based effluent limits described in Section (6)(f), the department will calculate a mass-based limit where necessary to ensure that the condition described in Section (6)(c)(B) is met. Where mass-based limits are included, the permit shall specify how compliance with mass-based effluent limitations will be assessed.

(h) The permit shall include a provision requiring the department to consider the re-opening of the permit and re-evaluation of the site-specific background pollutant criterion if new information shows the discharger no longer meets the conditions described in subsections (6)(c) and (e).

(i) Public Notification Requirements.

(A) If the department proposes to grant a site-specific background pollutant criterion, it must provide public notice of the proposal and hold a public hearing. The public notice may be included in the public notification of a draft NPDES permit or other draft regulatory decision that would rely on the criterion and will also be published on the water quality standards website;

(B) The department will publish a list of all site-specific background pollutant criteria approved pursuant to this rule. A criterion will be added to this list within 30 days of its effective date. The list will identify: the permittee; the site-specific background pollutant criterion and the associated risk level; the waterbody to which the criterion applies; the allowable pollutant effluent limit; and how to obtain additional information about the criterion.

(7) Arsenic Reduction Policy: The inorganic arsenic criterion for the protection of human health from the combined consumption of organisms and drinking water is 2.1 micrograms per liter. While this criterion is protective of human health and more stringent than the federal maximum contaminant level (MCL) for arsenic in drinking water, which is 10 micrograms per liter, it nonetheless is based on a higher risk level than the Commission has used to establish other human health criteria. This higher risk level recognizes that much of the risk is due to naturally high levels of inorganic arsenic in Oregon’s waterbodies. In order to maintain the lowest human health risk from inorganic arsenic in drinking water, the Commission has determined that it is appropriate to adopt the following policy to limit the human contribution to that risk.

(a) The arsenic reduction policy established by this rule section does not become applicable for purposes of ORS chapter 468B or the federal Clean Water Act unless and until the numeric arsenic criteria established by this rule are approved by EPA pursuant to 40 CFR 131.21 (4/27/2000).

(b) It is the policy of the Commission that the addition of inorganic arsenic from new or existing anthropogenic sources to waters of the state within a surface water drinking water protection area be reduced the maximum amount feasible. The requirements of this rule section (OAR 340-041-0033(4**7**)) apply to sources that discharge to surface waters of the state with an ambient inorganic arsenic concentration equal to or lower than the applicable numeric inorganic arsenic criteria for the protection of human health.

(c) The following definitions apply to this section (OAR 340-041-0033(4**7**)):

(A) “Add inorganic arsenic” means to discharge a net mass of inorganic arsenic from a point source (the mass of inorganic arsenic discharged minus the mass of inorganic arsenic taken into the facility from a surface water source).

(B) A “surface water drinking water protection area,” for the purpose of this section, means an area delineated as such by DEQ under the source water assessment program of the federal Safe Drinking Water Act, 42 U.S.C. ¦ 300j 13. The areas are delineated for the purpose of protecting public or community drinking water supplies that use surface water sources. These delineations can be found at DEQ’s drinking water program website.

(C) “Potential to significantly increase inorganic arsenic concentrations in the public drinking water supply source water” means:

(i) to increase the concentration of inorganic arsenic in the receiving water for a discharge by 10 percent or more after mixing with the harmonic mean flow of the receiving water; or

(ii) as an alternative, if sufficient data are available, the discharge will increase the concentration of inorganic arsenic in the surface water intake water of a public water system by 0.021 micrograms per liter or more based on a mass balance calculation.

(d) Following the effective date of this rule, applications for an individual NPDES permit or permit renewal received from industrial dischargers located in a surface water drinking water protection area and identified by DEQ as likely to add inorganic arsenic to the receiving water must include sufficient data to enable DEQ to determine whether:

(A) The discharge in fact adds inorganic arsenic; and

(B) The discharge has the potential to significantly increase inorganic arsenic concentrations in the public drinking water supply source water.

