Oregon Department of Environmental Quality

Jan. 23-24, 2020Enter EQC Meeting Date mm dd, yyyy

Oregon Environmental Quality Commission Meeting

Agency Staff Report

Rulemaking, Action Item J

****Willamette Basin Multiple Discharger Mercury Variance 2019****

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## Attachment 1: Draft variance document, issued with Public Notice

## Attachment 2: Summary of proposed revisions to Oregon’s water quality variance rule, issued with Public Notice

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| DEQ Recommendation to EQC |

DEQ recommends that the Environmental Quality Commission:

* Adopt the proposed amendments to definition language within OAR 340-041-0002,
* Adopt the proposed amendments to the variance rule at OAR 340-041-0059, and
* Adopt the proposed amendments to OAR 340-041-0340 to adopt a Multiple Discharger Variance for methylmercury for NPDES-permitted dischargers in the Willamette Basin.

Proposed motion language for the commission:

*I move that the commission adopt the proposed rule amendments, as seen on pages 73 through 97 of the staff report for this item, as part of Chapter 340 Division 41 of the Oregon Administrative Rules to adopt a Multiple Discharger Variance for methylmercury for NPDES-permitted dischargers in the Willamette Basin.*

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| Overview |

**This overvierw summarizes information found in the subsequent sections of this report. Please see the individual sections for additional detail.**

**Short summary of proposed rule changes**

DEQ proposes the following changes to OAR 340, division 41:

* Amend state variance authorization rules (OAR 340-041-0059) to be consistent with federal variance rules and add clarity; and
* Establish a multiple discharger variance for methylmercury that applies to permitted dischargers in the Willamette Basin that would otherwise have unattainable permit limits for mercury. Implementing the multiple discharger variance would, over the duration of the variance, lead to reductions in mercury concentrations in wastewater discharges to waters of the Willamette Basin.

**Background of reasons for doing this rulemaking**

The federal government adopted variance regulations (40 C.F.R. §131.14) in 2015. DEQ last revised Oregon regulations regarding variances (OAR 340-041-0059) in 2011. DEQ is proposing amendments to the state’s general variance rules to make them consistent with the federal regulations and to provide clarity regarding DEQ’s and the commission’s requirements for granting variances.

## DEQ is proposing rule amendments that establish a multiple discharger variance for mercury in the Willamette Basin for individual NPDES permittees that cannot currently meet mercury water quality based effluent limits. This rule is needed because human-caused sources of mercury, primarily due to atmospheric deposition of global mercury as well as erosion of natural levels of mercury in Oregon soils, currently prevent attaining the human health water quality criterion for methylmercury. The purpose of the variance is to create a tool, as authorized under the Clean Water Act, that allows incremental progress in reducing mercury from dischargers in the Willamette Basin that have individual permits under the National Pollutant Discharge Elimination System.

**How this rulemaking addresses the reasons for doing the rulemaking**

The proposed rule includes language identical or similar to the federal variance rule and removes language that is inconsistent with the federal rule or unnecessary. The rules give DEQ’s director the authority to grant individual discharger variances and retain EQC’s authority to grant multiple discharger variances and waterbody variances through rulemaking. Finally, some amendments clarify or streamline the rule language.

The Willamette Mercury Multiple Dicharger Variance rule addresses the need to reduce loads of mercury from wastewater dischargers in the Willamette Basin while also facilitating DEQ’s ability to issue permits in a timely manner. It does so by modifying the water quality standard for methylmercury as it applies to permitted dischargers for 20 years. The rule does not modify the underlying water quality standard as it applies to other Clean Water Act programs. The rule requires dischargers permitted under the variance to develop and implement a mercury minimization program that will result in mercury reductions. In addition, it requires DEQ to establish effluent limits equal to what the discharger can currently achieve to prevent degradation. Implementing the rule requires DEQ to update these permit limits based on recent facility effluent data during renewal of any permit.

**Key policy and technical issues**

DEQ identified four key policy and technical issues in the proposed rule amendments.

***Consistency with federal regulations, clarity of roles and requirements***

DEQ has specified the roles in the rule language, retaining the director’s authority to issue individual variances and the commission’s authority to grant multiple discharger variances and waterbody variances through rulemaking. The previous rule did not discuss multiple discharger variances or waterbody variances.

***Determinging the Highest Attainable Condition***

The permitted sources covered under the variance contribute approximately one percent of the total load of mercury to the Willamette Basin. DEQ is proposing a Highest Attainable Condition, or goal, that requires each discharger to properly maintain and operate their current treatment system and to implement a mercury minimization program that includes specific elements listed in the variance. This approach is consistent with EPA guidance on implementing the methylmercury criterion. The EPA prefers source control over treatment for mercury so that mercury is not reintroduced to the environment. Moreover, data from Oregon and other states show that source reduction decreases mercury levels in effluent over time.

***Defining the level currently achievable***

The level currently achievable, or the mercury concentration each discharger can achieve in their effluent with currently installed treatment technology, will serve as the basis for effluent limits when the variance is implemented into permits. Mercury levels can vary in both the influent and the effluent. Therefore, the procedure to derive the level currently achievable for each facility is designed to account for this variability.

***Duration of the variance***

DEQ proposes that the variance last 20 years. In order to justify this term, DEQ shows that the human health criterion for methylmercury cannot be achieved during the proposed term. Based on information developed during the recent TMDL update, the waters of the Willamette Basin will not achieve levels needed to meet the fish-tissue based criterion in the next 20 years, or likely even longer. In order to ensure that the variance will result in mercury reductions from point sources, DEQ will re-evaluate the requirements of the variance every five years. DEQ must submit the re-evaluation to EPA to ensure that the variance remains the applicable water quality standard for the purpose of NPDES permits.

**Affected parties**

Parties this rulemaking affects include individual industrial and municipal NPDES permit holders in the Willamette Basin, tribes, environmental groups, and consumers of fish.

**Outreach efforts and public and stakeholder involvement**

DEQ held informational sessions with current NPDES permit holders, environmental groups and tribes at the beginning of this rulemaking to provide initial information regarding the rulemaking and why DEQ was moving forward with it.

DEQ convened the Willamette Basin Mercury Multiple Discharger Variance advisory committee. The committee included representatives from individual municipal and industrial dischargers, environmental groups, fishing groups, tribes, and nonpoint sources and met six times. The committee’s web page is located at: <https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rmercury2019.aspx>.

DEQ has also fielded questions from interested individuals and groups over the course of the rulemaking by email.

**Hearing testimony**

DEQ held a public hearing on this rulemaking Oct. 22, 2019, jointly in Portland, Eugene, and by phone. DEQ received one comment during the hearing, which was specific to suction dredge mining.

**Summary of significant public comments and responses**

**Comments on variance authorization rule**

DEQ received 46 separate comments from seven different commenters on proposed rule changes. Many of these comments requested clarifications, supported proposed changes, or asked for additional changes to ensure that these rules are consistent with federal rules that were adopted since DEQ last amended this rule. DEQ has incorporated many of these suggestions.

One commenter objected to removing a provision in the current language that prohibits DEQ from granting a variance if it would jeopardize the continued existence of species listed as threatened or endangered under the Endangered Species Act, or if it would result in unreasonable risk to human health. After considering the comment, DEQ still proposes to remove these provisions, for the following reasons:

1. The federal variance rule does not require these provisions.
2. EPA is required to perform an ESA-consultation for any variance to an aquatic life criterion. It makes sense for DEQ to rely on the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, which have the responsibility and expertise to conduct such ESA reviews, rather than attempt to conduct such a review itself.
3. The provision regarding “unreasonable risk” to human health is subjective and un-defined. Importantly, a variance is only allowable if it is not feasible to attain the water quality standard, but progress can be made toward attaining the standard. In addition, variance requirements must reflect the “highest attainable condition.” In other words, a permittee must do whatever is feasible to reduce pollutant levels. The variance is a tool to, over time, decrease risks to human health to the extent feasible, even though the underlying standard cannot feasibly be attained during the term of the variance.

DEQ received one comment from a member from the suction dredge mining community in Oregon asking for a variance to cover DEQ’s Suction Dredge Mining permit once the commission adopts a revised variance authorization rule. DEQ has responded that variances are only needed for dischargers that have effluent limits for mercury that cannot be attained. DEQ’s suction dredge mining permit does not contain a numeric effluent limit for mercury and, therefore, a variance is unnecessary.

**Comments on Willamette Basin Mercury Multiple Discharger Variance**

DEQ received approximately 35 comments on the proposed Willamette Basin Mercury Multiple Discharger Variance and associated supporting documents.

DEQ received a number of comments from EPA, including a request to provide additional support for the 20-year term of the variance and to document overall state efforts to reduce human caused sources of mercury, including nonpoint source controls. DEQ has addressed these comments in revisions to its supporting documentation and the proposed rules.

DEQ also received one comment suggesting that the proposed variance is a waterbody variance, not a discharger-specific variance, because DEQ included eligibility criteria for dischargers that wish to qualify for this variance. DEQ has clarified in response to this comment that it is proposing a multiple discharger variance to ensure DEQ has a means to issue permits to dischargers that cannot feasibly meet effluent limits based on the human health criterion for methylmercury. In order to address the comment, DEQ has included in the proposed rules the names of individual wastewater dischargers that the variance applies to, as well as additional individual wastewater dischargers that the variance will apply to if, during the duration of the variance, DEQ would otherwise need to include water quality based effluent limits in their permits that are not feasible to achieve.

DEQ received comments requesting that it modify documentation supporting the multiple discharger variance, which previously included a discussion of mercury levels attained by different types of treatment. DEQ has made such modifications, as there is no treatment that can attain effluent limits based on the water quality standard. Moreover, EPA guidance suggests that source control is the preferred method for reducing mercury from point sources, rather than end-of-pipe treatment.

DEQ received some comments regarding how the variance will be implemented in permits, including comments regarding required elements for a pollutant minimization plan. DEQ considered these comments and made some changes in response.

**Effects of this rulemaking on any fees**

This rulemaking does not involve fees.

**Brief summary of fiscal impact**

DEQ does not expect that the changes to the variance authorization rule will have any fiscal or economic impact, as these changes are ensuring that DEQ’s variance rules are consistent with federal rules. They do not otherwise change any corresponding effort needed for developing a variance, as this effort will be required in any case.

The primary impact of the proposed rule is to make the process of obtaining a variance for wastewater dischargers in the basin efficient. Without the multiple discharger variance in place, each individual discharger that would otherwise have unattainable water quality based effluent limits for mercury in their permit, would have to apply for an individual variance. The MDV creates efficiency because the justification and the highest attainable condition for each variance is similar across all permittees. Individual variances would be resource intensive for the permit holder, DEQ staff, and EPA, which must approve each individual variance. By developing an multiple discharger variance, DEQ may justify the need for the variance and obtain EPA approval one time. Obtaining coverage under the variance will still require some effort from both permit holders and DEQ staff, but it will require less overall effort than applying for individual variances.

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| Statement of Need |

**1. Variance Authorization Rule**

#### What need would the proposed rule address?

The proposed rule amendments ensure the state variance authorization rule is consistent with the more recently promulgated federal variance rule (2015). In addition, the amendments clarify the variance rules by retaining the authority to the Oregon Environmental Quality Commission (EQC) to grant multiple discharger and waterbody variances, which are not discussed in the existing rules.

#### How would the proposed rule address the need?

The proposed rule includes language identical or similar to the federal variance rule and removes language that is inconsistent with the federal rule or unnecessary. The rules would give the EQC the authority to grant multiple discharger and waterbody variances.

#### How will DEQ know the rule addressed the need?

DEQ will know the rule addressed the need if EPA approves the rule language.

**2. Multiple Discharger Variance for Mercury in the Willamette Basin**

#### What need would the proposed rule address?

The proposed rule will address the need to reduce loads of mercury from wastewater dischargers in the Willamette Basin while also facilitating DEQ’s ability to issue permits in a timely manner and provide permit requirements that are achievable if the facilities are well-operated.

#### How would the proposed rule address the need?

The MDV rule addresses this need by modifying the water quality standard for methylmercury as it applies to permitted dischargers for a limited duration. The rule does not modify the underlying water quality standard as it applies to other water quality programs. The rule requires dischargers permitted under the variance to develop and implement a mercury minimization plan that will result in mercury reductions. In addition, it requires DEQ to establish effluent limits equal to what the discharger can currently achieve to prevent degradation. The rule requires DEQ to update these permit limits based on recent facility data during renewal of any permit.

#### How will DEQ know the rule addressed the need?

DEQ will know the rule addresses the need if the agency is able to issue permits with variance-related requirements in a timely manner and with achievable permit limits. DEQ will also know that the rule addresses the need through a re-evaluation of the highest attainable condition, which must be conducted every five years in accordance with federal requirements and will allow DEQ to measure progress in reducing mercury from wastewater dischargers in the Willamette Basin. This analysis will include reviewing technology to determine if there are improvements that make mercury removal more feasible. The review also will entail analysis of mercury data from wastewater dischargers covered under the variance to determine if mercury levels have decreased. The public will have an opportunity to review and comment on this analysis before DEQ submits a final version to the U.S. Environmental Protection Agency (EPA).

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| Rules Affected, Authorities, Supporting Documents Rules affected, authorities, supporting documents |

#### Lead division

Water Quality

#### Program or activity

Standards and Assessment

#### Chapter 340 action

**Amend - OAR**

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| 340-041-0002 | 340-041-0059 | 340-041-0345 |  |  |
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### Statutory authority - ORS

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| 468.020 | 468B.010 | 468B.015 | 468B.020 | 468B.030 |
| 468B.035 | 468B.048 | 468B.110 |  |  |

### Statutes implemented – ORS

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| 468B.035 | 468B.048 |  |  |  |
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### Documents relied on for rulemaking

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| Document title | Document location |
| EPA Methylmercury Criteria documents. | <https://www.epa.gov/wqc/human-health-criteria-methylmercury> |
| Oregon DEQ. Draft Willamette Basin Mercury TMDL. 2019. | <https://www.oregon.gov/deq/wq/tmdls/Pages/willhgtmdlac2018.aspx> |
| Tetra Tech, 2019. Mercury TMDL Development for the Willamette River Basin (Oregon) – Technical Support Document (Public Review Draft). Prepared for Oregon Department of Environmental Quality and U.S. EPA Region 10. 162 pp. | <https://www.oregon.gov/deq/FilterDocs/wbmtmdl042019mm.pdf> |
| Oregon DEQ. Statewide Aquatic Tissue Toxics Assessment Report. 2017. | <http://www.oregon.gov/deq/FilterDocs/wqmtissueaq.pdf> |
| U.S. Environmental Protection Agency. 2010. Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion. Office of Science and Technology. Washington, DC. EPA 823-R-10-001. 221 pp. | <https://www.epa.gov/wqc/guidance-implementing-january-2001-methylmercury-water-quality-criterion> |
| U.S. EPA. 2007. Treatment Technologies for Mercury in Soil, Waste, and Water. Office of Superfund Remediation and Technology Innovation. | <https://clu-in.org/download/remed/542r07003.pdf> |
| U.S. Environmental Protection Agency. 2008. Municipal Nutrient Removal Technologies Reference Document. Office of Wastewater Management, Municipal Support Division, Municipal Technology Branch. EPA 832-R-08-006. 449 pp. | <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100GE8B.TXT> |
| U.S. Environmental Protection Agency. 2014. *Water Quality Standards Handbook, Chapter 5: General Policies*. Office of Water. EPA 820-B-14-004. | <https://www.epa.gov/sites/production/files/2014-09/documents/handbook-chapter5.pdf> |
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| Mercury Deposition Network studies | <http://nadp.slh.wisc.edu/mdn/> |
| California EPA, Regional Water Quality Control Board, Central Valley Region. 2010. Staff Report: A Review of Methylmercury and Inorganic Mercury Discharges from NPDES Facilities in California’s Central Valley. | <https://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/delta_hg/other_technical_reports/npdes_mehg_final_rpt.pdf> |
| Mercury effluent data from pre-treatment wastewater treatment plants in Oregon | DEQ Offices |
| Ohio Environmental Protection Agency. 1997. Assessing the Economic Impacts of the Proposed Ohio EPA Water Rules on the Economy. | <https://dnr.wi.gov/topic/wastewater/documents/OhioEPAstudy.pdf> |
| Treatment Technology Review and Assessment, Association of Washington Businesses, HDR, Dec. 2013. | <https://www.awb.org/file_viewer.php?id=2903> |
| Michigan Department of Environmental Quality. 2015. Mercury Multiple Discharge Variance Document. | <https://www.michigan.gov/documents/deq/wrd-npdes-rules-MercuryVariance2015_2019_508884_7.pdf> |
| Urgun-Demirtas et al. 2013. Achieving the Great Lakes Initiative Mercury Limits in Oil Refinery Effluent. Water Environment Research 85(1): 77-86. | DEQ Offices |
| Hollerman, et al. 1999. Results from the low level mercury sorbent test at the Oak Ridge Y-12 Plant in Tennessee. Journal of Hazardous Materials B68:193-203. | DEQ Offices |
| Wisconsin NPDES discharger mercury analysis | DEQ Offices |
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| Electric Power Research Institute and Water Research Foundation. 2013. Electricity Use and Management in the Municipal Water Supply and Wastewater Industries. | <http://www.allianceforwaterefficiency.org/WorkArea/DownloadAsset.aspx?id=8695> |
| AECOM. 2015. Chloride Compliance Study Nine Springs Wastewater Treatment Plant Final Report | <https://www.madsewer.org/Portals/0/ProgramInitiatives/ChlorideReduction/MMSD%20Chloride%20Compliance%20Study%20Report%20-%20Final%206-19-15bookmarks.pdf> |
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| Fee Analysis |

This rulemaking does not involve fees.

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| **Statement of Fiscal and Economic Impact** |

## Fiscal and Economic Impact

DEQ does not expect that the changes to the variance authorization rule will have any fiscal or economic impact, as these changes are simply ensuring that DEQ’s variance rules are consistent with federal rules. They do not otherwise change any corresponding effort needed for developing a variance, as this effort will be required in any case.

The primary impact of the proposed rules is to make the process of obtaining a variance for wastewater dischargers in the basin efficient. Without the MDV, each individual discharger that would otherwise have unattainable water quality based effluent limits for mercury would have to apply for an individual variance, even though the justification for each variance is similar across all permittees. Individual variances would be resource intensive for the permit holder, DEQ staff, and the EPA, which must approve each individual variance. By developing an MDV, DEQ only has to justify the need for the variance and obtain EPA approval one time. Obtaining coverage under the variance will still require some effort from both permit holders and DEQ staff, but it will require less effort than applying for individual variances.

These rules could affect facilities with National Pollutant Discharge Elimination System permits to discharge wastewater into the Willamette Basin. The rules also could affect holders of minor NPDES permits in industries that have the potential to discharge mercury. At this time, DEQ has identified a total of 23 major municipal NPDES dischargers and no more than eight industrial wastewater dischargers that these rules could affect. These numbers could change as communities grow larger and some minor municipal NPDES dischargers expand their flow volumes to become major dischargers.

The proposed rules will affect DEQ staff, particularly permitting staff, who will be responsible for including variance requirements into the permit of any discharger wishing to be covered under the MDV. However, this would also be the case if permittees pursued individual variances in this rule’s absence. The proposed rules also will require a re-evaluation of the highest attainable condition every five years, consistent with federal variance regulations. This re-evaluation will require effort from both water quality standards staff and permitting staff. Without the proposed rules, DEQ would have to do a re-evaluation of the Highest Attainable Condition for each individual permittee obtaining a variance, assuming the variance lasted longer than a permit cycle. If the variance only lasted a permit cycle, DEQ staff would have to work with the permittee to reapply for the variance every five years. This would likely be even more burdensome and happen as each permit is renewed. Therefore, the proposed rules will likely save effort from DEQ staff overall.

## Statement of Cost of Compliance

DEQ expects the cost of compliance with these rules to be the same as the same as the cost of compliance were these rules not adopted. Without the rules in place, each facility that could not meet water quality based effluent limits for mercury would need to apply for an individual variance. Permit limits for mercury will be the same, whether done through individual variances or an MDV, as DEQ expects it would use the same methodology to calculate these limits in either instance. Moreover, required sampling would be the same whether under individual variances or an MDV.

State agencies

### DEQ

*Direct Impacts*

The proposed rules will require additional effort for DEQ permitting staff to ensure that permittees have provided all required documentation needed for coverage under the MDV and to incorporate variance-related permit requirements into the permit. DEQ is already developing permitting tools for individual mercury variances. Once DEQ finalizes these tools, such work should require no more than a few hours to calculate the basis for permit limits.

However, without the MDV rules in place, permittees would have to apply for individual variances. Individual variances would also require additional staff time because the justification for the variance would need to be made for each facility. As a result, the proposed rules will result in less time per permit than not having the rules in place.

The proposed rules will require DEQ staff to conduct a review of the highest attainable condition under the variance every five years. However, DEQ would either have to do an HAC re-evaluation for each facility for individual variances, or only issue individual variances for five years. In either case, the HAC would have to be re-evaluated for each facility. Thus, HAC re-evaluation is more efficient under an MDV than using individual variances.

*Indirect Impacts*

DEQ does not expect indirect impacts from the proposed rules.

### Local governments

*Direct Impacts*

The proposed rules will have a positive impact on local government, as compared to not having the rules in place. The proposed rules will ensure that local governments operating wastewater treatment plants that discharge effluent into waters of the Willamette Basin have a means for complying with effluent limits for mercury. Without the MDV available, local governments would have to apply for individual variances, which can be a lengthy process, and require each government to justify the variance under federal and state rules. The MDV would save the extra effort needed to justify each individual variance and wait for approval for the variance from EPA. DEQ cannot quantify exactly how much effort the MDV will save as compared to an individual variance, as that would likely vary for each facility.

*Indirect Impacts*

DEQ does not anticipate indirect impacts from the proposed rules.

### Public

*Direct Impacts*

DEQ does not expect direct impacts to the public from the rules.

*Indirect Impacts*

The public will benefit indirectly from the proposed rules. The proposed rules will likely save local government additional effort needed to apply for individual variances. This will potentially have a small impact on the cost associated with applying for a variance. Such an impact will likely be small.

### Large businesses - businesses with more than 50 employees

*Direct Impacts*

Impacts to large businesses will be similar to that of local governments. The proposed rules will ensure that any large businesses that discharge wastewater into waters of the Willamette Basin have a means for complying with effluent limits for mercury. Without the MDV available, large businesses would have to apply for individual variances, which can be a lengthy process. The MDV would save extra effort needed to justify each individual variance and wait for approval for the variance from EPA. DEQ cannot quantify exactly how much effort the MDV will save as compared to an individual variance, as that will likely vary for each facility.

*Indirect Impacts*

DEQ does not expect indirect impacts to large businesses.

### Small businesses – businesses with 50 or fewer employees

*Direct Impacts*

To the extent that there are any small businesses that would be covered under the MDV, impacts to small businesses will be similar to that of large governments. The proposed rules will ensure that any large businesses that discharge wastewater into waters of the Willamette Basin have a means for complying with effluent limits for mercury. Without the MDV available, small businesses would have to apply for individual variances, which can be a lengthy process. The MDV would save extra effort needed to justify each individual variance and wait for approval for the variance from EPA. DEQ cannot quantify exactly how much effort the MDV will save as compared to an individual variance, as that will likely vary for each facility.

*Indirect Impacts*

DEQ does not expect indirect impacts to small businesses.

#### Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule.

The rule could impact small businesses from the following industries and which have permits to discharge wastewater to the Willamette River.

* Timber products;
* Paper products;
* Chemical products;
* Glass/clay/cement/concrete/gypsum products;
* Primary metal industries;
* Fabricated metal products; and
* Electronics and instruments.

There are currently no more than 20 businesses the proposed rules could affect. It is likely fewer as many of these likely would not otherwise have water quality based effluent limits for mercury. Four of these are small businesses based on 2015 Oregon Employment Department data.

#### **b. Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule**.

No additional resources are required for compliance with the proposed rules. All small businesses that would receive coverage under the MDV would otherwise need to comply with similar rules for individual variances.

#### c. Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule.

No additional resources are required for compliance with the proposed rules. All small businesses who would receive coverage under the MDV would otherwise need to comply with similar rules for individual variances.

#### d. Describe how DEQ involved small businesses in developing this proposed rule.

DEQ included small business representatives on the Willamette Basin Mercury Multiple Discharger Variance Advisory Committee that reviewed the fiscal impact statement. This included representatives of the Oregon Business and Industry and the Oregon Association of Nurseries. DEQ also provided rulemaking notice to any small business signed up for water quality standards rulemaking notices.

## Housing Cost

As ORS 183.534 requires, DEQ evaluated whether the proposed rules would have an effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached, single-family dwelling on that parcel. DEQ determined the proposed rules would have no effect on the development costs because these rules do not apply to developers or any materials related to housing construction.

