Oregon Department of Environmental Quality

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Oregon Environmental Quality Commission Meeting

Agency Staff Report

Rulemaking Action Item No. XX

**Willamette Valley Multiple Discharger Mercury Variance 2019**

This package contains the following documents:

* EQC Staff Report
* Draft Rules – Edits Highlighted
* Draft Rules – Edits Included (final clean version)
* Attachments

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| DEQ recommendation to the EQC |

DEQ recommends that the Environmental Quality Commission adopt the proposed amendments in Attachment A to the variance rule at 340-041-0059, and then adopt the proposed amendments in Attachment A to rule 340-041-0340 to adopt a Multiple Discharger Variance for methylmercury for NPDES permitted dischargers in the Willamette Basin.

Proposed motion for the commission:

*I move that the commission adopt the proposed rule amendments, attached to this report as Attachment A, as part of chapter 340 of the Oregon Administrative Rules, divisions*

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| Overview |

**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. Implementation of the MDV will, 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 transparent 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 the 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 MDV 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. Implementation of 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**

The key policy issue with the variance rule is to ensure consistency with federal regulations adopted after Oregon’s current rule, and to clarify the roles and requirements for granting variances. DEQ has specified the roles in the rule language, retaining the director’s authority to issue individual variances and delegating to the Commission the authority to grant multiple discharger variances and waterbody variances through rulemaking. The previous rule did not anticipate multiple discharger variances or waterbody variances.

A key policy and technical issue for the Willamette Mercury MDV was determining the Highest Attainable Condition, or the goal for the variance. The permitted sources covered under the variance contribute approximately 1% of the total load of mercury to the Willamette Basin. DEQ is proposing a Highest Attainable Condition that requires each discharger to maintain and operate their current treatment system well, and 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, which indicates preference for source control over treatment for mercury, so that mercury isn’t reintroduced to the environment. Moreover, data from Oregon and other states show that source reduction decreases mercury levels in effluent over time.

Another key policy and technical issue for the MDV was how DEQ defines the level currently achievable, or the mercury concentration each discharger can achieve in their effluent with currently installed treatment technology. The LCA 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.

Another key policy issue was the 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 affected by this rulemaking include holders of individual industrial and municipal NPDES permits in the Willamette Basin, tribes, environmental groups, and consumers of fish.

**Outreach efforts and public and stakeholder involvement**

DEQ held informational sessions with 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 citizens and groups over the course of the rulemaking by email.

**Hearing testimony**

DEQ held a public hearing on this rulemaking on October 22, 2019, held jointly in Portland, Eugene and by phone. DEQ received one comment during the hearing, from Tom Quintal, a suction dredge miner in Oregon, requesting that suction dredge miners qualify for a variance.

**Summary of significant public comments and responses**

**Comments on variance authorization rule**

DEQ received 46 separate comments from seven different commenters on proposed changes to the variance authorization rule at OAR 340-041-0059. 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. These provisions are not required by the federal variance rule.
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.

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 dischargers that the variance applies to, as well as additional 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 MDV, 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 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 MDV rule 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 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 MDV, 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 effort than applying for individual variances.

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| Statement of Need |

**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 providing authority to the Environmental Quality Commission to grant multiple discharger and waterbody variances.

#### 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.

**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. 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 |  |  |

### Statute 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> |
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| 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> |
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| Mercury Deposition Network studies | <http://nadp.slh.wisc.edu/mdn/> |
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| 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 |
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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 U.S. Environmental Protection Agency, 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 impact facilities with National Pollutant Discharge Elimination System permits to discharge wastewater into the Willamette Basin. The rules also could impact 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 impact 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, which 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

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 that could be impacted by the proposed rule. 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 who 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.

## 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 |

## Advisory committee

DEQ appointed an advisory committee.

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.

## 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.

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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 in accordance 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:

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| --- | --- |
| 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

### 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).
* Provided notice of meetings and links to committee information through postings on Facebook and Twitter.

### 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 shares general rulemaking information with EQC through the Director’s Report at EQC meetings.

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

## Public Notice

DEQ provided notice of the proposed rulemaking and hearing by:

* On DATE, filing with the Secretary of State for publication in the DATE *Oregon Bulletin*
* Posting notice on the DEQ rulemaking web page:
* On DATE sending email notices through GovDelivery to the following subscriber lists:
  + Rulemaking ( # of subscribers)
  + DEQ Public Notices ( # of subscribers)
* Issuing a press release
* Emailing the following key legislators:
  + Senator
  + Representative

## 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 on October 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 XX 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 Officers’ Record

### Hearing 1 – Portland, Eugene and teleconference

October 22, 2019

700 NE Multnomah Street, Portland, OR 97202

Place: Portland: 700 NE Multnomah Street, Suite 600, Portland Oregon 97232, Floor 3 Conference Room and Eugene: 165 E. Seventh Avenue, Eugene, OR 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 September 16, 2019, until 4:00 p.m. on November 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 healthThe 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 |
| **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 CFR 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.** 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, by ignoring the state’s own responsibility for protecting water quality as habitat for ESA-listed species. In addition, commenter notes that removal of 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 removal of the language in 340-041-0059(1) 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.

**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 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.

**Response.** Federal requirements at 40 CFR 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 CFR 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 revised 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 CFR 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.

**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 has 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.** 340-041-0345(6)(a)

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.** 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.** 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 (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 section (i) 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 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 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.** 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, 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 commenters people 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 will become effective after filing on approximately January 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)

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| 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).

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| Draft Rules – With Edits Highlighted |

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| Draft Rules – With Edits Included |

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| Supporting Documents |

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)