

OREGON'S WATER QUALITY STANDARDS PROJECT

**Rulemaking Workgroup: Non-NPDES Source Issues (Meeting #9)
and NPDES Permitting Issues (Meeting #18)**

**October 4, 2010, 8:30 AM – 3:30 PM
Location: EPA 5th Floor Conference Room
Portland, OR**

Present for all or part of the meeting (in-person or on the phone):

Workgroup Members: Bob Baumgartner (CWS/LOC), Nina Bell (NWEA), Myron Burr (Associated Oregon Industries), Michael Campbell (Industrial Dischargers), David Ford (OR Small Woodlands Association), Rich Garber (Boise Inc.), Rick George (CTUIR), Janet Gillaspie (ACWA), Lauren Goldberg (Columbia Riverkeeper), Chris Jarmer (Oregon Forest Industries Council), Jannine Jennings (EPA), Dave Kliever (ACWA), Jennifer Shmikler (OR Farm Bureau), Mary Lou Soscia (EPA), Ryan Sudbury (CTUIR), Kathryn Van Natta (NWPPA), Dave Wilkinson (ODA)

Other Representatives: Ken Bailey (Orchard View Farms), Gene Foster (DEQ), Lisa Hanson (ODA), Allison Hennesy (OEC, on the phone), Joe Hobson (OFB), Koto Kishida (DEQ), Greg Lande (DEQ), Kevin Masterson (DEQ), Andrea Matzke (DEQ), Neil Mullane (DEQ), Christine Psyk (EPA), Steven Riley (ODA), Debra Sturdevant (DEQ), Kathryn Walker (Oregon Dairy Farmers Association), Jennifer Wigal (DEQ)

Also Present: Donna Silverberg (DS Consulting, facilitator), Stephanie Brandon (DEQ, note-taker)

Follow Up Items Resulting from this Meeting (Summary notes to follow):

Non-NPDES Workgroup:

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RWG:

- DEQ, EPA and CTUIR will meet with interested parties to further explore the background pollutant allowance issue and other possible implementation tools

Welcome, Introductions and Review Goals (*Donna Silverberg, facilitator*)

Donna welcomed the group, reviewed the agenda, reviewed the goals for the day, and conducted a round of introductions.

Announcements:

- Mary Lou reported that EPA published the Columbia River Basin Toxics Reduction Action Plan in September. She handed out copies.
- Janet Gillaspie from ACWA reported that Congress passed a revision to the controlled substances act.

Division 41 and 42: Changes and Authority (*Gene Foster*)

See updated Division 41 and 42 Issue Paper.

Questions/comments from workgroup members and others:

340-041-0007(5)

- Comments: Workgroup member objected to the use of the word “discharge” for nonpoint source (NPS) rule language suggesting it was inappropriate when connected to on-point sources.

- Response: DEQ wanted to know why “discharge” is not appropriate since they don’t use the language “point source” or “end of pipe.” There was disagreement about whether “discharge” is defined in the Clean Water Act (CWA). DEQ will provide formal reasoning in its issues paper.
- Comment: “Discharge” for NPS is defined in the Forest Practices Act (FPA).
- Forest Industries Council reminded the group that they objected to the entire rule as it relates to forestry as they believe DEQ does not have the authority that DOJ has suggested in the memo to DEQ.
- Comment from DEQ: On page 5 of the issue paper, an area is bolded that asks the workgroup to provide DEQ with additional comments.

340-041-0061(11)

- Question: Were there concerns with the old language about forestry on state and private lands? Was this language that DEQ changed on its own or something the workgroup commented on?
- Comment: A workgroup member said that none of the comments they had made are reflected in the new language. All of the new language is based on what DEQ wrote.
- Question: Why is this language different than the previous paragraph?
 - Answer: The language is intended to state that WQ standards are meant to be met by NPS under the Forest Practices Act (FPA) and Agricultural Water Quality Management area plans (“area plans”). This is different than the previous section, but the standards should still be met by the FPA.
- Question: What does DEQ mean by “generally deemed”?
 - Answer: DEQ used “generally” for situations where they have measurements and have done sufficiency analysis. Not all sufficiency analyses are conclusive, so using “generally” is better.

340-041-0061 (12)

- Comment: Request to remove the word “retain” under the second bullet on page 8. Workgroup member did not like the last two sentences of that bullet, either because it seems like DEQ is usurping the area plans through these rules.
- Comment: The time for DEQ to wait for Ag action could be infinite if not spelled out more clearly.
- Comment: Area plans should be constructed to prevent water pollution. Did not like the language that says, “Area plans and rules must be designed to achieve and maintain water quality standards.” DEQ needs to stick with the statute that states, “prevent and control water pollution.”
- Comment: It seems like DEQ is not going to revise the language anymore. However, if it is changed, all the areas where DEQ refers to Ag need to be changed to reflect DEQ’s authority.
 - Response: By changing the language, we are saying that DEQ will act to control water pollution, but not meet the CWA.
- Comment from EPA: EPA will want to see a demonstration that WQS have been met. If that is the intent of these rules, it is important to keep it that way throughout.

