Message

**From**: Hisel-Mccoy, Sara [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=0641D449FE4E4444971B9F695B74F0B8-SARA HISEL-MCCOY]
**Sent**: 12/3/2019 10:49:14 PM
**To**: WIGAL Jennifer [Jennifer.WIGAL@state.or.us]
**Subject**: FW: Follow ups from call

Jen,

Hi there. I hope all is well and that you had a pleasant Thanksgiving. I am reaching out to you because there seems to be a lot of back and forth on your multiple discharger variance. It was my understanding that you attended a call last week and had agreed to say something in the variance PMP around how OR would investigate additional reductions from nonpoint sources, such as X (OR is working on a sentence or two that they will run by us first). I am hoping that this is still where you are. If not, I think maybe you and I should discuss.

Thanks,
Sara

Sara Hisel McCoy
Director, Standards and Health Protection Division
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(202) 566-1649

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**From:** Fleisig, Erica <Fleisig.Erica@epa.gov>
**Sent:** Tuesday, December 03, 2019 5:27 PM
**To:** Barash, Shari <Barash.Shari@epa.gov>; Hisel-Mccoy, Sara <Hisel-McCoy.Sara@epa.gov>
**Cc:** Vlcan, Manjali <Vlcan.Manjali@epa.gov>; Dreyfus, Melissa G. <Dreyfus.Melissa@epa.gov>; Pettit, Elizabeth (Libby) <pettit.elizabetha@epa.gov>; Buffo, Corey <Buffo.Corey@epa.gov>; Keating, Jim <Keating.Jim@epa.gov>
**Subject:** FW: Follow ups from call

FYI so you guys have what R10 sent over to Oregon in response to their question at the bottom of this email chain that came after our last call.

-Erica

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**From:** Labiosa, Rochelle <labiosa.rochelle@epa.gov>
**Sent:** Monday, December 02, 2019 4:24 PM
**To:** BOROK Aron <Aron.BOROK@state.or.us>; DOU Connie <Connie.Dou@state.or.us>
**Cc:** Guzzo, Lindsay <Guzzo.Lindsay@epa.gov>; Shaw, Hanh <Shaw.Hanh@epa.gov>
**Subject:** RE: Follow ups from call

Hi Aron,

I hope you had a great Thanksgiving! I am responding to your email request after the last discussion between EPA and ODEQ on the MDV: *In addition to what was discussed, DEQ is requesting that EPA provide some language regarding why DEQ should acknowledge in the variance state efforts state activities to address mercury sources beyond those we are requiring for point sources. This language will be helpful for our own documentation and for any discussions we need to have with stakeholders.*

EPA's position on why DEQ should acknowledge in the variance state efforts to address mercury sources beyond those for point sources is based on the fact that Oregon is justifying this variance based on 131.10(g)(3), asserting that "Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied" during the term of the variance. For the HAC, 131.14(b)(ii) specifies that "The requirements shall represent the highest attainable condition of the waterbody or waterbody segment applicable throughout the term of the WQS variance based on the documentation required in (b)(2) of this section," so the HAC ties back to the justification for the variance and in this case looks at what can be feasibly remedied during the term of the variance.

In addition to previous comments EPA shared, below are relevant excerpts from the preamble, regs, and response to comments for the reg revisions:

**Preamble to the Proposed Rule 78 FR 171 pg. 54533-34**

*Describes similarities between HAU and HAC*

... As discussed in Section III.C, the EPA is proposing a requirement that a state or tribe adopts the highest attainable use closest to the 101(a)(2) goals when it has demonstrated that the use specified in CWA section 101(a)(2) or a subcategory of such a use is not attainable based on a UAA. The EPA is proposing that a similar requirement apply to variances such that if states or tribes can demonstrate that a use specified in section 101(a)(2) or subcategory of such a use is not attainable for the variance period, then the state or tribe must adopt a variance reflecting the highest attainable condition during the term of the variance. Such a requirement ensures that feasible progress will be made towards the designated use and the criterion to protect that use during the period of the variance. Requiring that states and tribes establish interim requirements that apply for purposes of CWA section 402 permitting and in issuing certifications under section 401 of the Act, and that such requirements reflect the highest attainable condition during the variance, creates a framework for variances to provide states and tribes with time to implement adaptive management approaches that drive progress towards meeting the designated use and criterion in a transparent and accountable manner—a key environmental benefit of a variance.

