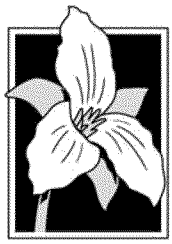
NORTHWEST ENVIRONMENTAL ADVOCATES



November 1, 2019

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Oregon Department of Environmental Quality
700 N.E. Multnomah St., Suite 600
Portland, OR 97232-4100 *Via email only*: mercury2019@deq.state.or.us

Re: **Willamette Basin Mercury Multiple Discharger Variance and Amendments to Variance Authorization Rule**

Dear Mr. Borok:

The following constitutes Northwest Environmental Advocates (NWEA) comments on the Willamette Basin Mercury Multiple Discharger Variance and Amendments to Variance Authorization Rule. With regard to the amendments to the variance authorization rule, it is unclear why the Department of Environmental Quality (DEQ) is choosing to establish its own variance rules since mostly all it has done is cut and past parts of the federal rule into its own, yet it has also omitted necessary parts of the federal rule. It has certainly rolled back any additional protections that Oregon's rule already provided on the basis that those protections are not required by the federal rule. In other words, DEQ does not adopt a policy of providing any protection that could be justified as a matter of policy but only chooses to do the minimum required by the U.S. Environmental Protection Agency (EPA).

The problem with the proposed rule for the Mercury Variance starts with the fact that the proposed variance authorization rules are flawed and continues to the very beginning of the DEQ's justification for it:

> 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.

Oregon DEQ, *Notice of Proposed Rulemaking: Willamette Basin Mercury Multiple Discharger Variance and Amendments to Variance Authorization Rule* (Sept. 16, 2019) (hereinafter "Notice") at 2. Yes, the source of the mercury to Oregon lands is primarily air deposition but the

primary source of mercury to Oregon waters is Oregon nonpoint sources. *See* DEQ, *Revised Willamette Basin Mercury TMDL Draft for Public Comment* (July 3, 2019) (hereinafter "Mercury TMDL") at 62, Table 10-1 (showing that mercury contributions from general nonpoint sources are 94.5 percent of the total loading). Until DEQ is "transparent" about that fact, rather than hiding behind the smokescreen of international air pollution, Oregon will never stand a chance of cleaning up the unsafe levels of mercury in the waters of the Willamette Basin—in 20 years or any number of years. Indeed, the increment of progress that will be made under the variance will be so tiny as to be unmeasurable. The purpose of this variance is quite clearly not to make incremental progress because, if it were, DEQ would be adopting a water body variance that focused on controlling nonpoint sources. The only thing that is "transparent" here is DEQ's continuing fear of regulating nonpoint sources of pollution in Oregon.

DEQ claims that it will know that the Willamette Mercury Variance has met the stated need if it is able to issue NPDES permits in a timely manner, with achievable permit limits, and if DEQ can "measure progress in reducing mercury from wastewater dischargers in the Willamette Basin" every five years. *Id.* at 6. The problem is that DEQ has established the "need" for the variance narrowly, to address "loads of mercury from wastewater dischargers" rather than the obvious "need" established in federal rules for water body variances at 40 C.F.R. § 131.14(b)(2)(iii)(A). These federal rules require the variance to identify and document "any cost-effective and reasonable best management practices for nonpoint source controls . . . that could be implemented to make progress towards attaining the underlying designated use and criterion." Subsection (B) of that section requires documentation of whether and to what extent these nonpoint source controls were implemented and the water quality progress that was achieved. Therefore, at the outset, DEQ has cast the answers to its questions about need incorrectly. In focusing only on the point source dischargers, DEQ has ignored federal regulations and certainly ignored what is necessary to bring the Willamette Basin rivers and streams into compliance with the underlying standard as demonstrated by its very own TMDL. Combined with DEQ's imminent issuance of a new Willamette Basin Mercury TMDL, the entire picture is, frankly, idiotic, a prime example of a paper-pushing agency that actually has a goal of not making any water quality progress despite having spent years adopting protective human health criteria for mercury and developing the aforementioned TMDL.

Moreover, DEQ states that "[t]he purpose of the variance is to create a transparent tool, as authorized under the Clean Water Act, that allows incremental progress in reducing mercury." *Notice* at 2. The proposed TMDL for mercury finds that NPDES point sources are responsible for only 1.2 percent of the total mercury loading in the Willamette with permitted MS4 stormwater sources contributing 3.2 percent. *Mercury TMDL* at 62. DEQ has not addressed how a variance that is solely focused on NPDES permitted sources can result in "incremental progress in reducing mercury" in the Willamette that is in any measure useful.

