

### Rulemaking Action Item E

Ballast Water 2023

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# **DEQ Recommendation to the EQC**

DEQ recommends that the Environmental Quality Commission adopt the proposed rules in Attachment A as part of Chapter 340 of the Oregon Administrative Rules.

#### **Language of Proposed EQC Motion:**

"I move that the commission adopt the proposed rule amendments in Attachment A as part of chapter 340 of the Oregon Administrative Rules."

### **Overview**

This rulemaking proposes to:

- 1. Extend the sunset date on DEQ's 'exchange + treatment' requirement by four years to prevent a gap in coverage until equivalent federal regulations are expected to be fully implemented.
- 2. Update the agency's definition of Pacific Coast Region to align with the definition used by California and federal regulators, and
- 3. Correct three minor errors in DEQ's current ballast water rules.

# **Statement of Need**

Proposed Rule or Topic	Discussion		
340-143-0005			
What need would the proposed rule address?	Incorrect C.F.R. citation; statute requires update of rule		
How would the proposed rule address the need?	Correction of C.F.R. citation; aligning with California, EPA, and Coast Guard on definition of Pacific Coast Region		
How will DEQ know the rule addressed the need?	C.F.R. citation will be correct; Pacific Coast Region will be extended 5 degrees south		
340-143-0020			
What need would the proposed rule address?	Presence of defunct email address		
How would the proposed rule address the need?	Remove email address		
How will DEQ know the rule addressed the need?	Email address will be removed		
340-14	3-0050		
What need would the proposed rule address?	Incorrect Vibrio cholera naming convention; upcoming sunset date in rule		
How would the proposed rule address the need?	Correction of Vibrio cholera naming convention; extension of sunset date		
How will DEQ know the rule addressed the need?	Vibrio cholera serotypes will follow naming convention; sunset date will be extended		

# Rules Affected, Authorities, Supporting Documents

#### Lead division

Land Quality

### **Program or activity**

Ballast Water

### **Chapter 340 action**

Amend		
340-143-0005	340-143-0020	340-143-0050

Statutory Authority - ORS			
468.020	468.065	783.620 - 783.640	

Statutes Implemented - ORS			
783.620 - 783.640			

### Documents relied on for rulemaking

Document title	Document location
Management of Biological Invasions (2018) Volume 9, Issue 3: 309-321	https://doi.org/10.3391/mbi.2018.9.3.13
Environ. Sci. Technol., 2021, 55, 82-89.	https://dx.doi.org/10.1021/acs.est.0c05238?r ef=pdf
Science of the Total Environment, 775 (2021) 145238	https://doi.org/10.1016/j.scitotenv.2021.1452 38
Ocean and Coastal Management, 199 (2021) 105296	https://doi.org/10.1016/j.ocecoaman.2020.10 5296
Conservation Letters 2022; 15:e12866	https://doi.org/10.1111/conl.12866
Journal of Applied Ecology, 2023; 60:193-204.	https://doi.org/10.1111/1365-2664.14321
Molecular Ecology (2023). 00, 1-14.	https://doi.org/10.1111/mec.16888

# **Fee Analysis**

This rulemaking does not involve fees.

### Statement of Fiscal and Economic Impact

### **Fiscal and Economic Impact**

This rulemaking extends the sunset date on DEQ's 'exchange + treatment' requirement by four years, so does not impose any new costs to the regulated vessels.

### **Statement of Cost of Compliance**

#### State agencies

This rulemaking will not require additional resources for DEQ, nor other state or federal agencies.

#### Local governments

This rulemaking only affects commercial vessels greater than 300 gross tons arriving from outside Oregon waters, and therefore has no fiscal impact on local governments.

#### **Public**

This rulemaking would not impose a negative economic impact on the public. Rather, these rules are intended to protect the public by preventing the introduction of aquatic invasive species, which have caused devastating economic impacts for public and private sector entities in other regions of the country.

#### Large businesses - businesses with more than 50 employees

DEQ is requesting an extension of the sunset date so regulated vessels will continue to operate under existing standards and fees.

