**Document Review Checklist**

**Rulemaking Name: Willamette Valley Mercury Variance**

**Document Name: EQC Staff Report**

Every document that will be shared with anyone outside of DEQ staff must go through management review. This includes reports and PowerPoint presentations.

All documents must be reviewed and approved by the Program Manager, Communications, and either the Agency Rules Coordinator or the Air Quality Rules Coordinator.

The Notice of Rulemaking and EQC Staff Report must also be reviewed and approved by the relevant Division Administrator.

You do not need to use this checklist for routine editing. You should use this checklist whenever a required reviewer is completing their required review and approving the document for distribution.

Each required reviewer should add their name and the date when they complete their final review and approve the document for distribution.

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| **Reviewer** | **Name** | **Date** | **Date** | **Date** |
| Program Mgr |  |  |  |  |
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Oregon Department of Environmental Quality

ENTER EQC MEETING DATEEnter EQC Meeting Date mm dd, yyyy

Oregon Environmental Quality Commission Meeting

Agency Staff Report

Rulemaking Action Item No. XX

**Enter Rulemaking Name Here**

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## Note – Tables

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| DEQ recommendation to the EQC  |

DEQ recommends that the Environmental Quality Commission adopt the proposed amendments in Attachment A to rule 340-041-0059, then adopt the proposed amendments in Attachment A to rule 340-041-0340.

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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
* Establish a multiple discharger variance for methylmercury that applies to eligible permitted dischargers in the Willamette Basin and that will, over time, lead to reductions in mercury concentrations in wastewater discharging 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 substantially 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 responsibility 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, currently prevent attaining the human health water quality criterion for mercury. 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. The attached Variance document describes DEQ’s justification for the MDV and proposed procedures for issuing permits and establishing variance requirements, as federal and state rules for variances require.

**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 would give the EQC the authority to grant multiple discharger and waterbody variances.

The 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 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.

**Key policy and technical issues**

The key policy issue with the variance rule was trying to ensure consistency with federal requirements, while also clarifying roles in issuing variances. DEQ has done so by outlining these roles in the rule language, specifically giving the director authority to issue individual variances and the Commission authority to issue multiple discharger and waterbody variances.

The key policy and technical issue for the multiple discharger variance was determining the Highest Attainable Condition, or the desired goal for the variance. It’s important to consider that the sources covered under the variance only contribute 1% of the total load of mercury to the Willamette Basin. DEQ is proposing a Highest Attainable Condition that requires each discharger covered under the variance to maintain current treatment while implementing a mercury minimization plan. This approach is consistent with EPA guidance on the methylmercury criterion; moreover, there is evidence from Oregon and other states that this approach reduces mercury levels over time.

**Affected parties**

Parties affected by this rulemaking include holders of individual industrial and municipal NPDES permits, 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 also has 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**

**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 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.

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| Optional Additional Topic from Notice |

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| Statement of Need |

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**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 |