Further, we agree that EPA revised its variance regulations in 2015, making it necessary for

Oregon to revise its variance regulations. Unfortunately, despite the assertion that the purpose of the amendment of OAR 340-041-0059 is "to be consistent with federal variance rules," *Notice* at 2, DEQ has done anything but that as described further below.

I. Fiscal and Economic Impact

This fiscal and economic impact is flawed because it says absolutely nothing about nonpoint source controls, as are required by federal rules for water body variances of which this should be one. *See Notice* at 12 – 16. The statement of indirect impacts to the public—namely that the "public will benefit indirectly from the proposed rules"—suffers from the same deficiency. Since the proposed rules do not address the need for nonpoint source controls that are key to reducing mercury levels in the Willamette Basin waters and the fish that the public consumes, the proposed rules do not benefit the public.

II. Federal Relationship

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DEQ asserts that "[t]he proposed rules adopt procedures for a multiple discharger variance that are in accordance with federal requirements." *Notice* at 17. This is factually incorrect. See discussion below.

III. Land Use

DEQ concludes that the proposed rules "do not affect land use." *Notice* at 18. The rationale for this conclusion is that rules affect land use if the rule is reasonably expected to have a significant effect on "resources, objectives or areas identified in the statewide planning goals," which themselves "specifically reference" DEQ's "[n]onpoint source discharge water quality program – Goal 16." *Id.* Therefore, in its own words, DEQ has established that its proposed basin variance rule is intended to have no effect on nonpoint sources, contrary to the requirements of federal rules as discussed in these comments.

IV. Proposed Rule Language

A. OAR 340-041-0002 Definitions

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[1] Page references are to the "changes highlighted" portion of the Notice.

(72) – This definition is accurate as stated but omits the fact that the underlying designated use and criterion addressed by the variance remain in effect. *See* 40 C.F.R. § 131.14(a)(2). The definition is also inconsistent with the rules that DEQ proposes to adopt.

B. 340-041-0059 Variances

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APPLICABILITY

(1) – Despite the clarity of EPA's regulations, DEQ attempts a too-clever-by-half approach to establishing a water body variance without having to apply the rules set out by the federal rules for such a sweeping variance. This is DEQ's creation of the "multiple discharger variance." While federal regulations allow for variances that cover more than one individual discharger, those dischargers must be named in the EPA-approved variance. *See* 40 C.F.R. § 131.14(b)(1)(i). In contrast, for water body or waterbody segment variances, the state would have to actually do something about nonpoint sources. That, of course, is something that the State of Oregon's Department of Environmental Quality would never even whisper about doing. This creation of DEQ's sets up problems that become more evident deeper into the rule. Specifically, what DEQ has done is take a federal rule that refers to "discharger(s)-specific" variances, which means—assuming that one can read—one or more named dischargers, and "water body or waterbody segment" variances, which means that nonpoint sources are included, and split off the plural version of "discharger" and moved it partially, but only partially, into the requirements for a water body variance. That is, it has removed the clear federal requirement to name the dischargers while omitting the requirement to identify nonpoint source controls. *Compare id.* at (b)(1)(i)("[d]ischarger(s)-specific WQS variances must also identify the permittee(s)") *with id.* at (b)(2)(iii)("for a WQS variance that applies to a water body or waterbody segment . . . [i]dentification and documentation of any cost-effective and reasonable best management practices for nonpoint source controls"). Instead, DEQ just says that we should "note that submittal requirements for multiple discharger and waterbody variances will be noted in the rule for these variances," thereby putting multiple discharger variances into an altogether new category of variances that pertain to named dischargers but that function like water body variances. *Notice* at 109. This is all, as is too starkly obvious, to avoid having to talk about nonpoint sources.

(1)(b)(B) deleted – 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. First, DEQ's explanation that "[a]ny variance for an aquatic life criterion would require consultation under the Endangered Species Act and thus, would not be approved by EPA if it would jeopardize

threatened or endangered species," *Notice* at 108, is certainly true but ignores the state's own responsibility for protecting water quality as habitat for species on the brink of extinction and therefore is shortsighted in the extreme. Why does DEQ believe that it is in the best interests of Oregon's water quality and Oregon's species to ask EPA to approve water quality standards that it might know will likely jeopardize those species? It's an inane policy choice.