- Comment: Regarding the last sentence on page 7, this does not need to address individual landowners because this is already addressed in the area plans. Another committee member also did not like the last two sentences on page 7.
- Comment: DEQ should rely on the statute and not go beyond it.

340-042-0080(2)

- Comment: Suggest removing “discharges” from the first sentence.
- Comment: On page 10, second line – Change “assign” to “attribute.”
- Question: Why did DEQ delete “and identify measures”?
 - Answer: This was in direct response to comments by ODF. The language suggests DEQ can use surrogate measures.
- Comment: If DEQ isn’t being explicit by taking out some stuff, then they should take out a lot of language that is already in the statute. “Identify measures” should be left in because it applies to coastal areas in regards to logging (due to the Coastal Zone Act Reauthorization Amendments (CZARA) decision last week).

340-042-0080 (3)

- Comment: DEQ’s language is different than what is in the FPA.
- Comment: On the top of page 11 where it says, “The department may also assign sector or source specific load allocations needed for agricultural or rural residential nonpoint sources to implement the load allocation. 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.” This can’t be done from a practical and legal standpoint. DEQ can’t regulate to a specific number of NPS contributions. DEQ has a rule that the area plans are an implementation measure. The areas plans are there to prevent and control pollution to the extent practicable and then DEQ puts together the TMDL load allocation.
- Question: Is there any legal connection between area plans and TMDLs? The idea is that you prevent and control water pollution as best you can and then calculate the load allocations. The area plan comes first and then the TMDLs.
- Question: Does Ag agree with this statement?
 - Response: Believes Ag has a rule that area plans are supposed to be designed to meet the TMDL load allocation, but not positive.
 - Comment: If that is true, then the workgroup member does not agree with it.
- Comment: Regarding those same sentences on page 11, “may” is too discretionary. DEQ needs to use a stronger word like “will.”
- Question: Why is the language on page 7 different than the language on page 11 regarding division 41 and division 42?
 - Response: The Division 42 language was written according to TMDLs. Division 41 is broader to address areas where there is no plan in place.

340-042- 0080(3)

- Question: How would DEQ take the standard back to a single landowner? What is the threshold if everything is based on a basin-wide scale of things?

- Answer: Boxes 1-4 on the flowchart on page 18 of the issue paper shows the process of how implementation can be attributed to an individual landowner. DEQ can take action on the violation if ODA does not take action.
- Comment: Regarding 0080(2 & 3) – The implication is that there would be a problem and then a petition would go to either ODF or ODA. This implies that the only action that DEQ might take is a petition, nothing else. This does not honor commitments that DEQ has made regarding coastal logging via the CZARA lawsuit nor does it advance the EQC's directive.

340-042-0040(h)-

- Comment: DEQ needs to describe the first four boxes of the flow chart on page 18 of the issue paper a bit more. It seems like DEQ is taking over the AgWQM area plans and telling Ag what to do. DEQ seems to be saying, if Ag doesn't do it, then DEQ will do it for them.
 - Response: This is subset of much broader activities under the Ag plans and how DEQ acts. If DEQ thinks a WQ violation is due to an Ag source, it will be referred to ODA for action. If no action is taken at ODA, then DEQ will have to take action as directed by the CWA.
- Question: Regarding Box 10 – Is DEQ OK with leaving the compliance process to ODA even if it doesn't meet WQS?
 - Answer: Yes, because the overall area plans are designed to assist people—and the state-- with meeting the standards.
- Question: There are Ag activities that don't fall under area plans, so how do these fit into the flow chart and how are they addressed?
 - Answer: The flow charts will be put into IMDs and DEQ will lay out a clear process showing DEQ's authority and a clear process for making decisions on who will address the issues (ODA or DEQ). The flow charts are the first step in the guidance document.
- Question: If there is a WQS issue that is taking a long time to get resolved, then are municipalities supposed to come to DEQ and ask for help to resolve it (if what Ag is doing is not satisfactory)?
 - Answer: Yes. DEQ has backup authority for Ag WQ issues.
- Comment: The Ag process is the same for everyone, and if it is not being handled right, DEQ has the authority to take over. Ag will be treating complaints from DEQ the same as complaints from everyone else.
 - Response: DEQ needs to make this clearer in the flow chart.