## Documents relied on for fiscal and economic impact

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| Document title | Document location |
| Oregon Department of Employment  2015 data | Employment Department  875 Union Street NE  Salem OR 97311 |

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| Federal Relationship |

### Relationship to federal requirements

ORS 183.332, 468A.327 and OAR 340-011-0029 require DEQ to attempt to adopt rules that correspond with existing equivalent federal laws and rules unless there are reasons not to do so.

The proposed rules would adopt federal requirements for variances that are found at 40 C.F.R. §131.14 and requirements related to public hearings at 40 C.F.R. Part 25. The proposed rules adopt procedures for a multiple discharger variance that are consistent with federal requirements.

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| Land Use |

### Land-use considerations

In adopting new or amended rules, ORS 197.180 and OAR 340-018-0070 require DEQ to determine whether the proposed rules significantly affect land use. If so, DEQ must explain how the proposed rules comply with state wide land use planning goals and local acknowledged comprehensive plans.

Under OAR 660-030-0005 and OAR 340 Division 18, DEQ considers that rules affect land use if:

* The statewide land use planning goals specifically refer to the rule or program, or
* The rule or program is reasonably expected to have significant effects on:
* Resources, objectives or areas identified in the statewide planning goals, or
* Present or future land uses identified in acknowledged comprehensive plans

To determine whether the proposed rules involve programs or actions that affect land use, DEQ reviewed its Statewide Agency Coordination plan, which describes the DEQ programs that have been determined to significantly affect land use. DEQ considers that its programs specifically relate to the following statewide goals:

|  |  |
| --- | --- |
| Goal | Title |
| 5 | Open Spaces, Scenic and Historic Areas, and Natural Resources |
| 6 | Air, Water and Land Resources Quality |
| 11 | Public Facilities and Services |
| 16 | Estuarial Resources |
| 19 | Ocean Resources |

Statewide goals also specifically reference the following DEQ programs:

* Nonpoint source discharge water quality program – Goal 16
* Water quality and sewage disposal systems – Goal 16
* Water quality permits and oil spill regulations – Goal 19

### Determination

DEQ determined that these proposed rules do not affectland use under OAR 340-018-0030 or DEQ’s State Agency Coordination Program.

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| Advisory Committee |

### Advisory committee

DEQ appointed an advisory committee for this rulemaking.

As ORS 183.333 requires, DEQ asked for the committee’s recommendations on:

* Whether the proposed rules would have a fiscal impact,
* The extent of the impact, and
* Whether the proposed rules would have a significant adverse impact on small businesses; if so, then how DEQ can comply with ORS 183.540 reduce that impact.

The committee reviewed the draft fiscal and economic impact statement and documented its recommendations in approved meeting summary and supplemental materials for the June 3, 2019 meeting, available at the following website: <https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rmercury2019.aspx>.

The committee provided minor corrections to the fiscal impact statement but did not find that there would be a significant adverse impact on small business. One advisory committee member expressed concern about increased cost of sampling under the proposed rule. DEQ clarified that these costs would be incurred whether or not the proposed rule was in place.

### Background

DEQ convened the Willamette Basin Mercury Multiple Discharger Variance advisory committee. The committee included representatives from individual municipal and industrial dischargers, environmental groups, fishing groups, Tribes, and nonpoint sources and met six times. The committee’s web page is located at: <https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rmercury2019.aspx>.

The committee members were:

|  |  |
| --- | --- |
| Willamette Basin Mercury MDV Rulemaking Advisory Committee | |
| **Name** | **Representing** |
| Stephanie Eisner | Association of Clean Water Agencies (Meetings 1-2) |
| Chandra Ferrari | Trout Unlimited |
| Raj Kapur | Association of Clean Water Agencies (Alternate) |
| Michael Karnosh | Confederated Tribes of Grand Ronde |
| Allison Laplante | Earthrise Law Center |
| Todd Miller | Association of Clean Water Agencies (Meetings 3-6) |
| Sharla Moffett | Oregon Business and Industry |
| Donna Schmitz | Benton County Soil and Water Conservation District |
| Jeff Stone | Oregon Association of Nurseries |
| Kathryn VanNatta | Northwest Pulp and Paper Association |

### Meeting notifications

To notify people about the advisory committee’s activities, DEQ:

* Sent GovDelivery bulletins, a free e-mail subscription service, to the following lists:
* Rulemaking
* Water Quality Standards
* Added advisory committee announcements to DEQ’s calendar of public meetings at [DEQ Calendar](http://www.oregon.gov/deq/Get-Involved/Pages/Calendar.aspx).

### Committee discussions

In addition to the recommendations described under the Statement of Fiscal and Economic Impact section above, the committee provided input on: 1.) the justification for the variance; 2.) variance requirements, including the term of the variance, the expression of the highest attainable condition and the HAC re-evaluation process; and 3.) variance application procedures and how DEQ will incorporate permit conditions based on the variance. The advisory committee also provided input on proposed amendments to the variance authorization rule and the rule establishing the multiple discharger variance for mercury in the Willamette Basin. Supporting materials and summaries of committee discussions are documented on the committee’s webpage at: <https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rmercury2019.aspx>.

### EQC prior involvement

DEQ shared information about this rulemaking with the EQC through informational items on the Nov. 16, 2018, and Jan. 25, 2019, EQC agendas.

## Public Notice

DEQ provided notice of the proposed rulemaking and hearing by:

* Filing notice with the Secretary of State for publication in the October, 2019, Oregon Bulletin
* Posting notice on the DEQ rulemaking web page:
* Emailing interested parties through GovDelivery to the following subscriber lists:
  + Rulemaking
  + Water Quality Standards
* Emailing the following key legislators:
* Senator Michael Dembrow, Chair, Senate Interim Committee on Environment and National Resources
* Senator Alan Olsen, Vice-Chair, Senate Interim Committee on Environment and National Resources
* Beth Patrino, LPRO Analysis, Senate Interim Committee on Environment and National Resources
* Representative Karin Power, Chair, House Interim Committee on Energy and Environment
* Representative E. Werner Reschke, Vice-Chair, House Interim Committee on Energy and Environment
* Representative Janeen Sollman, Vice-Chair, House Interim Committee on Energy and Environment
* Representative Ken Helm, Chair, House Interim Committee on Water
* Representative Gary Leif, Vice-Chair, House Interim Committee on Water
* Representative Jeff Reardon, Vice-Chair, House Interim Committee on Water
* Misty Freeman, LPRO Analyst, House Interim Committee on Energy and Environment and House Interim Committee on Water

## Request for other options

During the public comment period, DEQ requested public comment on whether to consider other options for achieving the rules’ substantive goals while reducing the rules’ negative economic impact on business. This document includes a summary of comments and DEQ responses.

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| Public Hearings |

## Public hearings

DEQ heldone a public hearing Oct. 22, 2019, in Portland, Eugene, and via phone. DEQ received one comment at the hearing. Later sections of this document include a summary of the comments received during the open public comment period, DEQ’s responses, and a list of the commenters. Original comments are on file with DEQ.

## Presiding Officer’s Record

### Hearing 1 – Portland, Eugene, and teleconference

Oct. 22, 2019

700 NE Multnomah Street, Portland, Oregon 97232

Place: Portland: 700 NE Multnomah Street, Suite 600, Portland Oregon 97232, Floor 3 Conference Room and Eugene: 165 E. Seventh Avenue, Eugene, Oregon 97401, Willamette Conference Room (Room 100)

Start Time: 4:40 PM

Ending Time: 4:47 PM

Presiding Officer: Michele Martin

The presiding officer convened the hearing, summarized procedures for the hearing, and explained that DEQ was recording the hearing. The presiding officer asked people who wanted to present verbal comments to sign the registration list, or if attending by phone, to indicate their intent to present comments. The presiding officer advised all attending parties interested in receiving future information about the rulemaking to sign up for GovDelivery email notices.

As Oregon Administrative Rule 137-001-0030 requires, the presiding officer summarized the content of the rulemaking notice.

Seven people attended the hearing in person in Portland, three people attended the hearing in person in Eugene, and three people attended by teleconference or webinar. One person commented orally and no one submitted written comments at the hearing.

## Public comment period

## DEQ accepted public comment on the proposed rulemaking from Sept. 16, 2019, until 4 p.m. on Nov. 4, 2019.

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| Summary of comments and DEQ responses |

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For public comments received by the close of the public comment period, the following table organizes comments into seven categories with cross references to the commenter number. DEQ’s response follows the summary. Original comments are on file with DEQ.

DEQ changed the proposed rules in response to comments described in the response sections below.

| **List of Comments** | | |
| --- | --- | --- |
| **Comment #** | **Comment Summary** | **Commenter Numbers** |
| **General Comments** | | |
|  | NWPPA requests that ODEQ provide written confirmation that the multi-discharger variance is proposed under 40 CFR 131.14(b)(ii)(A) for discharger specific variances and not as a variance applicable to a waterbody or waterbody segment under 40 CFR 131.14(b)(ii)(B) so it’s not necessary for the variance to include identification and documentation of nonpoint source controls. The variance appropriately includes nonpoint source controls as elements that could be considered in mercury minimization plans under OAR-041-0345(6)(f) and (g). | #7 |
|  | DEQ refers to the variance as a multiple discharge or variance when EPA regulations clearly refer to this type of variance as a water body or water body segment variance. As a result, DEQ needs to identify and document “any cost-effective and reasonable best management practices for nonpoint source controls that could be implemented to make progress toward attaining the underlying designated use and criterion.” | #3 |
|  | NWPPA supports the basis of the variance to achieve the highest attainable condition determined by the level currently achievable and implementation of a mercury minimization plan through the term of the variance. | #7 |
|  | NWPPA requests that ODEQ provide written confirmation that during the term of the variance for a discharger, the terms of the variance – achieving the highest attainable condition and implementation of a mercury minimization plan – are controlling in terms of NPDES permit conditions over underlying water quality standards and TMDL waste load allocations. | #7 |
|  | When DEQ amends state variance authorization rules to be consistent with federal variance rules and EPA approves it for NPDES permit holders; I am requesting an individual variance or MDV from DEQ to operate my suction dredge as a minor 700 NPDES permit discharger for the Willamette Basin Mercury TMDL. | #2 |
|  | NWPPA supports attainable state-developed human health water quality standards that improve water quality, protect human health and provide for vibrant economies. NWPPA does not support unattainable or unachievable water quality standards that lead to regulatory uncertainty, water permitting delays, potential job loss and degraded local communities. | #7 |
|  | NWPPA has consistently advocated for and supported “implementation tools” for facilities holding National Pollution Discharge Elimination System water permits – issued under the federal Clean Water Act for compliance with the federally delegated water quality permitting program – if water quality standards are unattainable or unachievable. | #7 |
|  | NWPPA supports the intent of ODEQ’s variance authorization rule and the Willamette Basin mercury multi-discharger variance rule as “implementation tools” to provide a compliance pathway for point source dischargers; however, NWPPA strongly believes that a variance is not a *one-size-fits-all* solution removing all regulatory uncertainty from the NPDES permitting program during DEQ’s proposed 20-year timeframe for the Willamette Basin mercury MDV. | #7 |
|  | NWPPA supports the scientific foundation of the Willamette Basin mercury multi-discharger variance in ODEQ’s Willamette Mercury TMDL supporting documents, that in-stream mercury pollution comes from a variety of sources with a majority of the mercury load contributions from air deposition sources outside the Willamette Basin and that the science of mercury methylation is still evolving. | #7 |
|  | NWPPA would prefer attainable water quality standards that remove the uncertainty of not being able to comply with ultra-low water quality standards and the risk of the unintended consequence of threatening current facility operations and jobs -- including water permit delays, unknown compliance paths, potential litigation and extreme high costs for water treatment using unproven technologies. | #7 |
|  | NWPPA supports the July 2019 draft Willamette River Mercury TMDL pollution prevention and minimization approach, similar to other mercury TMDLs across the nation, to comply with Oregon’s exceptionally stringent methylmercury fish tissue water quality criterion of 0.040 mg/kg (wet weight). | #7 |
|  | NWPPA believes that the draft Mercury TMDL’s conservative policy decisions and modeling assumptions, combined with an aggressive approach to pollutant prevention and minimization result in a TMDL that is very highly protective of the most sensitive beneficial use of fish consumption in addition to being highly protective of all other designated beneficial uses of waters in the Willamette Basin. | #7 |
|  | 20 year justification  Support documents should provide clear and detailed rationale for 20-year term for all dischargers. | #5 |
|  | NWPPA believes the 10 percent aggregate reduction of total mercury for all point source water permit holders is appropriate given that: 1) industrial point sources in the Willamette Basin provide 0.3 percent of the total load for mercury to the Willamette; 2) all permitted point source dischargers (NPDES and stormwater) comprise approximately 4 percent of the total mercury load; 3) the applicable water quality criterion is a methylmercury fish tissue criterion and thus the contribution of point source total mercury loads to methylmercury concentrations is fish is uncertain; and, 4) scientific knowledge of the Willamette Basin methylation processes are still evolving | #7 |
|  | NWPPA notes that a well-documented and highly-conservative approach led to the instream water column target of 0.14 ng/L total mercury but that the target is exceptionally stringent and will take 20 or more years to achieve given the current levels of total instream mercury in the Willamette Basin | #7 |
|  | NWPPA believes the TMDL Mercury load reduction efforts should be common sense minimization efforts similar to other TMDLs across the nation to the extent practicable given that the majority of mercury loading comes from air deposition and -- if required – NWPPA believes that a multi-discharger variance rule for the Willamette Basin is an appropriate alternative compliance path. | #7 |
|  | NWPPA believes that Oregon Revised Statute 468B.037 to 468B.038, regarding ODEQ’s issuance of variances requiring that applicants be consulted and that negative economic impacts be minimized should be the basic tenant of ODEQ’s work to develop, issue, implement and review all variances. | #7 |
|  | NWEA recommends that DEQ establish the close of business or midnight for the close of comment periods. | #3 |
| **Draft Amendments to Definitions Rule** | | |
|  | The definition for a variance omits the fact that the underlying designated use and criterion addressed by the variance remain in effect. | #3 |
| **Draft Amendments to Variance Rule** | | |
|  | I understand the change to essentially make Oregon’s mercury variance process more lenient, in order to make Oregon’s process consistent with federal regulations. I strongly disagree with loosening environmental regulations that limit human and environmental exposure to neurotoxins such as mercury. | #1 |
|  | 340-041-0059  NWPPA supports the concept of the variance water quality standard “implementation tool” in OAR 340-041-0059 and believes the proposal is correctly based on the requirements of 40 CFR §131.14 and EPA guidance | #7 |
|  | 340-041-0059  DEQ has removed the clear federal requirement to name the dischargers in a discharger-specific variance while omitting the requirement to identify nonpoint source controls. | #3 |
|  | 340-041-0059(1)  It would be helpful if the variance rule were to specify where multiple discharger and waterbody variances should be memorialized. It would make sense to add waterbody variances to the basin-specific water quality standards; perhaps individual and multiple discharger variances should be assigned their own section within Division 41. This may also avoid confusion between multiple discharger and waterbody variances. | #8 |
|  | 340-041-0059(1)  Delete “all qualified facilities that discharge to” from Applicability  A waterbody variance applies to the waterbody or waterbody segment where all point and non-point source dischargers are evaluated | #5 |
|  | 340-041-0059(1)(b)  The removal of language that prohibits DEQ or the commission from issuing a variance if it 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 is an error in policy and law. | #3 |
|  | 340-041-0059(1)(b)  It is factually incorrect that removal of this language as well as removal of language pertaining to unreasonable risks to human health is justified because “any discharger still has to comply with technology based limits irrespective of whether there is a variance.“  DEQ’s rationale for removing the language pertaining to unreasonable risks to human health is disingenuous. The justification states that, “variances are intended to reduce pollutant loads over time, decreasing any potential risk to human health. The variance DEQ is proposing is not intended to reduce pollutant loads over time in any meaningful way. | #3 |
|  | 340-041-0059(2)  In the section on conditions to grant a variance, DEQ omits the requirements of 40 CFR section 131.10(g) which refers to unchanged requirements in 131.10(h)(1) regarding existing uses. Including this language would make clear to readers of the rule that existing uses must be factored into the determination of what the highest attainable interim use is when a variance is adopted. | #3 |
|  | 340-041-0059(2)  DEQ has not put in its rules any method of ensuring that data are available to make the determination that a variance will not result in a lowering of the currently attained ambient water quality. | #3 |
|  | 340-041-0059(3)  Propose language “DEQ will identify the specific re-evaluation frequency and how it will obtain public input on the reevaluation in each variance” | #5 |
|  | 40-041-0059(3)  NWPPA supports the proposed changes to the “Duration and Re-evaluation” of a variance in OAR 340-041-0059(3) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV. | #7 |
|  | 340-041-0059(3)(a)  The provisions regarding the variance duration and the process for re-evaluation should be placed in separate sections for clarity.  Moreover, DEQ should adopt the federal language regarding HACs and the term of variances, and change the term “achieve” to “apply.” | #8 |
|  | 340-041-0059(3)(a)  The time frames in this section of the rule should be clearer.  Suggest clarifying: “For variance durations exceeding 5 years, DEQ will re­evaluate highest attainable condition on a frequency of less than 5 years, as specified by DEQ. Re­evaluation shall be based on all existing and readily available information. The re-evaluation frequency shall be set to allow for DEQ 's timely submittal of the re-evaluation to EPA/or EPA approval within 30 days of submittal.”  ACWA is concerned with this part of the proposed rule: "If DEQ does not submit the re-evaluation to EPA within the specified timeline, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA." How are permittees protected against having an unforeseen and unattainable water quality standard in lieu of the variance? Does the variance apply in an NPDES permit until time of permit renewal? ACW A recommends clarification in the rule on this issue. | #4 |
|  | DEQ has put no provision requiring permit is to gather information that is needed to reevaluate the highest attainable condition at least every five years. | #3 |
|  | 340-041-0059(3)(b)  Suggest DEQ clarify when they would suggest a facility use a variance rather than a compliance schedule | #8 |
|  | 340-041-0059 (3)(b)  ACWA suggests revising the language to read: "For variances issued prior to renewal of a NPDES permit, either the permittee must comply with the specified effluent limitation sufficient to meet the underlying water quality standard when the variance expires, or a compliance schedule shall be adopted in the permit at renewal to specify when the permittee will comply with the effluent limitation." | #4 |
|  | 340-041-0059 (3)(b)  We support the clarity of DEQ’s having permits include the date to the interim absolute limit will expire corresponding to the variance expiration date. | #3 |
|  | 340-041-0059 (3)(c)  The proposed language will result in variances that are less than clear because it will only specify the duration of the variance not its effective date or its expiration date. | #3 |
|  | 340-041-0059 (3)(c)  We support the removal of the language which allowed variances to be set out in NPDES permits. | #3 |
|  | 340-041-0059(4)  NWPPA supports the proposed changes to the “Variance Submittal Requirements” in OAR 340-041-0059(4) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV. | #7 |
|  | 340-041-0059 (4)(a)  It is unclear how an individual variance in a place to a “permittee” in (4)(a) can apply to “dischargers“ plural in, in nearly all cases, “water bodies“ plural in (a)(A). | #3 |
|  | 340-041-0059 (4)(a)  DEQ should include in this rule, or commit to establishing guidance, on what constitutes sufficiency for purposes of rule (4)(a)(D). | #3 |
|  | 340-041-0059 (4)(a)  DEQ provides no guidance in its proposed rules on the content of a pollutant minimization plan. DEQ should require municipal sewage treatment programs to improve their pre-treatment programs that regulate indirect discharges to their collection systems or to establish a pre-treatment program where none exists. | #3 |
|  | 340-041-0059 (4)(b)  The language in (4)(b) is inconsistent with federal regulations. | #3 |
|  | The language in (4)(c) is incorrect in that it requires dischargers to submit information to DEQ regarding nonpoint source controls that DEQ should submit to EPA. | #3 |
|  | 340-041-0059 (4)(c)  ACWA recommends the rule define that the scope is nonpoint sources “within the permittee’s control” to clarify action permittees required to take | #4 |
|  | OAR 340-041-0059(5)  NWPPA supports the proposed changes to the “Highest Attainable Condition” in OAR 340-041-0059(5) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV | #7 |
|  | OAR 340-041-0059(5)  The language in (5) should note that the highest attainable condition include “the highest attainable condition later identified during any reevaluation, whichever is most stringent.” | #3 |
|  | OAR 340-041-0059(5)  This section also should state that the highest attainable condition is required to be a quantifiable expression. | #3 |
|  | OAR 340-041-0059(5)(b)(B)  The language in (5)(b)(B) should note that DEQ is responsible for adopting its own pollutant minimization plan as required for water body variances. | #3 |
|  | OAR 340-041-0059(6)  NWPPA supports the proposed changes to the “Variance Permit Conditions” in OAR 340-041-0059(6) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV | #7 |
|  | 340-041-0059(6)  Item (b) requires the permit to include a requirement to implement any pollutant reduction actions approved as part of a pollutant minimization plan "adopted in the applicable variance."  A PMP is not adopted in a variance so it would be better to express this permit element as requiring incorporation of the PMP into the permit by reference, or requiring compliance with the PMP developed in compliance with the variance. | #8 |
|  | 340-041-0059(6)  The language in section 6 should make clear that the responsibility for identifying and documenting BMPs for non-point sources is DEQ’s. | #3 |
|  | 340-041-0059(6)  The rule should also make clear that where a permittee does have control over nonpoint sources, the pollutant minimization plan must demonstrate conformity with the BMPs identified by DEQ that are a part of a water body variance. | #3 |
|  | 340-041-0059(6)  DEQ should include a guidance on how it will determine which of provisions for the Highest Attainable Condition will apply. The proposed rule does not describe what DEQ will do with regard to permits if DEQ determines that additional feasible pollutant control technologies are available. | #3 |
|  | 340-041-0059(6)  The proposed rule in section (6)(a) links section (5)(a)(B) which is an effluent condition, to a permit condition but does not link any highest attainable interim criterion identified in (5)(a)(A) to any permit condition. The rule also fails to address the necessary variance permit conditions associated with the adoption of any water body variance. | #3 |
|  | 340-041-0059(6)  The proposed rule in section (6)(c) should read “any monitoring and public reporting necessary to ensure compliance with the conditions of the variance.” | #3 |
|  | 340-041-0059(6)  The annual report required in section (6)(d) should identify any activities in a dischargers plan that were permit conditions that were not completed. | #3 |
|  | 340-041-0059(6)  DEQ should commit in this rule to publishing on its website all annual reports submitted by permittees covered under variances. | #3 |
|  | 340-041-0059(7)  DEQ has left out of it public notification section, its obligation to provide for public notice and comment on any documentation of cost-effective and reasonable BMPs for non-point sources that are required supporting documentation for a water body variance. | #3 |
|  | 340-041-0059(7)  The title of section 7 should refer to public input as well as public notification. | #3 |
|  | 340-041-0059(7)  DEQ should Add language to this section to address requirement for how DEQ intends to obtain public input on re-evaluations or reference language if added to OAR 340-041-0059(3) | #5, #3 |
|  | 340-041-0059(7)  The items to be included in the published list in (b) includes "discharger," but not "facility." Since a discharger may own or operate multiple facilities, the items to be included should include facility names. | #8 |
|  | 340-041-0059(7)  Recommends stating where the published list of all approved variances can be found | #5 |
|  | 340-041-0059(8)  "Willamette Basin" should be spelled out. | #8 |
|  | DEQ should include a provision that states, “any subsequent water quality standards variance for a water body or water body segment must include documentation of whether and to what extent best management practices for nonpoint source controls were implemented.” | #3 |
| **Draft Rule Establishing Willamette Basin Multiple Discharger Variance** | | |
|  | 340-041-0345(6)  Since different requirements apply, the rule should clearly state whether the Multiple Discharger Variance for Mercury is a multiple discharger variance or a water body variance.  The lead paragraph to this section should refer to the "fish tissue-based human health criterion for methylmercury." | #8, #4 |
|  | 340-041-0345(6)(a)  The language in section 6A should note that the commission is issuing the findings rather than DEQ. | #3 |
|  | 340-041-0345(6)(a)  DEQ’s finding that “the fishing use and associated human health criterion for mercury cannot be obtained in the waters of the women basin in the next 20 years” is flawed. Without nonpoint source controls, the underline uses and criteria will never be met. | #3 |
|  | DEQ’s finding that mercury sources cannot be remedied is flawed because DEQ has not evaluated whether it can use the state’s non-point source authority to remedy the erosion of native soils such that the use and criterion can be met. | #3 |
|  | 340-041-0345(6)(a)  DEQ should include the required finding in 340-041-0345(6)(a) to be consistent with 340-041-0059(2)(a) . | #8 |
|  | 340-041-0345(6)(a)  comparison between potential interim measures (treatment vs. source control) does not belong in findings supporting a variance | #8 |
|  | 340-041-0345(6)(a)  Recommend clarifying that “erosion of native soils” in many cases, can be controlled by the state and is included in the draft TMDL | #5 |
|  | 340-041-0345(6)(a)(A)  Remove “and erosion of native soils are deposited or transported to Willamette Basin waters” end with “in the next 20 years because of local deposition of atmospheric mercury derived from global sources” | #6 |
|  | 340-041-0345(6)(a)(A)  NWPPA supports the concept of a multi-discharger variance and supports the basis of the Willamette Basin mercury multi-discharger variance (MDV) based on 40 CFR §131.14(b)(vi)(2)(i)(A)(1) and 40 CFR §131.10(g)(3) that “human caused conditions or sources of pollution prevent the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.” The proposed variance rule provides the appropriate basis for the variance in OAR 340-041-0345(6)(a)(A) through (C). | #7 |
|  | 340-041-0345(6)(a)(C)  "It would cause more environmental harm to install and operate additional treatment technology to remove additional mercury than to reduce mercury through implementing mercury minimization plans. This finding does not affect any requirement that would result in installing additional technology to address pollutants other than mercury."  ACWA recommends clarifying the second sentence by adding "including technology that may have the additional benefit of reducing effluent mercury concentrations.” | #4 |
|  | 340-041-0345(6)(a)(C)  DEQ has not analyzed the use of additional treatment technology for the removal of nutrient pollution that would also have the benefit of reducing mercury pollution. | #3 |
|  | 340-041-0345(6)(c) and (d) revised as follows:  *(c) Eligibility requirements. To qualify for coverage under the variance, a permittee must meet the following requirements:*  (A) Own or operate a permitted municipal or industrial point source employing a minimum of secondary treatment;  (B) Hold an individual NPDES permit to discharge wastewater to waters of the Willamette Basin;  (C) Have effluent levels greater than the water concentration value needed to meet the human health criterion for fish tissue methylmercury;  (D) Have the potential to reduce mercury from the facility's effluent or in the receiving waterbody; and  (E) Provide DEQ at least two years of quarterly effluent data.  *(d) Application requirements. To apply for coverage under the variance, a permittee must provide to DEQ the following information:*  (A) A letter applying for the mercury variance under this rule;  (B) All mercury effluent data from the previous five years, including at least two years of quarterly effluent data; and  (C) A mercury minimization plan, as described in 340-041-0345(6)(f). | #8 |
|  | 340-041-0345(6)(c)  Only a water body or water body segment variance can qualify for this type of variance in which discharges are allowed to apply for coverage after EPA’s approval. | #3 |
|  | 340-041-0345(6)(e)  The last sentence provides that, "The LCA is the 95th percentile value of recent data, the highest value of recent data, or a previously applicable LCA, whichever is lower." The District suggests redrafting this section to be consistent with the description of LCA calculation included at section 3.2.1 of the supporting document.  Regarding enforcement of the LCA, the supporting document at 4.2.1 (page 31), states that DEQ will include permit limits based on quarterly average concentrations and proposes to define a violation of the maximum quarterly average permit limit as two consecutive quarters in which the quarterly average is above the 95th percentile of the distribution. There should be a reference to the supporting document, such as, "implemented as described in section 4.2.1 of the variance supporting document." | #8 |
|  | 340-41-0345(6)(e), (f), and (g)  Add language to (6)(e) to clarify the HAC includes this requirement as applicable to all sources as well as (6)(f) for municipalities and (6)(g) for industrial sources | #5 |
|  | 340-41-0345(6)(f)  For other than dental offices, DEQ has called for the identification of other possible indirect mercury dischargers, *id.* at (C) and (D), and outreach to such dischargers, *id*. at (E) and (F), but it has stopped short of actually requiring the dischargers to regulate the indirect dischargers. This level of effort—identification and outreach—is less than what is required to make these truly “minimization” plans. The addition of “regulation” would achieve that end. | #3 |
|  | 340-41-0345(6)(f)(A) and (6)(g)(A)  Monitoring plans for dischargers that take advantage of this opportunity to contribute to violations of mercury criteria in the Willamette should be required to assist in the collection of data in the receiving water—including ambient, tissue, and sediment  data or other means of assessing mercury levels (e.g., semipermeable membrane devices)—the data being needed by DEQ to conduct the reevaluation required in (6)(i) and by federal regulations. | #3 |
|  | 340-041-0345(6)(f)(B) and (D)  Oregon Revised Statutes 679.520 requires dentists to install and maintain amalgam separators, so they are required throughout the state, with inspection to be provided by the Oregon Board of Dentistry.  Recommend that **outreach** be required instead of inspection for dental offices and commercial laboratories. | #8, #4 |
|  | Object to the naming of specific industry as a target of MMP in the OARs. Remove section 6(f)(B) | #6 |
|  | 340-041-0345(6)(f)(G)  Suggests that this requirement "cleanup of legacy mercury from collection systems" be deleted from the mercury minimization plans. | #8/#4 |
|  | 340-041-0345(6)(f)(I) and (g)(E)  The District requests that this section be structured to allow trading. | #8 |
|  | 340-041-345(6)(h)  The description of the permittee's request should be described as a request for coverage under the variance, not an authorization. | #8 |
|  | 340-041-0345(6)(i)  “Separate provisions for variance duration and process for re-evaluation” (comment #2 from 340-041-0059(3)(a), Variance Duration and Re-evaluation) | #8 |
|  | 340-041-0345(6)(i)  This provision on the reevaluation of the variance fails to include the fact that in the absence of the timely reevaluation, the variance lapses. | #3 |
|  | 340-041-0345(6)(i)(B)  DEQ should commit to posting the reevaluation and all previous reevaluations on its website. Particularly given that DEQ intends to offer a minimum of a 30-day comment period, potential commenters should not have to request copies of previous reevaluations from DEQ. In addition, the reevaluation may be of use to citizens seeking to comment on draft NPDES permits for the dischargers in the future. | #3 |
|  | 40-041-0345(6)(i)(C)(ii)  Revisions to Mercury Minimization Plans should only be requested if necessary. The District suggests that this provision read, "DEQ will review updates to the facility's site-specific mercury minimization plan and, if necessary, request revisions to ensure that it is consistent with variance requirements." | #8 |
| **Notice of Proposed Rulemaking - Attachment 1 – Supporting Documentation** | | |
|  | Section 1 .4, page 4  Major Municipal Facilities without Advanced Wastewater Treatment table. The list of permittees does not include the District's Hillsboro WWTF. | #8 |
|  | Section 2.2.1  EQ should review the characterization of these facilities and present effluent characterization data that reflect this categorization (eight facilities in advanced treatment category, whereas the table on page 4 and later sections include only three facilities in this category). Need to use criteria to define advanced treatment facilities. Be consistent throughout document. | #8 |
|  | Section 3.1.2  Recommends stating that upgrading facilities just for mercury removal is not warranted due to negligible improvement in performance, high costs, additional energy usage, and no corresponding water quality benefit. As facilities upgrade for other reasons (nutrient removal, mass load restrictions, or other water quality considerations), improvements in mercury removal will be realized. | #8 |
|  | Section 3 .1.2.1  The analysis leading to this conclusion is not particularly rigorous and is unnecessary. Since it has already been made clear in section 3.1.2 that source reduction is preferred over advanced treatment for other reasons, comparing the two further is not needed to support that approach. The studies cited in comment 18 are counter to the conclusion reached. | #8 |
|  | Section 3.2.2  Provide clarifying edits to ensure it is clear the activities specified within implementation of MMP. Refer to facility-specific information that will be provided once a facility qualifies for the variance. | #5 |
|  | Section 3.2.3  Include a discussion of what can be remedied by the state and the dischargers covered by the variance. Describe reasons why the reductions achievable through the MMP are those that can be remedied within the 20-year term of the variance.  The variance must identify how other sources, beyond point sources, of mercury can be remedied and include those activities. (For example, this could include non-point source reductions; commitments under existing programs, etc.). Cite to existing information sources. | #5 |
|  | Section 3.2.3  Suggest removal of section: unnecessary for this document. | #6 |
|  | Since the measured data may not necessarily match a log-normal distribution, ODEQ should modify the approach to allow for the use of alternative distributions if deemed appropriate by standard statistical tests (e.g., Shapiro-Wilk) by a variance. If data do not match any specific distribution (again, by using standard statistical tests), then non-parametric methods should be allowed by the variance. These methods are easily implementable in ProUCL, as discussed in EPA’s Technical Support Document (which is referenced on p. 24 of Attachment #1). | #7 |
|  | We ask that ODEQ be more responsive to legitimate data requests so that stakeholders are able to adequately assess the methods used by the department and offer alternatives in a quantitative manner. NWPPA reiterates that given the paucity of information on industrial discharges for calculating LCA’s that the alternative LCA calculation methods in NWPPA comment 22 be added the variance rules or be allowed for variance implementation. | #7 |
|  | NWPPA comments that while implementation of MMPs will help to identify mercury loads that contribute to effluent loads, ODEQ should be cautious in delineating expectations for achievable reductions prior to an improved understanding of Oregon-specific source loads and opportunities for reducing those loads for manufacturing facilities  DEQ appears to have only used Wisconsin industrial dischargers as examples for MMP implementation (last paragraph on p. 22, Attachment #1). While these findings are valid for point sources in Wisconsin, ODEQ should not necessarily anticipate that the magnitudes of reductions or the residual effluent concentrations following MMP implementation at Oregon point sources should be similar to point sources in Wisconsin.  As noted throughout TetraTech’s Mercury TMDL technical support document, contributions to mercury loadings in the Willamette are regionally specific. Local factors such as current and historic land use practices, local and long-range air transport and deposition, regional weather patterns and terrain features, and others, can influence mercury concentrations in effluents.  Further, NWPPA emphasizes that the availability and cost effectiveness of raw material and process additive substitution alternatives are site-specific to each manufacturing facility. | #7 |
| **Fiscal Impact Statement** | | |
|  | NWPPA supports the ODEQ Fiscal Statement and conclusions that the Willamette Basin mercury MDV rule proposal will: decrease variance application costs for applicants; increase government efficiency to review, issue and administer variances; and, allow ODEQ build on scientific research from the draft Willamette Basin Mercury TMDL. | #7 |
|  | The fiscal and economic impact is flawed because it says absolutely nothing about non-point source controls, as is required by federal rules for waterbody variances. | #3 |
| **Land Use Impact Statement** | | |
|  | DEQ’s conclusion that the proposed rules do not affect land-use is incorrect because it has an impact on non-point sources of pollution. | #3 |