Second, it is inconsistent with the antidegradation policy incorporated into Oregon's water quality standards. OAR 340-04100004(1); *Northwest Environmental Advocates v. U.S.E.P.A.*, 855 F.Supp.2d 1199, 1220-1222 (D. Or. 2012). Existing uses are required to be protected but here, DEQ is proposing a water quality standard variance rule that will eliminate an existing use on a temporary basis, albeit a temporary basis that will never end. A standard that is "likely [to] jeopardize" is already a high bar and also represents a dangerous level of pollution to threatened and endangered species and yet DEQ proposes to remove this language from its variance rules. Likely to jeopardize is the same as likely to eliminate an existing use and therefore is inconsistent with the federally-required antidegradation policy in Oregon's water quality standards.

Third, DEQ states that the removal of this language, along with the removal of language pertaining to unreasonable risks to human health—because why would the DEQ want to not subject Oregonians to unreasonable risks?—is justified because "any discharger still has to comply with technology-based limits irrespective of whether there is a variance, further ensuring removal of pollutants to the extent feasible." *Notice* at 108. This sounds good but is factually incorrect. DEQ does not implement technology-based requirements other than those contained in largely outdated national effluent guidelines. And, it is water quality-based effluent limits that push the development of technology that ensures the removal of pollutants to the extent feasible. In addition, DEQ does not require the implementation of state-of-the-art technology or anything remotely similar to it for municipal sewage treatment plants because EPA has defined technology-based limits to not include the removal of nutrient pollution and Oregon has followed suit. So, when DEQ states that federal technology-based limits ensure the "removal of pollutants to the extent feasible," it is misleading the public. Enhanced secondary and tertiary treatment of sewage for the removal of nutrients is feasible but not often used in Oregon. *See, e.g.*, EPA, Science Advisory Board, *Hypoxia in the Northern Gulf of Mexico: An Update by the EPA Science Advisory Board* 199 (Dec. 2007), *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/C3D2F27094E03F90852573B800601D93/$File/EPA-SAB-08-003complete.unsigned.pdf (last accessed Nov. 2, 2016); Washington Department of Ecology, *Technical and Economic Evaluation of Nitrogen and Phosphorous Removal at Municipal Wastewater Treatment Facilities* ES-2 (June 2011) *available at* https://fortress.wa.gov/ecy/publications/documents/1110060.pdf (last accessed Sept. 13, 2018); EPA, *Advanced Wastewater Treatment to Achieve Low Concentration of Phosphorus* 9 – 10 (April 2007), *available at* https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1004JC4.TXT (last accessed Sept. 13, 2018); Memorandum from Victor D'Amato, Tetra Tech, to Tina Laidlaw, EPA Region 8, Re: *State of*

Montana wastewater system nutrient reduction cost estimates (Oct. 21, 2016) *available at* https://deq.mt.gov/Portals/112/Water/WQPB/Standards/NutrientWorkGroup/NutrientWorkGroupprepresentations/Montana%20Major%20and%20Minor%20WWTP%20nutrient%20costs%20v.2.pdf (last accessed Sept. 13, 2018).

The removal of nutrient pollution is also well known to remove many other forms of pollution, particularly toxics, both regulated and unregulated. *See, e.g.*, Washington Department of Ecology, *Control of Toxic Chemicals in Puget Sound Phase 3: Pharmaceuticals and Personal Care Products in Municipal Wastewater and Their Removal by Nutrient Treatment Technologies* (Jan. 2010) at 88 ("Analysis of tertiary-treated reclaimed water indicate that these facilities can consistently produce water that is of a chemical quality comparable to that of drinking water for most parameters, including heavy metals, organic chemicals, pesticides, and disinfection by-products (Crook, 1998; EPA, 2004)"). What DEQ does not explain is how these rules intersect with the Oregon technology-based rules that require that all dischargers with NPDES permits to use "the highest and best practicable treatment and/or control of wastes, activities, and flows . . . so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels." OAR 340-041-0007(1). This is a technology-based requirement in state law. Yet, despite saying that we, the public, should be reassured that all dischargers "still have to comply with technology- based limits irrespective of whether there is a variance," *Notice* at 108, DEQ has not included any reference to the state's own technology-based limits in the rule language. We urge DEQ to include a reference to the above-cited rule in this section and to explain the relationship. And we request that DEQ state how many times it has ever used this provision in issuing NPDES permits.

