

Onsite Septic Variances Internal Management Directive



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1. Intent/Purpose/Statement of Need

The purpose of this IMD is to clarify the variance review process and provide direction to staff on the role of the variance officer and factors to be considered when making decisions. The variance requirements and procedures for the onsite program are provided in ORS 454.657 and OAR 340-071-0415 to 071-0445. The purpose of the variance process and hearing are to consider the applicant's proposal to deviate from specific onsite program rules with a system design that overcomes the limitations of the site and demonstrates that such a system would be as protective of public health and waters of the state as if the rules were strictly applied. This IMD is intended to help guide staff in determining whether or not the application meets this requirement.

2. Applicability

This IMD will be used by DEQ's Onsite Septic Program's Variance officers when reviewing variance applications.

3. Summary

The variance requirements and procedures for the onsite program are provided in ORS 454.657 and OAR 340-071-0415 to 071-0445. The Environmental Quality Commission's authority to grant variances is delegated to appointed variance officers as provided in ORS 454.660.

A DEQ variance officer will review a variance proposal and materials relevant to the site; request any other information determined necessary to make a decision; conduct a site visit to assess site conditions and evaluate the proposal; and hold a public information gathering hearing. The decision to approve or deny a variance application is based on the information presented in the proposal and the requirements and purpose of DEQ's regulations. The purpose of the variance process and hearing are to consider the applicant's proposal to deviate from specific onsite program rules with a system design that overcomes the limitations of the site and demonstrates that such a system would be as protective of public health and waters of the state as if the rules were strictly applied. In making their decision, the variance officer will look at the proposal as a whole and local conditions in determining which factors are most relevant.

4. Background and Legal Authority

In general, variances are requests for deviations from regulations or municipal codes that are prescriptive, such as building codes and zoning. It is uncommon to allow variances for most environmental health programs or performance-based regulations. For example, variances are not an option for food handling codes, such as allowing sale of expired food or holding temperatures at restaurants because of the public health concerns that could result.

The onsite program has aspects that are similar to building codes or zoning but also has aspects similar to environmental health programs. The variance requirements and procedures for the onsite program are provided in ORS 454.657 and OAR 340-071-0415 to 071-0445. The Environmental Quality Commission's authority to grant variances is delegated to appointed variance officers as provided in ORS 454.660. ORS 454.657(1) provides that variance officers may grant:

. . . variances from the requirements of any rule or standard pertaining to subsurface sewage disposal systems for such period of time and upon such conditions as it may consider necessary to protect the public health and welfare and to protect the waters of the state, as defined in ORS 468B.005 (Definitions for water pollution control laws). The commission shall grant such specific variance only where after hearing it finds that strict compliance with the rule or standard is inappropriate for cause or because special physical conditions render strict compliance unreasonable, burdensome or impractical.

Based on this section there are two components to decisions to grant a variance. First, a variance may only be granted if through conditions on the approval (generally the specifics of the approved proposal), the public health and welfare and waters of the state can be protected. Second, the hearings officer must find that:

- (1) strict compliance with the rule or standard is inappropriate for cause; or
- (2) special physical conditions render strict compliance unreasonable, burdensome or impractical.

Onsite rules are intended to protect public health and waters of the state. OAR 340-071-0110 provides that "[t]he onsite rules establish requirements for constructing, altering, repairing, operating, and maintaining onsite wastewater treatment systems. Their purpose is to restore and maintain the quality of public waters and to protect the public health and general welfare of the people of the State of Oregon." A variance officer must consider that the intent of the rules is to protect public health and the environment, and how the variance proposal would be as protective as strict compliance with the rule.

A variance officer appointed by the DEQ Director must have a minimum of five years of full-time experience in wastewater treatment methods, and be highly knowledgeable of wastewater systems, soils, and the agency rules. ORS 454.660(2) requires that

variance officers be qualified in soil sciences and knowledgeable in subsurface sewage disposal. The minimum requirements for a variance officer are found in OAR 340-071-0425. In practice, DEQ also expects variance officers to be subject matter experts with knowledge of local soils and water conditions and to be able to soundly exercise professional judgement. While counties can request that their staff be appointed as variance officers, this has not been requested or approved by DEQ to date.