Select one option below

**General Comments**

**Comment #1**

NWPPA requests that ODEQ provide written confirmation that the multi-discharger variance is proposed under 40 CFR 131.14(b)(ii)(A) for discharger specific variances and not as a variance applicable to a waterbody or waterbody segment under 40 CFR 131.14(b)(ii)(B) so not necessary for the variance to include identification and documentation of nonpoint source controls. The variance appropriately includes nonpoint source controls as elements that could be considered in mercury minimization plans under OAR-041-0345(6)(f) and (g).

**Response**

DEQ confirms that the proposed multiple discharger variance of the human health criterion for methylmercury is a discharger-specific variance as allowed by 40 C.F.R. §131.14(b)(ii)(A), not a waterbody variance. At EPA’s request, DEQ has listed in the rule and supporting documentation existing programs that will, over time, lead to reductions in mercury loads in order to 1) justify the need for the variance using factor 3, because even with these actions it is not feasible to attain the standard within the term of the variance, and 2) the 20-year term of the variance, because it will take at least 20 years and is expected to take much longer, to attain the water quality standard.

DEQ did not make any changes to the rule language in response to this comment. DEQ did make changes to the MDV Support Document to clarify this point.

**Comment #2**

DEQ refers to the variance as a multiple discharger variance when EPA regulations clearly refer to this type of variance as a water body or water body segment variance. As a result, DEQ needs to identify and document “any cost-effective and reasonable best management practices for nonpoint source controls that could be implemented to make progress toward attaining the underlying designated use and criterion.”

**Response**

DEQ is proposing a multiple discharger variance, not a waterbody variance. The purpose of this MDV is to issue NPDES permits for dischargers that cannot feasibly meet effluent limits for mercury based on the human health criterion for methyl-mercury, while ensuring that mercury levels from these dischargers decrease. An MDV is an appropriate CWA tool for this purpose and has been used by several other states for many years. DEQ continues to address nonpoint sources of mercury through implementation of any effective TMDL and associated water quality management plan. These are appropriate tools to remedy sources of mercury other than point sources to make progress toward the water quality standard.

DEQ did not make any changes to the rule language in response to this comment. DEQ did make changes to the MDV Support Document to clarify this point.

**Comment #3**

NWPPA supports the basis of the variance to achieve the highest attainable condition determined by the level currently achievable and implementation of a mercury minimization plan through the term of the variance.

**Response**

DEQ acknowledges NWPPA’s comment supporting the basis of the variance. DEQ did not make any changes in response to this comment.

**Comment #4**

NWPPA requests that ODEQ provide written confirmation that during the term of the variance for a discharger, the terms of the variance – achieving the highest attainable condition and implementation of a mercury minimization plan – are controlling in terms of NPDES permit conditions over underlying water quality standards and TMDL waste load allocations.

**Response**

A variance is a temporary change to the water quality standard for purpose of developing permit limits and requirements. A variance does not change the underlying water quality standard for purposes of assessment and development of TMDLs. However, the commenter is correct;if a discharger has a variance, the permit conditions are based on the variance, not the underlying standard or TMDL waste load allocations. DEQ did not make any changes in response to this comment.

**Comment #5.** When DEQ amends state variance authorization rules (OAR 340-041-0059) to be consistent with federal variance rules and EPA approves it for NPDES permit holders; I am requesting an individual variance or MDV from DEQ to operate my suction dredge as a minor 700 NPDES permit discharger for the Willamette Basin Mercury TMDL.

Cross reference to commenter number or numbers submitted in this category using format ##, ##, ## and ##.

**Response**

This rulemaking grants a multiple discharger variance to individual wastewater dischargers covered under the NPDES program. Variances are only necessary for such dischargers, which would otherwise have numeric water quality based effluent limits for mercury that are not attainable for the reason justified under the variance. Any request for a variance, if one is necessary and justified, must be made to DEQ’s permit program. DEQ did not make any changes in response to this comment. Enter DEQ’s response to this category of comments.

**Comment #6**

NWPPA supports attainable state-developed human health water quality standards that improve water quality, protect human health and provide for vibrant economies. NWPPA does not support unattainable or unachievable water quality standards that lead to regulatory uncertainty, water permitting delays, potential job loss and degraded local communities.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response. Enter DEQ’s response to this category of comments

**Comment #7**

NWPPA has consistently advocated for and supported “implementation tools” for facilities holding National Pollution Discharge Elimination System water permits – issued under the federal Clean Water Act for compliance with the federally delegated water quality permitting program – if water quality standards are unattainable or unachievable.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response.

**Comment #8**

NWPPA supports the intent of ODEQ’s variance authorization rule and the Willamette Basin mercury multi-discharger variance rule as “implementation tools” to provide a compliance pathway for point source dischargers; however, NWPPA strongly believes that a variance is not a *one-size-fits-all* solution removing all regulatory uncertainty from the NPDES permitting program during DEQ’s proposed 20-year timeframe for the Willamette Basin mercury MDV.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response.

**Comment #9**

NWPPA supports the scientific foundation of the Willamette Basin mercury multi-discharger variance in ODEQ’s Willamette Mercury TMDL supporting documents, that in-stream mercury pollution comes from a variety of sources with a majority of the mercury load contributions from air deposition sources outside the Willamette Basin and that the science of mercury methylation is still evolving.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response.

**Comment #10**

NWPPA would prefer attainable water quality standards that remove the uncertainty of not being able to comply with ultra-low water quality standards and the risk of the unintended consequence of threatening current facility operations and jobs -- including water permit delays, unknown compliance paths, potential litigation and extreme high costs for water treatment using unproven technologies.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response.

**Comment #11**

NWPPA supports the July 2019 draft Willamette River Mercury TMDL pollution prevention and minimization approach, similar to other mercury TMDLs across the nation, to comply with Oregon’s exceptionally stringent methylmercury fish tissue water quality criterion of 0.040 mg/kg (wet weight).

**Response**

DEQ acknowledges NWPPA’s comment related to the draft mercury TMDL, which is a separate process. DEQ did not make any changes in response to this comment. Enter DEQ’s response to this category of comments

**Comment #12**

NWPPA believes that the draft Mercury TMDL’s conservative policy decisions and modeling assumptions, combined with an aggressive approach to pollutant prevention and minimization result in a TMDL that is very highly protective of the most sensitive beneficial use of fish consumption in addition to being highly protective of all other designated beneficial uses of waters in the Willamette Basin.

**Response**

DEQ acknowledges NWPPA’s comment related to the draft mercury TMDL, which is a separate process. DEQ did not make any changes in response to this comment.

**Comment #13**

Support documentation should provide a clear and detailed rationale for 20-year term for all dischargers.

**Response**

DEQ has revised the rationale for the 20-year term in its support documentation in response to this comment.

**Comment #14**

NWPPA believes the 10 percent aggregate reduction of total mercury for all point source water permit holders is appropriate given that: 1) industrial point sources in the Willamette Basin provide 0.3 percent of the total load for mercury to the Willamette; 2) all permitted point source dischargers (NPDES and stormwater) comprise approximately 4 percent of the total mercury load; 3) the applicable water quality criterion is a methylmercury fish tissue criterion and thus the contribution of point source total mercury loads to methylmercury concentrations in fish is uncertain; and, 4) scientific knowledge of the Willamette Basin methylation processes are still evolving

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response. Enter DEQ’s response to this category of comments

**Comment #15**

NWPPA notes that a well-documented and highly-conservative approach led to the instream water column target of 0.14 ng/L total mercury but that the target is exceptionally stringent and will take 20 or more years to achieve given the current levels of total instream mercury in the Willamette Basin.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response.

**Comment #16**

NWPPA believes the TMDL Mercury load reduction efforts should be common sense minimization efforts similar to other TMDLs across the nation to the extent practicable given that the majority of mercury loading comes from air deposition and -- if required – NWPPA believes that a multi-discharger variance rule for the Willamette Basin is an appropriate alternative compliance path.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response. Enter DEQ’s response to this category of comments

**Comment #17**

NWPPA believes that Oregon Revised Statute 468B.037 to 468B.038, regarding ODEQ’s issuance of variances requiring that applicants be consulted and that negative economic impacts be minimized should be the basic tenant of ODEQ’s work to develop, issue, implement and review all variances.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response.

**Comment #18**

DEQ should establish the close of business or midnight for the close of comment periods.

**Response**

DEQ closes the comment period at 4 p.m. because DEQ staff members must manually close the comment system. Closing the comment period at 4 p.m. ensures that DEQ can always close the comment period without staffing issues. DEQ made no changes in response to this comment.

**Comments on Definitions Rule (OAR 340-041-0002)**

**Comment #19**

The definition for a variance omits the fact that the underlying designated use and criterion addressed by the variance remain in effect.

**Response**

DEQ’s definition of a variance is consistent with the federal definition of a variance at 40CFR 131.3 (o). In addition, per 40 CFR 131.14 (a)(3), DEQ will clarify in the variance authorization rule at OAR 340-041-0059(1)(a) that the variance applies only for the purpose of developing NPDES permit limits and requirements under CWA section 301(b)(1)(C), or for issuing certifications under CWA section 401. For all other CWA purposes, the underlying designated use and criterion remain in effect.

**Comments on Variance Authorization Rule (OAR 340-041-0059)**

**Comment #20**

The change to the variance rules make Oregon’s mercury variance process more lenient, in order to make Oregon’s process consistent with federal regulations. I disagree with loosening environmental regulations that limit human and environmental exposure to neurotoxins such as mercury.

**Response**

DEQ is revising Oregon’s variance rules to ensure they are consistent with new federal regulations adopted in 2015, and to make the use of this CWA tool efficient where it is appropriate. Commenter does not specify what in DEQ’s proposed rules make the variance process more lenient. DEQ did not make any changes in response to this comment.

**Comment #21**

NWPPA supports the concept of the variance water quality standard “implementation tool” in OAR 340-041-0059 and believes the proposal is correctly based on the requirements of 40 CFR §131.14 and EPA guidance.

**Response**

DEQ acknowledges NWPPA’s comment and did not make any changes in response to this comment. Enter DEQ’s response to this category of comments

**Comment #22**

DEQ has removed the clear federal requirement to name the dischargers in a discharger-specific variance while omitting the requirement to identify nonpoint source controls.

**Response**

The federal variance rule (40 CFR 131.14(b)(1)(i)) states that discharger(s)-specific variances identify the permittee(s) subject to the variance. The preamble to the rule also states, “As an alternative to identifying the specific dischargers at the time of adoption of a WQS variance for multiple dischargers, states and authorized tribes may adopt specific eligibility requirements in the WQS variance.” (80 Fed. Reg. 162, p. 51036). EPA’s variance builder tool available on the agency’s website also indicates that states have the option to include eligibility requirements.

DEQ did not make changes to OAR 340-041-0059 in response to this comment. See response to Comment #78 related to the Willamette Basin Mercury MDV.

**Comment #23**

It would be helpful if the variance rule were to specify where multiple discharger and waterbody variances should be memorialized. It would make sense to add waterbody variances to the basin-specific water quality standards; perhaps individual and multiple discharger variances should be assigned their own section within Division 41. This may also avoid confusion between multiple discharger and waterbody variances.

**Response**

Multiple discharger and waterbody variances are rulemakings that amend Oregon Administrative Rules. The type of variance and the requirements of the variance will be clearly stated in the adopted rule language. In addition, DEQ will publish a list of all variances, including individual discharger variances, on the department’s website. DEQ did not make any changes in response to this comment.

**Comment #24**

DEQ should delete “all qualified facilities that discharge to” from Applicability. A waterbody variance applies to the waterbody or waterbody segment where all point and non-point source dischargers are evaluated.

**Response**

DEQ has amended this provision to state that a waterbody variance applies to all facilities that discharge to the waterbody. DEQ made changes in response to this comment.

**Comment #25**

Removing language that prohibits DEQ or the commission from issuing a variance if it 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 is an error in policy and law, by ignoring the state’s own responsibility for protecting water quality as habitat for ESA-listed species. In addition, commenter notes that removing the language is inconsistent with antidegradation policy by removing an existing use on a temporary basis.

**Response**

As described in supporting documentation, it is the role of EPA to consult with the National Marine Fisheries Service and U.S. Fish and Wildlife Service under the Endangered Species Act. The rule as currently written asks DEQ to make an analysis on jeopardy to ESA-listed species, when that role is more appropriately situated with experts in the federal fisheries services.

DEQ disagrees that a variance removes an existing use on a temporary basis. EPA guidance clarifies that an existing use means, “… the use and water quality necessary to support the use that have been achieved in the waterbody on or after November 28, 1975.”[[1]](#footnote-1) A variance sets a floor on water quality, because pollutant levels in the dischargers cannot increase as a result of the variance. Those levels are expected to decrease during the variance based on the requirements in the variance. DEQ did not make any changes in response to this comment.

**Comment #26**

It is factually incorrect that removing the language in 340-041-0059(1) as well as removing language pertaining to unreasonable risks to human health is justified because “any discharger still has to comply with technology based limits irrespective of whether there is a variance.“

DEQ’s rationale for removing the language pertaining to unreasonable risks to human health is disingenuous. The justification states that, “variances are intended to reduce pollutant loads over time, decreasing any potential risk to human health. The variance DEQ is proposing is not intended to reduce pollutant loads over time in any meaningful way.

**Response**

The current rule language suggests that DEQ not grant a variance if it results in unreasonable risk to human health. A variance is only necessary if permit limits based on the underlying water quality standard are not feasibly achievable. At a minimum, any discharger must meet technology-based effluent limits. Moreover, any variance cannot result in a lowering of the currently attained water quality. Finally, conditions in the variance must result in the highest attainable condition by the end of the variance. This limitation is not required by federal variance regulations, it is un-necessary and it adds ambiguity to the rule because it is unclear. DEQ did not make any changes in response to this comment.

**Comment #27**

In the section on conditions to grant a variance, DEQ omits the requirements of 40 C.F.R. section 131.10(g) which refers to unchanged requirements in 131.10(h)(1) regarding existing uses. Including this language would make clear to readers of the rule that existing uses must be factored into the determination of what the highest attainable interim use is when a variance is adopted.

**Response**

Federal requirements at 40 C.F.R. §131.10 pertain to use attainability analysis, which is a process under which a state changes the underlying designated use and criterion for a waterbody. Variances are regulated by 40 C.F.R. §131.14 and do not change or remove the underlying designated use. Existing uses are considered in the variance because the existing water quality/existing use must be maintained, with an exception for restoration work. In addition, under a variance, permit requirements must make progress toward the underlying standard by achieving the highest attainable conditions during the term of the variance. DEQ did not make any changes in response to this comment.

**Comment #28**

DEQ has not put in its rules any method of ensuring that data are available to make the determination that a variance will not result in a lowering of the currently attained ambient water quality.

