



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

1200 Sixth Avenue, Suite 155  
Seattle, WA 98101-3123

WATER  
DIVISION

April 13, 2020

Ms. Jennifer Wigal  
Deputy Water Quality Administrator  
Oregon Department of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, Oregon 97232

Re: The EPA's Action on Revisions to the Oregon Department of Environmental Quality's Water Quality Standards Variance Authorizing Provisions, and Other Water Quality Standards Provisions

Dear Ms. Wigal:

The U.S. Environmental Protection Agency has completed the Clean Water Act (CWA) review of the new and revised water quality standards (WQS) at Chapter 340-041 of the Oregon Administrative Rules, sent to the EPA by the Oregon Department of Environmental Quality by letter dated January 29, 2020. Under the CWA Section 303(c), 33 U.S.C. § 1313(c), states must submit new and revised WQS to the EPA for review and action, and the EPA must ensure that those WQS are consistent with the CWA and the EPA's implementing regulations. The EPA's action is outlined below and further described in the enclosed Technical Support Document.

The EPA's action applies only to waters in the state of Oregon and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. Nothing in this action shall constitute an approval or disapproval of a WQS that applies to waters within Indian Country. The EPA, or authorized Indian Tribes, as appropriate, retain the authority to establish WQS for waters within Indian Country.

### **Summary of the EPA's Action**

- I. Pursuant to the EPA's authority under CWA section 303(c) and the implementing regulations at 40 CFR Part 131, the EPA is approving certain revisions to the following sections at OAR 340-041:
  - OAR 340-041-0059(1): Applicability.
  - OAR 340-041-0059(2): Conditions to Grant a Variance.
  - OAR 340-041-0059(3): Variance Duration and Re-evaluation.
  - OAR 340-041-0059(5): Highest Attainable Condition.
  - OAR 340-041-0059(6): Variance Permit Conditions.
  - OAR 340-041-0059(7): Public Input and Notification Requirements.
  - Portions of OAR 340-041-0345: Basin Specific Criteria (Willamette).

II. The EPA is not taking action on the following new and revised provisions in the following sections of OAR 340-041 because the EPA has determined they are not new or revised water quality standards that the EPA has the authority to review and approve or disapprove pursuant to its CWA section 303(c) authority, 33 U.S.C. § 1313(c)(3).

- OAR 340-041-0059(4): Variance Submittal Requirements.
- Portions of OAR 340-041-0345: Basin Specific Criteria (Willamette).

Finally, ODEQ also submitted a multi-discharger variance at OAR 340-041-0345(6) which is still under review.

The EPA appreciates the efforts your staff have dedicated to updating the WQS Variance Authorizing Provisions in Oregon and looks forward to continuing close collaborations with ODEQ. If you have any questions regarding this letter, please contact me at (206) 553-1855 or Lindsay Guzzo, the EPA staff lead, at (206) 553-0268 or [Guzzo.Lindsay@epa.gov](mailto:Guzzo.Lindsay@epa.gov).

Sincerely,

Daniel D. Opalski  
Director

Enclosure: Technical Support Document

cc (e-copy): Ms. Connie Dou, Water Quality Standards & Assessments Manager, ODEQ  
Mr. Aron Borok, Variance Permit Specialist, ODEQ  
Ms. Debra Sturdevant, Water Quality Standards Program Lead, ODEQ

# Technical Support Document

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The EPA's Action on  
the Revisions to Chapter 340-041 of the Oregon  
Administrative Rules Regarding Water Quality  
Standards Variance Authorizing Provisions and other  
Water Quality Standards Provisions

April 13, 2020

## I. Clean Water Act Requirements for Water Quality Standards

Under section 303(c) of the Clean Water Act (CWA) and federal implementing regulations at 40 CFR § 131.4, states (and authorized tribes) have the primary responsibility for reviewing, establishing, and revising water quality standards (WQS), which consist primarily of the designated uses of a waterbody or waterbody segment, the water quality criteria that protect those designated uses, and an antidegradation policy. This statutory and regulatory framework allows states to work with local communities to adopt appropriate designated uses (as required in 40 CFR § 131.10(a)) and to adopt criteria to protect those designated uses (as required in 40 CFR §131.11(a)).

States are required to hold public hearings for the purpose of reviewing applicable WQS periodically but at least once every three years and, as appropriate, modify and adopt these standards (40 CFR § 131.20). Each state must follow applicable legal procedures for revising or adopting such standards (40 CFR § 131.5(a)(6)) and submit certification by the state's attorney general, or other appropriate legal authority within the state, that the WQS were duly adopted pursuant to state law (40 CFR §131.6(e)). The U.S. Environmental Protection Agency's (EPA) review authority and the minimum requirements for state WQS submittals are described at 40 CFR § 131.5 and 131.6.

States are required by 40 CFR § 131.11(a) to adopt water quality criteria that protect their designated uses. In establishing such criteria, states should establish numeric values based on one of the following:

- (1) CWA 304(a) guidance;
- (2) CWA 304(a) guidance modified to reflect site-specific conditions; or,
- (3) Other scientifically defensible methods (40 CFR § 131.11 (b)(1)).

In addition, states should establish narrative criteria where numeric criteria cannot be determined or to supplement numeric criteria (see 40 CFR § 131.11 (b)(2)).