5. Variance Procedure

A DEQ variance officer will review a variance proposal and materials relevant to the site, request any other information determined necessary to make a decision, conduct a site visit to assess site conditions and evaluate the proposal, and hold a public information gathering hearing. The decision to approve or deny a variance application is based on the information presented in the proposal and the requirements and purpose of DEQ's regulations. The purpose of the variance process and hearing are to consider the applicant's proposal to deviate from specific onsite program rules with a system design that overcomes the limitations of the site and demonstrates that such a system would be as protective of public health and waters of the state as if the rules were strictly applied. The variance process is not intended as an opportunity to overturn the results of a site evaluation conducted by a county agent. The variance officer does not act as a consultant or adviser for how to overcome the site limitations.

5.1 Application Review and Burden of Proof

Typically, a variance application is submitted for a site that has been found unsuitable for an onsite wastewater septic system in a site evaluation report due to the site not meeting one or more siting criteria as outlined in Oregon Administrative Rules Chapter 340, Division 71. A variance application may also be submitted for a site that meets siting criteria for an onsite system, but the applicant is still requesting a variance from rule for another reason. The variance process is not an opportunity to ask DEQ to reconsider or change a site evaluation.

It is the applicant's burden to demonstrate through the variance application that: 1) the variance proposal will protect public health and waters of the state and 2) why strict compliance with the rule(s) or standard(s) is inappropriate; or why special physical conditions render strict compliance unreasonable, burdensome or impractical. If the applicant fails to demonstrate that the requirements in ORS 454.657 are met, then DEQ will deny the variance request.

The proposal is reviewed as presented. The variance decision can be to approve, deny, or approve with modifications. The application is reviewed for completeness by the variance officer. If determined to be incomplete, the applicant is notified by either letter, email or phone of the deficiencies and asked to provide the missing information, or additional necessary information, and given a reasonable time period to do so.

In making their decision, the variance officer reviews the application to determine whether the applicant meets its burden with the information presented in the proposal. The decision to approve or deny a variance application is based on the professional opinion and expertise of the variance officer and the unique characteristics of the property and proposal.

The variance officer can request clarifying information about the proposal before the hearing. Examples of clarifying information may include, but are not limited to, requests for additional detail about the proposal to assist with decision making, property line demarcation or lot size information, or additional information about variances from rules that need to be addressed as part of the proposal. The applicant must respond to these requests for clarification prior to the close of the record in order to be considered in the decision.

When the application is found to be complete, the variance officer schedules a time and date for the site visit and information gathering hearing. The rule provides that the hearing is held within 30 days of finding the application to be complete. The applicant is instructed to stake out the proposed system location as well as the replacement area.

The variance officer will review information in the record and consider relevant factors including but not limited to those identified below in Section III as Common Factors. Prior variance decisions may be reviewed as part of the decision-making analysis. However, each proposal and site are unique, and decisions are made based on the site's limitations and best available information about potential or known risks. Over time the risk analysis may change due to available treatment technologies or changes in, or increased knowledge of, environmental conditions. If information about whether the proposal will be protective of public health and the waters of the state is incomplete or insufficient, then the variance request must be denied.

Except for hardship variances, variance approvals run with the land. A site approved for a variance is not always immediately developed and may not be developed for many years. A variance approval must contain sufficient design details for a licensed installer to demonstrate the system can be constructed in accordance with requirements of the variance approval. In addition, the local agent must be able to review the permit application and issue a permit within 20 days. Therefore, when considering a variance proposal, the record must be clear and complete. Variance proposals that include overly complex future tasks that must be completed prior to or at the permitting stage (such as filling the site or installing a groundwater interceptor to adequately lower groundwater) should generally be denied because it would be difficult or overly burdensome for the

local agent to determine if those future tasks meet the requirements of the variance approval.

5.2 Preparing for the Hearing

The purpose of the hearing is to provide an opportunity for interested parties to view the site and provide testimony about the proposal. The variance officer prepares a hearing notice letter, containing the date and time for the hearing (time, date, and location). The notice letter should contain instructions for the preparation of the site, which may include marking the initial and replacement systems. A notice letter is sent to the property owner, consultants and the local county agent. The variance officer also notifies neighboring property owners whose names and addresses were provided in the variance application. Prior to the hearing, the variance officer visits the site to consider the proposal and gather site-specific details.

5.3 Conducting the Hearing

The hearing is part of the variance record and is an opportunity for parties, the county agent, or members of the public to provide additional information relevant to the decision. The variance officer begins with instructions and the purpose of the hearing which is part of the hearing protocol, or script. Because the application is already part of the record, it should be referenced, but does not need to be read out loud. Speakers are instructed to identify themselves prior to each time they speak and should not interrupt other speakers. It is important that only one person speak at a time out of respect and to ensure a clear recording. Anyone present may speak freely on their support, concern or opposition to the proposal. If requested, the hearing will include opportunities for remote participation by video conference or telephone. The variance officer may ask questions to clarify the testimony offered. At the end of the hearing, the variance officer describes next steps and either declares the record closed or specifies how long it will remain open, and for what purpose. The hearing is then concluded.