Questions regarding DEQ's Authority Memo:

- Comment: Committee member disagreed with what was stated in the Authority Memo about both Ag and Forestry. They testified before the EQC on this matter.
 - Response: Please submit comments on this matter to DEQ. This topic relates to information in an email that went out to the committee with a memo from Larry Knudsen to Lynn Hampton (EQC 2008, Nonpoint source and DEQ's authority). There have been significant court cases since 2008 and DOJ now is drafting a new memo about DEQ, ODA, and ODF's authorities. DOJ will send the memo to the directors of those agencies.
- Question: What about unfunded mandates?
 - Answer: These are requirements of the federal CWA and, because of this, are not subject to the State's unfunded mandates law.

3-Government State of the Process (Neil Mullane, DEQ; Christine Psyk, Associate Director Region 10 EPA; Rick George, CTUIR)

Neil, Christine, and Rick gave their comments on the 3 Governments' Process to-date.

Neil:

This has been a five year process so far and is a significant change in WQS for Oregon. It has been both technically challenging to draft as well as challenging from both a political and legal perspective. He noted his appreciation for the willingness of everyone to stay engaged and participating in the face of these challenges. DEQ needs to make sure we have a program we can implement when these rules are adopted. This is why DEQ asked the NPS interests to join the discussions. He noted that there recently were four memos from Nina that will be forwarded to work group members to help everyone understand the legal and policy challenges DEQ faces.

Neil went on to clarify that once the rule is drafted and adopted, DEQ will create IMDs internally for staff to use. DEQ will have a detailed, annotated outline of the IMDs done by the end of the year to accompany the other rule documents when the comment period opens. The EQC will have the draft final IMDs when they are adopting the rules in June 2011. As a reminder, the IMDs can't be finalized until the rules are final.

In closing, Neil thanked the Tribe and EPA for their assistance throughout the process. He noted that it has been helpful for DEQ to have EPA at the table from the start. EPA's role during this process has been to provide instant feedback and this was very instrumental in keeping DEQ on track. It also will help for a smother transition when the rule goes to the EQC. He thanked the Tribe for its help keeping everyone focused on the overall goal of reducing health impacts to Oregon's high fish consumers and on track with the timeline.

Christine:

This is a high priority project for EPA. Christine expressed thanks to DEQ and the Tribes for their leadership initiating this work and to the workgroup for assistance with ideas and a variety of perspectives. This is an aggressive and protective rule that Oregon is about to adopt. EPA will continue to be engaged in this effort and supports the work. EPA will keep up with the schedule and milestones, review draft documents, and provide real-time feedback so that issues are resolved quickly. EPA's senior staff and managers will continue to be involved in this process. EPA will help DEQ with the IMDs (especially the variance IMD and background pollutants provisions). EPA is currently vetting those provisions. EPA wants to ensure that what they support is defensible as well as practical.

She went on to note that EPA is carefully examining memos just received by the Northwest Environmental Advocates (NEA) regarding variances and the background pollutant allowance. The provision protecting human health use needs to be considered carefully. EPA has always supported DEQ adopting the higher fish consumption rate (FCR). She ended by noting that if DEQ is unable to complete this process for whatever reason, EPA stands ready to promulgate a more protective FCR and human health toxics criteria that will follow from that. It is very important for DEQ to stay on the schedule they have outlined.

Rick:

Six to eight years ago, the Tribe reached out to people who would be affected by a higher FCR (i.e., permittees) and asked them to get to know the tribal people. These folks came to the reservation and heard about the problem of toxic chemicals in fish and why the Tribe thought that Oregon's process would succeed with active participation from the permittees. The Tribe got a very good response from those with whom we engaged. The Tribe recently invited people from agriculture and forestry to sit down with them to discuss implementation. The Tribe will begin implementing irrigated agriculture in the very near future, as agriculture is big on the reservation. The Tribe aggressively and assertively provided more direct representation of high fish consumers in the FCR process, and supported making the rule change implementable for permittees, agriculture, forestry, and the state as a whole. The Tribe is eager for this

process to conclude. EPA is ready to move the rulemaking package forward in an efficient and educated way, and the Tribe sees this as critical.

Oregon is setting a precedent here since this rule will protect fish consumers that are most sensitive to toxic pollution. Thanks to Kathryn Van Natta and Northwest Pulp & Paper Association (NWPPA) who have been directly impacted and will have negative consequences if this process isn't done right. Thanks to ACWA as well. The Tribe views the roles of agriculture and forestry as important as the role of the permittees in the continuation of this process. He noted that everything matters: agriculture, forestry, industry, municipalities, people's homes, government complexes—all contribute to the problem and all need to be part of the solution. The Tribe's FCR of 385 grams per day is the highest of all the tribes nationally. He ended by saying that the best way to move forward is collaboratively working together to voluntarily fix the problems. He asked the group to continue to help shepherd the effort forward to protect Oregon's most vulnerable populations. Thanks to Donna for excellent facilitation of a diverse group.

