**1. (1)(b)(D)(iii): CERCLA exception**

From Gil Wistar: I have looked over the “CERCLA/RCRA variance” language in the proposed rule, talked it over with a seasoned Portland Harbor project manager in Northwest Region, and reviewed relevant sections of U.S. Code ([TITLE 42](http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42.html) > [CHAPTER 103](http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42_10_103.html) > [SUBCHAPTER I](http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42_10_103_20_I.html) > § 9621 [CERCLA], and [TITLE 42](http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42.html) > [CHAPTER 82](http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42_10_82.html) > [SUBCHAPTER III](http://www.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42_10_82_20_III.html) > § 6924 [RCRA]).  As a result of these reviews/discussion, I would recommend removing the variance language entirely. This is because of the following:

1. CERCLA § 9621(e)(1) says (my emphasis added): “No Federal, State, or local permit shall be required for the portion of any removal or remedial action **conducted entirely onsite**, where such remedial action is selected and carried out in compliance with this section.” In somewhat indirect fashion, this language conveys the intent of CERCLA cleanups at federal NPL sites -- as long as contaminants remain on-site, no permit is needed, but contaminants in off-site migration or discharge ARE subject to all applicable ARARs -- including state water-quality standards, if the migration or discharge enters surface waters.
2. RCRA § 6924, covering standards applicable to owners and operators of hazardous waste treatment, storage, and disposal (TSD) facilities, makes no mention or suggestion of a federal pre-emption of state ARARs at these facilities, and in fact emphasizes preventing off-site migration of ANY on-site contamination.
3. Our experience at upland sites in Portland Harbor is that EPA is inclined to insist on stricter WQ standards than those in existing state NPDES permits, suggesting that the proposed variance language is counter-intuitive.
4. Even ignoring the above points, there are too few federal NPL sites and RCRA TSD facilities in Oregon to justify this proposed variance language.  The fact that several other states appear to have included such language in their permit rules is by itself insufficient justification for us to do the same.

**2. (1)(b)(D)(ii): widespread socioeconomic benefit**

The socioeconomic analysis would be based on EPA’s Interim Economic Guidance from 1995, Chapter 5: Antidegradation: Role of Economic Analysis

- While the terminology is different, the tests to determine substantial and widespread economic impacts (used when removing a use or granting a variance) are basically the same as those used to determine if there might be interference with an important social and economic development (antidegradation). As such, antidegradation analysis is the mirror image of the analyses described in Chapters 2, 3 and 4. Variances and downgrades refer to situations where additional treatment needed to meet standards may result in worsening economic conditions; while antidegradation refers to situations where lowering water quality may result in improved social and economic conditions.

**3. Re-openers: Concern from Nina re: the lack of re-openers in relationship to the triennial review**

We shouldn’t need specific re-opener language in the variance regs. Under the general conditions in Schedule F

“the permittee must comply with all conditions of this permit. Failure to comply with any permit condition is a violation of Oregon Revised Statutes (ORS) 468B.025 and the federal Clean Water Act and is grounds for an enforcement action. Failure to comply is also grounds for the Department to terminate, modify and reissue, revoke, or deny renewal of a permit.”

In other words, if a permittee violated any conditions of the variance and the associated PMP, then the permit could be re-opened if necessary. The permittee may be able to achieve lower effluent limits for the pollutant of concern, so a permit could be re-opened to adjust the effluent limit; however, there is most likely not a significant environmental gain to be accomplished with re-opening a permit compared to adjusting an effluent limit during the permit renewal cycle.

**4. (5)(d): Milestones extending beyond the term of the permit**

Sent e-mail 7/6 to Larry Knutsen asking whether or not establishing PMP milestones when permit is administratively extended in within DEQ’s authority.

“Assuming for the sake of argument that DEQ could issue a variance that remains effective for a period longer than five years, then I think it is possible to develop permit conditions that would carry over into any administrative extension period. I believe that EPA has done something comparable with respect to compliance schedules in the Great Lakes Rules.  I can provide you with sample language if you'd like.  But before you spend a lot of energy on this, it would be good to get some idea from EPA whether it would accept a permit that is drafted on the assumption that the variance will be in place longer than the permit term.

 With respect to the language set out below, I haven't seen the rest of the rule language so I'm not sure I understand the context.  Assuming that EPA would accept the concept, it looks like it would generally be ok, except that I think DEQ would have to determine, rather than the applicant demonstrate, the likely variance term.  Consider the following revision: “

*(d) If the department determines that a water quality standard variance is likely to be in effect for a period that is longer than the term of the permit, the Department also may establish permit conditions implementing the variance, including milestones, that will apply during any period in which the permit is administratively extended.*

**5. Must variances include an interim effluent limit (our regs currently include one)? Nina says the variance must also include an interim criterion.**

 “A variance is a change to the water quality standards. Therefore, it must include a

criterion that applies during the pendency of the variance, not just a WQBEL that is

incorporated into the relevant NPDES permit. ANPRM at 36759; Handbook at 5-11. In

fact, it is contrary to the requirements of sections 301(b)(1)(C) and 402(a)(1) of the CWA

to issue a variance to an effluent limit. National Assessment of State Variance

Procedures 1990 at 7.”

**6. Requirement of pollutant minimization plans**

We have teetered a bit in whether or not we will require PMPs. We acknowledge that each PMP will be tailored to each discharger—i.e. greater expectation for those dischargers who contribute more pollutants. In other cases, the discharger will be able to do very little in terms of pollutant reduction. However, I think it would be cleaner if the PMP is required regardless. That way, the permit writer can work with the discharger in developing a PMP which makes sense to that particular situation. Consequently, I have gone back through the issue paper and revised sections where we indicated that a PMP may not be needed.

**7. Unreasonable risk to health**

Language is somewhat undefined. This language is somewhat undefined. Variance language from MI and IN describe it this way, “Characterize the extent of any increased risk to human health and the environment associated with granting the variance compared with compliance with WQS without the variance in a way that enables the department to conclude that the increased risk is consistent with the protection of the public health, safety, and welfare.” Does this definition provide more substance?