Section 303(c) of the CWA requires states to submit new or revised WQS to the EPA for review and action. The EPA is required to review these changes to ensure revisions to WQS are consistent with the CWA and EPA's implementing regulations.

The EPA considers four questions (described below) when evaluating whether a particular provision is a new or revised WQS. If all four questions are answered "yes" then the provision would likely constitute a new or revised WQS that the EPA has the authority and duty to approve or disapprove under CWA § 303(c)(3).<sup>1</sup>

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?

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<sup>1</sup> *What is a New or Revised Water Quality Standard under 303(c)(3)? Frequently Asked Questions*, EPA No. 820F12017 (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?
3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
4. Does the provision establish a new WQS or revise an existing WQS?

Furthermore, the federal WQS regulations at 40 CFR § 131.21 state, in part, that when the EPA disapproves a state's WQS, the EPA shall specify the changes that are needed to assure compliance with the requirements of the CWA and federal WQS regulations.

Finally, the EPA considers non-substantive edits to existing WQS to constitute new or revised WQS that the EPA has the authority to approve or disapprove under § 303(c)(3). While these edits and changes do not substantively change the meaning or intent of the existing WQS, the EPA believes it is reasonable to treat such edits and changes in this manner to ensure public transparency as to which provisions are applicable for CWA purposes. The EPA notes that the scope of its review and action on non-substantive edits or editorial changes extend only to the edits or changes themselves. The EPA is not re-opening or reconsidering the underlying WQS which are the subject of the non-substantive edits or editorial changes.

## **II. Regulatory Requirements for Water Quality Standards Variances**

States may adopt policies generally affecting the applicability and implementation of WQS such as mixing zones, low flows and variances (40 CFR § 131.13). A WQS variance is defined as a time-limited designated use and criterion for a specific pollutant or parameter that reflects the highest attainable condition during the term of the variance (40 CFR § 131.3(o)). The federal WQS regulation at 40 CFR 131.14 provides requirements for variances and clarifies that the adoption of any WQS variance is a WQS subject to the public participation requirements at 40 CFR 131.20(b) and the EPA's review and action pursuant to section 303(c) of the CWA.

States are not required to adopt their own WQS variance authorizing provisions before making use of WQS variances (80 Fed. Reg. 51020, 51040 (Aug. 21, 2015)); however, some states have chosen to do so to clarify what information is necessary for the state to adopt WQS variances. Consistent with 40 CFR § 131.13, when states include general variance authorizing provisions in their WQS, such policies are subject to the EPA's review and action. While states may choose to adopt their own WQS variance authorizing provisions, any WQS variance ultimately adopted by the state must comply with the federal regulations at 40 CFR § 131.14 and is not effective for CWA purposes until the EPA approves the WQS variance (40 CFR § 131.21(c)(2)). Therefore, the EPA's basis for review and action on WQS variance authorizing provisions is not whether the authorizing provision includes all the requirements of 40 CFR § 131.14, but whether the authorizing provision does not contradict the requirements at 40 CFR § 131.14 and does not undermine the ability of the state to adopt variances that are consistent with 40 CFR § 131.14. A summary of the EPA's review of the State of Oregon's WQS variance authorizing provision is presented below.

### **III. State of Oregon Water Quality Standards Submittal**

By letter dated January 29, 2020, the Oregon Department of Environmental Quality (ODEQ) submitted revisions to various sections of the Oregon Administrative Rules chapter 340, division 041, to the EPA for review and action under section 303(c) of the CWA. The revisions were adopted on January 24, 2020, were certified by the Oregon Attorney General on February 3, 2020 as duly adopted pursuant to state law and became effective under Oregon state law on January 24, 2020. Prior to adopting the revisions, ODEQ provided opportunity for public comment on the proposed rule, including joint webinar-based and in-person public hearings held simultaneously at two locations on October 22, 2019.

ODEQ submitted the following documents to the EPA in accordance with the minimum requirements of a WQS submittal at 40 CFR § 131.6:

- Cover letter from Jennifer Wigal, Oregon Department of Environmental Quality, Deputy Water Quality Administrator to Dan Opalski, EPA Region 10 Water Division Director, dated January 29, 2020.
- Letter from the Attorney General's Office certifying the standards were adopted pursuant to state law, February 3, 2020.
- Water Quality Standards for Surface Waters of the State of Oregon, OAR 340-041-0059 and OAR 340-041-0345, revised on January 24, 2020.
- Track-change version of Water Quality Standards for Surface Waters of the State of Oregon, OAR 340-041-0059 and OAR 340-041-0345, revised on January 24, 2020.
- Staff report to the Environmental Quality Commission, January 24, 2020.
- Copy of the Secretary of State Certificate of Filing, January 24, 2020.
- Letter to EPA, State Variance Authorizing Rules, Confirmation of Public Hearing Requirements, April 1, 2020.

The WQS revisions ODEQ submitted to the EPA for review and CWA action pursuant to section 303(c) include updates to the state's WQS variance authorizing provisions at OAR 340-041-0059, as well as non-substantive editorial and administrative revisions to other WQS provisions at OAR 340-041-0345. ODEQ also submitted a multi-discharger variance at OAR 340-041-0345(6) which is still under review.

ODEQ also submitted provisions or specific changes that do not constitute new or revised WQS actionable under section 303(c) of the CWA because they do not establish the desired condition or instream level of protection for any waters to which the EPA's authorities under CWA section 303(c) and 40 CFR Part 131 apply. These non-WQS provisions are discussed in the section titled "Provisions that the EPA is Not Taking Action On."

