**State of Oregon Department of Environmental Quality**

**Proposed Rule Language Package**

**Human Health Toxics Rulemaking**

NPDES Rulemaking Proposed Revisions

**\* Language proposed in this document does not represent final language\***

**1. Variances and Pollutant Reduction Plans (Division 41)**

**340-041-0059**

**Variances and Pollutant Reduction Plans**

*Variances with pollutant reduction plans are a mechanism by which permits can be written to meet a temporary modified water quality standard. DEQ may grant a variance with a pollutant reduction plan where a permittee demonstrates that compliance with a specific water quality standard is infeasible based on at least one of the factors specified in this rule. DEQ grants variances to specific regulated facilities; they do not alter the underlying water quality standard that applies to the water body and may ultimately be attainable. DEQ’s intent and expectation is that when it grants variances: (1) the variance will require the point source discharge concentration and load to be minimized to the maximum extent feasible through implementation of a pollutant reduction plan, so that the highest degree of protection for designated uses is achieved during the variance period, and (2) issuance of the variance will be predicated based on existing uses being maintained and protected.*  *As a matter of policy, DEQ would exercise judicious use of approvals for pollutant reduction plan requests based on aquatic life toxics criteria.*

 *(1) Applicability. The Commission or Department may grant a point source the ability to implement a variance with a pollutant reduction plan as a mechanism to comply with water quality standards in this Division where the requirements in sections (1) through (8) of this Rule are met. The Commission must review and approve any request for a variance for a pollutant reduction plan for new dischargers to a waterbody (See (1)(b)(D)).*

*(a) The variance may apply only to the point source for which the pollutant reduction plan is requested and only to the pollutant or pollutants specified in the plan; the underlying water quality standard otherwise remains in effect.*

*(b) A variance may not be granted if:*

*(A) The effluent limit sufficient to meet the underlying water quality standard will be attained by implementing technology-based effluent limits required under sections 301(b) and 306 of the federal Clean Water Act, and by the discharger implementing cost-effective and reasonable best management practices for nonpoint source control;*

*(B) The pollutant reduction plan would likely jeopardize the continued existence of any threatened or endangered species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat;*

*(C) The conditions allowed by the variance would result in an unreasonable risk to human health;*

*(D) A source requesting a pollutant reduction plan is a new discharger, unless a proposed plan for a new discharger is necessary to:*

1. *Prevent or mitigate a threat to public health or welfare;*
2. *Allow a water quality or habitat restoration project which may cause short term water quality standards exceedences, but is expected to provide long term water quality and/or habitat improvement, to proceed;*
3. *Provide a widespread socioeconomic benefit; or*
4. *Remediate water contamination pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq. as amended through July 1, 2006), or the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. 6901 et seq. as amended through July 1, 2006).*

*(2) Conditions to Grant a Variance. Before the Commission or Department may grant a variance, the permittee must demonstrate that a loss of an existing use would not result from the granting of the plan and that attaining the water quality standard is not feasible for one of the following reasons:*

*(a) Naturally occurring pollutant concentrations prevent the attainment of the use;*

*(b) Natural, ephemeral, intermittent, or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges to enable uses to be met without violating state water conservation requirements;*

*(c) 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;*

*(d) Dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way which would result in the attainment of the use;*

*(e) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and unrelated to water quality preclude attainment of aquatic life protection uses;*

*(f) Controls more stringent than those required by sections 301(b) and 306 of the federal Clean Water Act would result in substantial and widespread economic and social impact.*

*(3) Variance and Pollutant Reduction Plan Duration.*

 *(a) The duration of the variance and associated actions contained in the pollutant reduction plan must be specified and shall not exceed the term of the NPDES permit. The variance shall remain in effect in the event that a NPDES permit is administratively extended, as long as the discharger submits to the Director an application for renewal of the NPDES permit and variance at least one hundred eighty days prior to the date of expiration of the NPDES permit. When the duration of the variance is less than the term of the permit, the permittee must be in compliance with the effluent limitation sufficient to meet the underlying water quality standard upon the expiration of the variance. When the duration of the variance coincides with the term of the permit, the variance will expire at the end of the permit term and the subsequent permit will require compliance with the effluent limitation sufficient to meet the underlying water quality standard or the terms of a compliance schedule unless the Department approves a request to renew the variance.*

*(b) The variance and associated actions in the pollutant reduction plan are effective only after EPA approval. The effective date will be specified in a NPDES permit or order.*

 *(4) Variance and Pollutant Reduction Plan Submittal Requirements. To request that a variance be granted and a pollutant reduction plan be part of the permittee’s permit, a permittee must submit the following information to the Department for approval:*

*(a) A demonstration that attaining the water quality standard for a specific pollutant is not feasible based on one or more of the conditions found in section (2) of this Rule. The demonstration must also include an analysis supporting the timeframe needed for meeting water quality standards;*