**Response**

Any discharger under a variance will be required to conduct monitoring of the pollutant for which the WQS variance is granted as part of compliance monitoring. Such data also will be utilized to determine whether a variance is resulting in a lowering of water quality. DEQ did not make any changes in response to this comment.

**Comment #29**

DEQ should revise section 3(a) to state,“DEQ will identify the specific re-evaluation frequency and how it will obtain public input on the reevaluation in each variance”

**Response**

DEQ agrees with this comment and has revised rule language in 340-041-0059(3)(a) accordingly.

**Comment #30**

NWPPA supports the proposed changes to the “Duration and Re-evaluation” of a variance in OAR 340-041-0059(3) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV.

**Response**

DEQ acknowledges NWPPA’s comment in support of the proposed variance authorization rule. DEQ did not make any changes in response to this comment. Enter DEQ’s response to this category of comments

**Comment #31**

The provisions regarding the variance duration and the process for re-evaluation should be placed in separate sections for clarity. Moreover, DEQ should adopt the federal language regarding HACs and the term of variances, and change the term “achieve” to “apply.”

**Response**

DEQ agrees that it is confusing to include provisions regarding variance duration and re-evaluation in the same provision. DEQ will separate these provisions.

Commenter suggests that DEQ’s language regarding the duration of the variance is inconsistent with the federal rule. The federal variance rule states, “The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition…” (40 C.F.R. §131.14(b)(iv)), which is nearly identical to the proposed state rule. As a result, the commenter’s request is unclear. DEQ has changed the term “meet” to “achieve” to ensure consistency with the federal rule.

DEQ has made changes to proposed rules at OAR 340-041-0059(3) in response to this comment.

**Comment #32**

The timeframes in this section of the rule should be clearer.

DEQ should clarify the provision regarding re-evaluation to state, “For variance durations exceeding 5 years, DEQ will re­evaluate highest attainable condition on a frequency of less than 5 years, as specified by DEQ. Re­evaluation shall be based on all existing and readily available information. The re-evaluation frequency shall be set to allow for DEQ 's timely submittal of the re-evaluation to EPA/or EPA approval within 30 days of submittal.”

ACWA is concerned with the following language: "If DEQ does not submit the re-evaluation to EPA within the specified timeline, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA." How are permittees protected against having an unforeseen and unattainable water quality standard in lieu of the variance? Does the variance apply in an NPDES permit until time of permit renewal? ACWA recommends clarification in the rule on this issue.

**Response**

DEQ has clarified language in section (3) regarding variance re-evaluation to clarify the timeframes. DEQ has retained the provision stating, “If DEQ does not submit the re-evaluation to EPA within the specified timeline, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA.” This provision is consistent with federal language. DEQ intends to complete the re-evaluation and submit it to EPA on time. In case this does not happen and a permit has conditions related to the variance, those conditions will remain until the permit expires or DEQ completes the re-evaluation and submits it to EPA. If the variance is no longer the applicable water quality standard and the permit expires, the discharger has the option to apply for a new variance, if it is necessary and justified.

**Comment #33**

DEQ has put no provision requiring permittees to gather information needed to reevaluate the highest attainable condition at least every five years.

**Response**

Any discharger under a variance will be required to conduct monitoring of the pollutant for which the variance is adopted, which, at a minimum, will include compliance monitoring of effluent (See the proposed variance rule section 6). DEQ will utilize such data to reevaluate the highest attainable condition at least every five years. For waterbody variances, DEQ will use all available data including the data collected by the discharger, and any other available data collected by the state and others, to determine the impact of a waterbody variance. DEQ did not make any changes in response to this comment.

**Comment #34**

The language in 340-041-0059(3)(b) is confusing, as it suggests that, if a variance duration is less than the term of the permit, that the permittee must comply with an effluent limit sufficient to meet the underlying standard when the variance expires. This is a situation in which a compliance schedule seems like the more appropriate tool. DEQ should clarify when they would suggest a facility use a variance rather than a compliance schedule.

**Response**

DEQ agrees that compliance schedules are one tool to use in the case that a permittee cannot meet effluent limits during part of a permit term, but will at some point in the future of the term. However, there may be instances in which a variance is the appropriate tool at the permit writer’s discretion. DEQ is proposing to keep this language, if there is any case where a variance is a more appropriate tool. DEQ has not made any changes in response to this comment.

**Comment #35**

ACWA suggests revising the language in section (3)(b) to read: "For variances issued prior to renewal of a NPDES permit, either the permittee must comply with the specified effluent limitation sufficient to meet the underlying water quality standard when the variance expires, or a compliance schedule shall be adopted in the permit at renewal to specify when the permittee will comply with the effluent limitation."

**Response**

DEQ acknowledges this suggestion. The variance rule language does not preclude the use of compliance schedule. If a compliance schedule is necessary at the date the variance expires, DEQ will impose a compliance schedule that is consistent with OAR 340-041-0061(14) and applicable federal requirements. DEQ has not made any changes in response to this comment.

**Comment #36**

We support the proposed addition in section (3)(a) requiring permits to include the date to the interim absolute limit will expire corresponding to the variance expiration date.

**Response**

DEQ acknowledges this comment supporting DEQ’s proposed amendment of this provision. DEQ did not make any changes in response to this comment.

**Comment #37**

The proposed language will result in variances that are less than clear because it will only specify the duration of the variance not its effective date or its expiration date.

**Response**

DEQ cannot specify the effective date of the variance within the variance document, because the effective date is conditional on EPA’s approval date. DEQ will provide the effective date and expiration date on the list of all approved variances that is required by 340-041-0059(7)(b). DEQ revised proposed language at OAR 340-041-0059(7)(b) in response to this comment.

**Comment #38**

We support the removal of the language which allowed variances to be set out in NPDES permits.

**Response**

DEQ acknowledges this comment and did not make any changes in response to this comment.

**Comment #39**

NWPPA supports the proposed changes to the “Variance Submittal Requirements” in OAR 340-041-0059(4) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV.

**Response**

DEQ acknowledges this comment and did not make any changes in response to this comment.

**Comment #40**

It is unclear how an individual variance in a place to a “permittee” in (4)(a) can apply to “dischargers“ plural in, in nearly all cases, “water bodies“ plural in (a)(A).

**Response**

DEQ has clarified the rule language accordingly at OAR 340-041-0059(4)(a)(A) in response to this comment.

**Comment #41**

DEQ should include in this rule, or commit to establishing guidance, on what constitutes sufficiency for purposes of rule (4)(a)(D).

**Response**

DEQ plans to update its Variance Internal Management Directive subsequent to approval of the revised variance authorization rule to ensure it is consistent with the updated rule and the 2015 federal variance rule. DEQ will include information in this guidance regarding data sufficiency under this requirement. DEQ did not make any changes in response to this comment.

**Comment #42**

DEQ provides no guidance in its proposed rules on the content of a pollutant minimization plan. DEQ should require municipal sewage treatment programs to improve their pre-treatment programs that regulate indirect discharges to their collection systems or to establish a pre-treatment program where none exists.

**Response**

The required content of a pollutant minimization plan will differ depending on the pollutant, circumstances of the discharger and other factors. If a PMP is a requirement of the variance, DEQ will submit a PMP targeted to the unique circumstances of the pollutant and discharger(s) or water body/water body segment(s) to EPA for approval. In some cases, pre-treatment programs may relate to a variance and DEQ will incorporate pre-treatment measures into PMP requirements. In other cases, a pre-treatment program may have less relevance.

**Comment #43**

The language in (4)(b) is inconsistent with federal regulations, because it anticipates EPA approving a variance and DEQ accepting applicants for coverage.

**Response**

DEQ acknowledges this comment, but notes that it did not include a discussion of how this requirement is inconsistent with federal regulations. The preamble to the federal variance rule states, “As an alternative to identifying the specific dischargers at the time of adoption of a WQS variance for multiple dischargers, states and authorized tribes may adopt specific eligibility requirements in the WQS variance.” (80 Fed. Reg. 162, p. 51036). EPA’s variance guidance also indicates that this is a possibility. However, Provision (4)(b) simply stated that a permittee subject to a multiple discharger variance, must submit all information required in the rule for the specific variance. It does not presume whether the multiple discharger variance lists each permittee subject to the variance or whether the multiple discharger variance includes eligibility requirements. DEQ has not made changes in response to this comment.

**Comment #44**

The language in (4)(c) is incorrect in that it requires dischargers to submit information to DEQ regarding nonpoint source controls that DEQ should submit to EPA.

**Response**

DEQ agrees with this comment and has removed the rule language in (4)(c) accordingly and clarified in section (5) that DEQ is required to submit this information to EPA.

**Comment #45**

ACWA recommends the rule in section (4)(c) define that the scope is nonpoint sources “within the permittee’s control” to clarify action permittees required to take

**Response**

In response to comment #44,DEQ is removing section (4)(c), identification and documentation of best management practices is based on a federal requirement regarding what DEQ is required to submit to EPA for approval of a waterbody variance, not what a discharger must submit to DEQ. DEQ did not make any changes in response to this comment.

**Comment #46**

NWPPA supports the proposed changes to the “Highest Attainable Condition” in OAR 340-041-0059(5) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV.

**Response**

DEQ acknowledges this comment and has not made changes in response to this comment.

**Comment #47**

The language in section (5) should note that the highest attainable condition include “the highest attainable condition later identified during any reevaluation, whichever is most stringent.”

**Response**

The proposed language in Section (6) of the rule already states that permit conditions will be based on the highest attainable condition identified at the time DEQ adopts the variance or the highest attainable condition later identified during any re-evaluation. DEQ has not made changes in response to this comment.

**Comment #48**

Section (5) should state that the highest attainable condition is required to be a quantifiable expression.

**Response**

The proposed language in Section (5) already states that the Highest Attainable Condition must be a quantifiable expression. DEQ has not made changes in response to this comment.

**Comment #49**

The language in (5)(b)(B) should note that DEQ is responsible for adopting its own pollutant minimization plan as required for water body variances.

**Response**

DEQ has clarified the language in this provision and in provision (5)(a)(C) so they are consistent with federal rule language. DEQ made changes in response to this comment.

**Comment #50**

NWPPA supports the proposed changes to the “Variance Permit Conditions” in OAR 340-041-0059(6) that incorporate NWPPA’s specific comments on the Willamette Basin mercury MDV

**Response**

DEQ acknowledges this comment in support of proposed amendments to OAR 340-041-0059(6). DEQ has not made changes in response to this comment.

**Comment #51**

Section (6)(b) requires the permit to include a requirement to implement any pollutant reduction actions approved as part of a pollutant minimization plan "adopted in the applicable variance." A PMP is not adopted in a variance so it would be better to express this permit element as requiring incorporation of the PMP into the permit by reference, or requiring compliance with the PMP developed in compliance with the variance.

**Response**

Thefederal variance regulation in 40 CFR 131.14(b)(1)(ii)(A)(3) and (b)(1)(ii)(B)(2) require that a variance include adoption and implementation of a Pollutant Minimization Plan if no additional feasible pollutant control technology can be identified. EPA has clarified that this PMP is to be included in the variance. DEQ is revising section (6)(b) to clarify this requirement. DEQ has made changes in response to this comment.

**Comment #52**

The language in section 6 should make clear that the responsibility for identifying and documenting BMPs for non-point sources is DEQ’s.

**Response**

DEQ agrees that federal language requires DEQ to identify cost-effective and reasonable non-point source BMPs in the supporting documentation for a waterbody variance and has changed language in section 5 accordingly. DEQ has made changes to the rule language in response to this comment.

**Comment #53**

The rule should make clear that where a permittee does have control over nonpoint sources, the pollutant minimization plan must demonstrate conformity with the BMPs identified by DEQ that are a part of a water body variance.

**Response**

The federal variance rule does not require that PMPs developed under a waterbody variance conform to BMPs that are identified in supporting documentation for that variance. As such conformity is not required by the federal rule, DEQ has concluded that the decision as to whether to require such conformity should be based on the specific situation of each waterbody variance. DEQ has not made changes to the rule language in response to this comment.

**Comment #54**

DEQ should include a guidance on how it will determine which provision for the Highest Attainable Condition will apply. The proposed rule does not describe what DEQ will do with regard to permits if DEQ determines that additional feasible pollutant control technologies are available.

**Response**

DEQ will revise its Internal Management Directive for variances following adoption of any revised variance authorization rule. The revised IMD will discuss how DEQ will determine which HAC applies and what the process will be if DEQ determines that additional feasible pollutant technologies are available. DEQ has not made changes in response to this comment.

**Comment #55**

The proposed rule in section (6)(a) links section (5)(a)(B) which is an effluent condition, to a permit condition but does not link any highest attainable interim criterion identified in (5)(a)(A) to any permit condition. The rule also fails to address the necessary variance permit conditions associated with the adoption of any water body variance.

**Response**

DEQ has revised rule language in section 6 accordingly.

**Comment #56**

The proposed rule in section (6)(c) should read “any monitoring and public reporting necessary to ensure compliance with the conditions of the variance.”

**Response**

All monitoring done under the proposed rule must be included in the annual report as required in (6)(d). These reports are available to the public. Therefore, it is not necessary to add “public reporting” to the language in (6)(c). DEQ has not made changes in response to this comment.

**Comment #57**

The annual report required in section (6)(d) should identify any activities in a dischargers plan that were permit conditions that were not completed.

**Response**

The proposed rule language in section (6)(d) already includes the language “Any impediments to reaching any specific milestones.” This language requires dischargers to state why they were not able to complete any permit conditions and therefore addresses the recommendation in this comment. DEQ has not made changes in response to this comment.

**Comment #58**

DEQ should commit in this rule to publishing on its website all annual reports submitted by permittees covered under variances.

**Response**

All permitting documents submitted by permittees are available on DEQ’s permit document database, which is available to the public. DEQ has not made changes in response to this comment.

**Comment #59**

DEQ has left out of it public notification section, its obligation to provide for public notice and comment on any documentation of cost-effective and reasonable BMPs for non-point sources that are required supporting documentation for a water body variance.

**Response**

DEQ agrees that this is a federal variance requirement and has included such a provision in Section 5 of the rule. DEQ has made changes in response to this comment.

**Comment #60**

The title of section 7 should refer to public input as well as public notification.

**Response**

DEQ agrees and has revised the title of section 7 accordingly.

**Comment #61**

DEQ should add language to this section to address requirement for how DEQ intends to obtain public input on re-evaluations or reference language if added to OAR 340-041-0059(3)

**Response**

DEQ has added a new section under OAR 340-041-0059(7)(b) in response to this comment.

**Comment #62**

The items to be included in the published list in (7)(b) includes "discharger," but not "facility." Since a discharger may own or operate multiple facilities, the items to be included should include facility names.

**Response**

DEQ agrees and has clarified the requirements in section (7)(c) (renumbered) accordingly. DEQ has made changes in response to this comment.

**Comment #63**

DEQ should state where the published list of all approved variances can be found.

**Response**

DEQ has made changes to proposed language at OAR 340-041-0059(7)(c) (renumbered) in response to this comment to specify where and what information is published in DEQ website. DEQ also has deleted proposed language in section 8 in response to this comment.

**Comment #64**

"Willamette Basin" in section (8) should be spelled out.

**Response**

DEQ is proposing to delete proposed language at OAR 340-041-0059(8). See the response to Comment #63. DEQ has not made changes in response to this comment.

**Comment #65**

DEQ should include a provision that states, “any subsequent water quality standards variance for a water body or water body segment must include documentation of whether and to what extent best management practices for nonpoint source controls were implemented.”

**Response**

DEQ agrees that this comment is consistent with the federal regulations and has made changes to proposed rule language at OAR 340-041-0059(5)(C)) in response to this comment.

**Comments on Multiple Discharger Variance Rule (OAR 340-041-0345(6))**

**Comment #66**

Since different requirements apply, the rule should clearly state whether the Multiple Discharger Variance for Mercury is a multiple discharger variance or a water body variance. The lead paragraph to this section should refer to the "fish tissue-based human health criterion for methylmercury."

**Response**

The title of this rule states clearly that this is a multiple discharger variance. DEQ also revised the language in the lead paragraph in OAR 340-041-0345(6) to state clearly that it is a multiple discharger variance in response to this comment.

**Comment #67**

The language in section 6A should note that the commission is issuing the findings rather than DEQ.

**Response**

DEQ is proposing to change 340-041-0345(6)(a) in response to this comment.

**Comment #68**

DEQ’s finding that “the fishing use and associated human health criterion for mercury cannot be attained in the waters of the Willamette Basin in the next 20 years” is flawed. Without nonpoint source controls, the underlying uses and criteria will never be met.

**Response**

DEQ has provided justification in the supporting documentation that the human health criterion for methyl-mercury cannot be remedied within the next 20 years, which is the term of the variance. Based on findings in the updated TMDL and additional information cited in the variance support document, it will take a very long time to meet the underlying criterion. The Willamette Basin mercury TMDL submitted to EPA indicates that it will take decades to implement needed activities (including nonpoint source controls) and see reduced levels of mercury in fish tissue sufficient to meet load allocations under the TMDL. Nonpoint source controls are addressed in the TMDL.

In addition, the runoff of precipitation and snowmelt into streams and some level of erosion and sediment transport into and by streams are also natural process upon which flowing streams and stable channels depend. Therefore, it may not be possible to achieve the underlying criterion until dry and wet deposition of mercury from the atmosphere is also significantly reduced. This is expected to be a very long term process. DEQ has not made changes in response to this comment.

**Comment #69**

DEQ’s finding that mercury sources cannot be remedied is flawed because DEQ has not evaluated whether it can use the state’s non-point source authority to remedy the erosion of native soils such that the use and criterion can be met.

**Response**

Please see response to comment #68.

**Comment #70**

DEQ should include in the required findings in 340-041-0345(6)(a) language consistent with 340-041-0059(2)(a) that the requirements that apply throughout the term of the water quality standards variance will not result in lowering the currently attained ambient water quality.

**Response**

DEQ has added a statement to OAR 340-041-0345(6)(a)(C) that is consistent with CFR 131.14(b)(1)(ii) in response to this comment.

**Comment #71**

The comparison between potential interim measures (treatment vs. source control) does not belong in findings supporting a variance.

**Response**

DEQ has removed the provision in 340-041-0345(6)(a)(C).

**Comment #72**

DEQ should clarify that “erosion of native soils” in many cases, can be controlled by the state and is included in the draft TMDL

**Response**

DEQ has clarified the language in the findings at OAR 340-041-0345(a) accordingly.

**Comment #73**

DEQ should remove “and erosion of native soils are deposited or transported to Willamette Basin waters” end with “in the next 20 years because of local deposition of atmospheric mercury derived from global sources” because there are multiple sources of mercury.

**Response**

DEQ has changed language in the findings at OAR 340-041-0345(6)(a)(A) that mercury comes from multiple sources including direct runoff and direct deposition.

**Comment #74**

NWPPA supports the concept of a multi-discharger variance and supports the basis of the Willamette Basin mercury multi-discharger variance (MDV) based on 40 CFR §131.14(b)(vi)(2)(i)(A)(1) and 40 CFR §131.10(g)(3) that “human caused conditions or sources of pollution prevent the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.” The proposed variance rule provides the appropriate basis for the variance in OAR 340-041-0345(6)(a)(A) through (C).

**Response**

DEQ acknowledges support of the concept of the MDV and the basis for the MDV. DEQ has not made changes in response to this comment.

**Comment #75**

ACWA recommends clarifying the second sentence in the finding at OAR 340-041-0345(6)(a)(C) by adding "including technology that may have the additional benefit of reducing effluent mercury concentrations.”

**Response**

DEQ has removed this provision in response to Comment #71.

**Comment #76**

DEQ has not analyzed the use of additional treatment technology for the removal of nutrient pollution that would also have the benefit of reducing mercury pollution.

**Response**

DEQ notes in documentation supporting this variance that EPA 2010 guidance conducted a thorough analysis and recommends source reduction over end of pipe treatment as the preferred method for controlling methyl-mercury. DEQ has not made changes in response to this comment.

**Comment #77**

340-041-0345(6)(c) and (d) revised as follows:

*(c) Eligibility requirements. To qualify for coverage under the variance, a permittee must meet the following requirements:*

(A) Own or operate a permitted municipal or industrial point source employing a minimum of secondary treatment;

(B) Hold an individual NPDES permit to discharge wastewater to waters of the Willamette Basin;

(C) Have effluent levels greater than the water concentration value needed to meet the human health criterion for fish tissue methylmercury;

(D) Have the potential to reduce mercury from the facility's effluent or in the receiving waterbody; and

(E) Provide DEQ at least two years of quarterly effluent data.

*(d) Application requirements. To apply for coverage under the variance, a permittee must provide to DEQ the following information:*

(A) A letter applying for the mercury variance under this rule;

(B) All mercury effluent data from the previous five years, including at least two years of quarterly effluent data; and

(C) A mercury minimization plan, as described in 340-041-0345(6)(f).

**Response**

Please see response to Comment #78. DEQ has removed section (c), “Eligibility requirements, as DEQ has listed all possible permittees to which the variance may apply. In addition, DEQ has revised the section on “Application requirements” to clarify that this information is required in order for DEQ to incorporate variance-related requirements into permits.

**Comment #78**

Only a water body or water body segment variance can qualify for this type of variance in which discharges are allowed to apply for coverage after EPA’s approval.

**Response**

The federal variance rule (40 CFR 131.14(b)(1)(i)) requires that discharger(s)-specific variances identify the permittee(s) subject to the variance. The preamble to the rule also states, “As an alternative to identifying the specific dischargers at the time of adoption of a WQS variance for multiple dischargers, states and authorized tribes may adopt specific eligibility requirements in the WQS variance.” (80 Fed. Reg. 162, p. 51036). EPA’s variance-builder tool also guides states that don’t know which dischargers qualify for the variance to include eligibility requirements. However, for clarity, DEQ has incorporated in the variance rule language a list of dischargers that qualify for a variance under this rule. DEQ has changed OAR 340-041-0345(6) in response to this comment.

**Comment #79**

The last sentence provides that, "The LCA is the 95th percentile value of recent data, the highest value of recent data, or a previously applicable LCA, whichever is lower." The District suggests redrafting this section to be consistent with the description of LCA calculation included at section 3.2.1 of the supporting document.

Regarding enforcement of the LCA, the supporting document at 4.2.1 (page 31), states that DEQ will include permit limits based on quarterly average concentrations and proposes to define a violation of the maximum quarterly average permit limit as two consecutive quarters in which the quarterly average is above the 95th percentile of the distribution. There should be a reference to the supporting document, such as, "implemented as described in section 4.2.1 of the variance supporting document."

**Response**

DEQ has clarified the provision on level currently achievable to ensure it is consistent with section 4.2.1 of the supporting document. DEQ made changes to OAR 340-041-0345(6)(f) (renumbered) in response to this comment.

**Comment #80**

DEQ should add language to (6)(e) to clarify the HAC includes this requirement as applicable to all sources as well as (6)(f) for municipalities and (6)(g) for industrial sources.

**Response**

DEQ has made clarifications to the HAC sections of the rule to clarify that the level currently achievable applies to all facilities covered by the variance.

**Comment #81**

For other than dental offices, DEQ has called for the identification of other possible indirect mercury dischargers, *id.* at (C) and (D), and outreach to such dischargers, *id*. at (E) and (F), but it has stopped short of actually requiring the dischargers to regulate the indirect dischargers. This level of effort—identification and outreach—is less than what is required to make these truly “minimization” plans. The addition of “regulation” would achieve that end.

**Response**

Outreach, education, research and other volunteer activities are allowed and typically included in PMPs. DEQ also incorporated additional language in provision (g)(B) and (g)(F) to be consistent with pre-treatment requirements.

**Comment #82**

Monitoring plans for dischargers that take advantage of the variance should be required to assist in the collection of data in the receiving water—including ambient, tissue, and sediment data or other means of assessing mercury levels (e.g., semipermeable membrane devices)—the data being needed by DEQ to conduct the reevaluation required in (6)(i) and by federal regulations.

**Response**

DEQ will utilize the re-evaluation to ensure that effluent mercury concentrations for facilities covered by this variance decrease over time. Evaluation of overall progress toward achieving the water quality standard in waters of the basin is done through water quality assessment and TMDL processes. To the extent that dischargers are required to collect ambient mercury data, DEQ will utilize that data in documenting progress toward achieving the criteria. DEQ did not make changes in response to this comment.

**Comment #83**

Oregon Revised Statutes 679.520 requires dentists to install and maintain amalgam separators, so they are required throughout the state, with inspection to be provided by the Oregon Board of Dentistry. DEQ should revise language in the mercury minimization plan to require outreach instead of inspection for dental offices and commercial laboratories.

**Response**

DEQ agrees to include outreach as a component of this requirement. DEQ also proposes to maintain the requirement for inspection of dental offices to ensure installation of amalgam separators. DEQ will consider this requirement to be satisfied if inspection is done in accordance with ORS 679.520. DEQ made revisions to OAR 340-041-0345(g) (renumbered) in response to this comment.