(1)(b)(C) – The discussion above regarding the proposed removal of language regarding threatened and endangered species also pertains to the proposed removal of the following language: "The conditions allowed by the variance would result in an unreasonable risk to human health." Again, the bar is already placed high: "an unreasonable risk" to human health. The policy call has already been made, in setting the human health criteria for toxics including mercury, to provide protection to consumers of fish from Oregon waters. The criteria were revised to reflect that policy. Why would DEQ not want to honor that policy even where it is attempting to provide regulatory relief to point source polluters? People, including tribal members, consume fish from Oregon's rivers that are contaminated with mercury and other toxics at levels that are not safe to eat, a violation of the existing use protections of the antidegradation policy. Why does DEQ want a variance rule that allows it to ignore these violations in setting the goals for Oregon's waters? Again, as a matter of policy and law, the proposed removal of this language demonstrates that DEQ's intent is tainted.

DEQ justification for the removal of this language is disingenuous: "variances are intended to

reduce pollutant loads over time, decreasing any potential risk to human health." *Notice* at 108. The variance that DEQ is proposing in this very rulemaking, for mercury in the Willamette River basin, is not intended to reduce pollutant loads over time *in any meaningful way*. As discussed above, DEQ's own Willamette Mercury TMDL demonstrates that even a removal of all point source discharges of mercury would not "reduce pollutant loads over time" to any meaningful degree and would not, therefore result in "decreasing any potential risk to human health," as DEQ asserts. In fact, it is DEQ's intent to let the rivers of the Willamette River basin remain at the same or higher levels of mercury contamination for as far as we can see into the future. That's the agency's prerogative, assuming it is complying with state and federal law, but why not just come out and tell the truth? It is DEQ's choice to not establish a variance that addresses nonpoint sources, the only sources that can have the effect of reducing pollutant loads over time. Perhaps if DEQ left this language in the rules, it might make better decisions about variances.

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CONDITIONS TO GRANT A VARIANCE

(2) – In this section, DEQ includes some federal provisions and omits others, making it unclear what the purpose is. Why not just cite the federal rules? In addition, the outcome renders the rules inconsistent with federal law.

(2)(a) – In particular, DEQ omits the requirements of 40 C.F.R. § 131.10(g), which refers to unchanged requirements in 131.10(h)(1) regarding existing uses. 80 Fed. Reg. 51020, 51027 (Aug. 21, 2015). It is unclear why DEQ does not think this provision is worth including in Oregon's rules. 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. DEQ states that the federal requirements do not require it and that it is unnecessary because permit requirements "protect existing uses." *Notice* at 109. It is absurd to suggest that the water quality standards should not be clear because NPDES permit rules require compliance with water quality standards. Standards are the foundation. A variance is a type of water quality standard. What a variance can do should be clear in the rules, without a suggestion that one can defer to some other regulatory program, particularly one that has been such a spectacular failure as DEQ's NPDES program.

(2)(a) – DEQ should avoid including provisions in its rules for which it has no mechanism to implement. Specifically, here DEQ makes a reference to the variance's not "result[ing] in lowering" the "currently attained ambient water quality" yet it has not put in its rules any method of ensuring that data are available to make the determination that lowering will not occur. We urge DEQ to include monitoring requirements in the variance rules that will enhance the state's ability to ensure that variances are not allowing water quality problems to grow worse with time without anybody's even knowing it. Given that variances provide regulatory relief to permittees,

monitoring is the least they can do as part of their obligation to protect public waters. In addition, it is extremely unclear why DEQ is limiting water quality to "ambient," particularly when, in the case of mercury, also a subject of this rulemaking, it has adopted a fish tissue-based toxic criterion. We urge the removal of this word.

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VARIANCE DURATION

(3)(a) – Again, DEQ should avoid including provisions in its rules for which it has no mechanism to implement. In this section, DEQ states that it will "re-evaluate the highest attainable condition using all existing and readily available information at least every five years." It has made no provision to require permittees to gather this information, meaning that either the public must foot the bill for gathering information on mercury in the Willamette or that no information will be existing and readily available when the time comes for the reevaluation. If DEQ is truly interested in using the variance as something more than a get-out-of-jail-free pass, it would include provisions in this rule that would require the gathering of data upon which findings could be made later or, perhaps better, require permittees to pay into a fund that DEQ could use to obtain the data.