The variance officer closes the record at the conclusion of the hearing unless the variance officer determines that leaving the record open for additional testimony for a designated period of time is warranted. However major revisions to the proposal are not accepted after the hearing. Once the record is closed, the applicant or third parties may not submit any additional information for consideration.

5.4 After the Hearing

Within 45 days after closing the hearing, the variance officer reviews the entire record, including the recorded hearing, and prepares a written decision. The decision shall state facts and findings used as the basis of the decision. Decisions should briefly outline the proposal, specify the rules relevant to the request, and factors for approval or denial. A lack of information or failure to address aspects of the site limitations may be the basis

for a denial. A decision to grant the variance should identify the location of the system, describe how it is protective of public health and waters of the state, and specify any necessary conditions or specifications for the approval. The decision letter shall also contain the appropriate notice language about rights to appeal, to circuit court for denials and to the EQC for approvals. The decision is mailed to all parties of interest and includes a certificate of mailing, documenting the date it was mailed and to whom. Once the variance officer has completed the variance decision, all final records are entered into DEQ's records system e-Permitting. Medford DEQ staff is notified by the variance officer when the e-Permitting record is complete so that it may be uploaded to ORMS, where the official record will be stored. County onsite programs are provided with a copy of the variance decision.

6. Common Factors Considered When Reviewing Applications

The variance officer will look at the proposal as a whole and local conditions in determining which factors are most relevant.

6.1 The intent of the rule(s) for which a variance is requested and how variance from those rules could contribute to negative environmental or public health impacts.

- 6.1.1 For example, at some sites, a setback to a property line may not be considered critical to protect public health and the environment. Considerations in whether a variance is warranted may include ability to install a system and maintain the system without crossing a property line or accuracy of identified property line (a fence may not be on a property line but assumed to be a property line).
- 6.1.2 Another example, depth to 'conditions associated with saturation' identifies where the water table will be for an extended period. The definition for "Conditions Associated with Saturation" is based on the Natural Resources Conservation Service hydric soil indicators. Considerations here may be awareness that a water table can fluctuate above and below where conditions associated with saturation are identified and that site specific conditions may not be conducive to the formation of these conditions associated with saturation (they may not be present at every site). Does the variance proposal offer any information such as observed data points for the site when wet conditions are expected or information on why those features are not relevant, making complying with that rule burdensome or impractical?

- 6.1.3 Does the proposal adequately address the basis for the site evaluation denial and how the intent of the rules will be met?
- 6.1.4 How substantial is the deviation from the specific rules and siting criteria? The greater the distance between the standard that is set in rule and the proposed system, the greater the risk that the design will not work as proposed and be protective. Once a home is constructed and occupied, if the system doesn't work the repair options are that much more challenging.
 - Has the applicant demonstrated variance to a rule is warranted?
 - Does the proposal address all rules that resulted in site evaluation approval or denial?
 - Is the variance proposal equally as protective of the environment and public health as adhering to existing rules?

6.2 Evaluation of the request may include broader factors based on OAR 340-071-0130.

Subsection (1) states: Protection of public waters from public health hazards. An agent may not authorize installation or use of a system that is likely to pollute public waters or create a public health hazard. If, in the judgment of the agent, the minimum standards in this division will not adequately protect public waters or public health on a particular site, the agent must require a system to meet requirements that are protective. This may include but is not limited to increasing setbacks, increasing drainfield sizing, or using an alternative system. The agent must provide the applicant with a written statement of the specific reasons why more stringent requirements are necessary. Factors could be:

- 6.2.1 Groundwater management areas
- 6.2.2 Impaired waters and TMDLs where nutrients or bacteria have been the cause of impairment
- 6.2.3 Areas subject to or with publications / results from government studies or assessments

6.3 Information provided by county agent

The local agent should be consulted on the variance proposal. The local onsite program staff are often helpful in understanding local conditions. They may have concerns or may be supportive of the proposal. The variance officer considers this information as part of the overall review of the proposal. The final decision is made by the variance officer.

6.4 Lot information

- 6.4.1 Lot size – smaller lots typically are located in areas where population density is higher, and therefore the risk to public health should be considered.
- 6.4.2 Drinking water source – community water system or individual wells – potential beneficial uses of groundwater including wells is an important consideration for possible impacts to human health.