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#### 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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|  |  |
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| Document title | Document location |
| EPA Methylmercury Criteria documents. | <https://www.epa.gov/wqc/human-health-criteria-methylmercury> |
| Oregon DEQ. Draft Willamette Basin Mercury TMDL. 2019. | <https://www.oregon.gov/deq/wq/tmdls/Pages/willhgtmdlac2018.aspx> |
| Tetra Tech, 2019. Mercury TMDL Development for the Willamette River Basin (Oregon) – Technical Support Document (Public Review Draft). Prepared for Oregon Department of Environmental Quality and U.S. EPA Region 10. 162 pp. | <https://www.oregon.gov/deq/FilterDocs/wbmtmdl042019mm.pdf>  |
| Oregon DEQ. Statewide Aquatic Tissue Toxics Assessment Report. 2017. | <http://www.oregon.gov/deq/FilterDocs/wqmtissueaq.pdf> |
| U.S. Environmental Protection Agency. 2010. Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion. Office of Science and Technology. Washington, DC. EPA 823-R-10-001. 221 pp. | <https://www.epa.gov/wqc/guidance-implementing-january-2001-methylmercury-water-quality-criterion>  |
| U.S. EPA. 2007. Treatment Technologies for Mercury in Soil, Waste, and Water. Office of Superfund Remediation and Technology Innovation. | <https://clu-in.org/download/remed/542r07003.pdf> |
| U.S. Environmental Protection Agency. 2008. Municipal Nutrient Removal Technologies Reference Document. Office of Wastewater Management, Municipal Support Division, Municipal Technology Branch. EPA 832-R-08-006. 449 pp. | <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100GE8B.TXT> |
| U.S. Environmental Protection Agency. 2014. *Water Quality Standards Handbook, Chapter 5: General Policies*. Office of Water. EPA 820-B-14-004. | <https://www.epa.gov/sites/production/files/2014-09/documents/handbook-chapter5.pdf>  |
| Amos et al, 2013. Legacy impacts of all-time anthropogenic emissions on the global mercury cycle. BIOGEOCHEMICAL CYCLES, VOL. 27, 410–421, doi:10.1002/gbc.20040 | DEQ Offices |
| Eagles-Smith et al. 2018. Modulators of mercury risk to wildlife and humans in the context of rapid global change. *Ambio, 47*, 170-197. | DEQ Offices |
| Eagles-Smith et al. 2016. Spatial and temporal patterns of mercury concentrations in freshwater fish across the Western United States and Canada. Science of the Total Environment. 568:1171-1184. | DEQ Offices |
| Mercury Deposition Network studies | <http://nadp.slh.wisc.edu/mdn/> |
| California EPA, Regional Water Quality Control Board, Central Valley Region. 2010. Staff Report: A Review of Methylmercury and Inorganic Mercury Discharges from NPDES Facilities in California’s Central Valley. | <https://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/delta_hg/other_technical_reports/npdes_mehg_final_rpt.pdf>  |
| Mercury effluent data from pre-treatment wastewater treatment plants in Oregon | DEQ Offices |
| Ohio Environmental Protection Agency. 1997. Assessing the Economic Impacts of the Proposed Ohio EPA Water Rules on the Economy.  | <https://dnr.wi.gov/topic/wastewater/documents/OhioEPAstudy.pdf> |
| Treatment Technology Review and Assessment, Association of Washington Businesses, HDR, Dec. 2013. | <https://www.awb.org/file_viewer.php?id=2903>  |
| Michigan Department of Environmental Quality. 2015. Mercury Multiple Discharge Variance Document. | <https://www.michigan.gov/documents/deq/wrd-npdes-rules-MercuryVariance2015_2019_508884_7.pdf> |
| Urgun-Demirtas et al. 2013. Achieving the Great Lakes Initiative Mercury Limits in Oil Refinery Effluent. Water Environment Research 85(1): 77-86. | DEQ Offices |
| Hollerman, et al. 1999. Results from the low level mercury sorbent test at the Oak Ridge Y-12 Plant in Tennessee. Journal of Hazardous Materials B68:193-203. | DEQ Offices |
| Wisconsin NPDES discharger mercury analysis | DEQ Offices |
| Influent data from Major Wastewater Treatment Plans in Minnesota | DEQ Offices |
| Electric Power Research Institute and Water Research Foundation. 2013. Electricity Use and Management in the Municipal Water Supply and Wastewater Industries. | <http://www.allianceforwaterefficiency.org/WorkArea/DownloadAsset.aspx?id=8695>  |
| AECOM. 2015. Chloride Compliance Study Nine Springs Wastewater Treatment Plant Final Report | <https://www.madsewer.org/Portals/0/ProgramInitiatives/ChlorideReduction/MMSD%20Chloride%20Compliance%20Study%20Report%20-%20Final%206-19-15bookmarks.pdf> |
| Oregon Department of Environmental Quality, 2010. Internal Management Directive: Implementation of Methylmercury Criterion in NPDES Permits. | <https://www.oregon.gov/deq/Filtered%20Library/IMDmethylmercuryCriterion.pdf> |
| Chetelat et al. 2015. Mercury in freshwater ecosystems of the Canadian Arctic: Recent advances on its cycling and fate. *Science of the Total Environment, 509*, 41-66. | DEQ Offices |
| City of Oshkosh, Wisconsin. 2018. Mercury Source Identification and Reduction Efforts | DEQ Offices |
| Stevens Point Public Utilities. 2018. Mercury Source Identification and Control PMP. | DEQ Offices |
| Driscoll et al. 2007. Mercury contamination in forest and freshwater ecosystems in the Northeastern United States. Bioscience, 57, 17-28. | DEQ Offices |
| Fitzgerald et al. 1998. The case for atmospheric mercury contamination in remote areas. *Environmental Science and Technology, 32*, 1-7. | DEQ Offices |
| Hall, B et al. 1997. Food as the dominant pathway of methylmercury uptake by fish. *Water, Air and Soil Pollution, 100*, 13-24. | DEQ Offices |
| Lindberg et al. 2007. A synthesis of progress and uncertainties in attributing the sources of mercury in deposition. *Ambio, 36*, 19-32. | DEQ Offices |
| Munthe et al. 2007. Recovery of mercury-contaminated fisheries. *Ambio, 36*, 33-44. | DEQ Offices |
| Schroeder, W., & Munthe, J. 1998. Atmospheric mercury -- An overview. *Atmospheric Environment, 30*, 809-822. | DEQ Offices |
| Trip, L., & Allan, R. 2000. Sources, trends, implications and remediation of mercury contamination of lakes in remote areas of Canada. *Water Science and Technology, 42*, 171-176. | DEQ Offices |