(3)(b) – We support the clarity of DEQ's having permits include the date the interim effluent limit will expire corresponding to the variance expiration date.

(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. We suggest that one or both of these be included in each variance, understanding that the dates will be dependent upon EPA approval. There is no reason why any reader of a permit should have to do math.

(3)(c) – We support the removal of the inappropriate and illegal language in which DEQ previously allowed variances to be set out in NPDES permits. DEQ really seems to have a problem understanding the differences between parts of the Clean Water Act regulatory program.

VARIANCE SUBMITTAL REQUIREMENTS

(4)(a)(A) – It is unclear how an individual variance that applies to a "permittee" in (4)(a) can applied to "dischargers" plural and, in nearly all cases, "waterbodies" plural in (a)(A). The use of plural is inconsistent with the word and concept of "individual."

(4)(a)(D) – The use of the word "ambient" is problematic, as described above, as evidenced by DEQ's seeking to establish a variance for mercury, which is a fish tissue-based criterion. This

provision is also missing requirements to evaluate downstream water quality, which is required by federal law. 40 C.F.R. § 131.10(b); *see also* 80 Fed. Reg. 51026 (Aug. 21, 2015). Given that the word "sufficient" with regard to "data and analyses" is not an objective standard, DEQ should include in this rule, or commit to establishing guidance, on what constitutes sufficiency for purposes of this rule. Sufficiency in water quality analysis can include: locations of data collection within a water body including depositional areas, backwaters, channels, etc.; geographic distribution of data collection such as point of discharge, streamside, downstream, depositional areas; seasons of data collection; media for data collection including ambient water, tissue, sediment, and methods such as semipermeable membrane devices; etc. Presumably the point of DEQ's adopting new rules rather than simply citing to the federal regulations for variances, is to provide some added value and yet, by ignoring this critical step that establishes the Highest Attainable Condition and serves as a reference point in the future for degradation or improvement, DEQ has added nothing at all.

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(4)(d) – deleted – The measure of DEQ's pathetic inability to make any movement towards controlling nonpoint sources is demonstrated by its deletion of a small provision that would require a permittee to take some measure of responsibility for "nonpoint sources under the control of the discharger." But no, apparently that's a step too far for DEQ. It is entirely unclear why nonpoint sources under the control of the discharger would not be required to be part of a discharger's pollutant minimization plan. That would be the plan that is required by proposed (4)(a)(E) that apparently DEQ intends be as narrow as possible in its pollution minimization efforts.

(4)(a)(E) – Strikingly, DEQ provides no guidance in its proposed rules on the content of a pollutant minimization plan. Ask for the minimum (no content), expect the minimum (no content). Another reason to ask the question: why is DEQ bothering to create its own variance rules (poorly) instead of just citing to the federal regulations? At a minimum, DEQ should require municipal sewage treatment permittees to improve their pretreatment programs that regulate indirect dischargers to their collection systems or to establish a pretreatment program where none exists. *See, e.g.*, Letter from Nina Bell, NWEA, to Environmental Quality Commission, Re: *Rulemaking Needed to Protect Oregon's Waters: Municipal Source Control* (Sept. 13, 2010). The existing water quality-based requirements for treatment for such indirect dischargers are inadequate because they are allowed to rely on the dilution of their discharge with dilute sewage and sometimes stormwater and only are triggered where there are water quality-based effluent limits for pollutants. This is an obvious way in which permittees could minimize their pass-through contribution of pollutants subject to a variance and yet DEQ is silent on it.

(4)(a)(F) – Same comment as above. What is the point of ensuring that a jurisdiction has legal

authority over indirect dischargers if the proposed rules say nothing about the jurisdiction's having to actually use that authority?

(4)(b) – DEQ misconstrues the meaning of a water quality standard. A standard is adopted by rule and approved by EPA. It is not, for example, like a general permit, where a source can obtain coverage under the terms of the permit after it has been issued. Here, it seems clear that DEQ's intent is to create the shell of a "multiple discharger variance" that it expects EPA will approve and only after its having been approved in that fashion will DEQ accept applicants for coverage. This is not consistent with the federal regulations or the law pertaining to water quality standards. Instead, it is an obvious attempted work-around to providing such coverage under a water body variance, a type of variance that would require DEQ to make some effort to control nonpoint sources of the pollutant at issue. NWEA could provide a detailed analysis of precisely how the proposed rule is inconsistent with the federal regulations but it is clear to us that the agency knows full well what it is doing.