(e) Where DEQ determines that both conditions in subsection (d) of this section (4**7**) are true, the industrial discharger must develop an inorganic arsenic reduction plan and propose all feasible measures to reduce its inorganic arsenic loading to the receiving water. The proposed plan, including proposed measures, monitoring and reporting requirements, and a schedule for those actions, will be described in the fact sheet and incorporated into the source’s NPDES permit after public comment and DEQ review and approval. In developing the plan, the source must:

(A) Identify how much it can minimize its inorganic arsenic discharge through pollution prevention measures, process changes, wastewater treatment, alternative water supply (for groundwater users) or other possible pollution prevention and/or control measures;

(B) Evaluate the costs, feasibility and environmental impacts of the potential inorganic arsenic reduction and control measures;

(C) Estimate the predicted reduction in inorganic arsenic and the reduced human health risk expected to result from the control measures;

(D) Propose specific inorganic arsenic reduction or control measures, if feasible, and an implementation schedule; and

(E) Propose monitoring and reporting requirements to document progress in plan implementation and the inorganic arsenic load reductions.

(f) In order to implement this section, DEQ will develop the following information and guidance within 120 days of the effective date of this rule and periodically update it as warranted by new information:

(A) A list of industrial sources or source categories, including industrial stormwater and sources covered by general permits, that are likely to add inorganic arsenic to surface waters of the State.

(i) For industrial sources or source categories permitted under a general permit that have been identified by DEQ as likely sources of inorganic arsenic, DEQ will evaluate options for reducing inorganic arsenic during permit renewal or evaluation of Stormwater Pollution Control Plans.

(B) Quantitation limits for monitoring inorganic arsenic concentrations.

(C) Information and guidance to assist sources in estimating, pursuant to subsection (e)(C) of this section, the reduced human health risk expected to result from inorganic arsenic control measures based on the most current EPA risk assessment.

(g) It is the policy of the Commission that landowners engaged in agricultural or development practices on land where pesticides, fertilizers, or soil amendments containing arsenic are currently being or have previously been applied, implement conservation practices to minimize the erosion and runoff of inorganic arsenic to waters of the State or to a location where such material could readily migrate into waters of the State.

[ED. NOTE: Tables referencing the toxics criteria are not included in rule text. Click here for a PDF copy of Table 30: Aquatic Life Water Quality Criteria for Toxic Pollutants. Click here for a PDF copy of Table 31: Aquatic Life Water Quality Guidance Values for Toxic Pollutants. Click here for a PDF copy of Table 40: Human Health Water Quality Criteria for Toxic Pollutants.]

[See end of this document for proposed amendments to Tables 30, 33C, and 40]

Stat. Auth.: ORS 468.020, 468B.030, 468B.035 & 468B.048  
Stats. Implemented: ORS 468B.030, 468B.035 & 468B.048  
Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03; DEQ 3-2004, f. & cert. ef. 5-28-04; DEQ 17-2010, f. & cert. ef. 12-21-10; DEQ 8-2011, f. & cert. ef. 6-30-11; DEQ 10-2011, f. & cert. ef. 7-13-11

**340-041-0009**

**Bacteria**

(1) Numeric Criteria: Organisms of the coliform group commonly associated with fecal sources (MPN or equivalent membrane filtration using a representative number of samples) may not exceed the criteria described in paragraphs (a) and (b) of this paragraph:

(a) Freshwaters and Estuarine Waters Other than Shellfish Growing Waters:

(A) A 30-day log mean of 126 E. coli organisms per 100 milliliters, based on a minimum of five (5) samples;

(B) No single sample may exceed 406 E. coli organisms per 100 milliliters.

(b) Marine Waters and Estuarine Shellfish Growing Waters: A fecal coliform median concentration of 14 organisms per 100 milliliters, with not more than ten percent of the samples exceeding 43 organisms per 100 ml.

(2) Raw Sewage Prohibition: No sewage may be discharged into or in any other manner be allowed to enter the waters of the State, unless such sewage has been treated in a manner approved by the Department or otherwise allowed by these rules;

(3) Animal Waste: Runoff contaminated with domesticated animal wastes must be minimized and treated to the maximum extent practicable before it is allowed to enter waters of the State;

(4) Bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation, or otherwise injurious to public health may not be allowed;

(5) Effluent Limitations for Bacteria: Except as allowed in subsection (c) of this section, upon NPDES permit renewal or issuance, or upon request for a permit modification by the permittee at an earlier date, effluent discharges to freshwaters, and estuarine waters other than shellfish growing waters may not exceed a monthly log mean of 126 E. coli organisms per 100 ml. No single sample may exceed 406 E. coli organisms per 100 ml. However, no violation will be found, for an exceedance if the permittee takes at least five consecutive re-samples at four-hour intervals beginning as soon as practicable (preferably within 28 hours) after the original sample was taken and the log mean of the five re-samples is less than or equal to 126 E. coli. The following conditions apply:

