UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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OFFICE OF
WATER AND WATERSHEDS

JUN 1 2010

Mr. Neil Mullane
Administrator
Water Quality Division
Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204-1390

Re: EPA's Action on New and Revised Human Health Water Quality Criteria for Toxics and Revisions to Narrative Toxics Provisions in Oregon's Water Quality Standards

Dear Mr. Mullane:

The U.S. Environmental Protection Agency (EPA) has completed its Clean Water Act (CWA) review of Oregon's new and revised human health water quality criteria for toxics and revisions to narrative toxic provisions included in Table 33A of Oregon water quality standards found in Chapter 340, Division 41, of Oregon's Administrative Rules (OAR 340-041) and submitted to EPA on July 8, 2004.

Under Section 303 of the Clean Water Act, 33 U.S.C § 1313, states are required to establish water quality standards and submit them to EPA for approval or disapproval. Likewise, revisions to a state's water quality standard must also be submitted to EPA for approval or disapproval.

Water quality standards describe the desired condition of a waterbody and consist of three principle elements: (1) the "designated uses" of the state's waters, such as public water supply, recreation, propagation of fish, or navigation; (2) "criteria" specifying the amounts of various pollutants, in either numeric or narrative form, that may be present in those waters without impairing the designated uses; and (3) antidegradation requirements, providing for protection of existing water uses and limitations on degradation of high quality waters. EPA's regulations at 40 C.F.R. Part 131 describe the minimum requirements for each of these three elements of water quality standards.

The Oregon Department of Environmental Quality (DEQ) proposed revisions to OAR 340-041 on June 2, 2003. DEQ provided an eighty-eight day formal public comment period on the proposed revisions and held six public hearings. The public comment period extended from June 2, 2003, through August 29, 2003, including a four-week extension from the original closing date of August 1, 2003. Fifty-one written comments were received to which DEQ responded. Revisions were adopted by the Oregon Environmental Quality Commission (Commission) on May 20, 2004, and filed with Oregon Secretary of State on May 28, 2004. DEQ submitted these revisions to EPA for review and approval on July 8, 2004. Oregon's

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submittal included a letter dated July 8, 2004, from Larry Knudsen, Assistant Attorney General, certifying that the revisions were adopted in accordance with Oregon State law.

On May 29, 2008, a U.S. District Court in the District of Oregon issued a consent decree setting forth deadlines by which EPA must take action, under Section 303(c) of the CWA, on Oregon's July 8, 2004, submission to EPA. *Northwest Environmental Advocates v. U.S. EPA*, No. 06-479-HA (D. Or. 2006). The court subsequently issued several extensions of the applicable deadlines for action. For the portions of the July 8, 2004, submission that EPA is acting on today, the currently applicable deadline for EPA action under the consent decree is June 1, 2010.

While the July 8, 2004, submittal included revisions to a number of provisions, not all of those are being addressed in today's decision. Revisions addressed in today's decision can be divided into the six general categories described below.

1. *New and revised human health criteria for non-carcinogens.*
   Oregon adopted new and revised human health criteria for 49 non-carcinogens. The criteria for 47 of these carcinogens were derived using the methodology presented in EPA's 2000 *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health.* Oregon also adopted a new methylmercury criterion based on EPA's 2001 guidance and a new copper criterion equivalent to EPA's drinking water criteria established under the Safe Drinking Water Act.

2. *New and revised human health criteria for carcinogens.*
   Oregon adopted new and revised human health criteria for 56 carcinogens. The criteria for 55 of these carcinogens were derived using the methodology presented in EPA's 2000 *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health.* Oregon also adopted a revised criterion for asbestos equivalent to EPA's drinking water criteria established under the Safe Drinking Water Act.

3. *New footnotes associated with human health criteria.*
   Oregon adopted seven new footnotes (H, I, J, K, L, R, and U) which are associated with human health criteria identified in Table 33A of the submittal.

4. *Withdrawal of human health criteria for eight toxic pollutants.*
   Oregon withdrew previously adopted human health criteria for beryllium, cadmium, chromium III, chromium VI, lead, mercury, silver, and 1,1,1-trichloroethane.

5. *Revisions to Narrative Toxic Provisions.*
   Oregon revised narrative toxic provisions found at OAR 340-041-0033(1) through (3).

6. *New EPA Pollutant Identification Numbers and Chemical Abstract Service Numbers.*
   Oregon added EPA's pollutant identification numbers and chemical abstract service (CAS) numbers for each of the pollutant names included in Table 33A.

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Revisions not addressed in today's action have been, or will be, addressed by EPA in a separate action.