### Small businesses - businesses with 50 or fewer employees

DEQ is requesting an extension of the sunset date so regulated vessels will continue to operate under existing standards and fees.

#### **ORS 183.336 - Cost of Compliance for Small Businesses**

a. Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule.

This rulemaking only affects commercial vessels greater than 300 gross tons arriving from outside Oregon waters and therefore should have no fiscal impact on small businesses.

b. Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule.

This rulemaking only affects commercial vessels greater than 300 gross tons arriving from outside Oregon waters and therefore should have no fiscal impact on small businesses.

# c. Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule.

This rulemaking only affects commercial vessels greater than 300 gross tons arriving from outside of Oregon waters and therefore should have no fiscal impact on small businesses.

# d. Describe how DEQ involved small businesses in developing this proposed rule.

DEQ did not involve small businesses directly in this rulemaking because this rulemaking only affects commercial vessels greater than 300 gross tons arriving from outside of Oregon waters and therefore should have no fiscal impact on small businesses. Some of the advisory committee members represent organizations that may have small businesses as part of the membership.

During the public comment period DEQ sent notifications about this rulemaking to potentially impacted companies, including small businesses, giving them the opportunity to provide comments on the proposed rules.

### Documents relied on for fiscal and economic impact

Document title	Document location
Vessel Incidental Discharge Act (2018)	33 U.S.C. § 1322(p)

### Advisory committee fiscal review

DEQ appointed an advisory committee.

As ORS 183.33 requires, 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 adverse impact on small businesses; if so, then how DEQ can comply with ORS 183.540 reduce that impact.

The committee reviewed the draft fiscal and economic impact statement, and its findings are stated in the approved minutes dated Aug. 24, 2023.

The committee did not provide or request additional data to support or refute DEQ's finding of no significant direct or indirect economic impacts. The committee determined the proposed rules would not have a significant adverse impact on small businesses in Oregon.

# **Housing cost**

As ORS 183.534 requires, DEQ evaluated whether the proposed rules would have an 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.

DEQ determined the proposed rule amendments will have no impact on the supply of housing or land for residential development. The proposed rule amendments will not impact the cost of labor or administration related to such development.

### **Racial Equity**

ORS 183.335(2)(a)(F) requires state agencies to provide a statement identifying how adoption of this rule will affect racial equity in this state.

This rulemaking is not expected to affect racial equity in the state. The focus of the rule is a vessel operating procedure that is already currently required of the vessels subject to the rule. The exchange of low-salinity ballast prior to treatment is required by both rule and statute to take place no less than 50 nautical miles from shore in a minority of cases, and at least 200 nautical miles from any shore in most voyages subject to the rule. Further, this rule is primarily focused on the prevention of an action (the introduction of invasive species via ballast water discharge) that would certainly affect lower-income communities disproportionately. The following is a short list of potential impacts being prevented by Oregon's ballast water exchange requirement.

**Disproportionate impact on indigenous communities:** ballast water discharge can introduce invasive species that can disrupt ecosystems and harm traditional food sources of indigenous communities who rely on fishing and harvesting from natural waters sources.

Unequal access to resources for monitoring and responding to invasive species: marginalized communities may not have access to the same resources or expertise as other communities to monitor and respond to invasive species, making them more vulnerable to the impacts of discharging unmanaged ballast water.

**Health impacts:** invasive species introduced through ballast water discharge can pose health risks to individuals who come into contact with contaminated water, such as recreational water users or those who rely on water sources for drinking or irrigation.

**Economic impacts:** invasive species can have significant economic impacts, including damage to fisheries and other industries that rely on water resources. These impacts can disproportionately affect marginalized communities who may already be economically disadvantaged.

### **Environmental Justice Considerations**

ORS 182.545 requires natural resource agencies to consider the effects of their actions on environmental justice issues.

As noted above, this rulemaking primarily focuses on the prevention of an action (the introduction of invasive species via ballast water discharge). If ballast water discharge leads to the introduction/spread of species, that would certainly affect lower-income communities disproportionately. Below are a few examples of the potential impacts.