**Comment #84**

We object to the naming of specific industries as a target of MMP in the OARs are request removing section 6(f)(B).

**Response**

Industries named in the mercury minimization plan were identified during the 2019 update to the Willamette Basin Mercury TMDL as those with likelihood of adding mercury into the basin. DEQ has specified these industries in the MMP in this variance to be consistent with the updated TMDL and to focus MMP efforts to those industries. DEQ has not made any changes in response to this comment.

**Comment #85**

DEQ should delete the requirement "cleanup of legacy mercury from collection systems" from the mercury minimization plan for municipal dischargers. Municipalities already clean their collection systems to maintain capacity and prevent sanitary sewer overflows. It is doubtful that any “legacy mercury” remains in these systems.

**Response**

DEQ has determined that it makes sense to keep this requirement in the mercury minimization plan. DEQ has clarified this requirement by removing the term “legacy mercury,” and requiring periodic collection system cleaning. To the extent municipalities are already doing so, they would meet this requirement under the variance.

**Comment #86**

The elements of the mercury minimization plans for municipal and industrial dischargers allow facilities that have accomplished all activities within their control to implement mercury reduction activities outside their control. This section should be structured to allow trading.

**Response**

The Multiple Discharger Variance rulemaking is complex. Adding trading will complicate the rule further. Thus,DEQ has opted to not include trading in this variance rulemaking. However, trading may be a topic to be explored in the future. DEQ did not make changes in response to this comment.

**Comment #87**

The description of the permittee's request should be described as a request for coverage under the variance, not an authorization.

**Response**

DEQ agrees and has made changes to proposed language at OAR 340-041-0345(6)(j) (renumbered) in response to this comment.

**Comment #88**

DEQ should separate provisions for variance duration and process for re-evaluation. (comment #32 above)

**Response**

DEQ is unclear how this comment relates to the rule language for the multiple discharger variance. DEQ made revisions to the variance authorization rule in response to Comment #32. DEQ did not make changes in response to this comment.

**Comment #89**

This provision on the reevaluation of the variance fails to include the fact that in the absence of the timely reevaluation, the variance lapses.

**Response**

DEQ has revised rule language accordingly. DEQ has made changes to proposed language at OAR 340-041-0345(6)(k) (renumbered) in response to this comment.

**Comment #90**

DEQ should commit to posting the reevaluation and all previous reevaluations on its website. Particularly given that DEQ intends to offer a minimum of a 30-day comment period, potential commenters should not have to request copies of previous reevaluations from DEQ. In addition, the reevaluation may be of use to citizens seeking to comment on draft NPDES permits for the dischargers in the future.

**Response**

DEQ expects to make re-evaluations of this variance and other future variances requiring re-evaluation available to the public.

**Comment #91**

Revisions to Mercury Minimization Plans should only be requested if necessary. Rule language at (6)(i)(C)(ii) should read, "DEQ will review updates to the facility's site-specific mercury minimization plan and, if necessary, request revisions to ensure that it is consistent with variance requirements."

**Response**

DEQ has revised the rule language accordingly. DEQ has made changes to proposed language at OAR 340-041-0345(6)(k)(C)(ii) (renumbered) in response to this comment.

**Comments on Supporting Documentation (Notice of Proposed Rulemaking, Attachment 1)**

**Comment #92**

The list of permittees in Section 1.4 does not include Clean Water Services’ Hillsboro WWTF.

**Response**

DEQ has revised supporting documentation accordingly. DEQ also has included a list of facilities covered in this variance in the rule language at OAR 340-041-0345(6).

**Comment #93**

Section 2.2.1. DEQ should review the characterization of these facilities and present effluent characterization data that reflect this categorization (eight facilities in advanced treatment category, whereas the table on page 4 and later sections include only three facilities in this category). Need to use criteria to define advanced treatment facilities. Be consistent throughout document.

**Response**

DEQ has made substantial revisions to this section and has deleted the referenced text and sections, as DEQ concluded they are not relevant to this variance.

**Comment #94**

Section 3.1.2. DEQ should state that upgrading facilities just for mercury removal is not warranted due to negligible improvement in performance, high costs, additional energy usage, and no corresponding water quality benefit. As facilities upgrade for other reasons, improvements in mercury removal will be realized.

**Response**

DEQ has made substantial revisions to this section and has deleted the referenced text and sections.

**Comment #95**

Section 3.1.2.1. The analysis leading to this conclusion is not particularly rigorous and is unnecessary. Since it has already been made clear in section 3.1.2 that source reduction is preferred over advanced treatment, comparing the two further is not needed to support that approach.

**Response**

Please see response to Comment #94.

**Comment #96**

Section 3.2.2. Please provide clarifying edits to ensure it is clear that the activities specified in section 3.2.2 constitute the MMP for this variance. To reduce confusion, please refer to facility-specific information that will be provided once a facility qualifies for the variance as implementation of the MMP.

**Response**

DEQ has made clarifications to the supporting documentation accordingly.

**Comment #97**

Section 3.2.3. Include a discussion of what can be remedied by the state and the dischargers covered by the variance. Describe reasons why the reductions achievable through the MMP are those that can be remedied within the 20-year term of the variance.

The variance must identify how other sources, beyond point sources, of mercury can be remedied and include those activities. (For example, this could include non-point source reductions; commitments under existing programs, etc.). Cite to existing information sources.

**Response**

DEQ has revised its justification for the term of the variance. In addition, DEQ has included additional discussion in Section 3.2.3 of the supporting documentation (Notice of Proposed Rulemaking Attachment 1) regarding regulatory and non-regulatory state programs that, over time, will reduce mercury loads. As discussed in the supporting documentation, DEQ’s November 2019 Willamette Mercury TMDL and Water Quality Management Plan indicates that it will take at least 20 years, for activities conducted through these programs to result in attainment of the fish-tissue based methylmercury criterion. At EPA’s request, DEQ also has included in subsection (6)(h) of the rule an acknowledgement of state programs and activities that will result in mercury reductions over time.

Comment #98

We object to the inclusion of this list of activities, especially without a complete discussion of the causes of exceedances and the complex mechanics of removing mercury loading from nonpoint sources. Please remove Section 3.2.3 from Notice of Proposed Rulemaking Attachment 1.

**Response**

DEQ has included a description of what the State can do to address the fact that the fish-tissue based human health criterion for methyl-mercury is not attainable during the term of the variance. The activities specified within this list is consistent with the updated TMDL that DEQ has developed simultaneously to this variance. EPA has indicated that such a description is necessary to justify the variance and the proposed 20-year term.

**Comment #99**

Since the measured data may not necessarily match a log-normal distribution, ODEQ should modify the approach to allow for the use of alternative distributions if deemed appropriate by standard statistical tests (e.g., Shapiro-Wilk) by a variance. If data do not match any specific distribution (again, by using standard statistical tests), then non-parametric methods should be allowed by the variance. These methods are easily implementable in ProUCL, as discussed in EPA’s Technical Support Document (which is referenced on p. 24 of Notice of Proposed Rulemaking Attachment #1).

**Response**

DEQ has revised Section 4.2.1 of the supporting documentation to allow for alternate methods to develop permit limits if a discharger provides data to DEQ showing that the measured effluent data do not match a log-normal distribution. Any alternate method for developing effluent limits should be consistent with EPA’s guidance.

**Comment #100**

We ask that ODEQ be more responsive to legitimate data requests so that stakeholders are able to adequately assess the methods used by the department and offer alternatives in a quantitative manner. NWPPA reiterates that given the paucity of information on industrial discharges for calculating LCA’s that the alternative LCA calculation methods in NWPPA comment 22 (Comment #100 in this document) be added to the variance rules or be allowed for variance implementation.

**Response**

Please see response to Comment #99.DEQ tries to be responsive to data requests and apologizes for not responding in a timely manner in this case. We strive to do better in the future.

**Comment #101**

NWPPA comments that while implementation of MMPs will help to identify mercury loads that contribute to effluent loads, ODEQ should be cautious in delineating expectations for achievable reductions prior to an improved understanding of Oregon-specific source loads and opportunities for reducing those loads for manufacturing facilities

DEQ appears to have only used Wisconsin industrial dischargers as examples for MMP implementation (last paragraph on p. 22, Notice of Proposed Rulemaking Attachment #1). While these findings are valid for point sources in Wisconsin, ODEQ should not necessarily anticipate that the magnitudes of reductions or the residual effluent concentrations following MMP implementation at Oregon point sources should be similar to point sources in Wisconsin.

As noted throughout TetraTech’s Mercury TMDL technical support document, contributions to mercury loadings in the Willamette are regionally specific. Local factors such as current and historic land use practices, local and long-range air transport and deposition, regional weather patterns and terrain features, and others, can influence mercury concentrations in effluents.

Further, NWPPA emphasizes that the availability and cost effectiveness of raw material and process additive substitution alternatives are site-specific to each manufacturing facility.

**Response**

DEQ acknowledges NWPPA’s comment. DEQ understands that mercury loading contributions are site-specific and that results of MMP implementation will vary. Based on data provided by Wisconsin, Minnesota and Oregon dischargers, DEQ expects MMP implementation will lower mercury contributions from point sources in aggregate. In addition, as any approved TMDL is implemented, overall mercury loads should decrease, which should simultaneously decrease mercury intake concentrations.

**Comment #102**

NWPPA supports the ODEQ Fiscal Statement and conclusions that the Willamette Basin mercury MDV rule proposal will: decrease variance application costs for applicants; increase government efficiency to review, issue and administer variances; and, allow ODEQ build on scientific research from the draft Willamette Basin Mercury TMDL.

**Response**

DEQ acknowledges NWPPA’s support of the fiscal impact statement.

**Comment #103**

The fiscal and economic impact is flawed because it says absolutely nothing about non-point source controls, as is required by federal rules for waterbody variances.

**Response**

DEQ is adopting a multiple discharger variance that applies to point sources, not a waterbody variance and supporting documentation is not required to identify and document cost-effective and reasonable best management practices for nonpoint source controls.

**Comment #104**

DEQ’s conclusion that the proposed rules do not affect land use is incorrect because it has an impact on non-point sources of pollution.

**Response**

DEQ is adopting a multiple discharger variance that applies to point sources, not a waterbody variance and supporting documentation is not required to identify and document cost-effective and reasonable best management practices for nonpoint source controls.

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| --- |
| Commenters |

## Comments received by close of public comment period

The table below lists number of commenterspeople and organizations that submitted public comments about the proposed rules by the deadline. Original comments are on file with DEQ.

| **List of Commenters** | | | | |
| --- | --- | --- | --- | --- |
| **#** | **Name** | **Organization** | **Comment Number** | **Hearing #** |
| 1 | Diana Tesh |  | 20 |  |
| 2 | Tom Quintal | Willamette Valley Mining Association | 5 | 1 |
| 3 | Nina Bell | Northwest Environmental Advocates | 2, 18, 19, 22, 25, 26, 27, 28, 29, 33, 36, 37, 38, 40, 41, 42, 43, 44, 47, 48, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65, 67, 68, 69, 76, 78, 81, 83, 90, 91, 103, 104 |  |
| 4 | Amy Pepper | Oregon Association of Clean Water Agencies (ACWA) | 32, 35, 45, 66, 83, 85, 89 |  |
| 5 | Lindsay Guzzo | EPA | 13, 24, 29, 61, 63, 72, 80, 96, 97 |  |
| 6 | Mary Anne Cooper | Oregon Farm Bureau (OFB, OFIC, OAN) | 73, 84, 98 |  |
| 7 | Kathryn VanNatta | Northwest Pulp & Paper Association (NWPPA) | 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 21, 30, 39, 46, 50, 74, 75, 99, 100, 101, 102 |  |
| 8 | Kirsten Losli | Clean Water Services | 23, 31, 34, 51, 62, 64, 66, 71, 72, 77, 79, 83, 85, 86, 87, 88, 92, 93, 94, 95 |  |

Add more commenters by copying and pasting additional commenter sections here.

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| Implementation |

## Notification

The proposed rules would become effective after filing on approximately Jan. 24, 2020, and then after DEQ submits and EPA approves the rules under the Clean Water Actmmm, dd, yyyy. Once DEQ sends the rules to EPA for approval, EPA has 60 days to approve or 90 days to disapprove the rule.

DEQ will notify affected parties by:

* Submitting a GovDelivery notice to the Water Quality Standards and DEQ Rulemaking lists.
* Emailing DEQ staff and members of the Rulemaking Advisory Committee and other interested parties

Describe Notification (PARTIES AND METHOD USED TO PROVIDE NOTICE)

|  |
| --- |
| Five-year Review ORS 183.405 |

Requirement

Oregon law requires DEQ to review newrules within five years after EQC adopts them. The law also exempts some rules from review. DEQ determined whether the rules described in this report are subject to the five-year review. DEQ based its analysis on the law in effect when EQC adopted these rules.

## Exemption from five-year rule review

The Administrative Procedures Act exempts all of the proposed rules from the five-year review because the proposed rules would:

* Amend or repeal an existing rule. ORS 183.405(4).
* Correct errors or omissions in the existing rules. ORS 183.405(d).

|  |
| --- |
| Draft Rules – With Edits Highlighted |

**Key to Identifying Changed Text:**

**~~Strikeout: Deleted Text~~**  
Underline: New/inserted text  
Double-strikethrough – with underline: Text deleted from one location - and moved to another location

**340-041-0002  
Definitions**

Definitions in this rule apply to all basins unless context requires otherwise.

(1) "401 Water Quality Certification" means a determination made by DEQ that a dredge and fill activity, private hydropower facility, or other federally licensed or permitted activity that may result in a discharge to waters of the state has adequate terms and conditions to prevent an exceedance of water quality criteria. The federal permit in question may not be issued without this state determination in accordance with the Federal Clean Water Act, section 401 (33 USC 1341).

(2) "Ambient Stream Temperature" means the stream temperature measured at a specific time and place. The selected location for measuring stream temperature must be representative of the stream in the vicinity of the point being measured.

(3) "Anthropogenic," when used to describe "sources" or "warming," means that which results from human activity.

(4) "Applicable Criteria" means the biologically based temperature criteria in OAR 340-041-0028(4), the superseding cold water protection criteria in 340-041-0028(11) or the superseding natural condition criteria in 340-041-0028(8). The applicable criteria may also be site-specific criteria approved by U.S. EPA. A subbasin may have a combination of applicable temperature criteria derived from some or all of these numeric and narrative criteria.

(5) "Appropriate Reference Site or Region" means a site on the same water body or within the same basin or ecoregion that has similar habitat conditions and represents the water quality and biological community attainable within the areas of concern.

(6) "Aquatic Species" means plants or animals that live at least part of their life cycle in waters of the state.

(7) "Basin" means a third-field hydrologic unit as identified by the U.S. Geological Survey.

(8) "BOD" means 5-day, 20°C Biochemical Oxygen Demand.

(9) "Cold-Water Aquatic Life" means aquatic organisms that are physiologically restricted to cold water including, but not limited to, native salmon, steelhead, mountain whitefish, char including bull trout, and trout.

(10) "Cold Water Refugia" means those portions of a water body where or times during the diel temperature cycle when the water temperature is at least 2 degrees Celsius colder than the daily maximum temperature of the adjacent well-mixed flow of the water body.

(11) "Commission" or “EQC” means the Oregon Environmental Quality Commission.

(12) "Cool Water Aquatic Life" means aquatic organisms that are physiologically restricted to cool waters including, but not limited to, native sturgeon, Pacific lamprey, suckers, chub, sculpins and certain species of cyprinids (minnows).

(13) "Core Cold Water Habitat Use" means waters expected to maintain temperatures within the range generally considered optimal for salmon and steelhead rearing, or that are suitable for bull trout migration, foraging and sub-adult rearing that occurs during the summer. These uses are designated on the following subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Figures 130A, 151A, 160A, 170A, 180A, 201A, 220A, 230A, 271A, 286A, 300A, 310A, 320A, and 340A.

(14) "Critical Habitat" means those areas that support rare, threatened, or endangered species or serve as sensitive spawning and rearing areas for aquatic life as designated by the U.S. Fish and Wildlife Service or National Oceanic and Atmospheric Administration-Fisheries according to the Endangered Species Act (16 U.S. Code § 1531).

(15) "Daily Mean" for dissolved oxygen means the numeric average of an adequate number of data to describe the variation in dissolved oxygen concentration throughout a day, including daily maximums and minimums. For calculating the mean, concentrations in excess of 100 percent of saturation are valued at the saturation concentration.

(16) "Department" or "DEQ" means the Oregon State Department of Environmental Quality.

(17) "Designated Beneficial Use" means the purpose or benefit to be derived from a water body as designated by the Water Resources Department or the Water Resources Commission.

(18) "DO" means dissolved oxygen.

(19) "Ecological Integrity" means the summation of chemical, physical, and biological integrity capable of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region.

(20) "Epilimnion" means the seasonally stratified layer of a lake or reservoir above the metalimnion; the surface layer.

(21) "Erosion Control Plan" means a plan containing a list of best management practices to be applied during construction to control and limit soil erosion.

(22) “Estuarine Waters” means all mixed fresh and oceanic waters in estuaries or bays from the point of oceanic water intrusion inland to a line connecting the outermost points of the headlands or protective jetties.

(23) "High Quality Waters" means those waters that meet or exceed levels necessary to support the propagation of fish, shellfish and wildlife, recreation in and on the water, and other designated beneficial uses.

(24) "Hypolimnion" means the seasonally stratified layer of a lake or reservoir below the metalimnion; the bottom layer.

(25) "Industrial Waste" means any liquid, gaseous, radioactive, or solid waste substance or a combination of them, resulting from any process of industry, manufacturing, trade, or business, or from developing or recovering any natural resources.

(26) "In Lieu Fee" means a fee a jurisdiction collects in lieu of requiring construction of onsite stormwater quality control facilities.

(27) "Intergravel Dissolved Oxygen" (IGDO) means the concentration of oxygen measured in the water within the stream bed gravels. Measurements should be taken within a limited time period before fry emerges.

(28) "Jurisdiction" means any city or county agency in the Tualatin River and Oswego Lake subbasin that regulates land development activities within its boundaries by approving plats or site plans or issuing permits for land development.

(29) "Land Development" means any human-induced change to improved or unimproved real estate including, but not limited to, construction, installation, or expansion of a building or other structure, land division, drilling, or site alteration, such as land surface mining, dredging, grading, construction of earthen berms, paving, improvements for use as parking, or storage, excavation, or clearing.

(30) "Load Allocation” or “LA" means the portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading that may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever possible, natural and nonpoint source loads should be distinguished.

(31) "Loading Capacity” or “LC" means the greatest amount of loading that a water body can receive without violating water quality standards.

(32) "Low Flow Period" means the flows in a stream resulting primarily from groundwater discharge or base flows augmented from lakes and storage projects during the driest period of the year. The dry weather period varies across the state according to climate and topography. Wherever the low flow period is indicated in Water Quality Management Plans, this period has been approximated by the inclusive months. Where applicable in a waste discharge permit, the low flow period may be further defined.

(33) "Managed Lakes" refers to lakes in which hydrology is managed by controlling the rate or timing of inflow or outflow.

(34) “Marine Waters” means all oceanic, offshore waters outside of estuaries or bays and within the territorial limits of the State of Oregon.

(35) "mg/l" or "mg/L" means milligrams per liter.

(36) "Metalimnion" means the seasonal, thermally stratified layer of a lake or reservoir that is characterized by a rapid change in temperature with depth and that effectively isolates the waters of the epilimnion from those of the hypolimnion during the period of stratification; the middle layer.

(37) "Migration Corridors" mean those waters that are predominantly used for salmon and steelhead migration during the summer and have little or no anadromous salmonid rearing in the months of July and August. Migration corridors are designated in Tables 101B and 121B and Figures 151A, 170A, 300A and 340A under OAR 340-041-0101 to 340-041-0340.

(38) "Minimum" for dissolved oxygen means the minimum recorded concentration including seasonal and diurnal minimums.

(39) "Monthly (30-day) Mean Minimum" for dissolved oxygen means the minimum of the 30 consecutive-day floating averages of the calculated daily mean dissolved oxygen concentration.

(40) "Natural Conditions" means conditions or circumstances affecting the physical, chemical, or biological integrity of a water of the state that are not influenced by past or present anthropogenic activities. Disturbances from wildfire, floods, earthquakes, volcanic or geothermal activity, wind, insect infestation and diseased vegetation are considered natural conditions.

(41) "Natural Thermal Potential" means the determination of the thermal profile of a water body using best available methods of analysis and the best available information on the site-potential riparian vegetation, stream geomorphology, stream flows and other measures to reflect natural conditions.

(42) "Nonpoint Sources" means any source of water pollution other than a point source. Generally, a nonpoint source is a diffuse or unconfined source of pollution where wastes can either enter into waters of the state or be conveyed by the movement of water into waters of the state.

(43) "Ocean Waters" means all oceanic, offshore waters outside of estuaries or bays and within the territorial limits of Oregon.

(44) "Outstanding Resource Waters" means waters designated by the EQC where existing high quality waters constitute an outstanding state or national resource based on their extraordinary water quality or ecological values or where special water quality protection is needed to maintain critical habitat areas.

(45) “Pollutant Minimization Plan” or “PMP” means a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

(46) "Pollution" means such contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any water of the state that either by itself, or in connection with any other substance present, can reasonably be expected to create a public nuisance or render such waters harmful, detrimental, or injurious to public health, safety, or welfare, to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wildlife, fish, other aquatic life or the habitat thereof.

(47) "Point Source" means a discernible, confined, and discrete conveyance including, but not limited to, a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or leachate collection system from which pollutants are or may be discharged. Point source does not include agricultural storm water discharges and return flows from irrigated agriculture.

(48) "Public Water" means the same as "waters of the state."

(49) "Public Works Project" means any land development conducted or financed by a local, state, or federal governmental body.

(50) "Reserve Capacity" means that portion of a receiving stream's loading capacity that has not been allocated to point sources or to nonpoint sources and natural background as waste load allocations or load allocations, respectively. The reserve capacity includes that loading capacity that has been set aside for a safety margin and is otherwise unallocated.

(51) "Resident Biological Community" means aquatic life expected to exist in a particular habitat when water quality standards for a specific ecoregion, basin or water body are met. This must be established by accepted biomonitoring techniques.

(52) "Salmon" means chinook, chum, coho, sockeye and pink salmon.

(53) "Salmon and Steelhead Spawning Use" means waters that are or could be used for salmon and steelhead spawning, egg incubation, and fry emergence. These uses are designated on the following subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Tables 101B, and 121B, and Figures 130B, 151B, 160B, 170B, 220B, 230B, 271B, 286B, 300B, 310B, 320B, and 340B.

(54) "Salmon and Trout Rearing and Migration Use" means thermally suitable rearing habitat for salmon, steelhead, rainbow trout, and cutthroat trout as designated on subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Figures 130A, 151A, 160A, 170A, 220A, 230A, 271A, 286A, 300A, 310A, 320A, and 340A.

(55) "Salmonid or Salmonids" means native salmon, trout, mountain whitefish and char including bull trout. For purposes of Oregon water quality standards, salmonid does not include brook or brown trout because they are introduced species.

(56) "Secondary Treatment" means the following depending on the context:

(a) For sewage wastes, secondary treatment means the minimum level of treatment mandated by U.S. Environmental Protection Agency regulations under Public Law 92-500.

(b) For industrial and other waste sources, secondary treatment means control equivalent to best practicable treatment.

(57) "Seven-Day Average Maximum Temperature" means a calculation of the average of the daily maximum temperatures from seven consecutive days made on a rolling basis.

(58) "Sewage" means the water-carried human or animal waste from residences, buildings, industrial establishments, or other places, together with such groundwater infiltration and surface water as may be present. The admixture with sewage of industrial wastes or wastes, as defined in this rule, may also be considered "sewage" within the meaning of this division.

(59) "Short-Term Disturbance" means a temporary disturbance of six months or less when water quality standards may be violated briefly but not of sufficient duration to cause acute or chronic effects on beneficial uses.

(60) "Spatial Median" means the value that falls in the middle of a data set of multiple intergravel dissolved oxygen (IGDO) measurements taken within a spawning area. Half the samples should be greater than and half the samples should be less than the spatial median.

(61) "SS" means suspended solids.

(62) "Stormwater Quality Control Facility" means any structure or drainage way designed, constructed and maintained to collect and filter, retain, or detain surface water runoff, during and after a storm event, for the purpose of water quality improvement. It may also include, but is not be limited to, existing features such as wetlands, water quality swales and ponds maintained as stormwater quality control facilities.

(63) "Subbasin" means a fourth-field hydrologic unit as identified by the U.S. Geological Survey.

(64) "Summer" means June 1 through September 30 of each calendar year.

(65) "Threatened or Endangered Species" means aquatic species listed as either threatened or endangered under the federal Endangered Species Act (16 U.S. Code § 1531 et seq., and Title 50 of the Code of Federal Regulations).