(a) If the Department finds that re-sampling within the timeframe outlined in this section would pose an undue hardship on a treatment facility, a more convenient schedule may be negotiated in the permit, provided that the permittee demonstrates that the sampling delay will result in no increase in the risk to water contact recreation in waters affected by the discharge;

(b) The aquatic life criteria for chlorine established in the water quality toxic substances rule under OAR 340-041-0033 must be met at all times outside the assigned mixing zone;

(c) For sewage treatment plants that are authorized to use recycled water pursuant to OAR 340, division 55, and that also use a storage pond as a means to dechlorinate their effluent prior to discharge to public waters, effluent limitations for bacteria may, upon request by the permittee, be based upon appropriate total coliform limits as required by OAR 340, division 55:

(i) Class C limitations: No two consecutive samples may exceed 240 total coliform per 100 milliliters.

(ii) Class A and Class B limitations: No single sample may exceed 23 total coliform per 100 milliliters.

(iii) No violation will be found for an exceedance under this paragraph if the permittee takes at least five consecutive re-samples at four hour intervals beginning as soon as practicable (preferably within 28 hours) after the original sample(s) were taken; and in the case of Class C recycled water, the log mean of the five re-samples is less than or equal to 23 total coliform per 100 milliliters or, in the case of Class A and Class B recycled water, if the log mean of the five re-samples is less than or equal to 2.2 total coliform per 100 milliliters.

(6) Sewer Overflows in winter: Domestic waste collection and treatment facilities are prohibited from discharging raw sewage to waters of the State during the period of November 1 through May 21, except during a storm event greater than the one-in-five-year, 24-hour duration storm. However, the following exceptions apply:

(a) The Commission may on a case-by-case basis approve a bacteria control management plan to be prepared by the permittee, for a basin or specified geographic area which describes hydrologic conditions under which the numeric bacteria criteria would be waived. These plans will identify the specific hydrologic conditions, identify the public notification and education processes that will be followed to inform the public about an event and the plan, describe the water quality assessment conducted to determine bacteria sources and loads associated with the specified hydrologic conditions, and describe the bacteria control program that is being implemented in the basin or specified geographic area for the identified sources;

(b) Facilities with separate sanitary and storm sewers existing on January 10, 1996, and which currently experience sanitary sewer overflows due to inflow and infiltration problems, must submit an acceptable plan to the Department at the first permit renewal, which describes actions that will be taken to assure compliance with the discharge prohibition by January 1, 2010. Where discharges occur to a receiving stream with sensitive beneficial uses, the Department may negotiate a more aggressive schedule for discharge elimination;

(c) On a case-by-case basis, the beginning of winter may be defined as October 15, if the permittee so requests and demonstrates to the Department's satisfaction that the risk to beneficial uses, including water contact recreation, will not be increased due to the date change.

(7) Sewer Overflows in summer: Domestic waste collection and treatment facilities are prohibited from discharging raw sewage to waters of the State during the period of May 22 through October 31, except during a storm event greater than the one-in-ten-year, 24-hour duration storm. The following exceptions apply:

(a) For facilities with combined sanitary and storm sewers, the Commission may on a case-by-case basis approve a bacteria control management plan such as that described in subsection (6)(a) of this rule;

(b) On a case-by-case basis, the beginning of summer may be defined as June 1 if the permittee so requests and demonstrates to the Department's satisfaction that the risk to beneficial uses, including water contact recreation, will not be increased due to the date change;

(c) For discharge sources whose permit identifies the beginning of summer as any date from May 22 through May 31: If the permittee demonstrates to the Department's satisfaction that an exceedance occurred between May 21 and June 1 because of a sewer overflow, and that no increase in risk to beneficial uses, including water contact recreation, occurred because of the exceedance, no violation may be triggered, if the storm associated with the overflow was greater than the one-in-five-year, 24-hour duration storm.

(8) Storm Sewers Systems Subject to Municipal NPDES Stormwater Permits: Best management practices must be implemented for permitted storm sewers to control bacteria to the maximum extent practicable. In addition, a collection-system evaluation must be performed prior to permit issuance or renewal so that illicit and cross connections are identified. Such connections must be removed upon identification. A collection system evaluation is not required where the Department determines that illicit and cross connections are unlikely to exist.