EPA'S DECISION

Pursuant to EPA's authority under Section 303(c) of the Clean Water Act and implementing regulations found in the *Code of Federal Regulations* (C.F.R.) at 40 C.F.R. Part 131, EPA is approving the following:

- Human health criteria for copper and asbestos;
- Footnote K insofar as it applies to the "water + organism" human health criteria for iron and manganese;
- Withdrawal of the human health criteria for eight toxic pollutants; and,
- Revisions to the narrative toxic provisions at OAR 340-041-0033(1) and (2).

EPA is disapproving the following:

- Human health criteria for 103 toxic pollutants – 48 non-carcinogenic pollutants and 55 carcinogenic pollutants;
- Footnotes I, R, and U; and,
- Footnote K insofar as it applies to the "organism only" human health criterion for manganese.

EPA does not consider the following to be water quality standards under Section 303(c) of the CWA and therefore is taking no action on these elements:

- Revisions to the narrative toxics provision at OAR 340-041-0033(3);
- Addition of footnotes H, J, and L; and
- Addition of EPA's pollutant identification numbers and Chemical Abstract Service numbers.

A detailed discussion of the rationale supporting today's actions is included in the enclosed Technical Support Document.

ADDRESSING THE DISAPPROVALS

Under CWA Section 303(c)(3) and EPA's regulations at 40 CFR Parts 131.21 and 131.22, if EPA disapproves a state's new or revised water quality standards, it must "specify the changes" necessary to meet the applicable requirements of the Act and EPA's regulations. If the state does not adopt necessary changes, EPA is required to propose and promulgate appropriate changes.

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EPA acknowledges the huge amount of work that Oregon has already accomplished which can provide a significant basis for actions to address EPA's disapproval action. We believe that the information developed by DEQ over the last four years in cooperation with EPA and the Umatilla Tribe during the Fish Consumption Rate Review Project and subsequent rulemaking process has been very useful in informing EPA's decisions. The Tribe's partnership has been critical as has the willingness of the State of Oregon to consider and address the fishing and consumption patterns of Tribal people. The work of the Human Health Focus Group and their recommendations on an appropriate range of fish consumption rates provides a valuable synthesis of available data and captures the latest thinking from technical experts. DEQ's public outreach during the Fish Consumption Rate Review Project was extensive and resulted in a better understanding of fish consumption patterns in Oregon as well as the concerns of many of Oregon's stakeholders. This will all help to frame the work needed to address this disapproval.

On October 23, 2008, DEQ provided the Environmental Quality Commission an extensive presentation and a recommendation that Oregon's water quality criteria for toxics be revised to address the concerns delineated during the Fish Consumption Rate Review Project. DEQ recommended that a statewide fish consumption rate of 175 grams per day (24 8 ounce meals a month) be used to develop water quality criteria protective of the people of Oregon. In response, the Commission directed DEQ to pursue such a rulemaking and DEQ has been working towards that end. It is EPA's understanding that DEQ is currently planning to provide public notice of a proposed rule in January 2011 and take a rulemaking recommendation to the Commission in mid-2011. EPA believes that Oregon's adoption of human health criteria consistent with Commission's Directive to develop criteria using a fish consumption rate of 175 grams per day statewide would be adequate to address EPA's disapproval of the new and revised human health criteria adopted in 2004. Such a rule would also adequately address EPA's disapproval of footnotes I, R, and U.

In order to adequately address EPA's disapproval of footnote K insofar as it applies to the "organism only" human health criterion for manganese, Oregon should either submit supporting documentation to demonstrate that expression of this criterion as a dissolved criterion is protective of the fishing designated use in Oregon or revise the footnote so that the criterion is applied as total manganese.

I want to thank you, your staff and the Commission for the leadership you have shown in response to issues raised relative to the fish consumption rate used to derive Oregon's human health criteria for toxics. Oregon's work on the Fish Consumption Rate Review Project resulted in a solid foundation to support the development of human health criteria protective of consumers of fish caught in Oregon's waters. This foundation considers the relatively high level of fish consumption in Oregon's general population, the consumption patterns of Tribal and other subsistence fishers in the State, the cultural importance of fish to Tribes in Oregon and your government-to-government relationship with those Tribes.

The Clean Water Act requires that these disapprovals be addressed in a timely manner. We prefer that the State of Oregon address these disapprovals under its current process. However, if you are unable to adequately address these disapprovals, we will move forward to propose a federal rule.

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We have appreciated our work together throughout this process and remain committed to provide assistance as you finalize your new rule. If you have any questions concerning this letter please contact me at (206) 553-4198 or you may contact Jannine Jennings, Water Quality Standards Unit Manager, at (206) 553-2724.

Sincerely,

Michael A. Bussell, Director
Office of Water and Watersheds

Enclosure:

cc: Ms. Jennifer Wigal, ODEQ
Ms. Debra Sturdevant, ODEQ

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