Process Schedule

Neil reviewed the process schedule (see the handout). In December, DEQ will hold one final official meeting of the workgroup to share the final rule package with the workgroup before it goes out to the public and to the EQC. This will happen before the SOS bulletin deadline of December 15.

Jennifer added additional comments about the schedule.

- October 27: Draft rule package due for internal review by DEQ's rulemaking team.
- November: DEQ will do another review that is more formal and final.
- December: Neil and Jennifer will sign off on the final rule package to meet the SOS deadline of December 15 for publication in the register.
- January 3: The public comment process starts. The comment period will be 45 days.
- Late January/early February: DEQ will conduct public hearings across the state. DEQ is open to suggestions about where to have them, so please let DEQ know if you have any opinions on locations.
- April: DEQ will work on responding to the comments and have more in-depth Info Items at the EQC.
- June: There will be an Action Item on the EQC agenda and the rules will be presented for adoption.
- Within one month post-adoption: DEQ will get the Attorney General certification and send it to EPA.
- Within 90 days of submittal to EPA: EPA will approve the rules.

Neil said that, in the future, DEQ will be working internally on streamlining the rulemaking process via the Kaizen process. DEQ would like feedback from the workgroup on what they think of DEQ's current rulemaking process and what could be improved.

Questions/comments from workgroup members and others:

- Question: When will the IMDs be done? When will the new rules be incorporated into permits? What about variances?
 - Answer: Once the rules are adopted by EQC and approved by EPA they will go into effect. There is no early action. An annotated outline of the IMDs will be sent out to the workgroup in early December. When the material is out for comment, DEQ will work on improving them. They will be finalized about a month or so after EQC adoption, but DEQ may wait until after EPA's approval just in case there are changes.
- Comment: From the municipalities' point of view, they can't determine how workable the process is if they don't have the details of the IMD. At this point, the munis don't know if the Tribe's goal of creating implementable rules will be met.

Fiscal and Economic Impact of Proposed Rulemaking on Non-NPDES Sources (DEQ)

(See the Fiscal and Economic Impact Narrative handout.) Andrea Matzke, DEQ gave a presentation outlining the narrative portion that will be attached to the fiscal impacts form. The narrative characterizes the incremental cost between the existing (6.5 gpd) and proposed (175 gpd) criteria. There are two main elements:

- (1) direct/indirect impacts from criteria revisions and
- (2) the effect of using implementation tools.

DEQ said that they did not intend to address the impacts to DEQ resources and staff for today's meeting, but encouraged the workgroup to ask questions if they had them. There is a wide range of potential impacts to the public, small/large businesses, communities, and public agencies. However, DEQ doesn't track information on small businesses, so they have very limited data on this. A small business consists of 50 employees or less. DEQ requested this information from the workgroup and conducted a qualitative analysis based on information shared by stakeholders (especially dairy and forest representatives).

Andrea did a comparison of the current and proposed criteria. It was difficult to make a direct comparison based on EPA's action in June when DEQ had to revert back from 17.5 gpd (the level at which the 2008 SAIC fiscal analysis was completed) to the old criteria of 6.5 gpd. Ten criteria don't rely on the FCR, they rely on Maximum Contaminant Levels (MCLs) (from the Safe Drinking Water Act). In 2004, about 40 criteria were added to Table 20. About half of the quantitation limits (QLs) are higher than the criteria so the compliance point would be higher than the actual criterion, which could lessen the fiscal impact.

Questions/comments from workgroup members and others:

- Question: Can DEQ get more detailed information about small businesses? A lot of the businesses that will be impacted, on the forestry and agricultural side of the issue, are less than 50 people.
 - Answer: DEQ does not track if a discharger is a small business; they track for other reasons. Where DEQ has this information, they have included it. For example, permit writers provided information based on their direct knowledge of a facility. None of the major industrial permittees are small businesses. DEQ does not have that information for the minor industrial permittees, so they can't make estimates of how they will be affected by the new rules. DEQ found out from Ag and related groups that most of Oregon farms are small businesses. The law requires DEQ to look at available information. DEQ spoke to the Oregon Department of Revenue about getting the small business status of dischargers if DEQ gave the department of revenue tax ID numbers, but they would not provide small business information to DEQ because it's not considered public information. DEQ's charge is to evaluate available information and their attempts to collect that information. Where data is not available, then DEQ qualitatively analyzed the information they did have.
- Comment: DEQ might want to start tracking small business information for future fiscal impact analyses.

