Oregon's Water Quality Standards Review Project
Rulemaking Workgroup

October 19, 2009 Meeting

Facilitator's Summary

The following notes are a summary of issues discussed and issues that may need further discussion at upcoming meetings.

Present for all or part of the meeting:
Workgroup Members: Nina Bell (NW Environmental Associates), Myron Burr (Siltronic), Michael Campbell (Industrial Dischargers), Lauren Goldberg (Columbia Riverkeeper), Charles Logue (ACWA), Mark Riskedahl (on phone, NEDC), Peter Ruffier (League of Oregon Cities), Ryan Sudbury (CTUIR), Kathryn Van Natta, Northwest Pulp and Paper).

Other Representatives: Spencer Bohaboy (DEQ), Kathleen Feehan (on phone, CTUIR), Ellen Hammond (ODA), Jannine Jennings (EPA), Andrea Matzke (DEQ), Melinda McCoy (EPA), Christine Svetkovich (DEQ), Sturdevant Sturdevant (DEQ), Jennifer Wigal (DEQ), Dave Wilkinson (on phone, ODA).
Also Present: Donna Silverberg and Erin Halton, DS Consulting Facilitation Team.

Welcome/Updates
Facilitator Donna Silverberg welcomed everyone to the meeting and conducted a round of introductions. The following updates were shared with the Rulemaking Group:

- Annette Liebe, DEQ, had a girl – Welcome Isabel May!
- The EQC meeting is being held later this week in Klamath Falls. DEQ staff is scheduled to give about three hours worth of presentation; Jennifer Wigal clarified that the primary objective is to educate the EQC about the water quality and toxics issues that DEQ has been working on. The goal is to give them enough information so they can be conversational about the work that is underway. Wigal noted that she was aware that several RWG members plan to make statements. As a result, staff will try to make it possible for their presentations to be made available a day earlier than the meeting. Wigal noted that a brief DEQ memo will accompany the presentation materials. Copies of the presentation will along with the meeting minutes will be available on the DEQ website following the EQC meeting at http://www.deq.state.or.us/about/eqc/EQCminutes.htm.
- The final SB737 list will be available on October 20.

NPDES Implementation Tools
Jennifer Wigal, DEQ, referred the group to the revised "Implementation Tools and Approaches" document. She clarified that a few definitions and other pieces had been added to this latest version. She added that the document provides a status update and clarification about definitions which is intended to help the reader understand the

overview of the framework. Wigal said that DEQ was interested in hearing the following: First, what situations need implementation tools? Second, are these existing tools, or does something new need to be developed? Finally, Wigal said DEQ would also like to hear of scenarios that will not work within the proposed framework, and choices for addressing those gaps.

Sturdevant, DEQ, noted that per the RWG discussion two meetings ago, DEQ placed approaches that did not need further development in a separate section near the end of the revised document.

Spencer Bohaboy, DEQ, said that DEQ had assembled a panel of people to discuss and draft language on how to address quantitation limits (which is a similar process that was used to develop the current quantitation limits.) Specifically, the group will be looking to put recommendations together about how frequently quantitation limits should be updated and the process for doing so. Bohaboy said the expected completion date is mid-January 2010 and that the recommendations will eventually be part of the "reasonable potential" Internal Management Directive.

Sturdevant noted that, as to compliance schedule language, DEQ is putting together specific human health criteria language. This language will reflect EPA's most recent comments on the draft language. DEQ plans to update the group on this issue at the next meeting. Jennifer clarified that DEQ is not expecting a lot of feedback from the RWG at this time, but would rather begin to craft rules that DEQ will share with this group. Where input is needed from the RWG, the specific input requested will be identified up front.

Comments / Questions from RWG members:

- Comment: There doesn't seem to be anything new on the implementation tools list. Nothing on the list appears to address gaps; instead, there are things that DEQ can do already, and things that do not seem to be helpful except maybe in a very rare situation.
- Comment: are negotiations limited to 5 years for compliance schedules or will that be expanding? If any new language affects the 5 year permit term, would like to see flexibility such as provided in the EPA guidance.
- Question: is there a prediction on timeline for compliance schedules?
    - Answer: We want to make sure that the litigation process is completed before we bring compliance schedules into the fold.