### **IV. The EPA's Action on New and Revised Water Quality Standards**

Today's action applies only to waters within the jurisdiction of the state of Oregon and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. Nothing in this decision document shall constitute an approval or disapproval of a WQS that applies to waters

within Indian Country. The EPA, or authorized Indian Tribes, as appropriate, retain the authority to establish WQS for waters within Indian Country.

The EPA's action and rationale on the new and revised WQS submitted by ODEQ are provided below. Underlined text indicates the new and/or revised language, and strikeout text indicates ODEQ's previous text, which has been replaced by the new or revised text.

#### **A. OAR 340-041-0059 – Variances**

~~This rule (OAR 340-041-0059) does not become applicable for purposes of ORS chapter 468B or the federal Clean Water Act unless and until EPA approves the provisions it identifies as water quality standards pursuant to 40 CFR 131.21 (4/27/2000).~~

##### OAR 340-041-0059(1) – Applicability

(1) Applicability. Subject to the requirements and limitations set out in sections (2) through (7) below, ~~a point source~~ DEQ or the EQC commission ~~may request~~ grant a water quality standards variance where the discharger or DEQ demonstrates that it is not feasible to attain where it is demonstrated that the designated use and criterion during the term of the variance because of one of the factors listed in subsection (2)(a) of this rule. source cannot feasibly meet effluent limits sufficient to meet water quality standards. ~~The director may grant an individual discharger variance and the commission may grant a multiple discharger variance or a water body variance. All water quality standards variances are subject to EPA approval. The director of the department will determine whether to issue a variance for a source covered by an existing NPDES permit. The commission will determine whether to issue a variance for a discharger that does not have a currently effective NPDES permit.~~

~~(a) The variance applies~~ may be used only for the purpose of establishing NPDES permit limits and requirements under CWA Section 301(b)(1)(C) or for issuing certifications under CWA Section 401, only to the specified point source permit and pollutant(s); ~~tThe underlying water quality standard(s)~~ designated use and criterion otherwise remains in effect.

~~(b) The department or commission may not grant a variance if:~~ (A) ~~The effluent limit sufficient to meet the underlying water quality standard can be attained by implementing technology-based effluent limits required under sections 301(b) and 306 of the federal Clean Water Act, and by implementing cost-effective and reasonable best management practices for nonpoint sources under the control of the discharger;~~ or

(B) ~~The variance 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;~~ or

(C) ~~The conditions allowed by the variance would result in an unreasonable risk to human health;~~ or.

(D) ~~A point source does not have a currently effective NPDES permit, unless the variance is necessary to:~~

(i) ~~Prevent or mitigate a threat to public health or welfare;~~

(ii) ~~Allow a water quality or habitat restoration project that may cause short term water quality standards exceedances, but will result in long term water quality or habitat improvement that enhances the support of aquatic life uses;~~

(iii) ~~Provide benefits that outweigh the environmental costs of lowering water quality. This analysis is comparable to that required under the antidegradation regulation contained in OAR-041-0004(6)(b);~~ or

(E) ~~The information and demonstration submitted in accordance with section (4) below does not allow the department or commission to conclude that a condition in section (2) has been met.~~

*The EPA Action and Rationale:* In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the changes at OAR 340-041-0059(1). These changes clarify that Oregon can adopt WQS variances for individual dischargers or waterbodies in accordance with 40 CFR § 131.14(a)(1), that the underlying designated use and criterion remains in effect during the WQS variance term in accordance with 40 CFR § 131.14(a)(2), and that WQS variances can only be used to establish NPDES permit limits or for issuing CWA Section 401 certifications in accordance with 40 CFR § 131.14(a)(3). Additionally, these revisions specify that WQS variances must be justified using certain factors (see the EPA's action and rationale for OAR 340-041-0059(2) below) and that all WQS variances are subject to the EPA's approval in accordance with 131.14.

### **B. OAR 340-041-0059(2) – Conditions to Grant a Variance**

Conditions to Grant a Variance. Before the ~~EQC commission~~ or department DEQ may grant a variance, it must determine that:

~~(a) No existing use will be impaired or removed as a result of granting the variance and~~  
(~~b~~a) Attaining the water quality standard designated use and criterion during the term of the variance is not feasible for one or more of the following reasons:

(A) Naturally occurring pollutant concentrations prevent attaining ~~the attainment of~~ the use;

(B) Natural, ephemeral, intermittent, or low flow conditions, or water levels prevent the attaining ~~ment of~~ the use, unless these conditions may be compensated for by ~~the discharging of~~ sufficient volume of effluent discharges to enable uses to be met without violating state water conservation requirements;

(C) Human-caused conditions or sources of pollution prevent the attaining ~~ment of~~ the use and cannot be remedied or would cause more environmental damage to correct than to leave in place;

(D) Dams, diversions, or other types of hydrologic modifications preclude the attaining ~~ment of~~ the use, and it is not feasible to restore the waterbody to its original condition or to operate such modification in a way which would result in the attainment of the use;

(E) Physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality preclude attaining ~~ment of~~ aquatic life protection uses; ~~or~~

(F) Controls more stringent than those required by sections 301(b) and 306 of the federal Clean Water Act would result in substantial and widespread economic and social impact; ~~or~~

(G) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented;

(b) The effluent limit sufficient to meet the underlying designated use and criterion cannot be attained by implementing technology-based effluent limits required under sections 301(b) and 306 of the federal Clean Water Act.