For the SAIC report, DEQ sampled about 20 different municipal/industrial facilities and looked at the cost of complying with existing criteria (17.5 g/day), as well as a range of FCRs up to 175 g/day. Most of the quantitative data DEQ has is from that report.

The arsenic rulemaking comment period closed last week. The new criteria won't be as strict to account for background concentrations. The mercury criterion is being switched to fish tissue methyl-mercury concentration. 43% of 303(d) listings are based on As, Fe, Mn, so DEQ is expecting segments to be delisted.

Identification of Known Pollutants: Major industrials (pulp & paper, primary smelting and/or refining, electronics); Municipalities; Urban stormwater; Agriculture (legacy contaminants, current use pesticides); Air deposition; Naturally occurring.

Analysis between existing and proposed criteria: There are non-NPDES impacts. The applicable pollutants are some legacy and some current use pesticides. NPS programs are not fully implemented currently, so it was difficult to determine the fiscal impact.

Questions/comments from workgroup members and others:

- Question: Is the implication that the forestry and ag programs aren't in compliance now?
 - Answer: The area plans indicate that certain environmental conditions need to be met, but in certain areas, the conditions are still not being met
 - Comment: A workgroup member did not agree with this.
 - Response: Naturally occurring levels are OK, but if it is due to anthropogenic activities, then they are not meeting ODA/ODF rules.
- Question from DEQ: Why is DEQ making this statement now, that the programs aren't fully implemented?
 - Answer from DEQ: The SAIC report stated that many of the programs to address nonpoint sources of pollution are not fully implemented. DEQ takes that to mean NPS programs have not been evaluated for their adequacy to meet the current toxics criteria. For example, sufficiency analysis was done for FPA to meet WQS in 2002, but that did not include any analysis to meet the toxics standards. It is therefore difficult for DEQ to evaluate the fiscal impact of this rulemaking, since we don't know how much more (if any) needs to be done in order to meet the proposed toxics standards and other associated rule changes.
- Question: Is there a background level?
 - Answer: Yes, in many cases.
- Comment: Ag does not say that their plans are not fully implemented even though the standards are not being met. The IMDs will help put forth objectives based on a timeline.
 - Response: To clarify, "Not fully implemented" was the language used in the SAIC report.
- Question: If the language was "fully implemented," then could DEQ determine the economic impact?
 - Answer: Yes.
- Comment: If Forestry meets certain practices and is in compliance with the FPA, then it is assumed they are meeting WQS. It seems like DEQ is assuming that if people are complying with the FPA BMPs, they could still be out of compliance.
 - Response: If WQS aren't being met by BMPs, then a TMDL would need to be done and load allocations set. Right now, if they are using BMPs, then DEQ should assume they are in compliance. There could be a future economic impact even if they are in compliance now. DEQ needs to talk about how they are characterizing this.
- Comment: First thought is that, for Ag, the fiscal impact would be small. The new rules would be implemented via more outreach which is not a costly item. However, if monitoring data is needed to motivate outreach, then this could be more costly for ODA and landowners who learn they need to do more. If TMDLs are implemented by DEQ at a higher rate, then this might not cost landowners anything.
 - Response: For purposes of this analysis, DEQ's focus is: Does the change in criteria cause a cost right now?
- Comment: Since Implementation-Ready TMDLs are part of package, it is hard to evaluate how we go from criteria to implementation.

- Comments: It is hard to believe that this change that DEQ has been working on for five years will not cause an impact, especially if DEQ is saying that it is because it is hard to evaluate and hard to find data. Others agreed that the paucity of information on DEQ's part does not lead to a lack of a fiscal impact. It just means that there is uncertainty of the fiscal impact. This is a big change, so there will be impacts.

Fiscal and Economic Impact of Proposed Rulemaking on NPDES Permittees (DEQ)

See the Fiscal and Economic Impact Narrative. Andrea gave a presentation on impacts to NPDES permittees.

Industrial Permits

- Direct Impacts
 - Mainly impact major industrials
 - Specific costs and/or impacts associated with revised criteria cannot be concluded
 - Estimated that none of the 19 major industrials are small businesses
- Indirect impacts
 - Possibility of increased costs for consumers of industrial goods. Will depend on the availability of implementation/mitigation tools.