Actions:

- Information about Compliance Schedules will be provided at the December 9 meeting.
- DEQ would like to close the loop on intake credit issues at the next meeting. They will send Great Lakes Initiative (GLI) rule language via email prior to next meeting.

Sturdevant continued to review the revised document for the group.

Regarding source reduction, trading and offset issues:

DEQ believes existing rules support trading. That said, there may be different definitions of trading. DEQ described working definitions of trading and offsets that relate to the table near the end of the document.

- Source reduction – it was noted that there is nothing preventing anyone from doing reduction of a pollutant if that will help meet the permit level.

- Trading - Sturdevant drew a schematic on the whiteboard that illustrated a trading scenario, and distinguished "trading" from "offsets" by saying that, in trading, the downstream point source creates assimilative capacity for its discharge by reducing loads upstream. Because the discharge would meet WQS at the discharge point, DEQ noted that a variance wouldn't be needed and, therefore, such trading would be allowed under the existing rules.

- Question: does this example assume that the upstream reductions have to help bring you into compliance so that you have the capacity to meet your limits (without adjusting concentration)? Answer: Yes. Trading increases the assimilative capacity.

- Offsets describe a situation where a source/facility can't use trading to meet standard, but they can perform source reduction activities at a source on a neighboring tributary in the watershed, which helps to offset pollution levels downstream such that WQS are met at a point below the facility's discharge. This situation would need a variance.

Regarding compliance schedules and variances:
Compliance schedules would be available when a source/facility needs time to implement tools that will help them meet the standards. This tool would be used when a permittee has certainty about when they can comply.

- A variance could be used with source reduction, trading or offset tools. It would be used when a permittee lacks certainty about when they will be able to comply with the standard, and could be renewed.
    - DEQ Clarification: the distinction between which tools to use (a variance vs. compliance schedule) is made by determining whether standards are expected to be met within a given timeframe as a result of conducting identified activities. Historically, determinations for granting compliance schedules have been made through the permitting process. On the other hand, variances are considered changes to water quality standards.
    - EPA agreed and added that they expect there may be an increased litigation potential for areas of non-compliance.

Comments / Questions from RWG members:

- Question: what is the point of compliance in these trading scenarios and how does Point of Maximum Impact apply? Answer: think the point of impact would likely be point of discharge.
- Comment: this has been helpful so far. A concern remains that trading for background issues won't work. In most cases, there are likely to be diffuse background levels without a specific identified point source upstream and therefore trading would not be a useful tool to help reach the EQC objectives.
- Question: what is the difference between watershed/bubble permits and offsets? – Answer: The watershed bubble permits are the regulatory/administrative tool used to accomplish trading and offset activities. Some trading or offset activities may require use of this type of regulatory/administrative tool or other types of tools, while other activities may not. Whether or not a regulatory/administrative tool is needed will relate to <u>how</u> an activity will occur. Also, DEQ has investigated the watershed/bubble permit option and our take is that it would be difficult to use in situations where there are cumulative activities.
    - Comment: bubble permits are appropriate when there is a defined load area. (e.g. stream segments that exceed in areas, but overall meet criteria)
- Comment: if the intent is to meet WQ Standards at the point of withdrawal for drinking water, offsets might work with a variance; however, it is hard to see how it would work in terms of fish consumption.
    - Comment: DEQ would have to re-work site specific uses.
- DEQ Comment: there might be opportunities for a stream-by-stream approach to take with these tools. The group was encouraged to look at the overall benefits and what we are trying to accomplish on a broader scale.
    - EPA Comment: we would agree, and if we're really going to manage water quality on a watershed scale, we have to think outside the Clean Water Act regulation mindset – both in terms of regulation and permitting. That said, while we're open to thinking creatively, we also will have to explain to D.C. headquarters how all this lines up for environmental benefit.
- Question: would a trading scenario require a variance? Answer: not necessarily – if a source can accomplish a trade such that the water quality standard is met at the point of discharge, DEQ would not require a variance because this essentially reduces the load at the edge of the mixing zone.
- Comment: for offset and trading scenarios, DEQ would need to ensure that the assimilative capacity created through trading and offset activities is maintained through time.
- Question: how would acute toxicity issues be factored in?
    - Answer: while the concept is applicable, this tool might be fairly limited.
- Comment: what is DEQ's thought on the draft IMD on trading? From a regulatory standpoint, do you believe that non-point sources need to include that?
- Question: as to whether trading uses a variance: is it conceivable that both variance and compliance schedules would be applicable (which raises the issue of enforcement options)?