(c) The requirements that apply throughout the term of the water quality standards variance will not result in lowering the currently attained ambient water quality, unless the variance is needed for restoration activities as specified in paragraph(2)(a)(G) of this rule.

*The EPA Action and Rationale:* In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the changes at OAR 340-041-0059(2). These revisions specify certain factors that Oregon can use to demonstrate the need for the WQS variance in accordance with 40 CFR § 131.14(b)(2)(i)(A), specify that a variance cannot be granted if the effluent limit sufficient to meet the underlying use and criterion can be attained by implementing technology-based limits in accordance with 40 CFR § 131.14(a)(4), and require that a WQS variance does not result in lowering of currently attained water quality except in limited circumstances in accordance with 40 CFR § 131.14(b)(1)(ii).

### **C. OAR 340-041-0059(3) – Variance Duration and Re-evaluation**

Variance Duration and Re-evaluation.

~~The duration of a variance must only be as long as necessary not exceed the term of the NPDES permit to meet achieve the highest attainable condition as described in section (5) of this rule. If the permit is administratively extended, the permit effluent limits and any other requirements based on the variance and associated pollutant reduction plan will continue to be in effect during the period of the administrative extension. The department will give priority to NPDES permit renewals for permits containing variances and where a renewal application has been submitted to the director at least one hundred eighty days prior to the NPDES permit expiration date.~~

(b) The DEQ order or EQC commission rule will specify the duration of the variance.

~~(bc) When If the duration of the variance is less than the term of the a NPDES permit, the permittee must be in compliance comply with the specified effluent limitation sufficient to meet the underlying water quality standard when the variance expires upon the expiration of the variance. The permit will include the date the variance and corresponding interim effluent limit will expire. (c) A variance is effective only after EPA approval. The effective date and duration of the variance will be specified in a NPDES permit or order of the commission or department.~~

(d) If the term of the variance exceeds five years, DEQ will re-evaluate the highest attainable condition using all existing and readily available information at least every five years. DEQ will specify the re-evaluation frequency in the variance. Following public input, DEQ will submit its re-evaluation to EPA within 30 days of completion. If DEQ does not submit the re-evaluation to EPA within the specified timeline, the variance will no longer be the applicable water quality standard until DEQ completes the re-evaluation and submits it to EPA.

*The EPA Action and Rationale:* In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the changes at OAR 340-041-0059(3). This section discusses requirements related to the WQS variance term and re-evaluations of WQS variances longer than five years, in accordance with 40 CFR § 131.14(b)(1)(iv)-(vi).

#### **D. OAR 340-041-0059(5) – Highest Attainable Condition**

(5) Highest Attainable Condition. The highest attainable condition is a quantifiable expression of one of the following:

(a) For individual or multiple discharger WQS variances:

(A) The highest attainable interim criterion; or

(B) The interim effluent condition that reflects the greatest pollutant reduction achievable; or

(C) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State grants the WQS variance, and adoption and implementation of a pollutant minimization plan.

(b) For WQS variances applicable to a waterbody or waterbody segment:

(A) The highest attainable interim use and interim criterion; or

(B) If no additional feasible pollutant control technology can be identified, the interim use and interim criterion that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a pollutant minimization plan.

(c) For any WQS variance that applies to a waterbody or waterbody segment, supporting documentation will 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 waterbody or waterbody segment(s) specified in the WQS variance that could be implemented to make progress towards attaining the underlying designated use and criterion. DEQ will provide public notice and comment for any such documentation.

(d) In any subsequent WQS variance for a waterbody or waterbody segment, DEQ will document whether and to what extent best management practices for nonpoint source controls were implemented to address the pollutant(s) or water quality parameter(s) subject to the WQS variance and the water quality progress achieved.

*The EPA Action and Rationale:* In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the changes at OAR 340-041-0059(5). This section specifies how the highest attainable condition must be expressed for WQS variances applicable to dischargers and waterbodies, in accordance with the requirements at 40 CFR § 131.14(b)(1)(ii). Additionally, it discusses additional requirements for WQS variances for waterbodies or waterbody segments, in accordance with 40 CFR § 131.14(b)(2)(iii).

For purposes of this CWA action, the EPA considers the definition of the term “pollutant minimization plan,” discussed at OAR 340-041-0059(5), to be equivalent to the federal definition of “Pollutant Minimization Program” found at 40 CFR § 131.3(p). The federal definition reads, “*Pollutant Minimization Program*, in the context of §131.14, is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.”