(66) "Total Maximum Daily Load (TMDL)" means the sum of the individual waste load allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources and background. If receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(67) "Toxic Substance" means those pollutants or combinations of pollutants, including disease-causing agents, that, after introduction to waters of the state and upon exposure, ingestion, inhalation or assimilation either directly from the environment or indirectly by ingestion through food chains, will cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), or physical deformations in any organism or its offspring.

(68) "Wasteload Allocation” or “WLA" means the portion of a receiving water's loading capacity allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(69) “Warm-Water Aquatic Life” means the aquatic communities that are adapted to warm-water conditions and do not contain either cold- or cool-water species.

(70) "Wastes" means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive, or other substances that may cause or tend to cause pollution of any water of the state.

(71) "Water Quality Limited" means one of the following:

(a) A receiving stream that does not meet narrative or numeric water quality criteria during the entire year or defined season even after standard technology is implemented;

(b) A receiving stream that achieves and is expected to continue to achieve narrative or numeric water quality criteria but uses higher than standard technology to protect beneficial uses;

(c) A receiving stream for which there is insufficient information to determine whether water quality criteria are being met with higher-than-standard treatment technology or a receiving stream that would not be expected to meet water quality criteria during the entire year or defined season without higher than standard technology.

(72) “Water Quality Standards Variance,” or “WQS variance” means a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflects the highest attainable condition during the term of the WQS variance.

(73) "Water Quality Swale" means a natural depression or wide, shallow ditch used to temporarily store, route, or filter runoff for the purpose of improving water quality.

(74) "Waters of the state" means lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private, except those private waters that do not combine or effect a junction with natural surface or underground waters, that are located wholly or partially within or bordering the state or within its jurisdiction.

(75) "Weekly (seven-day) Mean Minimum" for dissolved oxygen means the minimum of the seven consecutive-day floating average of the calculated daily mean dissolved oxygen concentration.

(76) "Weekly (seven-day) Minimum Mean" for dissolved oxygen means the minimum of the seven consecutive-day floating average of the daily minimum concentration. For application of the criteria, this value is the reference for diurnal minimums.

(77) "Without Detrimental Changes in the Resident Biological Community" means no loss of ecological integrity when compared to natural conditions at an appropriate reference site or region.

Statutory/Other Authority: ORS 468.020, 468B.010, 468B.015, 468B.035 & 468B.048  
Statutes/Other Implemented: ORS 468B.035 & 468B.048  
History:  
DEQ 1-2015, f. & cert. ef. 1-7-15  
DEQ 3-2012, f. & cert. ef. 5-21-12  
DEQ 2-2007, f. & cert. ef. 3-15-07  
DEQ 3-2004, f. & cert. ef. 5-28-04  
DEQ 17-2003, f. & cert. ef. 12-9-03

**340-041-0059**  
**Variances**

(1) Applicability. Subject to the requirements and limitations set out in sections (2) through (7) below, DEQ or the EQC may grant a water quality standards variance where the discharger or DEQ demonstrates that it is not feasible to attain the designated use and criterion during the term of the variance because of one of the factors listed in subsection (2)(b) of this rule. The director may grant an individual discharger variance and the commission may grant a multiple discharger variance or a water body variance. All water quality standards variances are subject to EPA approval. The variance may be used only for the purpose of establishing NPDES permit limits and requirements under CWA Section 301(b)(1)(C) or for issuing certifications under CWA Section 401. The underlying designated use and criterion otherwise remains in effect.

(2) Conditions to Grant a Variance. Before the EQC or DEQ may grant a variance, it must determine that:

(a) Attaining the designated use and criterion during the term of the variance is not feasible for one or more 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 waterbody 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 waterbody, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, 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; or

(G) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented;

(b) The effluent limit sufficient to meet the underlying designated use and criterion cannot be attained by implementing technology-based effluent limits required under sections 301(b) and 306 of the federal Clean Water Act.

(c) The requirements that apply throughout the term of the water quality standards variance will not result in lowering the currently attained ambient water quality, unless the variance is needed for restoration activities as specified in paragraph (2)(a)(G) of this rule.

(3) Variance Duration and Re-evaluation.

(a) The duration of a variance must only be as long as necessary to achieve the highest attainable condition as described in section (5) of this rule.

(b) The DEQ order or EQC rule will specify the duration of the variance.

(c) If the duration of the variance is less than the term of the NPDES permit, the permittee must comply with the specified effluent limitation sufficient to meet the underlying water quality standard when the variance expires. The permit will include the date the variance and corresponding interim effluent limit will expire.

(d) If the term of the variance exceeds five years, DEQ will re-evaluate the highest attainable condition using all existing and readily available information at least every five years. DEQ will specify the re-evaluation frequency in the variance. Following public input, DEQ will submit its re-evaluation to EPA within 30 days of completion. If DEQ does not submit the re-evaluation to EPA within the specified timeline, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA.

(4) Variance Submittal Requirements.

(a) To request an individual variance, a permittee must submit the following information to DEQ:

(A) The specific pollutant, discharger, and receiving waterbody to which the variance will apply;

(B) A demonstration that attaining the designated use and criterion for the specific pollutant is not feasible for the requested duration of the variance based on one of the factors found in subsection (2)(a) of this rule;

(C) A description of treatment or alternative options considered to meet permit limits based on the applicable underlying water quality criterion, and a description of why these options are not technologically, economically, or otherwise feasible;

(D) Sufficient water quality data and analyses to characterize ambient and discharge water pollutant concentrations and determine the Highest Attainable Condition, as required in section (5) of this rule;

(E) If the highest attainable condition for the variance is consistent with paragraph (5)(a)(C) of this rule, a proposed pollutant minimization plan covering the term of the variance that includes actions the permittee(s) will take that will result in progress toward meeting the underlying water quality standard; and

(F) If the discharger is a publicly owned treatment works, a demonstration of the jurisdiction’s legal authority, such as a sewer use ordinance, to regulate the pollutant for which the variance is sought. The jurisdiction’s legal authority must be sufficient to control potential sources of that pollutant that discharge into the jurisdiction’s sewer collection system.

(b) To be eligible for any multiple discharger variance or waterbody variance, a permittee must submit all the information required in the specific multiple discharger or waterbody variance rule.

(5) Highest Attainable Condition. The highest attainable condition is a quantifiable expression of one of the following:

(a) For individual or multiple discharger WQS variances:

(A) The highest attainable interim criterion; or

(B) The interim effluent condition that reflects the greatest pollutant reduction achievable; or

(C) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State grants the WQS variance, and adoption and implementation of a pollutant minimization plan.

(b) For WQS variances applicable to a waterbody or waterbody segment:

(A) The highest attainable interim use and interim criterion; or

(B) If no additional feasible pollutant control technology can be identified, the interim use and interim criterion that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a pollutant minimization plan.

(c) For any WQS variance that applies to a waterbody or waterbody segment, supporting documentation will identify and document any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) or water quality parameter(s) and waterbody or waterbody segment(s) specified in the WQS variance that could be implemented to make progress towards attaining the underlying designated use and criterion. DEQ will provide public notice and comment for any such documentation.

(d) In any subsequent WQS variance for a waterbody or waterbody segment, DEQ will document whether and to what extent best management practices for nonpoint source controls were implemented to address the pollutant(s) or water quality parameter(s) subject to the WQS variance and the water quality progress achieved.

(6) Variance Permit Conditions. DEQ must establish and incorporate into the discharger’s NPDES permit all conditions necessary to implement an approved variance in lieu of the underlying water quality standard, so long as the variance remains effective. The permit must include, at a minimum, the following requirements:

(a) A permit limit or requirement deriving from the highest attainable effluent condition or highest attainable use and criterion specified in the variance, including any updated highest attainable effluent condition based on a five year re-evaluation;

(b) For variances expressing the highest attainable condition per section 5(a)(C) or 5(b)(B) of this rule, a requirement to implement the Pollutant Minimization Program included in the applicable variance ;

(c) Any studies, effluent monitoring, or other monitoring necessary to ensure compliance with the conditions of the variance; and

(d) An annual progress report to DEQ describing the results of any required studies or monitoring during the reporting year, and identifying the pollutant reduction activities completed and any impediments to reaching any specific milestones stated in the variance.

(7) Public Input and Notification Requirements.

(a) If DEQ proposes to grant a variance, it must provide public notice of the proposed variance and accept public comment. The public notice may be coordinated with the public notification of a draft NPDES permit or draft 401 certification that would rely on the variance;

(b) If DEQ is required to re-evaluate the highest attainable condition consistent with (3)(d) of this rule, DEQ will obtain public input on the re-evaluation prior to submitting the re-evaluation to EPA. The specific method of obtaining public input will be documented in the variance.

(c) DEQ will publish a list of all variances approved under this rule on its website. DEQ will add newly approved variances to this list within 30 days of their effective date. The list will identify:

(A) The effective date and duration of the variance;

(B) The facility or facilities;

(C) The pollutant(s) or water quality parameter(s);

(D) The waters to which the variance applies;

(E) The underlying designated use and criterion for the waterbody;

(F) The highest attainable condition specified in the variance;

(G) How to obtain additional information about the variance.

**Statutory/Other Authority:** ORS 468.020, 468B.010, 468B.020, 468B.035 & 468B.110  
**Statutes/Other Implemented:** ORS 468B.048  
**History:**  
DEQ 10-2011, f. & cert. ef. 7-13-11

**340-041-0345**  
**Basin-Specific Criteria (Willamette): Water Quality Standards and Policies for this Basin**

(1) pH (hydrogen ion concentration). pH values may not fall outside the following ranges:

(a) All basin waters, except main stem Columbia River and Cascade lakes: 6.5 to 8.5;

(b) Cascade lakes above 3,000 feet altitude: 6.0 to 8.5.

(2) Total Dissolved Solids. Guide concentrations listed may not be exceeded unless DEQ specifically authorizes otherwise upon such conditions as it may deem necessary to carry out the general intent of this plan and to protect the beneficial uses set forth in OAR 340-041-0340: Willamette River and Tributaries — 100.0 mg/l.

(3) Minimum Design Criteria for Treatment and Control of Sewage Wastes:

(a) Willamette River and tributaries except Tualatin River Subbasin:

(A) During periods of low stream flows (approximately May 1 to October 31): Treatment resulting in monthly average effluent concentrations not to exceed 10 mg/l of BOD and 10 mg/l of SS or equivalent control;

(B) During the period of high stream flows (approximately November 1 to April 30): A minimum of secondary treatment or equivalent control and, unless DEQ otherwise specifically authorizes, operating all waste treatment and control facilities at maximum practical efficiency and effectiveness so as to minimize waste discharges to public waters.

(b) Main stem Tualatin River from mouth to Gaston (river mile 0 to 65):

(A) During periods of low stream flows (approximately May 1 to October 31): Treatment resulting in monthly average effluent concentrations not to exceed 10 mg/l of BOD and 10 mg/l of SS or equivalent control;

(B) During the period of high stream flows (approximately November 1 to April 30): Treatment resulting in monthly average effluent concentrations not to exceed 20 mg/l of BOD and 20 mg/l of SS or equivalent control.

(c) Main stem Tualatin River above Gaston (river mile 65) and all tributaries to the Tualatin River: Treatment resulting in monthly average effluent concentrations not to exceed 5 mg/l of BOD and 5 mg/l of SS or equivalent control;

(d) Tualatin River Subbasin: The dissolved oxygen level in the discharged effluents may not be less than 6 mg/l;

(4) Nonpoint source pollution control in the Tualatin River subbasin and lands draining to Oswego Lake:

(a) Subsection (5)(b) of this rule applies to any new land development within the Tualatin River and Oswego Lake subbasins except those developments with application dates before January 1, 1990. The application date is the date on which the local jurisdiction receives a complete application for development approval as the local jurisdiction’s regulations require;

(b) For land development, no jurisdiction in these subbasins may approve any preliminary plat, site plan, permit, or public works project unless the conditions of the plat permit or plan approval include an erosion control plan containing methods or interim facilities, or both, to be constructed or used concurrently with land development and to be operated during construction to control the discharge of sediment in the stormwater runoff. The erosion control plan must include the following elements:

(A) Protection techniques to control soil erosion and sediment transport to less than one ton per acre per year, as calculated using the Natural Resources Conservation Service's Universal Soil Loss Equation or other equivalent methods (see Figures 1 to 6 in Appendix 1 for examples). The erosion control plan must include temporary sedimentation basins or other sediment control devices when, because of steep slopes or other site specific considerations, other on-site sediment control methods will not likely keep the sediment transport to less than one ton per acre per year. The local jurisdictions may establish additional requirements for meeting an equivalent degree of control. Any sediment basin constructed must be sized using 1.5 feet minimum sediment storage depth plus 2.0 feet storage depth above for a settlement zone. The storage capacity of the basin must be sized to store all of the sediment that is likely to be transported and collected during construction while the erosion potential exists. When the erosion potential has been removed, the sediment basin, or other sediment control facilities, can be removed and the site restored as per the final site plan. All sediment basins must be constructed with an emergency overflow to prevent erosion or failure of the containment dike; or

(B) A soil erosion control matrix derived from and consistent with the universal soil equation the jurisdiction or DEQ approves.

(c) The Director may modify Appendix 1 as necessary without approval from the Environmental Quality Commission. The Director may modify Appendix 1 to simplify it and to make it easier for people to apply;

(d) Subsection (5)(e) of this rule applies to any new land development within the Tualatin River and Oswego Lake subbasins, except:

(A) Those developments with application dates before June 1, 1990. The application date is the date on which the local jurisdiction receives a complete application for development approval as that jurisdiction’s regulations require;

(B) One and two family dwellings on existing lots of record;

(C) Sewer lines, water lines, utilities, or other land development that will not directly increase nonpoint source pollution once construction has been completed and the site is either restored to, or not altered from, its approximate original condition;

(D) If the Environmental Quality Commission determines that a jurisdiction does not need to require stormwater quality control facilities for new development;

(E) When a jurisdiction adopts ordinances that provide for a stormwater quality program equivalent to subsection (e) of this section. Ordinances adopted to implement equivalent programs must:

(i) Encourage on-site retention of stormwater, require phosphorus removal equivalent to the removal efficiency required by subsection (e) of this section, provide for adequate operation and maintenance of stormwater quality control facilities, and require financial assurance, or equivalent security, that assures construction of the stormwater quality control facilities the ordinance requires;

(ii) If the ordinances provide for exemptions other than those allowed for by paragraphs (B) and (C) of this subsection, the ordinances must provide for collecting in-lieu fees, or other equivalent mechanisms, that assure financing for, and construction of, associated, off-site stormwater quality control facilities. No exemption may be allowed if the jurisdiction is not meeting an approved schedule for identifying location of the off-site stormwater quality control facility to serve the development requesting an exemption.

(e) For new development, no jurisdiction may approve any plat, site plan, building permit or public works project in these subbasins unless the conditions of the plat, permit, or plan approval require permanent stormwater quality control facilities to control phosphorus loadings associated with stormwater runoff from the development site. Jurisdictions must encourage and provide preference to techniques and methods that prevent and minimize pollutants from entering the storm and surface water systems. Permanent stormwater quality control facilities for phosphorus must meet the following requirements:

(A) The stormwater quality control facilities must be designed to achieve a phosphorus removal efficiency as calculated from the following equation:

*Rp = 100 - 24.5/Rv*

*Where:*

*Rp = Required phosphorus removal efficiency*

*Rv = Average site runoff coefficient*

*The average site runoff coefficient can be calculated from the following equation:*

*Rv = (0.7 x A1) + (0.3 x A2) + (0.7 x A3) + (0.05 x A4) + (A5 x 0.0)*

*Where:*

*A1 = fraction of total area that is paved streets with curbs and that drain to storm sewers or open ditches.*

*A2 = fraction of total area that is paved streets that drain to water quality swales located on site.*

*A3 = fraction of total area that is building roof and paved parking that drains to storm sewers.*

*A4 = fraction of total area that is grass, trees and marsh areas.*

*A5 = fraction of total area for which runoff will be collected and retained on site with no direct discharge to surface waters.*

(B) A jurisdiction may modify the equation for Rv to allow applying additional runoff coefficients associated with land surfaces not identified in this subsection. DEQ must be notified in writing whenever an additional runoff coefficient is used. The use of additional runoff coefficients must be based on scientific data. The jurisdiction must discontinue using an additional runoff coefficient if DEQ objects to its use in writing within ten days of receiving notification;

(C) The stormwater quality control facilities must be designed to meet the removal efficiency specified in paragraph (A) of this subsection for a mean summertime storm event totaling 0.36 inches of precipitation with an average return period of 96 hours;

(D) The removal efficiency specified in paragraph (A) of this subsection specify only design requirements and are not intended to be used as a basis for performance evaluation or compliance determination of the stormwater quality control facility installed or constructed pursuant to this subsection;

(E) A jurisdiction may approve stormwater quality control facilities this subsection requires only if the following are met:

(i) For developments larger than one acre, the plat or site plan must include plans and a certification prepared by an Oregon registered, professional engineer, that the proposed stormwater control facilities have been designed in accordance with criteria expected to achieve removal efficiencies for total phosphorus required by paragraph (A) of this subsection;

(ii) The plat or site plan must be consistent with the area and associated runoff coefficients used to determine the removal efficiency required in paragraph (A) of this subsection;

(iii) The developer must provide a financial assurance, or equivalent security acceptable to the jurisdiction, with the jurisdiction that assures that the stormwater control facilities are constructed according to the plans established in the plat or site plan approval. Where practicable, the jurisdiction must combine the financial assurance this rule requires with other financial assurance requirements imposed by the jurisdiction;

(iv) Each jurisdiction that constructs or authorizes construction of permanent stormwater quality control facilities must file with DEQ an operation and maintenance plan for the stormwater quality control facilities within its jurisdiction. The operation and maintenance plan must allow for public or private ownership, operation, and maintenance of individual permanent stormwater quality control facilities. The jurisdiction or private operator must operate and maintain the permanent stormwater control facilities as the operation and maintenance plan specifies.

(f) Except as paragraph (D) of this subsection requires, the jurisdiction may grant an exception to subsection (e) of this section if the jurisdiction chooses to adopt and, on a case-by-case basis, impose a one time in-lieu fee. The fee will be an option where, because of the size of the development, topography, or other factors, the jurisdiction determines that the construction of on-site permanent stormwater treatment systems is impracticable or undesirable:

(A) The in-lieu fee will be based upon a reasonable estimate of the current, prorated cost for the jurisdiction to provide stormwater quality control facilities for the land development being assessed the fee. Estimated costs include costs associated with off-site land and rights-of-way acquisition, design, construction, and construction inspection;

(B) The jurisdiction must deposit any in-lieu fees collected under this paragraph in an account dedicated only to reimbursing the jurisdiction for expenses related to off-site land and rights-of-way acquisition, design, construction, and construction inspection of stormwater quality control facilities;

(C) The ordinance establishing the in-lieu fee must include provisions that reduce the fee in proportion to the ratio of the site's average runoff coefficient (Rv), as established according to the equation in paragraph (6)(e)(A) of this rule;

(D) No new development may be granted an exemption if the jurisdiction is not meeting an approved time schedule for identifying the location for the off-site stormwater quality control facilities that would serve that development.

(g) DEQ may approve other mechanisms that allow jurisdictions to grant exemptions to new development. DEQ may only approve those mechanisms that assure financing for off-site stormwater quality control facilities and that encourage or require on-site retention where feasible;

(h) Subsection (b) of this section applies until a jurisdiction adopts ordinances that provide for a program equivalent to subsection (b) of this section, or the Environmental Quality Commission determines such a program is not necessary when it approves the jurisdiction's program plan required by OAR 340-041-0470(2)(g).

(5) In order to improve water quality within the Yamhill River subbasin to meet the existing water quality standard for pH, the following special rules for total maximum daily loads, waste load allocations, load allocations and program plans are established:

(a) After wastewater control facilities and program plans the EQC approved under this rule are completed, and no later than June 30, 1994, no activities may be allowed, and no wastewater may be discharged to the Yamhill River or its tributaries, without the EQC’s authorization, that cause the monthly median concentration of total phosphorus to exceed 70 ug/1 as measured during the low flow period between approximately May 1 and October 31 of each year;

[NOTE: *DEQ may condition precise dates for complying with this rule on the receiving water’s physical conditions (i.e., flow temperature). DEQ may specify the compliance dates in individual permits or memorandums of understanding. DEQ may consider design flows, river travel times, and other relevant information, when establishing the specific conditions it inserts in the permits or memorandums of understanding.*]

(b) Within 90 days of adoption of these rules, the Cities of McMinnville and Lafayette must submit a program plan and time schedule to DEQ describing how and when they will modify their sewerage facility to comply with this rule;

(c) The commission will review and approve final program plans. The commission may define alternative compliance dates as program plans are approved. All proposed final program plans must be subject to public hearing before the commission considers them for approval;

(d) DEQ will, within 60 days of adoption of these rules, distribute initial waste load allocations and load allocations to the point and nonpoint sources in the basin. These allocations are considered interim and may be redistributed based upon the conclusions of the approved program plans.

(6) Multiple Discharger Variance for Mercury**.** The following rule is a multiple discharger variance to the fish-tissue based human health criterion for methylmercury. The variance applies to the following facilities:

Albany-Millersburg WRF (Willamette River); Canby STP (Willamette River); Cascade Pacific – Halsey Mill (Willamette River); City of Molalla (Molalla River); City of Portland Tryon Creek WWTP (Willamette River); City of Sandy (Tickle Creek); Clean Water Services Durham STP (Tualatin River); Clean Water Services Forest Grove STP (Tualatin River), Clean Water Services Hillsboro STP (Tualatin River), Clean Water Services Rock Creek STP (Tualatin River); Corvallis STP (Willamette River), Cottage Grove STP (Coast Fork Willamette River); Dallas STP (Rickreall Creek); Georgia-Pacific Halsey Mill (Willamette River); Gervais STP (Pudding River); International Paper Springfield Paper Mill (McKenzie River); Kellogg Creek WWTP (Willamette River); Lebanon WWTP (South Santiam River); McMinnville WRF (South Yamhill River); Metropolitan Wastewater Management Commission Eugene/Springfield STP (Willamette River); Newberg STP (Willamette River); Oak Lodge Services WRF (Willamette River); Saint Helens/Boise Cascade STP (Multnomah Channel); Salem Willow Lake STP (Willamette River); Siltronic Corporation (Willamette River); Silverton STP (Silver Creek); Stayton STP (North Santiam River); Sweet Home STP (South Santiam River); Teledyne Wah Chang (Willamette River); Tri-City Serivce District – Blue Heron (Willamette River); Tri-City Water Pollution Control Plant (Willamette River); West Linn Paper Company (Willamette River); Westrock, Newberg Mill (Willamette River); Wilsonville STP (Willamette River); Woodburn WWTP (Pudding River);

The variance will also apply to any of the following facilities for which DEQ would otherwise be required to establish mercury effluent limits during the term of the variance:

Amity STP (Salt Creek); Aumsville STP (Beaver Creek); Brooks STP (Willamette River); Brownsville STP (Calapooia River); Carlton STP (North Yamhill River); City of Estacada (Clackamas River); City of Scappoose (Multnomah Channel); Coburg WWTP (Unnamed tributary to Muddy Creek); Creswell STP (Unnamed tributary to Camas Swale Creek); Dayton STP (Yamhill River); Dundee STP (Willamette River); Halsey STP (Muddy Creek); Harrisburg Lagoon Treatment Plant (Willamette River); Hubbard STP (Mill Creek); Independence STP (Middle Willamette River); Jefferson STP (Santiam River); Junction City STP (Flat Creek); Lafayette STP (Yamhill River); Lane Community College (Russel Creek); Lowell STP (Middle Fork Willamette River); Monmouth STP (Willamette River); Mt. Angel STP (Pudding River); Oakridge STP (Middle Fork Willamette River); Philomath STP (Mary’s River); Tangent STP (Calapooia River); Sheridan STP (South Yamhill River); USDA Forest Service (Clackamas River); Veneta STP (Long Tom River); Willamina STP (South Yamhill River); Yamhill STP (North Yamhill River).

(a) Findings.The EQC finds the following:

(A) The fishing use and fish-tissue based human health criterion for methyl-mercury cannot be attained within the next 20 years due to mercury from atmospheric deposition and naturally occurring mercury in native soils. Neither the sources of mercury nor the processes by which the mercury is transported to waterbodies can be remedied to meet the underlying designated use and criterion within the next 20 years.

(B) There is no currently feasible mercury treatment technology that would result in achieving water quality-based effluent limits based on the human health criterion for mercury.

(C) The requirements of the variance will not result in degrading the currently attained ambient water quality for methyl-mercury in the Willamette Basin.

(b) Term of the variance. The term of this variance is 20 years from the date of EPA approval.

(c) Application requirements**.** To implement the variance, a facility must provide to DEQ the following information:

(A) All mercury effluent data from the previous five years, including a minimum of two years of quarterly effluent data.

(B) A facility-specific mercury minimization program with minimum elements described in subsection (6)(f) of this rule for municipal facilities or subsection (6)(g) of this rule for industrial facilities.