(9) Storm Sewers Systems Not Subject to Municipal NPDES Stormwater Permits: A collection system evaluation must be performed of non-permitted storm sewers by January 1, 2005, unless the Department determines that an evaluation is not necessary because illicit and cross connections are unlikely to exist. Illicit and cross-connections must be removed upon identification.

(10) Water Quality Limited for Bacteria: In those water bodies, or segments of water bodies identified by the Department as exceeding the relevant numeric criteria for bacteria in the basin standards and designated as water-quality limited under section 303(d) of the Clean Water Act, the requirements specified in section 11 of this rule and in OAR 340-041-0061(11) must apply.

(11) In water bodies designated by the Department as water-quality limited for bacteria, and in accordance with priorities established by the Department, development and implementation of a bacteria management plan may be required of those sources that the Department determines to be contributing to the problem. The Department may determine that a plan is not necessary for a particular stream segment or segments within a water-quality limited basin based on the contribution of the segment(s) to the problem. The bacteria management plans will identify the technologies, best management practices and/or measures and approaches to be implemented by point and nonpoint sources to limit bacterial contamination. For point sources, their National Pollutant Discharge Elimination System permit is their bacteria management plan. For nonpoint sources, the bacteria management plan will be developed by designated management agencies (DMAs) which will identify the appropriate best management practices or measures and approaches.

Stat. Auth.: ORS 468.020, 468B.030, 468B.035 & 468B.048  
Stats. Implemented: ORS 468B.030, 468B.035 & 468B.048  
Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03; DEQ 6-2008, f. & cert. ef. 5-5-08; DEQ 10-2011, f. & cert. ef. 7-13-11

**DIVISION 40**

**GROUNDWATER QUALITY PROTECTION**

**340-040-0020**

**General Policies**

(1) Groundwater is a critical natural resource providing domestic, industrial, and agricultural water supply; and other legitimate beneficial uses; and also providing base flow for rivers, lakes, streams, and wetlands.

(2) Groundwater, once polluted, is difficult and sometimes impossible to clean up. Therefore, the EQC shall employ an anti-degradation policy to emphasize the prevention of groundwater pollution, and to control waste discharges to groundwater so that the highest possible water quality is maintained.

(3) All groundwaters of the state shall be protected from pollution that could impair existing or potential beneficial uses for which the natural water quality of the groundwater is adequate. Among the recognized beneficial uses of groundwater, domestic water supply is recognized as being the use that would usually require the highest level of water quality. Existing high quality groundwaters which exceed those levels necessary to support recognized and legitimate beneficial uses shall be maintained except as provided for in these rules.

(4) Numerical groundwater quality reference levels and guidance levels are listed in **Tables 1 through 3** of this Division. These levels have been obtained from the Safe Drinking Water Act, and indicate when groundwater may not be suitable for human consumption or when the aesthetic quality of groundwater may be impaired. They will be used by the Department and the public to evaluate the significance of a particular contaminant concentration, and will trigger necessary regulatory action. These levels should not be construed as acceptable groundwater quality goals because it is the policy of the EQC to maintain and preserve the highest possible water quality.

(5) For pollutant parameters for which numerical groundwater quality reference levels or guidance levels have not been established, or for evaluating adverse impacts on beneficial uses other than human consumption, the Department shall make use of the most current and scientifically valid information available in determining at what levels pollutants may affect present or potential beneficial uses. Such information shall include, but not be limited to, values set forth in OAR 340-041-0033 .

(6) The Department shall develop, implement and conduct a comprehensive groundwater quality protection program. The program shall contain strategies and methods for problem prevention, problem abatement and the control of both point and nonpoint sources of groundwater pollution. The Department shall seek the assistance of federal, state, and local governments in implementing the program.

(7) In order to assure maximum reasonable protection of public health, the public shall be informed that groundwater, and most particularly local flow systems or water table aquifers, may not be suitable for human consumption due either to natural or human-caused pollution problems, and shall not be assumed to be safe for domestic use unless quality testing demonstrates a safe supply. The Department shall work cooperatively with the Water Resources Department and the Health Division in identifying areas where groundwater pollution may affect beneficial uses.