*(b) Description of treatment or alternative options considered to meet the applicable underlying water quality standard, and description of why these options are not technically or financially feasible;*

*(c) Sufficient water quality data and analyses to characterize ambient and discharge water pollutant concentrations; and*

*(d) A proposed pollutant reduction plan, including any actions to be taken by the permittee that would result in reasonable progress toward meeting the underlying water quality standard. Such actions may include proposed pollutant offsets or trading and/or other proposed pollutant reduction activities, and associated milestones for implementing these measures. Pollutant reduction plans will be tailored to address specific circumstances of each facility; and*

*(e) If a publically owned treatment works, a demonstration of the jurisdiction’s legal authority (e.g. in a sewer use ordinance) to regulate the pollutant for which the variance is sought and for which the pollutant reduction plan is intended to address. The jurisdiction’s legal authority must be sufficient to address potential sources of that pollutant that discharge into the jurisdiction’s sewer collection system.*

*(5) Variance Permit Conditions. The Department shall establish and incorporate into the discharger’s NPDES permit all conditions necessary to implement the approved variance with the associated actions contained in the pollutant reduction plan. Such permit conditions shall, at a minimum, require:*

 *(a) A permit limit or requirement representing the best achievable effluent quality based on discharge monitoring and which is no less stringent than that achieved under the previous permit;*

*(b) The implementation of a pollutant reduction plan, pollutant offsets or trading, and/or other pollutant reduction activities submitted in accordance with section (4)(d) above;*

*(c) That reasonable progress is made toward attaining the underlying water quality standards through any actions described in the pollutant reduction plan and any other appropriate conditions to be determined by the Department. Such conditions may include, but are not limited to, requirements for the permittee to conduct additional studies, monitoring or management practices. An annual progress report must be submitted to the Department. The report must describe the progress made and identify any impediments to reaching specific milestones;*

*(d) Where the Department determines that achieving compliance with the underlying water quality standard would be unlikely within the term of the permit, the Department may establish milestones extending beyond the term of the permit that would be effective if the permit was administratively extended.*

 *(6) Public Notification Requirements.*

 *(a) If the Department proposes to grant a variance with a pollutant reduction plan, it must provide public notice of the proposed plan and an opportunity for public comment and hearing. The public notice requirement may be satisfied by including the proposed pollutant reduction plan in the public notification of a draft NPDES permit;*

*(b) The Department will publish a list of all variances and pollutant reduction plans approved as a mechanism for achieving state water quality standards that have been granted pursuant to this Rule. Newly approved variances and pollutant reduction plans will be added to this list within 30 days of their effective date. The list will identify: the person or entity to which the variance was granted; the underlying water quality standards to which the pollutant reduction plan was developed to achieve; the water(s) affected; the effective date and duration of the variance and activities contained in the pollutant reduction plan; the allowable pollutant limit granted under the variance; and how to obtain additional information about the variance and pollutant reduction plan.*

*(7) Variance Renewals. A variance with a pollutant reduction plan may be renewed if the permittee makes a renewed demonstration pursuant to section (2) of this Rule that attaining the water quality standard is not feasible, and demonstrates that all requirements of the variance and actions contained in the pollutant reduction plan are being met. Renewal of the variance shall be denied if the applicant does not comply with the conditions of the original variance, including those specified in section (5) of this rule, or otherwise does not meet the requirements of this Rule.*

*(8) Variances with Pollutant Reduction Plans for Multiple Dischargers or Water Bodies. If the Department determines that variances with pollutant reduction plans for multiple dischargers or water bodies are necessary to address widespread water quality standards compliance issues, including the presence of human-caused or naturally high background levels of pollutants in a watershed, the Commission may adopt variances for multiple dischargers or water bodies through a separate rule provision.*

**2. Background Pollutant Allowance (Division 41)**

**OAR 340-041-0033 (3).** An increase of 3% or less in the background pollutant concentration of a water body that approaches or exceeds an applicable human health criterion does not result in a significant change in human health protection and may be allowed if all the definitions and conditions in this rule section [OAR 340-041-0033(3) (a) through (e)] are true.

1. For the purpose of this section, “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.
2. For the purpose of this section, “approaches or exceeds an applicable human health criterion” means that the pollutant concentration is equal to or greater than the applicable numeric criterion or would equal or exceed the criterion if it were increased by 3%.
3. The mass of the pollutant in the discharge does not exceed the mass that is attributable to the pollutant in the facility's intake water from the receiving water body and therefore, does not increase the mass load of the pollutant in the receiving water body.
4. The 3% increase above the background pollutant concentration is calculated:

(i) For the Willamette and Columbia Rivers, using 25% of the:

* + 1. harmonic mean flow of the water body for pollutants that are carcinogens, or
		2. 30Q5 flow of the water body for pollutants that are non-carcinogens.