**Disproportionate impact on low-income communities:** if ballast water discharge leads to the spread of invasive species, this can have a disproportionate impact on low-income communities that rely on fishing and other natural resources for their livelihoods. These communities may be particularly vulnerable to changes in fish populations or the introduction of new species that compete with native species.

**Cultural impacts:** some communities may have cultural or spiritual ties to the ocean and its ecosystems, and the introduction of invasive species can disrupt these traditional relationships. Additionally, ballast water discharge could have negative impacts on cultural sites, including burial grounds and other sacred areas.

**Environmental degradation:** the introduction of invasive species can cause significant environmental degradation, including the loss of habitat, changes in water quality, and alterations of the food chain. This can impact not only local aquatic life, but also the larger ecosystem, leading to cascading effects that can be difficult to predict.

### **Federal Relationship**

ORS 183.332, 468A.327 and OAR 340-011-0029 require DEQ to attempt to adopt rules that correspond with existing equivalent federal laws and rules unless there are reasons not to do so.

The proposed rules are not different from or in addition to federal requirements. This rulemaking extends a sunset date in DEQ's exchange plus treatment rule.

After Oregon adopted this rule, the Vessel Incidental Discharge Act (33 U.S.C. § 1322(p)) was signed into law in 2018. This law incorporates Oregon's rule for freshwater ballast and applies it to the entire Pacific Region.

However, the law is not expected to go into effect until 2026. As a result, the sunset date on Oregon's rule would create a gap in prevention of aquatic invasive species introduction. This rulemaking extends the sunset date in Oregon's rule, to prevent this gap until VIDA's equivalent rules are expected to be fully implemented.

### **Land Use**

In adopting new or amended rules, ORS 197.180 and OAR 340-018-0070 require DEQ to determine whether the proposed rules significantly affect land use. If so, DEQ must explain how the proposed rules comply with statewide land-use planning goals and local acknowledged comprehensive plans.

Under OAR 660-030-0005 and OAR 340 Division 18, DEQ considers that rules affect land use if:

- The statewide land use planning goals specifically refer to the rule or program, or
- The rule or program is reasonably expected to have significant effects on:
  - o Resources, objects, or areas identified in the statewide planning goals, or
  - o Present or future land uses identified in acknowledge comprehensive plans

DEQ determined whether the proposed rules involve programs or actions that affect land use by reviewing its Statewide Agency Coordination plan. The plan describes the programs that DEQ determined significantly affect land use. DEQ considers that its programs specifically relate to the following statewide goals:

Goal	Title
5	Natural Resources, Scenic and Historic Areas, and Open Spaces
6	Air, Water and Land Resources Quality
11	Public Facilities and Services
16	Estuarine Resources
19	Ocean Resources

Statewide goals also specifically reference the following DEQ programs:

- Nonpoint source discharge water quality program Goal 16
- Water quality and sewage disposal systems Goal 16
- Water quality permits and oil spill regulations Goal 19

#### **Determination**

DEQ determined these proposed rules do not affect land use under OAR 340-018-0030 or DEQ's State Agency Coordination Program.

# **EQC Prior Involvement**

DEQ did not present additional information specific to this proposed rule revision.

## **Advisory Committee**

### **Background**

DEQ convened the Ballast Water Rulemaking 2023 advisory committee. The committee included representatives from the shipping industry, environmental advocacy groups, academia, and the regulatory community and met one time. The committee's web page is located at: Ballast Water 2023

The committee members were:

Rulemaking Name Advisory Committee			
Name Representing			
Kate Mickelson	Columbia River Steamship Operators' Association		
Brien Flanagan (alternate)	Columbia River Steamship Operators' Association		
Carl Bertapelle	Portland Merchants Exchange		
Ross McDonald	Sause Bros.		
Blake Hamalainen	Port of Portland		
Dick Vander Schaaf	The Nature Conservancy		
Sarah Kidd (not present)	Lower Columbia Estuary Partnership		
Catherine Corbett (alternate)	Lower Columbia Estuary Partnership		
Catherine de Rivera	Portland State University		
James Michelli (not present)	U.S. Coast Guard		
Art Leskowich	U.S. Army Corps. of Engineers		
Blaine Parker	Columbia River Inter-Tribal Fish Commission		
Torey Wakeland (not present)	Confederated Tribes of Grand Ronde		

### Meeting notifications

To notify people about the advisory committee's activities, DEQ:

- Sent GovDelivery bulletins, a free e-mail subscription service, to the following lists:
  - o Rulemaking
  - o DEQ Public Notices
  - o Environmental Cleanup Program
- Added advisory committee announcements to DEQ's calendar of public meetings at DEQ Calendar.