(8) It is the policy of the EQC that groundwater quality be protected throughout the state. The Department will concentrate its groundwater quality protection implementation efforts in areas where practices and activities have the greatest potential for degrading groundwater quality, and where potential groundwater quality pollution would have the greatest adverse impact on beneficial uses.

(9) The Department, as lead agency for groundwater quality protection, shall work cooperatively with the Water Resources Department, the lead agency for groundwater quantity management, to characterize the physical and chemical charac-teristics of the aquifers of the state. The Department will seek the assistance and cooperation of the Water Resources Department to design an ambient monitoring program adequate to determine representative groundwater quality for significant groundwater flow systems. The Department shall assist and cooperate with the Water Resources Department in its groundwater studies. The Department shall also seek the advice, assistance, and cooperation of local, state, and federal agencies to identify and resolve ground-water quality problems.

(10) It is the intent of the EQC to see that groundwater problems associated with areawide on-site sewage disposal are corrected by developing and implementing areawide abatement plans. In order to accomplish this, all available and appropriate statutory and administrative authorities will be utilized, including but not limited to: permits, special permit conditions, penalties, fines, EQC orders, compliance schedules, moratoriums, Department orders, and geographic area rules (OAR 340-071-0400). It is recognized, however, that in some cases the identification, evaluation and implementation of abatement measures may take time and that continued degradation may occur while the plan is being developed and implemented. The EQC may allow short-term continued degradation only if the beneficial uses, public health, and groundwater resources are not significantly affected, and only if the approved abatement plan is being implemented on a schedule approved by the Department.

(11) In order to minimize groundwater quality degradation potentially resulting from point source activities, point sources shall employ the highest and best practicable methods to prevent the movement of pollutants to groundwater. Among other factors, available technologies for treatment and waste reduction, cost effectiveness, site characteristics, pollutant toxicity and persistence, and state and federal regulations shall be considered in arriving at a case-by-case determination of highest and best practicable methods that protect public health and the environment.

(12) In regulating point source activities that could result in the disposal of wastes onto or into the ground in a manner which allows potential movement of pollutants to groundwater, the Department shall utilize all available and appropriate statutory and administrative authorities, including but not limited to: permits, fines, EQC orders, compliance schedules, moratoriums, Depart-ment orders, and geographic area rules. Groundwater quality protection requirements shall be implemented through the Department's Water Pollution Control Program, Solid Waste Disposal Program, On-Site Sewage Disposal System Construction Program, Hazardous Waste Facility (RCRA) Program, Underground Injection Control Program, Emergency Spill Response Program, or other programs, whichever is appropriate.

**Table 1**

**NUMERICAL GROUNDWATER QUALITY REFERENCE LEVELS: 1**

**Inorganic Contaminants -- Reference Level (mg/L)**

Arsenic -- 0.05

Barium -- 1.0

Cadmium -- 0.01

Chromium -- 0.05

Fluoride -- 4.0

Lead -- 0.05

Mercury -- 0.002

Nitrate-N -- 10.0

Selenium -- 0.01

Silver -- 0.05

1All reference levels are for total (unfiltered) concentrations unless otherwise specified by the Department.

**Table 2**

**NUMERICAL GROUNDWATER QUALITY REFERENCE LEVELS (Continued): 1**

**Organic Contaminants -- Reference Level (mg/L)**

Benzene -- 0.005

Carbon Tetrachloride -- 0.005

p-Dichlorobenzene -- 0.075

1,2-Dichloroethane -- 0.005

1,1-Dichloroethylene -- 0.007

1,1,1-Trichloroethane -- 0.200

Trichloroethylene -- 0.005

Total Trihalomethanes -- 0.100

(the sum of concentrations bromodichloromethane, dibromochloromethane, tribromomethane (bromoform), and trichloromethane (chloroform))

Vinyl Chloride -- 0.002

2,4-D -- 0.100

Endrin -- 0.0002

Lindane -- 0.004

Methoxychlor -- 0.100

Toxaphene -- 0.005

2,4,5-TP Silvex -- 0.010

1All reference levels are for total (unfiltered) concentrations unless otherwise specified by the Department.