(ii) For all other waters, using 100% of the:

 i. harmonic mean flow of the water body for pollutants that are carcinogens, or

 ii. 30Q5 flow of the water body for pollutants that are non-carcinogens.

e) The Department may require the discharger to use any technologically and economically feasible pollutant reduction measures that are known to be available to prevent or minimize a pollutant concentration increase in the receiving water body.

**3. Intake Credits (Division 45)**

**340-045-XXXX**

*I. General*

*The following provisions apply to the Consideration of Intake Pollutants in Determining Reasonable Potential Rule and the Consideration of Intake Pollutants in Establishing Water Quality Based Effluent Limits Rule.*

*(1) An “intake pollutant” is the amount of a pollutant that is present in public waters (including groundwater as provided in (4), below) at the time it is withdrawn from such waters by the discharger or other facility supplying the discharger with intake water.*

*(2) 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:*

*(a) 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;*

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

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

*(3) 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.*

*(4) An intake pollutant from groundwater may be considered to be from the “same body of water” if the permitting authority 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 human activity, such as industrial, commercial, or municipal operations, disposal actions, or treatment processes.*

*(5) The determinations made under Sections II and III, below, shall be made on a pollutant-by-pollutant, and outfall-by-outfall basis.*

*II. Consideration of Intake Pollutants in Determining Reasonable Potential:*

*(1) The Department may determine that there is “no reasonable potential” for the discharge of an identified intake pollutant to cause or contribute to an excursion above a narrative or numeric water quality criterion contained in Oregon’s water quality standards where a discharger demonstrates to the satisfaction of the Department (based upon information provided in the permit application or other information deemed necessary by the Department) that:*

*(a) The facility withdraws 100 percent of the intake water containing the pollutant from the same body of water into which the discharge is made;*

*(b) The facility does not contribute any additional mass of the identified intake pollutant to its wastewater;*

*(c) The facility does not alter the identified intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutants were left in-stream;*

*(d) The facility does not increase the identified intake pollutant concentration at the edge of the mixing zone, or at the point of discharge if a mixing zone is not allowed, as compared to the pollutant concentration in the intake water, unless the increased concentration does not cause or contribute to an excursion above an applicable water quality standard; and*

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

*(2) Upon a finding under subsection (1) of this section that a pollutant in the discharge does not cause, have the reasonable potential to cause, or contribute to an excursion above an applicable water quality standard, the Department is not required to include a water quality-based effluent limit for the identified intake pollutant in the facility's permit, provided:*

*(a) The NPDES permit evaluation report includes a determination that there is no reasonable potential for the discharge of an identified intake pollutant to cause or contribute to an excursion above an applicable numeric water quality criterion and references appropriate supporting documentation;*

*(b) The permit requires all influent, effluent, and ambient monitoring necessary to demonstrate that the conditions above in subsection (1) of this section, are maintained during the permit term; and*

*(c) The permit contains a re-opener clause authorizing modification or revocation and re-issuance of the permit if new information shows that the conditions in subsection (1) (a) through (e) of this section are not being met.*

*III. Consideration of Intake Pollutants in Establishing WQBELs*

1. *The Department may consider pollutants in intake water as provided in this Section III when establishing water quality-based effluent limitations based on narrative or numeric criteria, provided that the discharger has that the following conditions are met:*

*(a) The facility withdraws 100 percent of the intake water containing the pollutant from the same body of water into which the discharge is made;*

*(b) The observed maximum ambient background concentration and the intake water concentration of the pollutant exceeds an applicable water quality criterion for that pollutant;*

*(c) The facility does not alter the identified intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutants were left in-stream;*

*(d) The facility does not increase the identified intake pollutant concentration, as defined by the Department, at the point of discharge; and*

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

*(2) Where the conditions in subsection (1) of this section are met, the Department may establish a water quality-based effluent limitation allowing the facility to discharge a mass and concentration of the intake pollutant that are no greater than the mass and concentration found in the facility’s intake water. A discharger may add mass of the pollutant to its waste stream if an equal or greater mass is removed prior to discharge, so there is no net addition of the pollutant in the discharge compared to the intake water.*

*(3) Where proper operation and maintenance of a facility’s treatment system results in the removal of an intake water pollutant, the Department may establish limitations that reflect the lower mass and concentration of the pollutant achieved by such treatment.*

*(4) 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 of the intake water pollutant shall be determined at the point where the water enters the water supplier’s distribution system.*

*(5) Where a facility discharges intake pollutants from multiple sources that originate from the receiving water body and from other water bodies, the Department may derive an effluent limitation reflecting the flow-weighted amount of each source of the pollutant provided that adequate monitoring to determine compliance can be established and is included in the permit. When calculating the flow-weighted effluent limitation, the pollutant from the receiving water body shall be assumed to have a concentration that is no greater than the concentration in the facility’s intake water; the same pollutant from other sources shall be assumed to have a concentration that is no greater than the most stringent applicable criterion/objective.*