(4)(c) – This provision establishes what a permittee must do to request coverage under a water body variance by submitting information. It oddly and incorrectly requires "this information" that must be submitted to DEQ to include the federally-required identification of best management practices for nonpoint sources. This makes zero sense and, again, demonstrates that because DEQ has no intention of using this provision precisely because it does include nonpoint sources, DEQ has given it no thought. The federal rules require *DEQ*—not permittees—as the submitter of the water body variance to EPA for approval to include various provisions, *see* 40 C.F.R. § 131.14(b)(1), and supporting documentation, *id.* (b)(2)(i), (ii). In addition, for a water body variance, DEQ, not some future permittee seeking coverage under a water body variance, must include in its supporting documentation the information about nonpoint sources. *Id.* (b)(2)(iii).

This is basic reading but DEQ further demonstrates that it is unable to copy and paste the federal requirements into its own rule by stating that the discharger-provided best management practices for nonpoint sources are limited to those "that the permittee could implement to make progress towards attaining the underlying designated use and criterion." Well, no. If DEQ bothered to read 40 C.F.R. § 131.14(b)(2)(iii), it would see that the federal regulations require DEQ, as the state submitting the variance to EPA for approval:

- to identify and document any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) or water quality parameter(s) and water body or waterbody segment specified in the variance that could be implemented to make progress;
- to not limit the BMPs that "could be implemented" to the permittee's implementation;
- to submit the documentation of the BMPs its intends to include with the variance

to public notice and comment; and

- to remain accountable in future for whether and to what extent the state ensured that the identified BMPs were implemented.

EPA was very clear in its regulations as well as the preamble to the final regulations as to the requirements and their purpose:

> States and authorized tribes must identify and document cost-effective and reasonable BMPs for nonpoint sources, and provide for public notice and comment on that documentation. States and authorized tribes must also document whether and to what extent BMPs were implemented and the water quality progress achieved during the WQS variance term to justify a subsequent WQS variance. Nonpoint sources can have a significant bearing on whether the designated use and associated criteria for the water body are attainable. It is essential for states and authorized tribes to consider how controlling these sources through application of cost-effective and reasonable BMPs could impact water quality before adopting such a WQS variance. Doing so informs the highest attainable condition, the duration of the WQS variance term, and the state's or authorized tribe's assessment of the interim actions that may be needed to make water quality progress.

80 Fed. Reg. 51038. The obligation is on the state.

HIGHEST ATTAINABLE CONDITION

(5), (5)(a)(A), and (5)(b)(A) – These three sections all refer to "highest attainable interim condition" without making any reference to the fact that this condition should change over time. DEQ claims that variances it adopts will be temporary changes to its water quality standards but if there is no method by which DEQ can demonstrate improvements in water quality as a result of the variances adopted, which would be reflected in changes in the highest attainable condition, it is unlikely that DEQ will do anything other than adopt and renew variances for the pollutants/ water bodies/permittees at the same level indefinitely. Not only is this a matter of appropriate policy but it is required by the federal regulations, which require that the highest attainable condition include "the highest attainable condition later identified during any reevaluation consistent with (b)(1)(v) of this section, whichever is more stringent." 40 C.F.R. § 131.14(b)(1)(iii).

(5) – This section also fails to state that the highest attainable condition is required to be a "quantifiable expression." *Id.* (b)(1)(ii).

(5)(b)(B) – DEQ copies the words of the federal regulation but it has not elsewhere included that

it—the agency itself—is responsible for adopting its own pollutant minimization program, as required for water body variances. *See* 40 C.F.R. § 131.14(b)(1)(B)(2); *see also id.* (b)(2)(ii)(pollutant minimization program required), (b)(2)(iii)(identification of nonpoint source controls required). That failure renders this language in the DEQ rule meaningless. Instead, DEQ persists in asserting that the responsibility for adopting a pollutant minimization plan that includes nonpoint source controls falls to any random permittee that might seek coverage under a water body variance, by citing to the requirement of "paragraph (4)(a)(E) of this rule."

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VARIANCE PERMIT CONDITIONS

(6) – DEQ perpetuates the problems created by its mistaken hope that for water body variances, the permittee is responsible for a pollutant minimization plan. Instead, as the responsibility for identifying and documenting BMPs for nonpoint sources is DEQ's, 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 the water body variance. This section on variance permit conditions does not note that there are differences based on what type of variance is at issue.