#### **Committee discussions**

In addition to the recommendations described under the Statement of Fiscal and Economic Impact section above, the committee members voiced no opposition to the five amendments proposed as a part of this rulemaking. All discussions affirmed that the proposed changes were agreeable as currently drafted. Committee members that spoke on the record all voiced support of the removal or extension of the sunset date in OAR 340-143-0050. There was no opposition to expanding the southern extent of the Pacific Coast Region, or against the correction of the three errors identified in the current rules.

### **Public Engagement**

#### **Public notice**

DEQ provided notice of the proposed rulemaking and rulemaking hearing by:

- On Aug. 31, 2023 filing notice with the Oregon Secretary of State for publication in the September 2023 Oregon Bulletin;
- Posting the Notice, Invitation to Comment and Draft Rules on the web page for this rulemaking, located at: <u>Ballast Water 2023</u>;
- Emailing approximately 24,000 interested parties on the following DEQ lists through GovDelivery:
  - o Rulemaking
  - o DEQ Public Notices
  - o Environmental Cleanup Program
- Emailing the following key legislators required under ORS 183.335:
  - o Sen. Janeen Sollman, Chair, Senate Committee on Energy and Environment
  - Sen. Lynn Findley, Vice-Chair, Senate Committee on Energy and Environment
  - o Sen. Jeff Golden, Senate Committee on Energy and Environment
  - o Sen. Cedric Hayden, Senate Committee on Energy and Environment
  - o Sen. Kate Lieber, Senate Committee on Energy and Environment
  - Rep. Pam Marsh, Chair, House Committee on Climate, Energy, and Environment
  - o Rep. Bobby Levy, Vice-Chair, House Committee on Climate, Energy, and Environment
  - o Rep. Emerson Levy, Vice-Chair, House Committee on Climate, Energy, and Environment
  - o Rep. Tom Andersen, House Committee on Climate, Energy, and Environment
  - o Rep. Ken Helm, House Committee on Climate, Energy, and Environment
  - o Rep. Jason Kropf, House Committee on Climate, Energy, and Environment
  - Rep. Virgle Osborne, House Committee on Climate, Energy, and Environment
  - o Rep. Mark Owens, House Committee on Climate, Energy, and Environment
  - o Rep. Khanh Pham, House Committee on Climate, Energy, and Environment
  - o Rep. Kim Wallan, House Committee on Climate, Energy, and Environment
- Emailing advisory committee members,
- Posting on the DEQ event calendar: <u>DEQ Calendar</u>

### **Public Hearing**

DEQ held one (1) public hearing. DEQ received no (0) comments at the hearing. Later sections of this document include a summary of the three (3) comments received during the open public comment period, DEQ's responses, and a list of the commenters. Original comments are on file with DEQ.

#### **Presiding Officers' Record**

#### **Hearing 1**

Date	Sept. 19, 2023
Place	Virtual, via Zoom
Start Time	3 p.m.
End Time	3:30 p.m.
Presiding Officer	Jennifer Flynt

#### **Presiding Officer:**

The presiding officer convened the hearing, summarized procedures for the hearing, and explained that DEQ was recording the hearing. The presiding officer asked people who wanted to present verbal comments to sign the registration list, or if attending by phone, to indicate their intent to present comments. The presiding officer advised all attending parties interested in receiving future information about the rulemaking to sign up for GovDelivery email notices.

As Oregon Administrative Rule 137-001-0030 requires, the presiding officer summarized the content of the rulemaking notice.

No person presented any oral testimony or written comments.