    - Answer: yes – and we can discuss that in the variance discussion later in today's meeting. DEQ believes that sources could use milestones for improvements (e.g. water quality-based requirements, etc.)
    - EPA added: suggest looking at establishing compliance milestones in permits where trading occurs as a condition of the variance.
- Comment: It seems that compliance schedules have an aspect of assurance to the public that an environmental benefit is forthcoming; this aspect of public assurance does not seem to be present with the variance tool as they can be renewed without the promise that environmental benefit will come at any time in the future. So far we have not heard how policy judgments are going to be made about the use of these two tools - how will DEQ decide the point at which variances would be allowed in lieu of the compliance schedule?
    - Answer: we acknowledge that the lines are blurry when we talk about them in the abstract. It is important to remember that a variance is a broad action that requires a justification process. There would be a DEQ/EPA coordinated review as far as the appropriateness of the tool and we expect we will spend lots of time working alongside EPA to make sure we're getting it right.
- Comment: the cause for concern comes from observing a history in Oregon of a lack of review and issuing less than ideal permits. It remains to be seen as to how much is DEQ going to push back on point sources and under what policies.
- Comment: regarding capacity, this could be a useful tool if it allows for a better ability to create more change upstream.
    - Comment: yes, if we're going to get to true toxics reduction, we need to look at this on a broad scale and get the most assured impact for the lowest cost.
- Comment: it is important to clarify where DEQ draws the line between compliance schedule and variance; and remember that the goal is to solve the problem the EQC directed you to address.
- Suggest: DEQ might consider calling it "pollutant trading" instead.
- Suggest A policy statement from DEQ or a revision to DEQ's Trading IMD would be needed to allow trading for toxics.
    - EPA Response: yes, think it would be wise to look at the IMD. We should not assume that people share the same understanding of trading – within the state and nationally, more discussion is needed.
- Question: how does the IMD integrate what we're working on with regard to toxics?
    - Answer: in two ways: 1) what can be done to achieve discharge levels and 2) creates a situation where there is allowance for discharge for a certain amount of time/space. The IMD is more of a placeholder as far as toxics.
    - Suggestion: this will be confusing for some; DEQ should include additional guidance language to make it clear how this integrates with the overall toxics reduction.

  Action: DEQ will look at its Trading IMD language to see how the current language could be changed to allow for toxics trading.

Regarding Gaps:
The group moved on to look at gaps that have not been addressed by the list of tools DEQ is putting forward at this time.
Comments / Questions from RWG members:

- Comment: There continues to be a gap to address the situation where there are infrequent hits of legacy pollutants (e.g. one hit per year). Something like the de minimus idea discussed before. Is there some way DEQ could integrate this idea into a permit as far as magnitude/duration that would not automatically put a facility into non-compliance?
- Comment/Question: I've been concerned from the beginning of this process that the lower detection limits will throw many facilities into non-compliance, based on what is known about water quality monitoring as it stands today. Note that some facilities might not have done priority pollutant scans – and others may not have performed a scan since the last 303(d) process because their permits have been administratively extended, therefore more of this problem is anticipated to occur in the future. Further, quantification limits on some of these pollutants have lowered. If a facility were to get some infrequent hits, how would DEQ handle this as part of the RPA process (would an infrequent hit lead to an automatic permit limit)?
    - DEQ Response: if a facility has enough data to complete the reasonable potential analysis, then DEQ has enough data to derive a permit limit. If a permit limit is derived from criteria that are below the detection limit, then the detection limit becomes the point of compliance.
- Comment: taking PCBs as an example, say a facility has hits - using water to dilute the problem would bring up water usage issues, which has its own sets of pros and cons. It remains unclear what implementation tool path that facility should follow to deal with that issue. Which will DEQ prefer?
- Comment: yes, this is a gap that Siltronic identified as well – when there is a hit because quantitation limits are lowered. Suggest that in the RPA, there are distinctions made for whether a hit is an outlier vs. something that needs a full RPA process that would be time consuming and costly.
- Comment: Willing to find some solution to this problem, but no de minimus. We do need to find the solution—especially with regards to an intake concentration allowance.

POSSIBLE ACTION: It was suggested that Michael, Nina and others might have informal discussions prior to the next meeting to bring forward a new and viable solution to the intake concentration issue.

- Comment: some of our collective concerns have been raised over and over – and we're seeing some of them have been moved to the section of the framework document called "Approaches that are not a priority for further development at this time..." We did discuss the concentration issue and we have a desire to work on a way to address it – that discussion would have to include EPA/DEQ staff

between now and next meeting or we fear the idea will once again end up on the 'can't be addressed' list. We're very interested in potential solutions.

- Comment: Note that pre-treatment is listed as #6 in the section of the framework document called "Approaches that are not a priority for further development at this time..." However, pre-treatment is a type of source reduction and source reduction is listed as a tool under #3. The Multi-media sub-committee is working on a memo that might help put a reality check on this, and be a serious attempt to build positively on the pre-treatment concept – and could be used to achieve source reduction. How it would interface with SB737 is unknown at this point.
- Comment: Want to note that the background concentration issue that keeps being brought up is very much related to the work of the multi-media subgroup and its focus on non-point sources.
- Comment: appreciate the willingness of the group to tackle implementation issues. While I would like to be supportive, I am not hearing anything specific enough to take back to those I represent. In regards to the previous comment about the work of the multi-media subgroup, I also want to remind the group that "non-NPDES" sources still include industrial sources, as well as non-point sources.
- Comment: in looking at what is a 'new idea', the only thing 'new' tool that I see is the Great Lakes Intake credit model. While it is good, it would solve only a tiny part of the background concentration problem. There remains skepticism about the variance option. As new tools get more scrutiny, others may not agree that they are "right." If there isn't a "fix" to the background concentration problem, then we need to know that. We don't want a "pretend fix." From the existing list, it seems there will not be a fix that will work for everyone. Still, we still need to grapple with the issues to see if there are any further possibilities.
    - RWG Member Response: support what was just said; NWPPA is also not finding any viable, creative implementation tools that we thought we might at this point in the process. We are dismayed at the current status and, while we'll keep an open mind, we remain unconvinced that variances will be a viable tool. This is especially true for the first facility to apply for one. We are worried that we have such high expectations for variances that the tool could morph into a "monster" tool which facilities become afraid to use—making the tool unworkable.
- Comment: recalled the FIIAC memo that listed other tools such as Use Attainability Analysis (UAA) and intake based concentration credit – we're not seeing them on this list presented today. We would like to see them included, as the current list is not sufficient enough to be a set of real, workable solutions for NPDES holders.
- Comment: would say that the Great Lakes intake credit worked for their unique system and it has its own section in the Clean Water Act. But the Great Lakes are a closed system. If this type of approach is going to work in Oregon, we need as clear a path that is doable for the facilities.
- Comment: would say that "clean water trading" is a path that will require sensitivity and likely will be better for municipalities for political and other reasons.