(6) – DEQ's proposed language leaves open the possibility that a permittee covered by a variance of any type might not have a pollutant minimization plan because it says "*if* one is adopted as part of the variance," with emphasis added. That is consistent with the "or" options in section (5) of this rule, and consistent with federal requirements, but DEQ has failed to include any guidance on how it will determine which of the three provisions (for discharger-specific variances) or the two provisions (for water body variances) will apply. Specifically, (5)(a)(C) or (5)(b)(B) apply in the event that "no additional feasible pollutant control technology can be identified." 40 C.F.R. § 131.14 (b)(1)(A)(3), (b)(1)(B)(2). In proposing these rules, DEQ has not explained how it will make that determination, a determination that if none can be identified requires the adoption and implementation of a pollutant minimization program. Or, in the alternative, if DEQ does determine that there are additional feasible pollutant control technologies, what will DEQ do with regard to the permits? The proposed rule is silent on whether DEQ will require the installation of such control technologies.

(6)(a) – The proposed rule links (5)(a)(B), which is an effluent condition, to a permit condition but it fails to link any highest attainable interim criterion, identified in (5)(a)(A), to any permit condition. That suggests DEQ will have no variance permit condition in the event of a discharger-specific variance that is based on an interim criterion. That is neither legal nor is it consistent with EPA's variance regulations. *See* 40 C.F.R. § 131.14(c). Naturally, since water body variances, by definition, do not include highest attainable effluent limits but, rather, are based on interim uses and criteria, this rule also fails to address the necessary variance permit

conditions associated with the adoption of any water body variance.

(6)(c) – The words "and public reporting" should be added after "Any monitoring" and before "necessary" so that this reads: "Any monitoring and public reporting necessary to ensure compliance with the conditions of the variance." Monitoring without reporting the results is neither transparent nor adequate to meet the stated aim of being able to evaluate progress towards achieving the underlying uses and criteria. The annual progress report required by (6)(d) is not sufficient. Added to the purposes of the monitoring required by (6)(c) should be the ability for DEQ to conduct the required reevaluations and assess achievement with the highest attainable conditions.

(6)(d) – The annual report should not be limited to "identifying the reduction activities completed" because it should also identify any activities in its plan that were permit conditions that were not completed. A reader, whether a DEQ staff person or a member of the public, should not have to go back to the permit and the plan to identify any conditions for which compliance was not achieved.

DEQ should commit in this rule to publishing on its website all annual reports submitted by permittees covered under variances. Citizens should not have to request documents that are as basic as this particularly given that the permittees are being allowed to contribute to violations of protective water quality standards as the result of the variance. In addition, given that there will be tight comment deadlines on, for example, proposed permits that include the variance, the reports should be available to the public without having to put in a special request that will cause delays.

PUBLIC NOTIFICATION REQUIREMENTS

(7) – DEQ has left out of its public notification section, its obligation to provide for public notice and comment on any documentation of cost-effective and reasonable BMPs for nonpoint sources that are required supporting documentation for a water body variance. 40 C.F.R. § 131.14(b)(2)(iii)(A). Again, a measure of DEQ's contempt for the idea of controlling nonpoint sources and contempt for the role of the public.

(7) – This section omits rules to address federal requirements pertaining to the mandatory reevaluation of the highest attainable condition. Each variance must include "a provision specifying how the State intends to obtain public input on the reevaluation." 40 C.F.R. § 131.14(b)(1)(v). DEQ's rules are silent on this requirement and, in addition, say nothing about what DEQ is proposing for this provision in advance of the adoption of any variance.

(7) – The title of a section on obtaining public input, although omitted from the content of the proposed rule, should be more than public "notification" since the federal rules require public

input as well.

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VARIANCE RENEWAL

(7) deleted – DEQ has proposed to remove the entire section on variance renewals because federal rules require a new variance upon expiration of an existing variance. *Notice* at 110. While that is true, the federal regulations do contain requirements that pertain to subsequent variances. Specifically, for water body variances, "[a]ny subsequent WQS variance for a water body or waterbody segment must include documentation of whether and to what extent best management practices for nonpoint source controls were implemented[.]" 40 C.F.R. § 131.14(b)(2)(iii)(B). The omission of this provision renders the DEQ rules inconsistent with federal requirements.