Municipal Permits

- Direct impacts
 - Criteria revisions applicable to all major POTWs
 - Unlikely minor will incur compliance costs
 - Specific costs associated with revisions can't be determined
- Indirect impacts
 - Businesses with discharge to POTWs may be impacted by pretreatment requirements
 - Municipal ratepayer impacts possible, but unknown at this time

Implementation/Mitigation Tools:

Intake Credits

- Minimal resources/effort to implement
- Most likely offset costs associated with other compliance options

Questions/comments from workgroup members and others:

- Question: How many major or minor NPDES holders will be able to use the intake credit?
 - Answer: Don't know.
- Comment: DEQ said a small amount, but they need to include a caveat.
 - Response: If DEQ doesn't make this clear in the fiscal, they need to make sure it is clear somewhere in the rule package.

Background Pollutant Allowance

- 32 minor and 4 major industrials may be impacted
- Most likely offset costs of expensive treatment technology associated with other compliance option tools
- Costs associated with treatment processes

Variiances

- Could offset costs of prohibitively expensive or unproven treatment technologies
- Costs would be associated with preparing and supporting an application, pollution reduction plan, etc.
- SAIC report estimated costs

- Renewals expected to be less resource intensive

Questions/comments from workgroup members and others:

- Comment: ACWA did a general solicitation at the national level and with associate members, especially with relation to the variance measure and associated costs. They got very little information and what they got wasn't necessarily applicable. They have the SAIC estimates. The estimates were related to first application of the variance. Ask that DEQ re-do the analysis as it related to extensions/renewals: It is a misnomer to call a variance a renewal. Each variance will stand on its own. ACWA thinks the renewals may cost the same as the initial applications. Each individual pollutant they address will need to have its own variance and be addressed. Why does DEQ not expect fiscal impacts for any of the minor permittees?
 - Response: Minors won't be doing priority pollutant scans, so there may be no increased costs. However, if there is a TMDL tied to it, then they may have increased costs.
- Comment: Some of these impacts will be based on how DEQ runs the permit program. We need to see the IMD first before we can answer a lot of questions about what the fiscals will be. The SAIC report shows a \$10 million investment at the high point, and this should be included in the fiscal. DEQ needs to be honest about it.
- Question: How much of this is related to arsenic?
 - Answer: Not sure.
- Comment: NWPPA agreed with the municipalities' point that the costs coming down the road are very real. The compliance schedule IMD doesn't say that minors are exempt from doing additional monitoring. DEQ doesn't specify the pollutants they are looking for. If you consider the compliance schedule IMD and those that are forthcoming, a lot of uncertainty is created. DEQ is still trying to figure out what chemicals at what quantitation limits. The monitoring levels aren't necessarily the QLs, so how will this information be used when writing permits?
- Comment: There is a lot of uncertainty. What effluent limit will the municipalities need to meet in order to achieve the conditions of the variances? DEQ also needs to determine the ambient levels for the different waterbodies.
 - Response: The municipalities would use the level currently achievable for the facility, not the ambient levels.
- Comment: It is in all of our best interests that the municipalities know what it takes to get to a variance through DEQ and ultimately EPA. If they don't, then they will overestimate or underestimate costs. Agree that there are a lot of steps to getting a variance, and these steps are not very well understood.
 1. The costs have not been well-thought out, even with the \$10 million estimate.
 2. Need a better understanding of the entire variance process to make the cost estimates.
- Comment: Requested an explicit statement on whether it is the belief of the regulatory agencies that an additional treatment will be required in pollution prevention plans as a requirement of receiving a variance. Industry has never received a commitment from the agencies about this. Also want to know what the acceptable cost of that treatment will be in order to receive a variance.
 - Response: It depends, because DEQ can imagine a lot of different scenarios where a variance would be applicable. In some cases, additional treatment / treatment optimization could be required if reasonable and cost effective.
- Comment: From a municipal standpoint, we don't know what that means. If someone has a well run secondary treatment plant, what kind of technology does DEQ want them to have to make sure they are doing a good job?