Handout: Summary of Topics and Issues Discussed To Date

The group was given a summary of the topics and issues discussed thus far in the RWG's work that includes whether or not DEQ believes they have sufficient input form the group. Feedback from RWG Members:

- Comment: it was helpful to see this information in this format
- Please note that at the 9/15 meeting, there was no time for Implementation discussion and, as such, it should be removed from the list.

Variances

Debra Sturdevant, DEQ, referred to variance-related handouts sent out in advance of the meeting as well as a handout shared today that describes the key differences between a variance and UAA application process. Sturdevant said that, for today's discussion, DEQ would like to hear feedback on whether the RWG thinks variances are appropriate for the specific scenarios put forth by the agencies. She noted that EPA had helped with these ideas and acknowledged the examples cover only a few scenarios. She also noted that there are a lot of site-specific considerations when it comes to variances, which will need to be considered at the time a variance request is submitted. She added that only a few work group members submitted comments regarding the draft variance authorizing provision rule language so far.

- DEQ Clarification – the variance process we're talking about now will include EPA coordination, and will be clear about who, what, when and how the coordination will work between the two agencies. These process-related aspects that are administrative in nature will continue to be developed by the agencies, and DEQ is not requesting input from the RWG on these administrative aspects. Jennifer suggested the group could provide input today to help "draw the line" between what is considered administrative versus what is considered substantive.

Spencer Bohaboy, DEQ, reviewed the summary of economic analysis requirements handout. He noted that EPA has extensive guidance for states. He used that which is relative to RWG consideration in his document. Bohaboy said that the economic analysis presumes that technology-based requirements will be met and only evaluates economic impacts beyond that would be incurred by implementing treatment above and beyond this threshold. He added that the guidance clarifies what needs to be demonstrated in the discussion of the analysis (see "key language" on page 1.) He reviewed specific differences in the determinations for public vs. private facilities and said, for both types, the facility first performs an initial analysis and then a more thorough analysis is conducted about how widespread the economic impact is. He clarified that the analysis would take into account the indirect effects on related industries.

Bohaboy reviewed a real-life example of a case in Idaho. He noted that there is a good track record of economic justification nationally, with metrics already defined, ties to readily available data sources, and a series of readily available worksheets.

Questions / Comments from RWG Members:

- Questions: 1) for economic dischargers, was there an indication of rates? And 2) has anyone sought a variance since the economic downturn?
    - DEQ Response: not sure about the rates and that's a really good question about the economic downturn.

  Action: Melinda McCoy, EPA, will check with EPA Headquarters on this and get back to the group with an answer.

- Comment: this raises the issue about whether or not there is data about the availability of financing in uncertain times for things that don't have any clear economic return.
- Question: did you observe whether states usually develop their own economic analysis guidance?
    - Answer: in most cases, states have relied on EPA's guidance.
- Question: so at first blush, is the economic analysis something that a NPDES permit writer could review? Would DEQ have a separate consultant to help review the economic analysis presented?
    - Answer: a consultant might assist us in the review, but we have not had much discussion about that. DEQ also has "plan review engineers" who would have the expertise to verify treatment costs identified in the economics evaluation.
    - EPA Comment: in most cases the economic analysis is developed by the facility or a consultant working for the facility. There have been occasions where EPA has assisted the state in performing its review of the analysis, and we do have an economist in Region 10 that Oregon might tap into for assistance.
- Question: can we conclude that this tool is most useful for public entities?
    - EPA Answer: from what have seen, municipalities have been the ones that have applied for and been granted variances using the economic justification.
- Question: is a "plan review engineer" someone who works only on public permits?
    - Answer: believe they do both public and private – DEQ included this as a suggestion based on that.
- Comment: we remain concerned by the idea that DEQ would have someone perform the economic analysis who lacks expertise in this area.
- Question: where will the line be drawn as far as % of income that can be afforded--is it 2%?
    - Answer: we have not discussed specifics as far as implementation, but we suspect we will have a higher rate of successful review if we do use that benchmark.
- Question regarding scope: Is performing an economic analysis required when a facility requests a variance based on any one of the six factors identified at 131.10(g)?
    - EPA Response: a common requirement for any variance, regardless of which factor the request is based on, is that the facility be at least complying with technology-based requirements, and that it demonstrate