### **Summary of Public Comments and DEQ Responses**

#### **Public comment period**

DEQ accepted public comment on the proposed rulemaking from Aug. 31, 2023 until 5 p.m. on Sept. 21, 2023.

For public comments received by the close of the public comment period, the following tables organize summaries of each comment, by whom the comment was submitted and their organizational affiliation, with cross references to the commenter number in the following table. DEQ's responses follow this summary.

DEQ changed the proposed rules in response to comments described in the response sections below.

#### Comments received by close of public comment period

The table below lists people and organizations that submitted public comments about the proposed rules by the deadline. Original comments are on file with DEQ.

	List of Comments			
Comment #	Comment Summary	Commenter Numbers		
1	Columbia River Steamship Operators' Association recalled that due to concerns that federal law in development at that time could diverge from the 'exchange + treatment' rule that DEQ proposed in its 2017 ballast water rulemaking, and further cited concerns regarding complications to ship operations presented by the practice and the effectiveness of onboard treatment systems. As a result, a sunset date was included in the rule that included a requirement to review the ballast water 'exchange + treatment' landscape by reviewing current science on federal ballast water discharge standards and shipboard treatment systems, or the potential need for continuation of the rule in order to prevent introductions of aquatic invasive species to Oregon waters.  CRSOA does not agree that DEQ met the requirement to consult with stakeholders contained in the provision, as DEQ did not discuss the use of 'exchange + treatment' onboard vessels and did not share the reviewed literature prior to the stakeholder meeting.	1		

List of Comments			
Comment #	Comment Summary	Commenter Numbers	
	Further, CRSOA did not find the level of review of current science by DEQ to be adequate and stated that a single meeting does not constitute a meaningful opportunity for consultation with stakeholders.		
2	Columbia River Steamship Operators' Association reiterates that the sunset provision was originally included due to concerns that incoming federal rules may differ from Oregon's, causing adverse impacts to navigation, and included a citation to a report stating that these concerns continue today.  Because the U.S. Coast Guard has not yet issued final regulations under the Vessel Incidental Discharge Act of 2018, CRSOA requests that DEQ extend its sunset date for 'exchange + treatment' by two years to 2025 rather than removing the sunset date outright, to ensure that federal agencies align with Oregon.	1	
3	Michal Junas submitted the following comment: "Tak to robte na mieste mozu to cerpat tankery nemusia koli tomu lode sa vracag do pristavu", which translates to: "So do it on the spot, the tankers can pump it, they don't have to when the ship is returning to the port".	2	

List of Commenters					
#	Name	Organization	Comment Number	Hearing #	
1	Kate Mickelson, Executive Director	Columbia River Steamship Operators' Association	1, 2	via email	
2	Michal Junas	None given	3	via email	

DEQ Comment Responses					
Number	DEQ Response				
	DEQ thanks you for raising these concerns. We take the issue of providing adequate and timely information very seriously, and we appreciate your feedback on this matter.				
	Transparency is a core value of our agency, and we are committed to ensuring that our rulemaking processes are as open and informative as possible. We understand that providing comprehensive information is crucial to the process.				
	DEQ follows a thorough and systematic process for gathering scientific information. The process includes gathering and reviewing relevant scientific literature, opening public comment periods, hosting public hearings, and soliciting input from experts in related fields of research.				
1	Regarding the specific concerns raised in this letter, we have taken steps to address the issues cited by delaying removal of the sunset date applied to the agency's 'exchange + treatment' rule. This delay is described further in the following response to comment.				
	We welcome feedback from all stakeholders, and we are open to discussing how we can improve our stakeholder engagement.				
	If you would like to discuss this matter or have additional concerns, please reach out to our designated point of contact for the rulemaking effort. We value your input and are committed to addressing your concerns.				
	Once again, thank you for this comment. We look forward to working collaboratively with all stakeholders to ensure our rulemaking processes continue to meet the highest standards of transparency and accountability.				
	Thank you for submitting comments on the Ballast Water 2023 rulemaking. We have considered your comments, and we will be making changes to our adoption proposal. Below is information to provide rationale for this change, including new information on the context of the ongoing federal rulemaking efforts for ballast water and other incidental discharges from commercial vessels.				
2	DEQ held the Rulemaking Advisory Committee meeting for this rulemaking on Aug. 24, 2023, and filed public notice of the effort on Aug. 31, 2023. At that time, DEQ was proposing to remove the sunset date from its Ballast Water Exchange +Treatment rule, effectively making the rule permanent. This approach was taken due to the Vessel Incidental Discharge Act incorporating Oregon's rule verbatim, and having been signed into law in 2018, establishing a new section of the Clean Water Act, section 312(p).				