**Preamble to Final Rule 80 FR 162 pg. 51025**

*Describes how to determine the HAU by using the information from the demonstration of need and the factors and information around attainability.*

...Second, EPA adds the phrase ''based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability'' to the final HAU definition to be clear that the HAU is the attainable use that results from the process of determining what is not attainable. For example, where the state or authorized tribe demonstrates that a use cannot be attained due to substantial and widespread economic and social impacts, the state or authorized tribe may then determine the HAU by considering the use that is attainable without incurring costs that would cause a substantial and widespread economic and social impact consistent with § 131.10(g)(6).

**HAU definition, as revised, 131.3(m)**

...

(m) *Highest attainable use* is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.

**Response to Comments (RTC)**

*Reinforces that the HAC is about what can be done in spite of the factors precluding attainment, similar to the HAU*

**RTC Essay 8.g.ii pg. 3-345**

States and authorized tribes often adopt discharger-specific WQS variances because requiring the discharger to meet the WQBEL of the NPDES permit would result in substantial and widespread economic and social impacts (section 131.10(g)(6)). In such cases, the limiting factor specifies the highest attainable effluent condition, meaning that performing an analysis of what is not feasible to attain (i.e., the levels of pollutant control that caused substantial and widespread economic and social impacts) informs the state's or authorized tribe's determination of HAC for the duration of the WQS variance.

**RTC Essay 8.g.iv pg. 3-361**

The final rule at section131.14 provides the regulatory requirements for WQS variances. For WQS variances for Clean Water Act (CWA) 101(a)(2) uses, EPA decided that it was most appropriate to include the same factors for justifying a WQS variance as appear in section 131.10(g) for downgrading a use. The underlying concept behind both a use removal and a WQS variance (a time-limited use and associated criteria) is attainability, as in the "wherever attainable" phrase in section 101(a)(2) of the CWA. Therefore, EPA determined it was appropriate to use the same factors for both regulatory provisions. The time-limited nature of a WQS variance suggests an additional appropriate factor (restoration activities).

To address this issue, we'd recommend that, at a minimum, Oregon consider aligning their variance with their TMDL implementation plan. This could involve importing the components of the implementation plan into the HAC. EPA believes this would ensure that the variance reflects Oregon's holistic evaluation of what can be remedied during the term of the variance while leaving Oregon sufficient flexibility to determine appropriate implementation of any nonpoint source controls.

If you have any follow-up questions regarding the above, please let us know.

All the best,
Rochelle

Rochelle Labiosa, Ph.D.
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**From:** BOROK Aron <Aron.BOROK@state.or.us>
**Sent:** Monday, November 25, 2019 4:02 PM
**To:** Labiosa, Rochelle <labiosa.rochelle@epa.gov>
**Cc:** Guzzo, Lindsay <Guzzo.Lindsay@epa.gov>
**Subject:** FW: Follow ups from call

Hi Lindsay and Rochelle,

I'm forwarding this request to Rochelle, as well, in case we'll need to coordinate after Lindsay heads to Europe.

Aron Borok
Water Quality Standards Specialist
Oregon Department of Environmental Quality
503-229-5050
borok.aron@deq.state.or.us
Water Quality Standards website

**From:** BOROK Aron
**Sent:** Monday, November 25, 2019 12:57 PM
**To:** Lindsay Guzzo <guzzo.lindsay@epa.gov>
**Cc:** mercury2019 <mercury2019@deq.state.or.us>; STURDEVANT Debra <STURDEVANT.Debra@deq.state.or.us>; DOU Connie <Dou.Connie@deq.state.or.us>
**Subject:** Follow ups from call

Hi Lindsay,

I wanted to quickly follow up with you after the meeting. In addition to what was discussed, DEQ is requesting that EPA provide some language regarding why DEQ should acknowledge in the variance state efforts state activities to address mercury sources beyond those we are requiring for point sources. This language will be helpful for our own documentation and for any discussions we need to have with stakeholders.

Thanks,

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