that treatment beyond this level would be required in order to meet water quality standards. The rest of the demonstration would focus on showing why implementing treatment (beyond technology based requirements) to meet WQS is infeasible based on at least one of the six reasons identified at 40 CFR 131.10(g). An economics analysis demonstrating "substantial and widespread economic and social impact" is only required if the reason for the variance request is based on factor 6 at 40 CFR 131.10(g). An economics analysis is not required if the request for the variance is based on one of the other five factors identified at 40 CFR 131.10(g) (although other types of supporting information/rationale would be needed to support the request based on one of these other five factors).

- Comment: It is unlikely that an industrial discharger will be willing to open its books, which is required for the economic analysis.
- Comment: It should be clarified in the rule language that variances need not be sought only for economic reasons if DEQ wants variances to be more accepted as a new and viable tool by industries.
- Question: from a background pollutant perspective, why should a municipality spend 2% of its resources for a difference that can't be measured?
  - Answer: we have a similar question about whether the economics analysis should weigh the cost of treatment with the amount of environmental benefit associated with the treatment. EPA's current guidance does not distinguish <u>how much</u> of a lowering you are contemplating.

- Question: under DEQ's proposal, is it possible for a new source to get a variance?
  - Answer: DEQ assumed new sources would be fall under the anti-degradation section. However, for an existing source that's growing, there's no reason they couldn't get a variance.
  - Might this be something that should be dealt with in a different context?
    - EPA Answer: we know that in the Great Lakes context, new sources are not able to apply for a variance.

  <u>Action:</u> DEQ/EPA will follow up on the new source issue with regards to variances.
- Question: how is the economics analysis conducted for a multi-discharger variance?
  - EPA Answer: Michigan's economic analysis for its multiple-discharger variance for mercury relied on Ohio's economic analysis for a MDV for mercury.

  <u>Action:</u> DEQ/EPA will have to follow up on this point as well.
- Question: does a permittee have to get EPA <u>and</u> DEQ approval?
  - Answer: the permittee would submit the variance request to DEQ, who would take the initial action of processing the request. A public comment period would follow. Then DEQ would issue its final determination about whether to grant the variance. (Under the current variance rule, the EQC would need to approve the request; however, under the draft proposed revisions to the current variance rule, DEQ's Director would have the authority to approve the request.) Following DEQ's final determination,

the variance would then be submitted to EPA, and would require EPA approval, before it could become effective

- Question: does DEQ feel they have the expertise at the staff level to get a proposal to the public comment level? Does DEQ have the economic expertise and/or general technical expertise?
    - Answer: we think it will come down to needing to have coordination between people with different capabilities; we would first look internally to staff and if we didn't have the expertise needed, we would turn to expertise within EPA – specifically those with variance experience. It will depend on the information being reviewed and developed regarding justification for the variance.
- RWG Member Response: so there would not be one person within the DEQ's Water Quality Division that would be dedicated to variances?
    - Answer: no, but we would expect we could coordinate with EPA expertise.
    - EPA Response: we acknowledge that DEQ's response may not be satisfying for those on the workgroup to hear; however, we note that several states have successfully processed and granted variances that EPA has approved despite limited staff resources at the state level.
- Comment: EPA's actual willingness to step in where states don't have resources has not at all played out in reality over the last couple of years. This seems to be exactly on point with statements made previously about the need for better communication from the agencies as to where, when and how they're coordinating. It is a troubling that the variance tool hinges on this coordination and adds to skepticism about the tool's usefulness.
    - DEQ Response: we're still developing the policies, and we haven't yet addressed the resources. If the RWG and others within DEQ suggest developing variances as a recommended tool, DEQ will need additional resources. That will need to be part of the package that we bring forward to the EQC.
- Comment: while I absolutely share the views on barriers discussed so far, I also recognize that we can't expect DEQ to have the resources in place now for the tools that are being considered and developed. It will be incumbent on the EQC and others who want to help the tools succeed to help DEQ as they continue to respond and develop tools that will be successful.
- Comment: interested in hearing about the other ways to attain a variance – especially the background pollutant issue.
- Process Comment: could DEQ let folks know when comments on documents have been received, read, and responded to?
- Comment: There remains a great deal of skepticism on all sides of the group about variances as a tool worth pursuing. If this is the key new idea, and there are no resources to support it, then the idea seems a non-starter—which is a frustration to work group members. To be viable, DEQ will at least need to have receipts authority granted to them.