- Response from EPA: These are all fair questions, but we don't have the answers right now. A variance is temporary relief for something that is cost-prohibitive now.
- Comment: The municipalities are the most affected source class and the regulatory agencies are asking them to put Oregon's communities at risk. The municipalities are asking that EPA answer these questions before they approve the rule. EPA can't remove all uncertainty, but they can't ask every community to put their treatment plan permits at risk. More details are needed.
- Comment from the Tribe: The municipalities are asking for something that can't be done in the timeframe allowed. EPA can't answer the permitting questions. How do we get from what ACWA is asking for to what DEQ is suggesting? Do we need to take an example and move it through the permitting process?
- Comment: ACWA is frustrated that they are left with one tool on the table to address the major source that is affected. We have been talking about other tools, but are left with just this one. We need some idea of how this will be workable.
- Comment: It comes down to the IMD process, but DEQ will need to consider a lot of different outcomes.
 - Response: DEQ has agreed to write an IMD that will cover this.
- Comment from EPA: EPA is committed to working with DEQ on the IMD, so that it will help them when they receive a request for a variance.
- Comment: There is a timing disagreement between DEQ and ACWA about things going out in draft rule before anyone sees the IMD. The public comment period will close before they see the level of detail they want in the IMD. It makes having this discussion difficult without having the whole package in front of us.
- Comment: Having an example of an illustration may be more helpful than the actual IMD. Many IMDs are very vague. DEQ could use an example with 100,000 citizens, PCBs, etc. Some people are in the dark about how a variance would work since they have never done one. It would be nice to see how EPA would react using an example
 - Response from CTUIR: We did this several months ago using dieldrin and it was shared with the group. This could be beefed up a little more.
- Comment from EPA: The "new" EPA will be working closely with DEQ and communities on their variances.
- Comment: ACWA made a critical point to DEQ to define as much in the rule as possible vs. putting guidance in the IMD. If we did the example first, we could determine what would need to be in the rule.
- Comment: We could look at an example for a non contact cooling water permit.
- Comment: There are a lot of unknowns and the word "unknown" is used liberally all through the document. Costs often "depend and vary" and often there is no data. Not sure if this document qualifies as an adequate fiscal analysis.
 - Response: DEQ's intent is to develop something that passes muster. The important thing to do is to make sure the structure of the document is there and then fill-in some of the blanks later. DEQ isn't required to do a cost benefit analysis with an economist. Instead, it is required to analyze the information it has—and we have.
- Comment: The takeaway message is that the fiscal impact is unknown.

- Response: DEQ would agree with that and say that they tried to collect as much information as they could, and this is what they came up with. DEQ is trying to do the best job that they can with the information they have and the information people will provide to them.
- Comment: NWPPA is working with a contractor to develop a revised fiscal analysis. Their goal is to have it within the next week and a half. The contractor is taking a subset of pulp and paper mills in Oregon and looking at effluent compared to the proposed standard, and then doing a fiscal analysis of what treatment standards would be. They are also looking at the cost of what a pollutant minimization plan would be. They are looking at PMPs in other parts of the country. They are looking at the cost of getting a variance, but making a lot of assumptions. They are also working through the background pollutant allowance. The goal is to determine if this is a workable scenario for pulp and paper industry. Last time, people did not like or approve of a similar analysis that came from industry.
- Comment: Page 8 of the fiscal narrative talks about stormwater permits and that DEQ does not anticipate any impacts to stormwater permit holders. Surprised to see that. Is this because of TMDLs?
 - Response: This is for the direct impacts, not what may occur in response to TMDLs. This is a conversation that is going on in the industrial stormwater arena. There are differing requirements for people that discharge to impaired water.
- Comment: DEQ has not thought this area through. DEQ denies the general permit for folks that discharge into waters that don't meet the human health criteria. Even before a TMDL, there will be permit conditions that address WQ limited streams. General permits are more of an issue than the individual permits.
 - Response: This is an existing issue, not a direct result of these new criteria.
 - Comment: Agreed, but the issue will be exacerbated with the new criteria. Stakeholders have never been forced to deal with these issues before. How well this will affect stormwater permitting is another shadowy area.
- Comment: The small paragraph on stormwater permits in the fiscal analysis is very loaded. DEQ needs to explain more clearly in the NDPES issue paper why the human health toxics criteria do not apply to stormwater permits. Columbia Riverkeeper will be providing feedback on this.
- Comment from DEQ: DEQ is struggling with how to get more information to do a better analysis. When looking at the municipalities, DEQ is trying to determine what facilities and how many would actually be impacted.
- Comment: The new rule will cause substantial fiscal impact to DEQ and that is underestimated. It is likely that the WQ budget will be cut and this also needs to be considered.

Background Pollutant Allowance - Update (DEQ & EPA)

There are continuing conversations between DEQ, EPA, and the Tribes to work through this issue. DEQ intends to include this provision as part of the rulemaking package. DEQ is working on revising the issue paper. They haven't been able to update it yet since the last meeting. DEQ director Dick Pedersen went to EPA's Region 10 office and talked with upper management about the background pollutant concentration issue. DEQ has a letter from Nina that outlines her concerns about how DEQ drafted the rule. Conversations with EPA, Nina, & others will be incorporated into the issue paper.

Questions/comments from workgroup members and others:

- Comment from EPA: There was a discussion at the last meeting on this provision and what EPA's opinion is. This would be a diversion from what EPA has done in their permitting program before.