#### **E. OAR 340-041-0059(6) – Variance Permit Conditions**

~~(5) (6) Variance Permit Conditions. Effluent limits in the discharger's permit will be based on the variance and not the underlying water quality standard, so long as the variance remains~~

~~effective. The department DEQ must establish and incorporate into the discharger's NPDES permit all conditions necessary to implement and enforce an approved variance in lieu of the underlying water quality standard, so long as the variance remains effective, and associated pollutant reduction plan.~~ The permit must include, at a minimum, the following requirements:

(a) ~~An interim concentration based permit limit or requirement representing deriving from the best achievable effluent quality, highest attainable effluent condition or highest attainable use and criterion specified in the variance, including any updated highest attainable effluent condition based on a five year re-evaluation; based on discharge monitoring data and that is no less stringent than that achieved under the previous permit. For a new discharger, the permit limit will be calculated based on best achievable technology;~~

(b) ~~For variances expressing the highest attainable condition per section 5(a)(C) or 5(b)(B) of this rule, A a requirement to implement the any pollutant reduction actions approved as part of a pPollutant Minimization reduction plan-Program included in the applicable variance submitted in accordance with section (4)(e) above and to make reasonable progress toward attaining the underlying water quality standard(s);~~

(c) Any studies, effluent monitoring, or other monitoring necessary to ensure compliance with the conditions of the variance; and

(d) An annual progress report to ~~the department DEQ~~ describing the results of any required studies or monitoring during the reporting year, and identifying the pollutant reduction activities completed and any impediments to reaching any specific milestones stated in the variance.

*The EPA Action and Rationale:* In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the changes at OAR 340-041-0059(6). This section specifies that the limitations and requirements necessary to implement the WQS variance must be included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance, in accordance with the requirements at 40 CFR § 131.14(b)(1)(iii) and 131.14(c).

#### **F. OAR 340-041-0059(7) – Public Input and Notification Requirements**

(67) Public Input and Notification Requirements.

(a) ~~If the department DEQ proposes to grant a variance, it must provide public notice of the proposal proposed variance and hold a public hearing accept public comment. The public notice may be coordinated with included in the public notification of a draft NPDES permit or other draft regulatory decision draft 401 certification that would rely on the variance;~~

(b) If DEQ is required to re-evaluate the highest attainable condition consistent with (3)(d) of this rule, DEQ will obtain public input on the re-evaluation prior to submitting the re-evaluation to EPA. The specific method of obtaining public input will be documented in the variance.

~~(bc) The department DEQ will publish a list of all variances approved under pursuant to this rule on its website. DEQ will add Nnewly approved variances will be added to this list within 30 days of their effective date. The list will identify:~~

(A) †The effective date and duration of the variance;

~~(B) The discharger facility or facilities;~~

~~(C) The pollutant(s) or water quality parameter(s);~~

~~(D) and The waters to which the variance applies;~~

~~(E) The underlying water quality standard designated use and criterion for the waterbody;~~

~~(F) the effective date and duration of the variance; The allowable pollutant effluent limit granted under highest attainable condition specified in the variance;~~

~~(G) and How to obtain additional information about the variance.~~

~~(7) Variance Renewals.~~

~~(a) A variance may be renewed if:~~

~~(A) The permittee makes a renewed demonstration pursuant to section (2) of this rule that attaining the water quality standard continues to be infeasible,~~

~~(B) The permittee submits any new or updated information pertaining to any of the requirements of section 4,~~

~~(C) The department determines that all conditions and requirements of the previous variance and actions contained in the pollutant reduction plan pursuant to section (5) have been met, unless reasons outside the control of the discharger prevented meeting any condition or requirement, and~~

~~(D) All other requirements of this rule have been met.~~

~~(b) A variance renewal must be approved by the department director and by EPA.~~

*The EPA Action and Rationale:* In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the changes at OAR 340-041-0059(7). This section specifies state public participation requirements for adoption and re-evaluation of WQS variances, in accordance with the requirements at 40 CFR § 131.14 and 131.14(b)(1)(v). On April 1, 2020, ODEQ provided a letter in response to a question that the EPA raised regarding the public information and notification requirements adopted at OAR 340-041-0059(7). ODEQ confirmed that the rule revision was not intended to conflict with federal public participation requirements for review and revision of WQS at 40 CFR § 131.20(b), which require one or more public hearings for the purpose of reviewing or revising WQS in accordance with 40 CFR Part 25. In response to EPA's question, DEQ clarified that the State will follow EPA public participation requirements whenever adopting a variance, including the requirement to hold one or more public hearings.

**G. OAR 340-041-0345(1) and (2) – Basin Specific Criteria (Willamette): Water Quality Standards and Policies for this Basin**

(1) pH (hydrogen ion concentration). pH values may not fall outside the following ranges:

(a) All basin waters, ~~(except main stem Columbia River and Cascade lakes):~~ 6.5 to 8.5;

(b) Cascade lakes above 3,000 feet altitude: 6.0 to 8.5.

(2) Total Dissolved Solids. Guide concentrations listed may not be exceeded unless ~~otherwise~~ DEQ specifically authorizes otherwise ~~and by DEQ~~ upon such conditions as it may deem necessary to carry out the general intent of this plan and to protect the beneficial uses set forth in OAR 340-041-0340: Willamette River and Tributaries — 100.0 mg/l.

*The EPA Action and Rationale:* In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR 131, the EPA approves the non-substantive editorial changes to OAR 340-041-0059(1) and (2) which simply clarify the language in the regulation. The scope of the EPA's action in approving such provisions extends only as far as the actual changes themselves. The EPA's action here does not constitute an action on the underlying WQS.

**V. Provisions that the EPA is Not Taking Action On**

The EPA is not taking action on the following provisions submitted by ODEQ as they are not WQS under section 303(c) of the CWA. The underlined text indicates the new and/or revised language, and strikethrough text indicates ODEQ's previous text, which has been replaced by the new or revised text.

**A. OAR 340-041-0059(4) – Variance Submittal Requirements**

(4) Variance Submittal Requirements.