*(6) The permit shall specify how compliance with mass and concentration-based limitations for the intake water pollutant will be assessed. This may be done by basing the effluent limitation on background concentration data. Alternatively, the Department may determine compliance by monitoring the pollutant concentrations in the intake water and in the effluent. This monitoring may be supplemented by monitoring internal waste streams or by a Department evaluation of the use of best management practices.*

*(7) In addition to the above, effluent limitations must be established to comply with all other applicable State and Federal laws and regulations including technology-based requirements and anti-degradation policies.*

*(8) When determining whether WQBELs are necessary, information from chemical-specific whole effluent toxicity and biological assessments shall be considered independently.*

Non-NPDES Rulemaking Proposed Revisions

# ****Divisions 41 and 42 Proposed Rule Changes****

## Forestry

### 340-041-0007 Statewide Narrative Criteria

**340-041-0007(5)** Logging and forest management activities must be conducted in accordance with the water quality standards and implementing rules established by the Environmental Quality Commission. Nonpoint source discharges of pollutants from forest operations on state and private forest lands are subject to best management practices and other control measures established by the Oregon Board of Forestry as provided in ORS 527.765 and 527.770. Forest operations conducted in good faith compliance with the best management practices and control measures established under the Forest Practice Act are generally deemed not to cause violations of water quality standards as provided in ORS527.770. Forest operations may be subject to load allocations established under ORS 468B.110 and OAR 340-042, however, to the extent needed to implement the federal Clean Water Act.

### 340-041-0061 Other Implementation of Water Quality Criteria

**340-041-0061(11)** Forestry on state and private lands. Nonpoint source discharges of pollutants from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry under the Forest Practices Act (ORS 527.610 to 527.992). Such forest operations, when conducted in good faith compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in ORS 527.770. Forest operations on state and private lands may be subject to load allocations under ORS 468.110 and OAR 340, Division 42 to the extent necessary to implement the federal Clean Water Act.

## Agriculture

### 340-041-0061 Other Implementation of Water Quality Criteria

**340-041-0061(12)** In areas subject to the Agricultural Water Quality Management Act the Oregon Department of Agriculture (ODA) under ORS 568.900 to 568.933 and 561.191 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. Area plans and rules must be designed to achieve and maintain water quality standards. If the department determines that the area plan and rules are not adequate to achieve water quality standards, the department will provide ODA with comments on what would be sufficient to meet WQS or TMDL load allocations. In addition, the department may request the Environmental Quality Commission to petition ODA for a review of part or all of water quality management area plan and rules. If a landowner’s activities are causing or contributing to water quality standards violations, the department will refer the activity to ODA for further evaluation and potential requirements. The department may also require remedies of a landowner causing pollution or contributing to water quality standards violation if ODA does not take action.

## TMDL Implementation

### 340-042-0080 Implementing a Total Maximum Daily Load

**340-042-0080(2)** Nonpoint source discharges of pollutants from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry under the ORS 527.610 to 527.992 and according to OAR chapter 629, divisions 600 through 665. Such forest operations, when conducted in good faith compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in ORS 527.770. The department may also assign sector or source specific load allocations needed for nonpoint sources of pollution on state and private forestlands to implement the load allocations. In areas where a TMDL has been approved, Forest Practices Act rules may need to be revised to meet the TMDL load allocations. If the department determines that the Forest Practices Act rules are not adequate to implement the load allocation, the department may request the Environmental Quality Commission to petition the Board of Forestry for a review of part or all of Forest Practices Act rules implementing the TMDL.

**340-042-0080(3)** In areas subject to the Agricultural Water Quality Management Act the Oregon Department of Agriculture (ODA) under ORS 568.900 to 568.933 and 561.191 and according to OAR chapter 603, divisions 90 and 95 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. The department may also assign sector or source specific load allocations needed for agricultural or rural residential nonpoint sources to implement the load allocations. In areas where a TMDL has been approved, agricultural water quality management area plans and rules must be sufficient to meet the TMDL load allocations. If the department determines that the plan and rules are not adequate to implement the load allocation, the department may request the Environmental Quality Commission to petition ODA for a review of part or all of water quality management area plan and rules implementing the TMDL.

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## Mix Media

### 340-42-0040 Establishing Total Maximum Daily Load

**340-042-0040(h)** Load allocations. This element determines the portions of the receiving water's loading capacity that are allocated to existing nonpoint sources, including runoff, deposition, soil contamination and groundwater discharges, or to background sources. Load allocations are best estimates of loading, and may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever reasonably feasible, natural background, long-range transport and anthropogenic nonpoint source loads will be distinguished from each other.