Variance Scenario 1 – Human Caused Conditions Justification, Background Pollutants Issue:

Sturdevant reviewed Scenario 1 in the "Hypothetical Variance Scenarios" document. She reviewed specifics for a background pollutant issue found on page 2. She said DEQ suggests a variance based on factor 3 from 40 CFR 131.10(g) (human caused conditions) could be a good tool for this scenario. Factor 3 states: "Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place." EPA added that they have had conversations about this line of reasoning and have not heard any negative response to using it as justification for a variance request. EPA does have a question about whether this is indeed the right tool for a long term problem (or would the better tool be a UAA or TMDL?)

Questions / Comments from RWG Members:

- Question to EPA: did you see examples of this in your research?
    - Answer: we have heard that New York is considering using this factor to support development of a multiple-discharger variance for mercury, but we have not heard of a case where a variance was approved quite like this scenario. However, we have not heard of any red flags on this from DC headquarters either.
- Comment: think DEQ might need rule language to clarify the steps for this. What does the source have to show for human caused?
    - Answer: the source would have to show mixing and intake analysis and identify how they would try to reduce the effluent limit.
    - EPA added that the source would also need to demonstrate that the human caused conditions could not be remedied or would cause more environmental damage to correct than to leave in place. .
- Comment: think the net benefit analysis is not the way to come at the Clean Water Act, as it would lead to justification of lack of a water supply, which sounds subjective.
- Comment: have real concerns that, as proposed, a variance could be justified in perpetuity. This doesn't seem appropriate and isn't the way that the Department or EQC should operate. Don't have a problem with intake concentration credits, but do have problem of evaluating concentration to determine whether it's a pollutant – it doesn't make good policy sense.
- Question: if we determine that a discharger's presence in the water body is changing concentration, is there some kind of "carrot" that they would be asked to reach?
    - Answer: we would have to talk about what their responsibility would be. In the first scenario, where the discharger is the source of the concentration of the pollutant, there would be an expectation that they would help reduce where possible.
- Comment: it seems like there should be some other requirement / responsibility for the increase in concentration - that would be consistent with ACWA's responsibility-based approach to toxics reduction.
- Comment: we have heard of cases where an industry has spent $100,000 or more on proving to DEQ that they're not contributing or there's no dilution available.

That is not a good result. However, if there is a facility that really is adding to the concentration, we want to follow the EQC directive to not allow that facility to have a regulatory "out."

- Comment: if we're not adding load, is the concentration itself adding an impact that would not otherwise be there? This is something to be mindful of as we consider variances.

Variance Scenario 2 – Economics Justification, Municipality and Inflow and Infiltration Issue:

Andrea Matzke, DEQ, presented Scenario 2 in the document.

Questions / Comments from RWG Members:

- Comment: as we review compliance schedules and variances: with compliance schedules one could lay out a timeline and get at the inflow and infiltration problems in order to meet WQS.
    - DEQ Response: our thinking was that for the case where timing and ability to comply with standards are not as certain, variances would work better.
- Comment: as I looked at this scenario, I wondered whether the City of Portland would have been able to receive a variance instead of the compliance schedule it received. This raises the question: Would the draft revisions to the variance authorizing provision apply to the new water quality criteria (human health criteria) or the current – or everything in between?
    - Answer: For discussion purposes in the RWG meetings to date, we have been thinking of it in terms of human health.