(d) Highest attainable condition. Permit requirements will reflect the highest attainable condition specified in this variance. The highest attainable condition for this variance is the level currently achievable, as described in section (f) below, for all dischargers, and a requirement to develop and implement a mercury minimization program with elements described in subsection (6)(f) of this rule for municipal dischargers and subsection (6)(g) of this rule for industrial dischargers.

(e) Highest attainable condition – level currently achievable (LCA). The highest attainable condition for all facilities covered under this variance will include the level currently achievable, which is a quantifiable expression of the effluent condition achievable with the pollutant control technologies in place at the time this variance is granted when those technologies are well maintained and operated. The LCA for this variance is the 95th percentile value of recent (e.g., two to five years) total mercury effluent data or a previously applicable LCA, whichever is lower.

(f) Highest attainable condition – mercury minimization program for municipal dischargers.The highest attainable condition for municipal dischargers will include implementing a mercury minimization program covering the term of the variance, which must contain the following minimum elements:

(A) A monitoring plan to include influent, effluent and biosolids monitoring;

(B) Regulation of dental offices to ensure installation and maintenance of amalgam separators, including inspection of dental facilities for proper management and disposal of dental waste;

(C) Identification of mercury-containing materials at facilities and offices each municipal wastewater treatment facility operates and implementation of any recommendations for removing mercury-containing materials;

(D) Identification and inspection of commercial laboratories, schools and healthcare facilities that may have mercury and providing recommendations and outreach materials to these facilities;

(E) Distribution of outreach materials to commercial and residential sectors;

(F) Evaluation of new facilities as potential sources of mercury, regulatory oversight of such sources of mercury under the municipality’s pre-treatment program where such sources are significant industrial users, and outreach to provide recommendations on activities that would reduce mercury in the facilities’ discharges. Priority facilities should include those in the timber, paper, glass, clay, cement, concrete, gypsum, primary and fabricated metal, and electronic instrument sectors;

(G) Cleanup of legacy mercury from collection systems;

(H) Facility-specific activities to reduce mercury loading into the waterbody. Ensure the existing treatment system is well maintained and operated in order to maximize the reduction of mercury. Facility activities may also include cost-effective and reasonable best management practices for nonpoint source controls under the control of the discharger that would make progress towards attaining the underlying designated use and criterion; and

(I) If a facility has accomplished all activities within its control, the facility may implement or fund mercury reduction activities outside the discharger’s control that will make progress toward attaining the underlying designated use and criterion.

(g) Highest attainable condition – mercury minimization program for industrial dischargers.The highest attainable condition for industrial dischargers will include implementing a mercury minimization program covering the term of the variance, with the following minimum elements:

(A) A monitoring plan to include influent, effluent and biosolids monitoring;

(B) Identification of mercury-containing materials used in the facility, offices and testing laboratories the discharger operates, and developing and implementing recommendations for using substitute materials with less or no mercury;

(C) Identification of other potential sources of mercury within the facility and developing and implementing recommendations for reducing these sources;

(D) Identification of other activities within discharger’s control discharger to reduce mercury loading into the waterbody. Ensure the existing treatment system is well maintained and operated in order to maximize the reduction of mercury. Facility activities may also include cost-effective and reasonable best management practices for nonpoint source controls under the control of the discharger that would make progress towards attaining the underlying designated use and criterion; and

(E) If a facility has accomplished all activities within its control, the facility may implement or fund mercury reduction activities outside the discharger’s control that will make progress toward attaining the underlying designated use and criterion.

(h) State mercury reduction activities in Oregon. The state implements numerous programs that will, over time, including over the 20-year term of this variance, reduce mercury loads to Willamette Basin waterbodies, including such programs as:

(A) Oregon’s Dental Amalgam Law and associated practices as required under ORS 679.520 and ORS 679.525, and subsequent federal regulations.

(B) Airborne toxic contaminant reduction from existing or newly permitted industrial sources through the Cleaner Air Oregon program and other DEQ Air Quality permitting requirements.

(C) DEQ coordination with the Oregon Department of Forestry on implementing the Forest Practices Act.

(D) DEQ coordination with the Oregon Department of Agriculture on implementing the Oregon Agriculture Water Quality Management Act.

(E) DEQ issuance of general discharge permits, such as Phase I and Phase II municipal separate storm sewer system permits, industrial stormwater permits, and suction dredge mining permits, in addition to individual wastewater discharge permits.

(F) DEQ in-water and upland remediation under state laws and rules, and coordination with US EPA on Portland Harbor, Gould, and Black Butte Mine Superfund site cleanups.

(G) Regulatory and voluntary programs to reduce or recycle products containing mercury, such as automotive light switches, thermostats, and LCD screens and monitors.

(i) Re-evaluatiion of the Highest Attainable Condition. DEQ will re-evaluate the highest attainable condition for this multiple discharger variance every five years from the date that EPA approves this variance. DEQ will provide a written summary of this re-evaluation to EPA within 30 days of completing the re-evaluation. If DEQ fails to submit the re-evaluation to EPA within the specified timeframe, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA.

(A) The re-evaluation will include the following elements:

(i) A summary of the mercury reduction activities completed and an analysis of mercury reductions facilities covered under this variance have achieved, using the data and information provided in their annual reports; and

(ii) A determination of the feasibility of wastewater treatment technology to attain the water quality standard.

(B) DEQ will provide public notice on the availability of its draft re-evaluation and provide at least 30 days opportunity for the public to comment on the draft re-evaluation.

(C) Upon permit renewal for each facility covered under the variance, DEQ will update conditions in the permit based on the re-evaluation of the Highest Attainable Condition, as follows:

(i) DEQ will re-calculate each facility’s level currently achievable, as described in OAR 340-041-0345(6)(e), utilizing the previous five years of data provided by each facility, at the time of their permit renewal. DEQ will adjust permit limits if the data shows that the level currently achievable is lower than the LCA in the previous permit.

(ii) DEQ will review updates to the facility’s site-specific mercury minimization plan and, if necessary, request revisions to ensure that it is consistent with variance requirements.

**Statutory/Other Authority:** ORS 468.020, 468B.030, 468B.035 & 468B.048  
**Statutes/Other Implemented:** ORS 468B.030, 468B.035 & 468B.048  
**History:**  
[DEQ 38-2018, minor correction filed 04/02/2018, effective 04/02/2018](https://secure.sos.state.or.us/oard/viewReceiptPDF.action?filingRsn=37478)  
DEQ 2-2007, f. & cert. ef. 3-15-07  
DEQ 17-2003, f. & cert. ef. 12-9-03

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| Draft Rules – With Edits Included |

**340-041-0002  
Definitions**

Definitions in this rule apply to all basins unless context requires otherwise.

(1) "401 Water Quality Certification" means a determination made by DEQ that a dredge and fill activity, private hydropower facility, or other federally licensed or permitted activity that may result in a discharge to waters of the state has adequate terms and conditions to prevent an exceedance of water quality criteria. The federal permit in question may not be issued without this state determination in accordance with the Federal Clean Water Act, section 401 (33 USC 1341).

(2) "Ambient Stream Temperature" means the stream temperature measured at a specific time and place. The selected location for measuring stream temperature must be representative of the stream in the vicinity of the point being measured.

(3) "Anthropogenic," when used to describe "sources" or "warming," means that which results from human activity.

(4) "Applicable Criteria" means the biologically based temperature criteria in OAR 340-041-0028(4), the superseding cold water protection criteria in 340-041-0028(11) or the superseding natural condition criteria in 340-041-0028(8). The applicable criteria may also be site-specific criteria approved by U.S. EPA. A subbasin may have a combination of applicable temperature criteria derived from some or all of these numeric and narrative criteria.

(5) "Appropriate Reference Site or Region" means a site on the same water body or within the same basin or ecoregion that has similar habitat conditions and represents the water quality and biological community attainable within the areas of concern.

(6) "Aquatic Species" means plants or animals that live at least part of their life cycle in waters of the state.

(7) "Basin" means a third-field hydrologic unit as identified by the U.S. Geological Survey.

(8) "BOD" means 5-day, 20°C Biochemical Oxygen Demand.

(9) "Cold-Water Aquatic Life" means aquatic organisms that are physiologically restricted to cold water including, but not limited to, native salmon, steelhead, mountain whitefish, char including bull trout, and trout.

(10) "Cold Water Refugia" means those portions of a water body where or times during the diel temperature cycle when the water temperature is at least 2 degrees Celsius colder than the daily maximum temperature of the adjacent well-mixed flow of the water body.

(11) "Commission" or “EQC” means the Oregon Environmental Quality Commission.

(12) "Cool Water Aquatic Life" means aquatic organisms that are physiologically restricted to cool waters including, but not limited to, native sturgeon, Pacific lamprey, suckers, chub, sculpins and certain species of cyprinids (minnows).

(13) "Core Cold Water Habitat Use" means waters expected to maintain temperatures within the range generally considered optimal for salmon and steelhead rearing, or that are suitable for bull trout migration, foraging and sub-adult rearing that occurs during the summer. These uses are designated on the following subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Figures 130A, 151A, 160A, 170A, 180A, 201A, 220A, 230A, 271A, 286A, 300A, 310A, 320A, and 340A.

(14) "Critical Habitat" means those areas that support rare, threatened, or endangered species or serve as sensitive spawning and rearing areas for aquatic life as designated by the U.S. Fish and Wildlife Service or National Oceanic and Atmospheric Administration-Fisheries according to the Endangered Species Act (16 U.S. Code § 1531).

(15) "Daily Mean" for dissolved oxygen means the numeric average of an adequate number of data to describe the variation in dissolved oxygen concentration throughout a day, including daily maximums and minimums. For calculating the mean, concentrations in excess of 100 percent of saturation are valued at the saturation concentration.

(16) "Department" or "DEQ" means the Oregon State Department of Environmental Quality.

(17) "Designated Beneficial Use" means the purpose or benefit to be derived from a water body as designated by the Water Resources Department or the Water Resources Commission.

(18) "DO" means dissolved oxygen.

(19) "Ecological Integrity" means the summation of chemical, physical, and biological integrity capable of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region.

(20) "Epilimnion" means the seasonally stratified layer of a lake or reservoir above the metalimnion; the surface layer.

(21) "Erosion Control Plan" means a plan containing a list of best management practices to be applied during construction to control and limit soil erosion.

(22) “Estuarine Waters” means all mixed fresh and oceanic waters in estuaries or bays from the point of oceanic water intrusion inland to a line connecting the outermost points of the headlands or protective jetties.

(23) "High Quality Waters" means those waters that meet or exceed levels necessary to support the propagation of fish, shellfish and wildlife, recreation in and on the water, and other designated beneficial uses.

(24) "Hypolimnion" means the seasonally stratified layer of a lake or reservoir below the metalimnion; the bottom layer.

(25) "Industrial Waste" means any liquid, gaseous, radioactive, or solid waste substance or a combination of them, resulting from any process of industry, manufacturing, trade, or business, or from developing or recovering any natural resources.

(26) "In Lieu Fee" means a fee a jurisdiction collects in lieu of requiring construction of onsite stormwater quality control facilities.

(27) "Intergravel Dissolved Oxygen" (IGDO) means the concentration of oxygen measured in the water within the stream bed gravels. Measurements should be taken within a limited time period before fry emerges.

(28) "Jurisdiction" means any city or county agency in the Tualatin River and Oswego Lake subbasin that regulates land development activities within its boundaries by approving plats or site plans or issuing permits for land development.

(29) "Land Development" means any human-induced change to improved or unimproved real estate including, but not limited to, construction, installation, or expansion of a building or other structure, land division, drilling, or site alteration, such as land surface mining, dredging, grading, construction of earthen berms, paving, improvements for use as parking, or storage, excavation, or clearing.

(30) "Load Allocation” or “LA" means the portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading that may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever possible, natural and nonpoint source loads should be distinguished.

(31) "Loading Capacity” or “LC" means the greatest amount of loading that a water body can receive without violating water quality standards.

(32) "Low Flow Period" means the flows in a stream resulting primarily from groundwater discharge or base flows augmented from lakes and storage projects during the driest period of the year. The dry weather period varies across the state according to climate and topography. Wherever the low flow period is indicated in Water Quality Management Plans, this period has been approximated by the inclusive months. Where applicable in a waste discharge permit, the low flow period may be further defined.

(33) "Managed Lakes" refers to lakes in which hydrology is managed by controlling the rate or timing of inflow or outflow.

(34) “Marine Waters” means all oceanic, offshore waters outside of estuaries or bays and within the territorial limits of the State of Oregon.

(35) "mg/l" or "mg/L" means milligrams per liter.

(36) "Metalimnion" means the seasonal, thermally stratified layer of a lake or reservoir that is characterized by a rapid change in temperature with depth and that effectively isolates the waters of the epilimnion from those of the hypolimnion during the period of stratification; the middle layer.

(37) "Migration Corridors" mean those waters that are predominantly used for salmon and steelhead migration during the summer and have little or no anadromous salmonid rearing in the months of July and August. Migration corridors are designated in Tables 101B and 121B and Figures 151A, 170A, 300A and 340A under OAR 340-041-0101 to 340-041-0340.

(38) "Minimum" for dissolved oxygen means the minimum recorded concentration including seasonal and diurnal minimums.

(39) "Monthly (30-day) Mean Minimum" for dissolved oxygen means the minimum of the 30 consecutive-day floating averages of the calculated daily mean dissolved oxygen concentration.

(40) "Natural Conditions" means conditions or circumstances affecting the physical, chemical, or biological integrity of a water of the state that are not influenced by past or present anthropogenic activities. Disturbances from wildfire, floods, earthquakes, volcanic or geothermal activity, wind, insect infestation and diseased vegetation are considered natural conditions.

(41) "Natural Thermal Potential" means the determination of the thermal profile of a water body using best available methods of analysis and the best available information on the site-potential riparian vegetation, stream geomorphology, stream flows and other measures to reflect natural conditions.

(42) "Nonpoint Sources" means any source of water pollution other than a point source. Generally, a nonpoint source is a diffuse or unconfined source of pollution where wastes can either enter into waters of the state or be conveyed by the movement of water into waters of the state.

(43) "Ocean Waters" means all oceanic, offshore waters outside of estuaries or bays and within the territorial limits of Oregon.

(44) "Outstanding Resource Waters" means waters designated by the EQC where existing high quality waters constitute an outstanding state or national resource based on their extraordinary water quality or ecological values or where special water quality protection is needed to maintain critical habitat areas.

(45) “Pollutant Minimization Plan” or “PMP” means a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

(46) "Pollution" means such contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any water of the state that either by itself, or in connection with any other substance present, can reasonably be expected to create a public nuisance or render such waters harmful, detrimental, or injurious to public health, safety, or welfare, to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wildlife, fish, other aquatic life or the habitat thereof.

(47) "Point Source" means a discernible, confined, and discrete conveyance including, but not limited to, a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or leachate collection system from which pollutants are or may be discharged. Point source does not include agricultural storm water discharges and return flows from irrigated agriculture.

(48) "Public Water" means the same as "waters of the state."

(49) "Public Works Project" means any land development conducted or financed by a local, state, or federal governmental body.

(50) "Reserve Capacity" means that portion of a receiving stream's loading capacity that has not been allocated to point sources or to nonpoint sources and natural background as waste load allocations or load allocations, respectively. The reserve capacity includes that loading capacity that has been set aside for a safety margin and is otherwise unallocated.

(51) "Resident Biological Community" means aquatic life expected to exist in a particular habitat when water quality standards for a specific ecoregion, basin or water body are met. This must be established by accepted biomonitoring techniques.

(52) "Salmon" means chinook, chum, coho, sockeye and pink salmon.

(53) "Salmon and Steelhead Spawning Use" means waters that are or could be used for salmon and steelhead spawning, egg incubation, and fry emergence. These uses are designated on the following subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Tables 101B, and 121B, and Figures 130B, 151B, 160B, 170B, 220B, 230B, 271B, 286B, 300B, 310B, 320B, and 340B.

(54) "Salmon and Trout Rearing and Migration Use" means thermally suitable rearing habitat for salmon, steelhead, rainbow trout, and cutthroat trout as designated on subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Figures 130A, 151A, 160A, 170A, 220A, 230A, 271A, 286A, 300A, 310A, 320A, and 340A.

(55) "Salmonid or Salmonids" means native salmon, trout, mountain whitefish and char including bull trout. For purposes of Oregon water quality standards, salmonid does not include brook or brown trout because they are introduced species.

(56) "Secondary Treatment" means the following depending on the context:

(a) For sewage wastes, secondary treatment means the minimum level of treatment mandated by U.S. Environmental Protection Agency regulations under Public Law 92-500.

(b) For industrial and other waste sources, secondary treatment means control equivalent to best practicable treatment.

(57) "Seven-Day Average Maximum Temperature" means a calculation of the average of the daily maximum temperatures from seven consecutive days made on a rolling basis.

(58) "Sewage" means the water-carried human or animal waste from residences, buildings, industrial establishments, or other places, together with such groundwater infiltration and surface water as may be present. The admixture with sewage of industrial wastes or wastes, as defined in this rule, may also be considered "sewage" within the meaning of this division.

(59) "Short-Term Disturbance" means a temporary disturbance of six months or less when water quality standards may be violated briefly but not of sufficient duration to cause acute or chronic effects on beneficial uses.

(60) "Spatial Median" means the value that falls in the middle of a data set of multiple intergravel dissolved oxygen (IGDO) measurements taken within a spawning area. Half the samples should be greater than and half the samples should be less than the spatial median.

(61) "SS" means suspended solids.

(62) "Stormwater Quality Control Facility" means any structure or drainage way designed, constructed and maintained to collect and filter, retain, or detain surface water runoff, during and after a storm event, for the purpose of water quality improvement. It may also include, but is not be limited to, existing features such as wetlands, water quality swales and ponds maintained as stormwater quality control facilities.

(63) "Subbasin" means a fourth-field hydrologic unit as identified by the U.S. Geological Survey.

(64) "Summer" means June 1 through September 30 of each calendar year.

(65) "Threatened or Endangered Species" means aquatic species listed as either threatened or endangered under the federal Endangered Species Act (16 U.S. Code § 1531 et seq., and Title 50 of the Code of Federal Regulations).

(66) "Total Maximum Daily Load (TMDL)" means the sum of the individual waste load allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources and background. If receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(67) "Toxic Substance" means those pollutants or combinations of pollutants, including disease-causing agents, that, after introduction to waters of the state and upon exposure, ingestion, inhalation or assimilation either directly from the environment or indirectly by ingestion through food chains, will cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), or physical deformations in any organism or its offspring.

(68) "Wasteload Allocation” or “WLA" means the portion of a receiving water's loading capacity allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(69) “Warm-Water Aquatic Life” means the aquatic communities that are adapted to warm-water conditions and do not contain either cold- or cool-water species.

(70) "Wastes" means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive, or other substances that may cause or tend to cause pollution of any water of the state.

(71) "Water Quality Limited" means one of the following:

(a) A receiving stream that does not meet narrative or numeric water quality criteria during the entire year or defined season even after standard technology is implemented;

(b) A receiving stream that achieves and is expected to continue to achieve narrative or numeric water quality criteria but uses higher than standard technology to protect beneficial uses;

(c) A receiving stream for which there is insufficient information to determine whether water quality criteria are being met with higher-than-standard treatment technology or a receiving stream that would not be expected to meet water quality criteria during the entire year or defined season without higher than standard technology.

(72) “Water Quality Standards Variance,” or “WQS variance” means a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflects the highest attainable condition during the term of the WQS variance.

(73) "Water Quality Swale" means a natural depression or wide, shallow ditch used to temporarily store, route, or filter runoff for the purpose of improving water quality.

(74) "Waters of the state" means lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private, except those private waters that do not combine or effect a junction with natural surface or underground waters, that are located wholly or partially within or bordering the state or within its jurisdiction.

(75) "Weekly (seven-day) Mean Minimum" for dissolved oxygen means the minimum of the seven consecutive-day floating average of the calculated daily mean dissolved oxygen concentration.

(76) "Weekly (seven-day) Minimum Mean" for dissolved oxygen means the minimum of the seven consecutive-day floating average of the daily minimum concentration. For application of the criteria, this value is the reference for diurnal minimums.

(77) "Without Detrimental Changes in the Resident Biological Community" means no loss of ecological integrity when compared to natural conditions at an appropriate reference site or region.

Statutory/Other Authority: ORS 468.020, 468B.010, 468B.015, 468B.035 & 468B.048  
Statutes/Other Implemented: ORS 468B.035 & 468B.048  
History:  
DEQ 1-2015, f. & cert. ef. 1-7-15  
DEQ 3-2012, f. & cert. ef. 5-21-12  
DEQ 2-2007, f. & cert. ef. 3-15-07  
DEQ 3-2004, f. & cert. ef. 5-28-04  
DEQ 17-2003, f. & cert. ef. 12-9-03

**340-041-0059**  
**Variances**

(1) Applicability. Subject to the requirements and limitations set out in sections (2) through (7) below, DEQ or the EQC may grant a water quality standards variance where the discharger or DEQ demonstrates that it is not feasible to attain the designated use and criterion during the term of the variance because of one of the factors listed in subsection (2)(b) of this rule. The director may grant an individual discharger variance and the commission may grant a multiple discharger variance or a water body variance. All water quality standards variances are subject to EPA approval. The variance may be used only for the purpose of establishing NPDES permit limits and requirements under CWA Section 301(b)(1)(C) or for issuing certifications under CWA Section 401. The underlying designated use and criterion otherwise remains in effect.

(2) Conditions to Grant a Variance. Before the EQC or DEQ may grant a variance, it must determine that:

(a) Attaining the designated use and criterion during the term of the variance is not feasible for one or more 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 waterbody 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 waterbody, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, 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; or

(G) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented;

(b) The effluent limit sufficient to meet the underlying designated use and criterion cannot be attained by implementing technology-based effluent limits required under sections 301(b) and 306 of the federal Clean Water Act.

(c) The requirements that apply throughout the term of the water quality standards variance will not result in lowering the currently attained ambient water quality, unless the variance is needed for restoration activities as specified in paragraph (2)(a)(G) of this rule.

(3) Variance Duration and Re-evaluation.

(a) The duration of a variance must only be as long as necessary to achieve the highest attainable condition as described in section (5) of this rule.

(b) The DEQ order or EQC rule will specify the duration of the variance.

(c) If the duration of the variance is less than the term of the NPDES permit, the permittee must comply with the specified effluent limitation sufficient to meet the underlying water quality standard when the variance expires. The permit will include the date the variance and corresponding interim effluent limit will expire.

(d) If the term of the variance exceeds five years, DEQ will re-evaluate the highest attainable condition using all existing and readily available information at least every five years. DEQ will specify the re-evaluation frequency in the variance. Following public input, DEQ will submit its re-evaluation to EPA within 30 days of completion. If DEQ does not submit the re-evaluation to EPA within the specified timeline, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA.

(4) Variance Submittal Requirements.

(a) To request an individual variance, a permittee must submit the following information to DEQ:

(A) The specific pollutant, discharger, and receiving waterbody to which the variance will apply;

(B) A demonstration that attaining the designated use and criterion for the specific pollutant is not feasible for the requested duration of the variance based on one of the factors found in subsection (2)(a) of this rule;

(C) A description of treatment or alternative options considered to meet permit limits based on the applicable underlying water quality criterion, and a description of why these options are not technologically, economically, or otherwise feasible;

(D) Sufficient water quality data and analyses to characterize ambient and discharge water pollutant concentrations and determine the Highest Attainable Condition, as required in section (5) of this rule;

(E) If the highest attainable condition for the variance is consistent with paragraph (5)(a)(C) of this rule, a proposed pollutant minimization plan covering the term of the variance that includes actions the permittee(s) will take that will result in progress toward meeting the underlying water quality standard; and

(F) If the discharger is a publicly owned treatment works, a demonstration of the jurisdiction’s legal authority, such as a sewer use ordinance, to regulate the pollutant for which the variance is sought. The jurisdiction’s legal authority must be sufficient to control potential sources of that pollutant that discharge into the jurisdiction’s sewer collection system.

(b) To be eligible for any multiple discharger variance or waterbody variance, a permittee must submit all the information required in the specific multiple discharger or waterbody variance rule.

(5) Highest Attainable Condition. The highest attainable condition is a quantifiable expression of one of the following:

(a) For individual or multiple discharger WQS variances:

(A) The highest attainable interim criterion; or

(B) The interim effluent condition that reflects the greatest pollutant reduction achievable; or

(C) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State grants the WQS variance, and adoption and implementation of a pollutant minimization plan.

(b) For WQS variances applicable to a waterbody or waterbody segment:

(A) The highest attainable interim use and interim criterion; or

(B) If no additional feasible pollutant control technology can be identified, the interim use and interim criterion that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a pollutant minimization plan.

(c) For any WQS variance that applies to a waterbody or waterbody segment, supporting documentation will identify and document any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) or water quality parameter(s) and waterbody or waterbody segment(s) specified in the WQS variance that could be implemented to make progress towards attaining the underlying designated use and criterion. DEQ will provide public notice and comment for any such documentation.