(a) To request an individual variance, a permittee must submit the following information to ~~the department~~ DEQ:

(aA) The specific pollutant, discharger, and receiving waterbody to which the variance will apply;

(B) A demonstration that attaining the water quality standard designated use and criterion for a the specific pollutant is not feasible for the requested duration of the variance based on one ~~or more~~ of the conditions-factors found in subsection (2)(ba) of this rule;

(bC) A description of treatment or alternative options the permittee considered by the permittee to meet permit limits based on the applicable underlying water quality standard-criterion, and a description of why these options are not technologically, economically, or otherwise feasible;

(eD) Sufficient water quality data and analyses to characterize ambient and discharge water pollutant concentrations and determine the Highest Attainable Condition, as required in section (5) of this rule;

~~(d) Any cost effective and reasonable best management practices for nonpoint sources under the control of the discharger that addresses the pollutant the variance is based upon;~~

~~(eE) If the highest attainable condition for the variance is consistent with paragraph (5)(a)(C) of this rule, A a proposed pollutant reduction-minimization plan covering the term of the variance that includes any actions the permittee(s) will take to be taken by the permittee that would will result in reasonable progress toward meeting the underlying water quality standard. Such actions may include proposed pollutant offsets or trading or other proposed pollutant reduction activities, and associated milestones for implementing these measures. Pollutant reduction plans will be tailored to address the specific circumstances of each facility and to the extent pollutant reduction can be achieved; and~~

(E) If the discharger is a publicly owned treatment works, a demonstration of the jurisdiction's legal authority, (such as a sewer use ordinance,) to regulate the pollutant for which the variance is sought. The jurisdiction's legal authority must be sufficient to control potential sources of that pollutant that discharge into the jurisdiction's sewer collection system.

(b) To be eligible for any multiple discharger variance or waterbody variance, a permittee must submit all the information required in the specific multiple discharger or waterbody variance rule.

*The EPA Action and Rationale:* The EPA has determined that the provisions at OAR 340-041-0059(4) are not new or revised WQS that the EPA has the authority to review and approve or disapprove pursuant to its CWA section 303(c) authority, 33 U.S.C. § 1313(c)(3). These provisions are related to information ODEQ is requesting of permittees prior to granting a WQS variance. The provisions are not binding as to the type of information ODEQ will be submitting to the EPA for review and action on the variance. Additionally, the provisions do not express or establish the desired condition or instream level of protection immediately or in the future; and therefore, are not a WQS. Many of the items listed at OAR 340-041-0059(4)(a) are required elements of a WQS variance package submittal by the ODEQ to the EPA for review and action pursuant to 40 CFR § 131.14.

**B. OAR 340-041-0345 – Basin Specific Criteria (Willamette): Water Quality Standards and Policies for this Basin**

(3) Minimum Design Criteria for Treatment and Control of Sewage Wastes:

(a) Willamette River and tributaries except Tualatin River Subbasin:

(A) During periods of low stream flows (approximately May 1 to October 31): Treatment resulting in monthly average effluent concentrations not to exceed 10 mg/l of BOD and 10 mg/l of SS or equivalent control;

(B) During the period of high stream flows (approximately November 1 to April 30): A minimum of secondary treatment or equivalent control and, unless DEQ otherwise specifically authorizes ~~by the Department~~, operating on of all waste treatment and control facilities at maximum practical efficiency and effectiveness so as to minimize waste discharges to public waters.

(b) Main stem Tualatin River from mouth to Gaston (river mile 0 to 65):

(A) During periods of low stream flows (approximately May 1 to October 31): Treatment resulting in monthly average effluent concentrations not to exceed 10 mg/l of BOD and 10 mg/l of SS or equivalent control;

(B) During the period of high stream flows (approximately November 1 to April 30): Treatment resulting in monthly average effluent concentrations not to exceed 20 mg/l of BOD and 20 mg/l of SS or equivalent control.

(c) Main stem Tualatin River above Gaston (river mile 65) and all tributaries to the Tualatin River: Treatment resulting in monthly average effluent concentrations not to exceed 5 mg/l of BOD and 5 mg/l of SS or equivalent control;

(d) Tualatin River Subbasin: The dissolved oxygen level in the discharged effluents may not be less than 6 mg/l;

(4) Nonpoint source pollution control in the Tualatin River subbasin and lands draining to Oswego Lake:

(a) Subsection (5)(b) of this rule applies to any new land development within the Tualatin River and Oswego Lake subbasins, except those developments with application dates ~~before~~ prior to January 1, 1990. The application date is the date on which the local jurisdiction receives a complete application for development approval as the local jurisdiction's regulations require is received by the local jurisdiction in accordance with the regulations of the local jurisdiction;

(b) For land development, no jurisdiction in these subbasins may approve any ~~no~~ preliminary plat, site plan, permit, or public works project ~~may be approved by any jurisdiction in these subbasins~~ unless the conditions of the plat permit or plan approval include an erosion control plan containing methods or and/or interim facilities, or both, to be constructed or used concurrently with land development and to be operated during construction to control the discharge of sediment in the stormwater runoff. The erosion control plan must include the following elements:

(A) Protection techniques to control soil erosion and sediment transport to less than one ton per acre per year, as calculated using the Natural Resources Conservation Service's Universal Soil Loss Equation or other equivalent methods (see Figures 1 to 6 in Appendix 1 for examples). The erosion control plan must include temporary sedimentation basins or other sediment control devices when, because of steep slopes or other site specific considerations, other on-site sediment control methods will not likely keep the sediment transport to less than one ton per acre per year. The local jurisdictions may establish additional requirements for meeting an equivalent degree of control. Any sediment basin constructed must be sized using 1.5 feet minimum sediment storage depth plus 2.0 feet storage depth above for a settlement zone. The storage capacity of the basin must be sized to store all of the sediment that is likely to be transported and collected during construction while the erosion potential exists. When the erosion potential has been removed, the sediment basin, or other sediment control facilities, can be removed and the site restored as per the final site plan. All sediment basins must be constructed with an emergency overflow to prevent erosion or failure of the containment dike; or

(B) A soil erosion control matrix derived from and consistent with the universal soil equation ~~approved by the jurisdiction or~~ DEQ approves the Department.

(c) The Director may modify Appendix 1 as necessary without approval from the Environmental Quality Commission. The Director may modify Appendix 1 to simplify it and to make it easier for people to apply;

(d) Subsection (5)(e) of this rule applies to any new land development within the Tualatin River and Oswego Lake subbasins, except:

(A) Those developments with application dates ~~before~~ prior to June 1, 1990. The application date is the date on which the local jurisdiction receives a complete application for development approval ~~is received by the local jurisdiction~~ as that jurisdiction's regulations require ~~in accordance with the regulations of the local jurisdiction~~;

(B) One and two family dwellings on existing lots of record;

(C) Sewer lines, water lines, utilities, or other land development that will not directly increase nonpoint source pollution once construction has been completed and the site is either restored to, or not altered from, its approximate original condition;

(D) If the Environmental Quality Commission determines that a jurisdiction does not need to require stormwater quality control facilities for new development;

(E) When a jurisdiction adopts ordinances that provide for a stormwater quality program equivalent to subsection (e) of this section. Ordinances adopted to implement equivalent programs must:

(i) Encourage on-site retention of stormwater, require phosphorus removal equivalent to the removal efficiency required by subsection (e) of this section, provide for adequate operation and maintenance of stormwater quality control facilities, and require financial assurance, or equivalent security, that assures construction of the stormwater quality control facilities the ordinance requires ~~d by the ordinance~~;

(ii) If the ordinances provide for exemptions other than those allowed for by paragraphs (B) and (C) of this subsection, the ordinances must provide for collecting or ~~in-lieu fees~~, or other equivalent mechanisms, that assure financing for, and construction of, associated, off-site stormwater quality control facilities. No exemption may be allowed if the jurisdiction is not meeting an approved schedule for identifying location of the off-site stormwater quality control facility to serve the development requesting an exemption.

(e) For new development, no jurisdiction may approve any ~~no~~ plat, site plan, building permit or public works project ~~may be approved by any jurisdiction~~ in these subbasins unless the conditions of the plat, permit, or plan approval require permanent stormwater quality control facilities to control phosphorus loadings associated with stormwater runoff from the development site. Jurisdictions must encourage and provide preference to techniques and methods that prevent and minimize pollutants from entering the storm and surface water systems. Permanent stormwater quality control facilities for phosphorus must meet the following requirements:

(A) The stormwater quality control facilities must be designed to achieve a phosphorus removal efficiency as calculated from the following equation:

$$R_p = 100 - 24.5/R_v$$

Where:

$R_p$  = Required phosphorus removal efficiency  
 $R_v$  = Average site runoff coefficient  
The average site runoff coefficient can be calculated from the following equation:

$$R_v = (0.7 \times A_1) + (0.3 \times A_2) + (0.7 \times A_3) + (0.05 \times A_4) + (A_5 \times 0.0)$$

Where:

$A_1$  = fraction of total area that is paved streets with curbs and that drain to storm sewers or open ditches.

$A_2$  = fraction of total area that is paved streets that drain to water quality swales located on site.

$A_3$  = fraction of total area that is building roof and paved parking that drains to storm sewers.

$A_4$  = fraction of total area that is grass, trees and marsh areas.

$A_5$  = fraction of total area for which runoff will be collected and retained on site with no direct discharge to surface waters.

(B) A jurisdiction may modify the equation for  $R_v$  to allow the applying cation of additional runoff coefficients associated with land surfaces not identified in this subsection. ~~The Department DEQ~~ must be notified in writing whenever an additional runoff coefficient is used. The use of additional runoff coefficients must be based on scientific data. The jurisdiction must discontinue using ~~e~~ of an additional runoff coefficient if ~~the Department DEQ~~ objects to its use in writing within ten days of receiving notification;

(C) The stormwater quality control facilities must be designed to meet the removal efficiency specified in paragraph (A) of this subsection for a mean summertime storm event totaling 0.36 inches of precipitation with an average return period of 96 hours;

(D) The removal efficiency specified in paragraph (A) of this subsection specify only design requirements and are not intended to be used as a basis for performance evaluation or compliance determination of the stormwater quality control facility installed or constructed pursuant to this subsection;

(E) A jurisdiction may approve ~~S~~ stormwater quality control facilities this subsection requires ~~d~~ by this subsection may be approved by a jurisdiction only if the following are met:

(i) For developments larger than one acre, the plat or site plan must include plans and a certification prepared by an Oregon registered, professional engineer, that the proposed stormwater control facilities have been designed in accordance with criteria expected to achieve removal efficiencies for total phosphorus required by paragraph (A) of this subsection;