DEQ Comment Responses				
Number	Number DEQ Response			
	On Sept. 6, 2023, in response to a lawsuit by Center for Biological Diversity and other plaintiffs, EPA signed a consent decree obligating the agency to complete its rulemaking required under VIDA by Sept. 23, 2024. EPA is further required by to publish updates on their rulemaking and progress toward completion every 90 days, until a final decision is signed.			
	As specified in VIDA, when EPA publishes finalized discharge standards, the U.S. Coast Guard then has no more than 2 years to publish implementation regulations, and at that point, VIDA will be in force. Given the specifics of EPA's recently signed consent decree, the Coast Guard will have until Sept. 24, 2026.			
	CRSOA requests that DEQ extend its sunset date for by two years to ensure that federal agencies align with Oregon, until Dec.19, 2025. The timeline for this certainty is beyond the requested extension date, as shown in the previous paragraph. As a result, DEQ proposes to extend the current sunset date to Dec. 19, 2027. This date is meant to provide time for the agency and stake holders to monitor the science and technology of ballast water exchange + treatment, as well as the development of federal regulations, as requested. This date will additionally prevent DEQ from needing to extend the sunset date a second time, as 2025 is prior to what is now known to be the required date by which VIDA will enter into force.			
3	DEQ has received this comment and thanks you for your interest in our ballast water rulemaking.			

### **Implementation**

#### **Notification**

The proposed rules would become effective upon filing on approximately Nov. 17, 2023. DEQ would notify affected parties by:

- Posting notice to the public Ballast Water Program website.
- Notice via GovDelivery to the same parties that received notice of the rulemaking.
- Contacting industry groups, such as Columbia River Steamship Operators'
  Association, to notify local agents employed by owners, operators, and/or charterers
  of commercial vessels arriving to Oregon ports.

### **Compliance and enforcement**

#### Affected parties

- This rulemaking does not expand the number of regulated parties.
- DEQ's Ballast Water Program will update fact sheets and other outreach and reference materials as necessary.
- DEQ's Office of Compliance and Enforcement, in coordination with the Ballast Water Program, will revise enforcement guidance as needed.

#### **DEQ** staff

- This rulemaking does not require any new staff training.
- Program staff will continue to review compliance through technical assistance, prearrival reporting, and onboard compliance inspections.

### Measuring, sampling, monitoring and reporting

#### Affected parties

• This rulemaking does not change measuring, sampling, monitoring, or reporting requirements for any number of vessels.

#### **DEQ** staff

- This rulemaking does not require any new staff training.
- Program staff will continue to promote compliance through technical assistance, prearrival reporting, and onboard compliance inspections.
- DEQ will update all applicable inspection checklists.

#### **Systems**

#### Website

• DEQ's Ballast Water Program will update its website, fact sheet and other materials for those rules requiring updates as a result of this rulemaking.

### **Training**

#### **Affected parties**

• This rulemaking does not expand the number of regulated parties or add compliance requirements that require training.

#### **DEQ** staff

• Additional Ballast Water Program staff training will not be required.

### **Five Year Review**

### Requirement

Oregon law requires DEQ to review new rules within five years after EQC adopts them. The law also exempts some rules from review. DEQ determined whether the rules described in this report are subject to the five-year review. DEQ based its analysis on the law in effect when EQC adopted these rules.

#### **Exemption from five-year rule review**

The Administrative Procedures Act exempts all the proposed rules from the five-year review because the proposed rules would:

• Amend or repeal an existing rule. ORS 183.405(4).

# **Accessibility Information**

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