**Table 3**

**NUMERICAL GROUNDWATER QUALITY GUIDANCE LEVELS: 1**

**Miscellaneous Contaminants -- Guidance Level (mg/L) 2**

Chloride -- 250

Color -- 15 Color Units

Copper -- 1.0

Foaming agents -- 0.5

Iron -- 0.3

Manganese -- 0.05

Odor -- 3 Threshold odor number

pH -- 6.5-8.5

Sulfate -- 250

Total dissolved solids -- 500

Zinc -- 5.0

1All guidance levels except total dissolved solids and are for total (unfiltered) concentrations unless otherwise specified by the Department.

2Unless otherwise specified, except pH.

Stat. Auth.: [ORS 468](http://landru.leg.state.or.us/ors/468.html) & [ORS 468](http://landru.leg.state.or.us/ors/468.html)B  
Stats. Implemented: [ORS 468](http://landru.leg.state.or.us/ors/468.html).020, [ORS 468](http://landru.leg.state.or.us/ors/468.html).035, [ORS 468](http://landru.leg.state.or.us/ors/468.html)B.155 & ORS 468B.165  
Hist.: DEQ 24-1981, f. & ef. 9-8-81; DEQ 13-1984, f. & ef. 7-13-84; DEQ 27-1989, f. & cert. ef. 10-27-89; Renumbered from 340-041-0029; DEQ 4-1996, f. & cert. ef. 3-7-96

**340-040-0080**

**Numerical Groundwater Quality Reference Levels and Guidance Levels**

(1) The numerical groundwater quality reference levels and guidance levels contained in **Tables 1 through 3** of this Division are to be considered by the Department and the public in weighing the significance of a particular chemical concentration, and in determining the level of remedial action necessary to restore contaminated groundwater for human consumption. They are not to be construed as acceptable groundwater quality management goals. They are to be used by the Director and the EQC in establishing permit-specific and remedial action concentration limits according to the requirements of OAR 340-040-0030 through 340-040-0060.

(2) The Department shall periodically review information as it becomes available for establishing new numerical groundwater quality reference levels and guidance levels, and to ensure consistency with other statutorily mandated standards.

(3) Human consumption is recognized as the highest and best use of groundwater, and the use which usually requires the highest level of water quality. The numerical groundwater quality reference levels listed in **Tables 1**and**2** of this Division reflect the suitability of groundwater for human consumption.

(4) The numerical groundwater quality guidance levels listed in **Table 3** of this Division are for contaminants which do not adversely impact human health at the given concentrations. At considerably higher concentrations, human health implications may exist. These guidance levels are for contaminants that primarily affect the aesthetic qualities relating to the public acceptance of drinking water. The aesthetic degradation of groundwater may impair its beneficial use.

(5) For pollutant parameters for which numerical ground-water quality reference levels or guidance levels have not been established and listed in **Tables 1 through 3**, or for evaluating adverse impacts on beneficial uses other than human consumption, the Department shall make use of the most current and scientifically valid information available in determining at what levels pollutants may affect present or potential beneficial uses. Such information shall include, but not be limited to, values set forth in OAR 340-041-0033.

Stat. Auth.: [ORS 468](http://landru.leg.state.or.us/ors/468.html) & [ORS 468](http://landru.leg.state.or.us/ors/468.html)B  
Stats. Implemented: [ORS 468](http://landru.leg.state.or.us/ors/468.html).020, [ORS 468](http://landru.leg.state.or.us/ors/468.html).035, [ORS 468](http://landru.leg.state.or.us/ors/468.html)B.155 & ORS 468B.165  
Hist.: DEQ 24-1981, f. & ef. 9-8-81; DEQ 13-1984, f. & ef. 7-13-84; DEQ 27-1989, f. & cert. ef. 10-27-89; Renumbered from 340-041-0029

**NEW TABLE 30**

**Note to Readers**:

Proposed changes (in redlined font) to the Toxic Substances rule would move all the aquatic life criteria from Tables 20, 33A, and 33B into one new aquatic life criteria table, Table 30. As a result of this movement, Tables 20, 33A, and 33B are no longer needed and the proposal would delete the tables from the Toxic Substances rule in OAR 340-041-0033 (see deleted Tables 20, 33A, and 33B following Table 40 proposed revisions). Table 30 contains criteria established to protect fish and aquatic life use, including the criteria that (1) EPA approved in their Jan. 31, 2013 action; (2) remained unchanged; (3) are proposed to address an EPA disapproval; and (4) were previously effective (i.e. criteria contained in Table 20) for those cases where EPA disapproved pollutant criteria contained in Tables 33A or 33B and DEQ is not proposing remedies to address the disapprovals at this time. When a criterion submitted to EPA by the state is disapproved by EPA, the previously effective criterion remains in effect for federal Clean Water Act purposes.