(ii) The plat or site plan must be consistent with the area and associated runoff coefficients used to determine the removal efficiency required in paragraph (A) of this subsection;

(iii) ~~The developer must provide~~ A financial assurance, or equivalent security acceptable to the jurisdiction, ~~must be provided by the developer with the jurisdiction that assures that the stormwater control facilities are constructed according to the plans established in the plat or site plan approval. Where practicable, the jurisdiction must combine the financial assurance~~ this rule requires ~~by this rule~~ with other financial assurance requirements imposed by the jurisdiction;

(iv) Each jurisdiction that constructs or authorizes construction of permanent stormwater quality control facilities must file with ~~the Department-DEQ,~~ an operation and maintenance plan for the stormwater quality control facilities within its jurisdiction. The operation and maintenance plan must allow for public or private ownership, operation, and maintenance of individual permanent stormwater quality control facilities. The jurisdiction or private operator must operate and maintain the permanent stormwater control facilities as in accordance with the operation and maintenance plan specifies.

(f) Except as ~~required by~~ paragraph (D) of this subsection requires, the jurisdiction may grant an exception to subsection (e) of this section if the jurisdiction chooses to adopt and, on a case-by-case basis, impose a one time in-lieu fee. The fee will be an option where, because of the size of the development, topography, or other factors, the jurisdiction determines that the construction of on-site permanent stormwater treatment systems is impracticable or undesirable:

(A) The in-lieu fee will be based upon a reasonable estimate of the current, prorated cost for the jurisdiction to provide stormwater quality control facilities for the land development being assessed the fee. Estimated costs include costs associated with off-site land and rights-of-way acquisition, design, construction, and construction inspection;

(B) The jurisdiction must deposit any in-lieu fees collected under pursuant to this paragraph in an account dedicated only to reimbursing the jurisdiction for expenses related to off-site land and rights-of-way acquisition, design, construction, and construction inspection of stormwater quality control facilities;

(C) The ordinance establishing the in-lieu fee must include provisions that reduce the fee in proportion to the ratio of the site's average runoff coefficient ( $R_v$ ), as established according to the equation in paragraph (6)(e)(A) of this rule;

(D) No new development may be granted an exemption if the jurisdiction is not meeting an approved time schedule for identifying the location for the off-site stormwater quality control facilities that would serve that development.

(g) ~~The Department-DEQ~~ may approve other mechanisms that allow jurisdictions to grant exemptions to new development. ~~The Department-DEQ~~ may only approve those mechanisms that assure financing for off-site stormwater quality control facilities and that encourage or require on-site retention where feasible;

(h) Subsection (b) of this section applies y until a jurisdiction adopts ordinances that provide for a program equivalent to subsection (b) of this section, or the Environmental Quality Commission determines such a program is not necessary when it approves the jurisdiction's program plan required by OAR 340-041-0470(2)(g).

(5) In order to improve water quality within the Yamhill River subbasin to meet the existing water

quality standard for pH, the following special rules for total maximum daily loads, waste load allocations, load allocations and program plans are established:

(a) After ~~completion of~~ wastewater control facilities and program plans the EQC approved by the Commission under this rule are completed, and no later than June 30, 1994, no activities may be allowed, and no wastewater may be discharged to the Yamhill River or its tributaries, without the EQC's authorization of the Commission that cause the monthly median concentration of total phosphorus to exceed 70 ug/1 as measured during the low flow period between approximately May 1 and October 31<sup>\*\*\*</sup> of each year;

[ NOTE: DEQ may condition precise dates for complying with this rule on the receiving water's physical conditions (i.e., flow temperature). DEQ may specify the compliance dates in individual permits or memorandums of understanding. DEQ may consider design flows, river travel times, and other relevant information, when establishing the specific conditions it inserts in the permits or memorandums of understanding.]

(b) Within 90 days of adoption of these rules, the Cities of McMinnville and Lafayette must submit a program plan and time schedule to ~~the Department~~ DEQ describing how and when they will modify their sewerage facility to comply with this rule;

(c) The commission will review and approve F-final program plans will be reviewed and approved by the Commission. The G commission may define alternative compliance dates as program plans are approved. All proposed final program plans must be subject to public hearing before the commission considers them prior to consideration for approval by the Commission;

(d) ~~The Department~~ DEQ will, within 60 days of adoption of these rules, distribute initial waste load allocations and load allocations to the point and nonpoint sources in the basin. These allocations are considered interim and may be redistributed based upon the conclusions of the approved program plans. ~~\*\*\*Precise dates for complying with this rule may be conditioned on physical conditions (i.e., flow, temperature) of the receiving water and may be specified in individual permits or memorandums of understanding issued by the Department. The Department may consider system design flows, river travel times, and other relevant information when establishing the specific conditions to be inserted in the permits or memorandums of understanding.~~

*The EPA Action and Rationale:* The EPA is not acting on the revisions at OAR 340-041-0345(3)-(5) as these provisions are not new or revised WQS that the EPA has the authority to review and approve or disapprove pursuant to its CWA section 303(c) authority, 33 U.S.C. § 1313(c)(3). The provisions at OAR 340-041-0345(3)-(5), discuss measures for effluent, erosion stormwater control, and nonpoint source control and do not express or establish the desired condition or instream level of protection immediately or in the future; and therefore, are not WQS.