  Action: DEQ will carry this question back to our managers again.

As to the level of support amongst the group for Scenario 2, ACWA and League of Oregon Cities representatives voiced their support, while industry representatives said they did not have a lot of confidence in the variance option. Michael Campbell clarified his response by saying it seems too cumbersome a set of criteria to work for industries. Kathryn Van Natta clarified that she preferred to move on to discuss pieces included in scenario 3.

Variance Scenario 3 – Economics Justification, Industrial Facility:

Matzke, DEQ, reviewed Scenario 3. Sturdevant noted that, in this scenario, there would be a high expectation for the discharger to identify and implement cost effective ways to address pollutant sources.

As time for the meeting was drawing to an end, RWG Members put forth the following questions/comments for DEQ consideration:

Questions / Comments from RWG Members:

- Comment: It is unclear what would be required of dischargers during the term of the variance, and it sounds like variances could be used to force industries to do offsets or trading. This doesn't appear to address the scenarios identified by the FIIAC. I am confused as to whether this is based on the assumption that we could or could not ever achieve the Water Quality Standard.

- Comment: we can see that if industries are having a substantial effect, that a condition of the variance would be to do something like trading or offsets, but I can also foresee a trivial benefit achieved by a trivial offset. In looking at this through a background pollutant lens, the assumption is that the health effect would be small. So far this hasn't come up much in Oregon.
- Comment: scenario 3 seems like a classic variance with stuff added on top. I do not believe the SAIC report contemplated this kind of a variance in looking at the economic impacts of revising the human health criteria, and the subjectivity is troublesome.
- Comment: in order for a variance to work, something needs to be included in the rule that defines the conditions under which a variance would be granted.
- Comment: nothing is written yet that holds up to the idea that sources are responsible for their loads. Lines need to be drawn that dictate what treatments and activities would be required. It would help to see specific rule language written up.
- Comment: interim requirements would help ground expectations.
- Comment: how DEQ approaches the maximum allowable duration for variances will really affect whether we like/dislike the tool.
- Question: how would we ensure it from a regulatory perspective?
- Question: are you going to address the need for a legally defensible allowable maximum duration for variances?

DEQ staff asked: "if we were to work on some more variance specifics, are we right to be optimistic about the variances tool?"

- Michael Campbell Response: as there is no other tool out there, I am not suggesting you take variances off the table. I am hopeful there is still time to return to my March memo and see if I can flesh out some of those ideas.
- Myron Burr: we do need more certainty; it is difficult for a company to develop a business plan without that.
- Generally, the group needs to see more specific rule language that eliminates subjectivity and increases certainty where ever possible

Next Steps: DEQ will revisit the variance discussion with Rulemaking Workgroup Members and move forward on developing the rule language. Columbia Riverkeepers said they have included comments regarding DEQ's proposed maximum duration for variances and is willing to share them via email with the rest of the group.

Wrapping Up / Looking Ahead

- Facilitator Donna Silverberg reviewed topics on schedule for the December 9th meeting. Between now and then, DS Consulting and DEQ will query RWG Members via email and telephone about which items need discussion at that meeting.
- DEQ will share its criteria updates via email and welcome responses form the group via email.
- DEQ looks forward to seeing the group at the DEQ Water Quality Standards Academy the week of October 26th.

- Informal discussion amongst Myron, Kathryn, Nina, Michael will continue between now and the next RWG meeting.
- Nov 17th = Toxics Workshop
- Nov 18th = Mixed Media subgroup meeting.
- RWG Placeholder – mid-to late January for a final "clean up" for NPDES portion of the rulemaking effort.

Next Rulemaking Workgroup Meeting: December 9th – at the LCREP offices.

These notes drafted and submitted by the third-party facilitation team from DS Consulting. For comments or changes, please contact Erin Halton at ehalton@cnnw.net or 503-248-4703.