WILLAMETTE RIVER BASIN VARIANCE

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(6) DEQ refers to this variance as a "multiple discharger variance" when EPA regulations clearly refer to this type of variance—that is a variance that applies broadly and does not include named dischargers in the body of the variance as promulgated and submitted to EPA for approval—as a "water body" or waterbody segment" variance. *See, e.g.*, 40 C.F.R. § 13.14(a)(1). It is quite clear that DEQ is pursuing this approach in order to avoid the requirements of 40 C.F.R. § 131.14(b)(2)(iii), which would require the state to actually do something about mercury pollution in the Willamette. *See Notice* at 108 ("the proposed rule removes consideration of cost-effective and reasonable best management practices for nonpoint sources in whether standards can be met. Such language is not included in the federal rule, except when granting waterbody variances.") Frankly, it's just sickening, particularly at a time when DEQ is re-issuing the Willamette River Basin Mercury TMDL that demonstrates, once again, that nonpoint sources are the greatest contributor to unsafe levels of mercury in the Willamette and its tributaries. The federal regulations for water body variances include what you might call a *quid pro quo* for letting point source dischargers off the hook for meeting the underlying water quality standards in the duration of the variance.

Given DEQ's refusal to comply with the federal regulations that apply to the waterbody variance that DEQ is attempting to promulgate without following those regulations, it is difficult and rather pointless to comment on the proposed variance other than to observe that is inconsistent with federal law. See above.

Nothing in this specific variance ensures that its provisions will be enforceable conditions of any

NPDES permits for the dischargers covered by it.

(6)(a) – If the Commission is the entity that issues so-called multiple discharger variances, why is it DEQ that is issuing the findings?

(6)(a)(A) – DEQ's finding that "[t]he 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 a flawed finding because DEQ has not shown that the use and criterion can be met at the end of 20 years and, based on the analysis in its forthcoming TMDL for mercury in the Willamette basin, without nonpoint source controls, the underlying uses and criteria will never been met. DEQ's decision to avoid the clear requirements of EPA regulations on variances ensures this outcome. DEQ has not even bothered to explain why it has not chosen the more appropriate water body variance for Willamette mercury pollution considering the results of its TMDL.

(6)(a)(A) – DEQ's finding that the mercury sources—"human-caused sources of mercury from global mercury emissions and erosion of native soils are deposited or transported to Willamette Basin"—"cannot be remedied to meet the underlying designated use and criterion" is flawed because DEQ has not evaluated whether it can use the state's nonpoint source authority to "remedy" the erosion of native soils such that the use and criterion can be met.

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(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. The fact that DEQ has included language about the use of additional technology to address pollutants other than mercury points to the possibility that DEQ is well aware of this fact. In addition, how does DEQ make a finding that the use of additional treatment technology would be more environmentally harmful as compared to mercury minimization plans when it literally has no such plans before it when it makes this finding?

(6)(c) – Only a water body or waterbody segment variance can qualify for this type of variance in which dischargers are allowed to apply for coverage after EPA's approval.

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(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.

(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.

(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.

(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.

V. Close of Comment Period

We fail to understand why DEQ has determined that it needs to establish odd hours for the close of public comment periods. In this case, the time is set at 4 PM. Why not the close of business? Why not midnight? Why choose some random time that many commenters will not anticipate? Why play games with the public along with insulting them by proposing a rule that is so obviously inconsistent with federal law?

Sincerely,

Nina Bell
Executive Director

Attachments by separate email:

DEQ, Revised Willamette Basin Mercury TMDL Draft for Public Comment (July 3, 2019)

EPA, Science Advisory Board, Hypoxia in the Northern Gulf of Mexico: An Update by the EPA Science Advisory Board (Dec. 2007)

Washington Department of Ecology, Technical and Economic Evaluation of Nitrogen and Phosphorous Removal at Municipal Wastewater Treatment Facilities (June 2011)

Memorandum from Victor D'Amato, Tetra Tech, to Tina Laidlaw, EPA Region 8, Re: State of Montana wastewater system nutrient reduction cost estimates (Oct. 21, 2016)

Washington Department of Ecology, Control of Toxic Chemicals in Puget Sound Phase 3: Pharmaceuticals and Personal Care Products in Municipal Wastewater and Their Removal by Nutrient Treatment Technologies (Jan. 2010)

Letter from Nina Bell, NWEA, to Environmental Quality Commission, Re: Rulemaking Needed to Protect Oregon's Waters: Municipal Source Control (Sept. 13, 2010).

EPA, Advanced Wastewater Treatment to Achieve Low Concentration of Phosphorus (April 2007)