This is a different type of WQS. A WQS is based on if it protects the human health use. It is difficult for EPA to see how this B.P.A. provision will protect the human health use. DEQ strongly represented to EPA how important this provision is to them. EPA heard it loud and clear, but they have concerns. It will be very hard for EPA to give DEQ the answer they are seeking. EPA is moving forward and vetting the issues surrounding this provision – both NPDES permits issues and WQS issues. They are vetting the issues in Region 10 and at headquarters to the highest levels. EPA will get a definitive answer back to DEQ as soon as possible. EPA is looking at how this provision will change longstanding practices in EPA's permitting program. EPA doesn't allow further concentrations or mass into certain waterbodies because they are already impaired. From a WQS standpoint, DEQ would have to prove that it is protective of the use. In this case, a permittee would be adding increased concentration. EPA is looking at what NWEA submitted and will take those comments into account. EPA wants their actions to be defensible and something that can be carried forward into the future.

- Response: NWPPA is disappointed with EPA's statement. They are out of solutions to deal with this. Does EPA have any other suggestions? Years of frustration surrounding this topic have built up.
- Comment from EPA: EPA acknowledged the frustration. EPA has been clear throughout the process that this provision is a difficult one for them to approve. There is no silver bullet to make implementation a good fit; it will be a struggle. A variance may be a good possibility. TMDLs could be used to provide flexibility to folks. For the legacy pollutants, NPS are really the sources, and this could be addressed in TMDLs. TMDLs can provide some flexibility to the sources and how allocations are made. The new criteria are not the only thing that is driving these implementation challenges – there is more monitoring for toxics and permitting for toxics. Region 10 may need to look at what other states are doing. More could also be done with compliance schedules.
- Comment: The use of compliance schedules is constrained by an agreement between DEQ and EPA. There isn't flexibility around them, there is a settlement agreement. You have to be able to come into compliance with a standard to have a compliance schedule, so use of this is limited.
- Comment: This is a problem of taking criteria that have been widely ignored seriously. For Oregon to take them seriously, we can't ignore the central regulatory aspect of the CWA. DEQ doesn't like to not issue a permit to a facility. There is a class of facilities out there that are insignificant to the issue that DEQ should not waste a lot of time doing variances on. EPA needs to develop a solution to this. It is not just an industry problem, it's an agency problem and an environmental problem.
- Comment from EPA: Ignoring permits or letting them lapse because we don't have solutions is not the way to go. Let's get expectations balanced. EPA is interested in hearing people's thoughts.
- Comment: This discussion is increasing frustration because this is the last meeting.
- Comment: It is important for EPA to be as clear as possible if there is any chance that the background pollutant allowance provision will pass. If it just won't work at all, they need to say that and be clear about it. The timeframe is very short.
 - Response from EPA: EPA is not saying this is off the table, but they do have concerns (e.g., WQS and permitting program). EPA is exploring ways to narrow the concerns and address them. EPA is open to hearing other ideas. No one at EPA has said definitely no, but they have voiced concerns. There is still room to work with this. EPA may have staff with a creative idea, but don't hold back any ideas here.
- Comment: It feels like EPA headquarters is not invested in finding a solution because they see it as an industry problem. It is difficult to see a path through EPA on this. TMDLs are a way of

implementing standards. Thinks EPA needs to come up with something because we have been bringing the wrong rock over and over.

- Response: DEQ responded that there could be ways of revising the background pollutant allowance to provide a greater justification for the protection of human health, but that it would certainly limit the scope of its applicability.
- Comment from EPA: EPA is willing to continue this discussion over the next few weeks.
- Comment: It would be beneficial if EPA would not make a decision or if they would write something down about where they will be flexible.
- Comment: There was conversation about this related to risk levels.
 - Response: We talked about them as mutually exclusive, never combined. This may be a new discussion.
- Comment: This should not be handled with the whole group, it needs to be a side discussion.
 - Response: A group consisting of Rich, Bob B., Michael, EPA, Nina, Llewellyn, Ryan will work on this issue. Deb, Jennifer, Jannine and Donna will also be involved.
- Comment: Another reason to be creative is that the background pollutant allowance doesn't do anything for the municipalities at this point.
- Question: What is the timeframe that DEQ and EPA want for the conclusion of this work?
 - Answer: October 27 is the last day to get it into the rulemaking package. A tentative meeting will be scheduled for next Thursday, October 14 from noon-4 PM at EPA.
- Comment from DEQ: DEQ needs specific information from EPA about what is wrong with their rationale and why EPA believes it isn't protective. They need to have critical people from EPA in that meeting who can answer those questions.
 - Response: EPA will have discussions about this before the meeting. EPA will come to the meeting with specific ideas of where to look for narrowing or changing the provision.

Next Steps/Wrap Up (Donna Silverberg)

There will be one final workgroup meeting to look at the final rulemaking package at the beginning of December (before the 15th). Date TBD.