- 6.4.3 Effective soil depth and soil texture – restrictive layers may play a role in where and how wastewater moves through the soil as well as precipitation, snowmelt and groundwater in general. Consider the likelihood of overall mounding of groundwater in the area under a proposed system.
- 6.4.4 Setbacks – consider factors such as lot size, intent of setbacks (such as environmental, structural)

6.5 Proximity to Waters of the State

Both groundwater and surface waters are “waters of the state”, and groundwater can emerge as surface water and vice versa. The proximity of a system to a lake, river or other surface waters could have an adverse impact or none depending on groundwater flow direction, recharge rates in the area and the velocity of groundwater. Likewise, both surface and groundwater may have known nutrient concerns in the immediate vicinity that can be determined by the variance officer in looking at TMDL listings, 303D list, U.S. Geological Survey (USGS) studies, etc.

6.6 Surface Water Issues

- 6.6.1 Proximity or location of wetlands
- 6.6.2 Location relative to floodplain
- 6.6.3 Impaired waters: If the TMDL for the watershed or DEQ’s Integrated Report (approved by U.S. Environmental Protection Agency every two years) identifies nutrients or bacteria that may be caused by onsite systems as contributing to the pollutant loads.
- 6.6.4 Soils, gradients and potential to migrate

6.7 Groundwater Issues

- 6.7.1 Known nutrient concerns in the immediate vicinity – this information may be found in TMDL listings, 303D list, USGS studies. Nitrates and to a lesser extent phosphorous are the nutrients of concern.
- 6.7.2 Conditions Associated with Saturation / Depth to groundwater – this would include separation distance to the bottom of a soil absorption facility to the water table as well as distance to the ground surface, as the water table will likely fluctuate above the depth identified with conditions associated with saturation in periods of heavy rain, high snowmelt or generally wetter precipitation years.
- 6.7.3 Dewatering issues – soil textures, landform, slope and volume of groundwater may influence how successful a groundwater interceptor would be at a site.
- 6.7.4 Potential for groundwater mounding – finer-textured soils slow movement of groundwater but is not the only consideration. Capillary movement of

- groundwater, coarser-textured soils with shallow groundwater on a flat site may also influence mounding.
- 6.7.5 Soil with rapid or very rapid permeability – these coarser textured soils have higher potential for rapid downward or lateral movement of treated effluent towards ground or surface waters.
 - 6.7.6 Direction and rate of subsurface flows – site and area specific conditions such as slope, soil texture, geologic discontinuities, and proximity to natural outlets (ex: drainage ways, surface waters, wetlands, etc.) can influence the gradient / movement of subsurface groundwater preferentially.

6.8 Proposed system design and assumed function

- 6.8.1 Data demonstrating system or design's nitrate reduction ability and reducing other pollutant treatment.
- 6.8.2 Hydrologic function and potential for mounding.
- 6.8.3 Whether the proposed system utilizes proven technology
- 6.8.4 Is proposed system one that can be installed and maintained by certified installers and maintenance providers in the local area, as designed? Once a variance has been approved, there is no additional oversight to ensure the system is being properly maintained.
- 6.8.5 Whether the consultant has provided comprehensive installation instructions.
- 6.8.6 Whether applicant has agreed to incorporate sampling and reporting to evaluate system function over time.
- 6.8.7 Can the local agent reasonably issue a construction-installation permit and a certificate of satisfactory completion for the proposed system without making compromises?
- 6.8.8 If the variance proposal occurs in a period of drier-than-normal conditions, consider how the proposal is likely to function in 'normal' conditions or wetter-than-normal conditions.

6.9 Existing scientific water quality and public health studies that support or contradict varying from onsite rules

- 6.9.1 Water quality or public health resources such as studies, peer-reviewed publications, or data sets prepared by a qualified public agency, or university or academic institution or funded and reviewed by these entities. These resources are typically considered reliable when they follow generally accepted protocols for scientific methods and research.

6.9.2 Consultant or association-prepared water quality assessments or system design data that are not part of the application materials for the variance site. This category includes information gathered from other states or onsite jurisdictions that is relevant to our climate or technologies. These resources can be helpful but may not be as robust as the resources in subsection 1) above, especially if they are small scale, site specific, not peer reviewed or contain data or conclusions that cannot be scientifically verified.

7. Record of Revisions to IMD

Revision	Date	Changes	Editor
None			