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| Fee Analysis |

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This rulemaking does not involve fees.

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| Statement of fiscal and economic impact |

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## 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 Employment2015 data | Employment Department875 Union Street NESalem 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 |

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### 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 |

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### Land-use considerations

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

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

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

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

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

Statewide goals also specifically reference the following DEQ programs:

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

### Determination

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

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|  Advisory Committee |

### Advisory committee

### 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:

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| 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 NUMBER OF CATEGORIES categories with cross references to the commenter number. DEQ’s response follows the summary. Original comments are on file with DEQ.

Select one of the following two statements:

DEQ did not change the proposed rules in response to comments.

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

Choose the format that suits your information, depending on the number of comments and commenters. If it is helpful, you can include a table like this, listing comments and ID of commenters who made that comment:

Option 1:

|  |
| --- |
| **List of Comments** |
| **Comment #** | **Comment Summary** | **Commenter Numbers** |
| 1 |  |  |
| 2 |  |  |
| 3 |  |  |

Select one option below

Option 2:

**Comment 1** 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.

DEQ received XX NUMBER comments in this category from commenters 1Cross reference to commenter number or numbers submitted in this category using format ##, ##, ## and ##.

**Response**

DEQ disagrees that the change to the variance rules make Oregon’s process more lenient. As with previous rules, variances are only allowed if one of seven criteria are met.

**Comment 2** I disagree with loosening environmental regulations that limit human and environmental exposure to neurotoxins such as mercury.

DEQ received XX NUMBER comments in this category from commenter 1 Cross reference to commenter number or numbers submitted in this category using format ##, ##, ## and ##.

Enter a summary of this comment category.

**Response**

Federal and state regulations allow variances if one or more of seven criteria are met. In this case, DEQ has concluded that the methylmercury criterion cannot currently be attained due to human caused sources of pollution outside the control of the discharger or the State. Under the variance, dischargers must continue to decrease the amount of mercury that they discharge to the Basin. Therefore, the amount of mercury will continue to decrease. Moreover, the proposed mercury variance maintains underlying criteria for methylmercury for other purposes, such as water quality assessments and TMDLs.

 Enter DEQ’s response to this category of comments.

**Comment 3** DEQ shouldprovide variances to suction dredge miners.

DEQ received XX NUMBER comments in this category from commenters 2Cross reference to commenter number or numbers submitted in this category using format ##, ##, ## and ##.

Enter a summary of this comment category.

**Response**

This comment is not relevant to this rulemaking, which 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 effluent limits for mercury that are not attainable for the reason justified under the variance.Enter DEQ’s response to this category of comments.

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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** |
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| **#** | **Name** | **Organization** | **Comment Number** | **Hearing #** |
| 1 | Diana Tesh |  |  |  |
| 2 | Tom Quintal | Willamette Valley Mining Association |  |  |
| 3 | Nina Bell | Northwest Environmental Advocates |  |  |
| 4 | Amy Pepper | Oregon Association of Clean Water Agencies (ACWA) |  |  |
| 5 | Lindsay Guzzo | EPA |  |  |
| 6 | Mary Anne Cooper | Oregon Farm Bureau (OFB, OFIC, OAN) |  |  |
| 7 | Kathryn VanNatta | Northwest Pulp & Paper Association (NWPPA) |  |  |
| 8 | Kirsten Losli | Clean Water Services |  |  |

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

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| Implementation  |

## Notification

The proposed rules would become effective upon filing on approximately January 20, 2020, and then after EPA approves of 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 |