(d) In any subsequent WQS variance for a waterbody or waterbody segment, DEQ will document whether and to what extent best management practices for nonpoint source controls were implemented to address the pollutant(s) or water quality parameter(s) subject to the WQS variance and the water quality progress achieved.

(6) Variance Permit Conditions. DEQ must establish and incorporate into the discharger’s NPDES permit all conditions necessary to implement an approved variance in lieu of the underlying water quality standard, so long as the variance remains effective. The permit must include, at a minimum, the following requirements:

(a) A permit limit or requirement deriving from the highest attainable effluent condition or highest attainable use and criterion specified in the variance, including any updated highest attainable effluent condition based on a five year re-evaluation;

(b) For variances expressing the highest attainable condition per section 5(a)(C) or 5(b)(B) of this rule, a requirement to implement the Pollutant Minimization Program included in the applicable variance ;

(c) Any studies, effluent monitoring, or other monitoring necessary to ensure compliance with the conditions of the variance; and

(d) An annual progress report to DEQ describing the results of any required studies or monitoring during the reporting year, and identifying the pollutant reduction activities completed and any impediments to reaching any specific milestones stated in the variance.

(7) Public Input and Notification Requirements.

(a) If DEQ proposes to grant a variance, it must provide public notice of the proposed variance and accept public comment. The public notice may be coordinated with the public notification of a draft NPDES permit or draft 401 certification that would rely on the variance;

(b) If DEQ is required to re-evaluate the highest attainable condition consistent with (3)(d) of this rule, DEQ will obtain public input on the re-evaluation prior to submitting the re-evaluation to EPA. The specific method of obtaining public input will be documented in the variance.

(c) DEQ will publish a list of all variances approved under this rule on its website. DEQ will add newly approved variances to this list within 30 days of their effective date. The list will identify:

(A) The effective date and duration of the variance;

(B) The facility or facilities;

(C) The pollutant(s) or water quality parameter(s);

(D) The waters to which the variance applies;

(E) The underlying designated use and criterion for the waterbody;

(F) The highest attainable condition specified in the variance;

(G) How to obtain additional information about the variance.

**Statutory/Other Authority:** ORS 468.020, 468B.010, 468B.020, 468B.035 & 468B.110  
**Statutes/Other Implemented:** ORS 468B.048  
**History:**  
DEQ 10-2011, f. & cert. ef. 7-13-11

**340-041-0345**  
**Basin-Specific Criteria (Willamette): Water Quality Standards and Policies for this Basin**

(1) pH (hydrogen ion concentration). pH values may not fall outside the following ranges:

(a) All basin waters, except main stem Columbia River and Cascade lakes: 6.5 to 8.5;

(b) Cascade lakes above 3,000 feet altitude: 6.0 to 8.5.

(2) Total Dissolved Solids. Guide concentrations listed may not be exceeded unless DEQ specifically authorizes otherwise upon such conditions as it may deem necessary to carry out the general intent of this plan and to protect the beneficial uses set forth in OAR 340-041-0340: Willamette River and Tributaries — 100.0 mg/l.

(3) Minimum Design Criteria for Treatment and Control of Sewage Wastes:

(a) Willamette River and tributaries except Tualatin River Subbasin:

(A) During periods of low stream flows (approximately May 1 to October 31): Treatment resulting in monthly average effluent concentrations not to exceed 10 mg/l of BOD and 10 mg/l of SS or equivalent control;

(B) During the period of high stream flows (approximately November 1 to April 30): A minimum of secondary treatment or equivalent control and, unless DEQ otherwise specifically authorizes, operating all waste treatment and control facilities at maximum practical efficiency and effectiveness so as to minimize waste discharges to public waters.

(b) Main stem Tualatin River from mouth to Gaston (river mile 0 to 65):

(A) During periods of low stream flows (approximately May 1 to October 31): Treatment resulting in monthly average effluent concentrations not to exceed 10 mg/l of BOD and 10 mg/l of SS or equivalent control;

(B) During the period of high stream flows (approximately November 1 to April 30): Treatment resulting in monthly average effluent concentrations not to exceed 20 mg/l of BOD and 20 mg/l of SS or equivalent control.

(c) Main stem Tualatin River above Gaston (river mile 65) and all tributaries to the Tualatin River: Treatment resulting in monthly average effluent concentrations not to exceed 5 mg/l of BOD and 5 mg/l of SS or equivalent control;

(d) Tualatin River Subbasin: The dissolved oxygen level in the discharged effluents may not be less than 6 mg/l;

(4) Nonpoint source pollution control in the Tualatin River subbasin and lands draining to Oswego Lake:

(a) Subsection (5)(b) of this rule applies to any new land development within the Tualatin River and Oswego Lake subbasins except those developments with application dates before January 1, 1990. The application date is the date on which the local jurisdiction receives a complete application for development approval as the local jurisdiction’s regulations require;

(b) For land development, no jurisdiction in these subbasins may approve any preliminary plat, site plan, permit, or public works project unless the conditions of the plat permit or plan approval include an erosion control plan containing methods or interim facilities, or both, to be constructed or used concurrently with land development and to be operated during construction to control the discharge of sediment in the stormwater runoff. The erosion control plan must include the following elements:

(A) Protection techniques to control soil erosion and sediment transport to less than one ton per acre per year, as calculated using the Natural Resources Conservation Service's Universal Soil Loss Equation or other equivalent methods (see Figures 1 to 6 in Appendix 1 for examples). The erosion control plan must include temporary sedimentation basins or other sediment control devices when, because of steep slopes or other site specific considerations, other on-site sediment control methods will not likely keep the sediment transport to less than one ton per acre per year. The local jurisdictions may establish additional requirements for meeting an equivalent degree of control. Any sediment basin constructed must be sized using 1.5 feet minimum sediment storage depth plus 2.0 feet storage depth above for a settlement zone. The storage capacity of the basin must be sized to store all of the sediment that is likely to be transported and collected during construction while the erosion potential exists. When the erosion potential has been removed, the sediment basin, or other sediment control facilities, can be removed and the site restored as per the final site plan. All sediment basins must be constructed with an emergency overflow to prevent erosion or failure of the containment dike; or

(B) A soil erosion control matrix derived from and consistent with the universal soil equation the jurisdiction or DEQ approves.

(c) The Director may modify Appendix 1 as necessary without approval from the Environmental Quality Commission. The Director may modify Appendix 1 to simplify it and to make it easier for people to apply;

(d) Subsection (5)(e) of this rule applies to any new land development within the Tualatin River and Oswego Lake subbasins, except:

(A) Those developments with application dates before June 1, 1990. The application date is the date on which the local jurisdiction receives a complete application for development approval as that jurisdiction’s regulations require;

(B) One and two family dwellings on existing lots of record;

(C) Sewer lines, water lines, utilities, or other land development that will not directly increase nonpoint source pollution once construction has been completed and the site is either restored to, or not altered from, its approximate original condition;

(D) If the Environmental Quality Commission determines that a jurisdiction does not need to require stormwater quality control facilities for new development;

(E) When a jurisdiction adopts ordinances that provide for a stormwater quality program equivalent to subsection (e) of this section. Ordinances adopted to implement equivalent programs must:

(i) Encourage on-site retention of stormwater, require phosphorus removal equivalent to the removal efficiency required by subsection (e) of this section, provide for adequate operation and maintenance of stormwater quality control facilities, and require financial assurance, or equivalent security, that assures construction of the stormwater quality control facilities the ordinance requires;

(ii) If the ordinances provide for exemptions other than those allowed for by paragraphs (B) and (C) of this subsection, the ordinances must provide for collecting in-lieu fees, or other equivalent mechanisms, that assure financing for, and construction of, associated, off-site stormwater quality control facilities. No exemption may be allowed if the jurisdiction is not meeting an approved schedule for identifying location of the off-site stormwater quality control facility to serve the development requesting an exemption.

(e) For new development, no jurisdiction may approve any plat, site plan, building permit or public works project in these subbasins unless the conditions of the plat, permit, or plan approval require permanent stormwater quality control facilities to control phosphorus loadings associated with stormwater runoff from the development site. Jurisdictions must encourage and provide preference to techniques and methods that prevent and minimize pollutants from entering the storm and surface water systems. Permanent stormwater quality control facilities for phosphorus must meet the following requirements:

(A) The stormwater quality control facilities must be designed to achieve a phosphorus removal efficiency as calculated from the following equation:

*Rp = 100 - 24.5/Rv*

*Where:*

*Rp = Required phosphorus removal efficiency*

*Rv = Average site runoff coefficient*

*The average site runoff coefficient can be calculated from the following equation:*

*Rv = (0.7 x A1) + (0.3 x A2) + (0.7 x A3) + (0.05 x A4) + (A5 x 0.0)*

*Where:*

*A1 = fraction of total area that is paved streets with curbs and that drain to storm sewers or open ditches.*

*A2 = fraction of total area that is paved streets that drain to water quality swales located on site.*

*A3 = fraction of total area that is building roof and paved parking that drains to storm sewers.*

*A4 = fraction of total area that is grass, trees and marsh areas.*

*A5 = fraction of total area for which runoff will be collected and retained on site with no direct discharge to surface waters.*

(B) A jurisdiction may modify the equation for Rv to allow applying additional runoff coefficients associated with land surfaces not identified in this subsection. DEQ must be notified in writing whenever an additional runoff coefficient is used. The use of additional runoff coefficients must be based on scientific data. The jurisdiction must discontinue using an additional runoff coefficient if DEQ objects to its use in writing within ten days of receiving notification;

(C) The stormwater quality control facilities must be designed to meet the removal efficiency specified in paragraph (A) of this subsection for a mean summertime storm event totaling 0.36 inches of precipitation with an average return period of 96 hours;

(D) The removal efficiency specified in paragraph (A) of this subsection specify only design requirements and are not intended to be used as a basis for performance evaluation or compliance determination of the stormwater quality control facility installed or constructed pursuant to this subsection;

(E) A jurisdiction may approve stormwater quality control facilities this subsection requires only if the following are met:

(i) For developments larger than one acre, the plat or site plan must include plans and a certification prepared by an Oregon registered, professional engineer, that the proposed stormwater control facilities have been designed in accordance with criteria expected to achieve removal efficiencies for total phosphorus required by paragraph (A) of this subsection;

(ii) The plat or site plan must be consistent with the area and associated runoff coefficients used to determine the removal efficiency required in paragraph (A) of this subsection;

(iii) The developer must provide a financial assurance, or equivalent security acceptable to the jurisdiction, with the jurisdiction that assures that the stormwater control facilities are constructed according to the plans established in the plat or site plan approval. Where practicable, the jurisdiction must combine the financial assurance this rule requires with other financial assurance requirements imposed by the jurisdiction;

(iv) Each jurisdiction that constructs or authorizes construction of permanent stormwater quality control facilities must file with DEQ an operation and maintenance plan for the stormwater quality control facilities within its jurisdiction. The operation and maintenance plan must allow for public or private ownership, operation, and maintenance of individual permanent stormwater quality control facilities. The jurisdiction or private operator must operate and maintain the permanent stormwater control facilities as the operation and maintenance plan specifies.

(f) Except as paragraph (D) of this subsection requires, the jurisdiction may grant an exception to subsection (e) of this section if the jurisdiction chooses to adopt and, on a case-by-case basis, impose a one time in-lieu fee. The fee will be an option where, because of the size of the development, topography, or other factors, the jurisdiction determines that the construction of on-site permanent stormwater treatment systems is impracticable or undesirable:

(A) The in-lieu fee will be based upon a reasonable estimate of the current, prorated cost for the jurisdiction to provide stormwater quality control facilities for the land development being assessed the fee. Estimated costs include costs associated with off-site land and rights-of-way acquisition, design, construction, and construction inspection;

(B) The jurisdiction must deposit any in-lieu fees collected under this paragraph in an account dedicated only to reimbursing the jurisdiction for expenses related to off-site land and rights-of-way acquisition, design, construction, and construction inspection of stormwater quality control facilities;

(C) The ordinance establishing the in-lieu fee must include provisions that reduce the fee in proportion to the ratio of the site's average runoff coefficient (Rv), as established according to the equation in paragraph (6)(e)(A) of this rule;

(D) No new development may be granted an exemption if the jurisdiction is not meeting an approved time schedule for identifying the location for the off-site stormwater quality control facilities that would serve that development.

(g) DEQ may approve other mechanisms that allow jurisdictions to grant exemptions to new development. DEQ may only approve those mechanisms that assure financing for off-site stormwater quality control facilities and that encourage or require on-site retention where feasible;

(h) Subsection (b) of this section applies until a jurisdiction adopts ordinances that provide for a program equivalent to subsection (b) of this section, or the Environmental Quality Commission determines such a program is not necessary when it approves the jurisdiction's program plan required by OAR 340-041-0470(2)(g).

(5) In order to improve water quality within the Yamhill River subbasin to meet the existing water quality standard for pH, the following special rules for total maximum daily loads, waste load allocations, load allocations and program plans are established:

(a) After wastewater control facilities and program plans the EQC approved under this rule are completed, and no later than June 30, 1994, no activities may be allowed, and no wastewater may be discharged to the Yamhill River or its tributaries, without the EQC’s authorization, that cause the monthly median concentration of total phosphorus to exceed 70 ug/1 as measured during the low flow period between approximately May 1 and October 31 of each year;

[NOTE: *DEQ may condition precise dates for complying with this rule on the receiving water’s physical conditions (i.e., flow temperature). DEQ may specify the compliance dates in individual permits or memorandums of understanding. DEQ may consider design flows, river travel times, and other relevant information, when establishing the specific conditions it inserts in the permits or memorandums of understanding.*]

(b) Within 90 days of adoption of these rules, the Cities of McMinnville and Lafayette must submit a program plan and time schedule to DEQ describing how and when they will modify their sewerage facility to comply with this rule;

(c) The commission will review and approve final program plans. The commission may define alternative compliance dates as program plans are approved. All proposed final program plans must be subject to public hearing before the commission considers them for approval;

(d) DEQ will, within 60 days of adoption of these rules, distribute initial waste load allocations and load allocations to the point and nonpoint sources in the basin. These allocations are considered interim and may be redistributed based upon the conclusions of the approved program plans.

(6) Multiple Discharger Variance for Mercury**.** The following rule is a multiple discharger variance to the fish-tissue based human health criterion for methylmercury. The variance applies to the following facilities:

Albany-Millersburg WRF (Willamette River); Canby STP (Willamette River); Cascade Pacific – Halsey Mill (Willamette River); City of Molalla (Molalla River); City of Portland Tryon Creek WWTP (Willamette River); City of Sandy (Tickle Creek); Clean Water Services Durham STP (Tualatin River); Clean Water Services Forest Grove STP (Tualatin River), Clean Water Services Hillsboro STP (Tualatin River), Clean Water Services Rock Creek STP (Tualatin River); Corvallis STP (Willamette River), Cottage Grove STP (Coast Fork Willamette River); Dallas STP (Rickreall Creek); Georgia-Pacific Halsey Mill (Willamette River); Gervais STP (Pudding River); International Paper Springfield Paper Mill (McKenzie River); Kellogg Creek WWTP (Willamette River); Lebanon WWTP (South Santiam River); McMinnville WRF (South Yamhill River); Metropolitan Wastewater Management Commission Eugene/Springfield STP (Willamette River); Newberg STP (Willamette River); Oak Lodge Services WRF (Willamette River); Saint Helens/Boise Cascade STP (Multnomah Channel); Salem Willow Lake STP (Willamette River); Siltronic Corporation (Willamette River); Silverton STP (Silver Creek); Stayton STP (North Santiam River); Sweet Home STP (South Santiam River); Teledyne Wah Chang (Willamette River); Tri-City Serivce District – Blue Heron (Willamette River); Tri-City Water Pollution Control Plant (Willamette River); West Linn Paper Company (Willamette River); Westrock, Newberg Mill (Willamette River); Wilsonville STP (Willamette River); Woodburn WWTP (Pudding River);

The variance will also apply to any of the following facilities for which DEQ would otherwise be required to establish mercury effluent limits during the term of the variance:

Amity STP (Salt Creek); Aumsville STP (Beaver Creek); Brooks STP (Willamette River); Brownsville STP (Calapooia River); Carlton STP (North Yamhill River); City of Estacada (Clackamas River); City of Scappoose (Multnomah Channel); Coburg WWTP (Unnamed tributary to Muddy Creek); Creswell STP (Unnamed tributary to Camas Swale Creek); Dayton STP (Yamhill River); Dundee STP (Willamette River); Halsey STP (Muddy Creek); Harrisburg Lagoon Treatment Plant (Willamette River); Hubbard STP (Mill Creek); Independence STP (Middle Willamette River); Jefferson STP (Santiam River); Junction City STP (Flat Creek); Lafayette STP (Yamhill River); Lane Community College (Russel Creek); Lowell STP (Middle Fork Willamette River); Monmouth STP (Willamette River); Mt. Angel STP (Pudding River); Oakridge STP (Middle Fork Willamette River); Philomath STP (Mary’s River); Tangent STP (Calapooia River); Sheridan STP (South Yamhill River); USDA Forest Service (Clackamas River); Veneta STP (Long Tom River); Willamina STP (South Yamhill River); Yamhill STP (North Yamhill River).

(a) Findings.The EQC finds the following:

(A) The fishing use and fish-tissue based human health criterion for methyl-mercury cannot be attained within the next 20 years due to mercury from atmospheric deposition and naturally occurring mercury in native soils. Neither the sources of mercury nor the processes by which the mercury is transported to waterbodies can be remedied to meet the underlying designated use and criterion within the next 20 years.

(B) There is no currently feasible mercury treatment technology that would result in achieving water quality-based effluent limits based on the human health criterion for mercury.

(C) The requirements of the variance will not result in degrading the currently attained ambient water quality for methyl-mercury in the Willamette Basin.

(b) Term of the variance. The term of this variance is 20 years from the date of EPA approval.

(c) Application requirements**.** To implement the variance, a facility must provide to DEQ the following information:

(A) All mercury effluent data from the previous five years, including a minimum of two years of quarterly effluent data.

(B) A facility-specific mercury minimization program with minimum elements described in subsection (6)(f) of this rule for municipal facilities or subsection (6)(g) of this rule for industrial facilities.

(d) Highest attainable condition. Permit requirements will reflect the highest attainable condition specified in this variance. The highest attainable condition for this variance is the level currently achievable, as described in section (f) below, for all dischargers, and a requirement to develop and implement a mercury minimization program with elements described in subsection (6)(f) of this rule for municipal dischargers and subsection (6)(g) of this rule for industrial dischargers.

(e) Highest attainable condition – level currently achievable (LCA). The highest attainable condition for all facilities covered under this variance will include the level currently achievable, which is a quantifiable expression of the effluent condition achievable with the pollutant control technologies in place at the time this variance is granted when those technologies are well maintained and operated. The LCA for this variance is the 95th percentile value of recent (e.g., two to five years) total mercury effluent data or a previously applicable LCA, whichever is lower.

(f) Highest attainable condition – mercury minimization program for municipal dischargers.The highest attainable condition for municipal dischargers will include implementing a mercury minimization program covering the term of the variance, which must contain the following minimum elements:

(A) A monitoring plan to include influent, effluent and biosolids monitoring;

(B) Regulation of dental offices to ensure installation and maintenance of amalgam separators, including inspection of dental facilities for proper management and disposal of dental waste;

(C) Identification of mercury-containing materials at facilities and offices each municipal wastewater treatment facility operates and implementation of any recommendations for removing mercury-containing materials;

(D) Identification and inspection of commercial laboratories, schools and healthcare facilities that may have mercury and providing recommendations and outreach materials to these facilities;

(E) Distribution of outreach materials to commercial and residential sectors;

(F) Evaluation of new facilities as potential sources of mercury, regulatory oversight of such sources of mercury under the municipality’s pre-treatment program where such sources are significant industrial users, and outreach to provide recommendations on activities that would reduce mercury in the facilities’ discharges. Priority facilities should include those in the timber, paper, glass, clay, cement, concrete, gypsum, primary and fabricated metal, and electronic instrument sectors;

(G) Cleanup of legacy mercury from collection systems;

(H) Facility-specific activities to reduce mercury loading into the waterbody. Ensure the existing treatment system is well maintained and operated in order to maximize the reduction of mercury. Facility activities may also include cost-effective and reasonable best management practices for nonpoint source controls under the control of the discharger that would make progress towards attaining the underlying designated use and criterion; and

(I) If a facility has accomplished all activities within its control, the facility may implement or fund mercury reduction activities outside the discharger’s control that will make progress toward attaining the underlying designated use and criterion.

(g) Highest attainable condition – mercury minimization program for industrial dischargers.The highest attainable condition for industrial dischargers will include implementing a mercury minimization program covering the term of the variance, with the following minimum elements:

(A) A monitoring plan to include influent, effluent and biosolids monitoring;

(B) Identification of mercury-containing materials used in the facility, offices and testing laboratories the discharger operates, and developing and implementing recommendations for using substitute materials with less or no mercury;

(C) Identification of other potential sources of mercury within the facility and developing and implementing recommendations for reducing these sources;

(D) Identification of other activities within discharger’s control discharger to reduce mercury loading into the waterbody. Ensure the existing treatment system is well maintained and operated in order to maximize the reduction of mercury. Facility activities may also include cost-effective and reasonable best management practices for nonpoint source controls under the control of the discharger that would make progress towards attaining the underlying designated use and criterion; and

(E) If a facility has accomplished all activities within its control, the facility may implement or fund mercury reduction activities outside the discharger’s control that will make progress toward attaining the underlying designated use and criterion.

(h) State mercury reduction activities in Oregon. The state implements numerous programs that will, over time, including over the 20-year term of this variance, reduce mercury loads to Willamette Basin waterbodies, including such programs as:

(A) Oregon’s Dental Amalgam Law and associated practices as required under ORS 679.520 and ORS 679.525, and subsequent federal regulations.

(B) Airborne toxic contaminant reduction from existing or newly permitted industrial sources through the Cleaner Air Oregon program and other DEQ Air Quality permitting requirements.

(C) DEQ coordination with the Oregon Department of Forestry on implementing the Forest Practices Act.

(D) DEQ coordination with the Oregon Department of Agriculture on implementing the Oregon Agriculture Water Quality Management Act.

(E) DEQ issuance of general discharge permits, such as Phase I and Phase II municipal separate storm sewer system permits, industrial stormwater permits, and suction dredge mining permits, in addition to individual wastewater discharge permits.

(F) DEQ in-water and upland remediation under state laws and rules, and coordination with US EPA on Portland Harbor, Gould, and Black Butte Mine Superfund site cleanups.

(G) Regulatory and voluntary programs to reduce or recycle products containing mercury, such as automotive light switches, thermostats, and LCD screens and monitors.

(i) Re-evaluatiion of the Highest Attainable Condition. DEQ will re-evaluate the highest attainable condition for this multiple discharger variance every five years from the date that EPA approves this variance. DEQ will provide a written summary of this re-evaluation to EPA within 30 days of completing the re-evaluation. If DEQ fails to submit the re-evaluation to EPA within the specified timeframe, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA.

(A) The re-evaluation will include the following elements:

(i) A summary of the mercury reduction activities completed and an analysis of mercury reductions facilities covered under this variance have achieved, using the data and information provided in their annual reports; and

(ii) A determination of the feasibility of wastewater treatment technology to attain the water quality standard.

(B) DEQ will provide public notice on the availability of its draft re-evaluation and provide at least 30 days opportunity for the public to comment on the draft re-evaluation.

(C) Upon permit renewal for each facility covered under the variance, DEQ will update conditions in the permit based on the re-evaluation of the Highest Attainable Condition, as follows:

(i) DEQ will re-calculate each facility’s level currently achievable, as described in OAR 340-041-0345(6)(e), utilizing the previous five years of data provided by each facility, at the time of their permit renewal. DEQ will adjust permit limits if the data shows that the level currently achievable is lower than the LCA in the previous permit.

(ii) DEQ will review updates to the facility’s site-specific mercury minimization plan and, if necessary, request revisions to ensure that it is consistent with variance requirements.

**Statutory/Other Authority:** ORS 468.020, 468B.030, 468B.035 & 468B.048  
**Statutes/Other Implemented:** ORS 468B.030, 468B.035 & 468B.048  
**History:**  
[DEQ 38-2018, minor correction filed 04/02/2018, effective 04/02/2018](https://secure.sos.state.or.us/oard/viewReceiptPDF.action?filingRsn=37478)  
DEQ 2-2007, f. & cert. ef. 3-15-07  
DEQ 17-2003, f. & cert. ef. 12-9-03

1. See U.S. EPA corresp. w/ Derek Smithee, State of Oklahoma Water Resources Board. September 5, 2008. Available at: <https://www.epa.gov/sites/production/files/2014-10/documents/existinguse-smithee-letter.pdf>. [↑](#footnote-ref-1)