The criteria in black type (i.e. not redline strikethrough) in Table 30 are currently effective and do not require Environmental Quality Commission adoption or EPA approval. Conversely, the redline/strikethrough proposed changes to Table 30 reflect corrections or clarifications to criteria, footnotes, and introductory language (originally associated with or contained in Tables 20, 33A, or 33B) to correct an EPA disapproval, or show changes to provide further clarifications on the toxics tables or rule language. The EQC must adopt these proposed changes and EPA must approve them before they become effective. The language portrayed in **grey** is explanatory in nature, intended to help the reader understand the origin of the criteria in the proposed table. Footnotes and endnotes may be found within the table and at the end of the table.

The aquatic life toxic criteria in Tables 20, 33A, and 33B that are submitted for EQC adoption and Secretary of State filing must show complete strikethrough of the tables because the tables will be deleted from the Toxics Substances rule. Because Table 30 will be a completely new table, the Secretary of State requires that the entire table be in red/underline text. Therefore, the table below provides a crosswalk of what the EQC previously adopted and the revisions DEQ proposes to make. The redline version of Table 30 follows the crosswalk.

A recent change in the Secretary of State Bulletin now allows for criteria tables to be attached to the Oregon Administrative Rules; therefore, proposed changes found at the end of the Toxic Substances rule state that Tables 30, 31 (aquatic life guidance values), and 40 (human health toxics criteria) will be attached as PDF documents.

**CROSSWALK**

**TABLE 30: Aquatic Life Water Quality Criteria for Toxic Pollutants**

*Effective April 18, 2014*

**Aquatic Life Criteria Summary**

The criteria for each compound listed in Table 30~~3A~~ must not be exceeded in waters of the state in order to protect aquatic life. The aquatic life criteria apply to waterbodies where fish and aquatic life is a designated beneficial use. All values are expressed as micrograms per liter (µg/L) ~~except where noted~~. Compounds are listed in alphabetical order with the corresponding information: ~~EPA number (from National Recommended Water Quality Criteria: 2002, EPA-822-R-02-047), the~~ the Chemical Abstract Service (CAS) number, whether there is a human health criterion for the pollutant (i.e. “y”= yes, “n” = no), and the associated~~.~~ aquatic life freshwater and saltwater acute and chronic criteria~~, aquatic life saltwater acute and chronic criteria~~ . Italicized pollutants are not identified as priority pollutants by EPA. Dashes in the table column indicate that there is no aquatic life criterion for that pollutant.

Unless otherwise noted in the table below, the acute criterion is the Criterion Maximum Concentration (CMC) applied as a one hour average concentration, and the chronic criterion is the Criterion Continuous Concentration (CCC) applied as a 96 hour (4 day) average concentration.The CMC and CCC criteria may not be exceeded more than once every three years. Footnote A, associated with eleven pesticide pollutants in Table 30, describes the exception to the frequency and duration of the toxics criteria stated in this paragraph.

Note on edits above: The paragraph above originated from the introductory language in Tables 33A and 33B. Redline text generally reflects DEQ’s proposed clarifying language. The last sentence referencing Footnote A (previously Footnote O in Tables 33A and 33B) will address EPA’s disapproval of 11 pesticides that have different frequencies and durations than the other toxic pollutants. EPA’s disapproval of 11 pesticides related to the frequency and duration statements that DEQ added to the introductory language in Tables 33A and 33B in 2004. EPA’s action letter indicated that when DEQ added the frequency and duration language to the introduction, it had the effect of changing the frequency and duration for the 11 pesticides. DEQ interpreted the introductory language in Table 33A with regards to the criteria frequency and duration as general in nature and that Footnote “O” for the pesticides superseded this general statement. It is DEQ’s intention that by adding the last sentence to the introductory paragraph above that it will clarify for the 11 pesticide criteria that Footnote A (previously Footnote O) supersedes the default frequency and duration components associated with the other aquatic toxic pollutants. Although EPA did not disapprove Footnote O, DEQ proposes to provide further clarification. See those revisions in Table 30 as re-named Footnote A.