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To:	Larry Merrill
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Subject:	As requested at this weeks meeting. My suggestions for Maryland to consider during their proposed adoption of its restoration variances
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As requested at this weeks meeting. Listed below are several suggestions for Maryland to consider during their proposed adoption of its restoration variances of 16 percent for the Lower Chester River's deep channel and 2 percent for the Eastern Bay's deep channel. I have also listed some suggestion that Maryland should consider for its existing variances. None of these comments or suggestions should be considered new ideas or requirements. Several stakeholders made several of the same comments during Maryland's initial adoption of their restoration variances (in 2005). And the suggestions below are consistent with EPA's longstanding position on variances and requirements discussed in EPA's WQS Handbook and Regulations.

- EPA should remind Maryland that for any variance it must provide EPA and the public with following information: (I assume that some of the information listed below may be found in various existing Bay documents. I suggest that any information used from these documents be summarized into a stand-alone WQS rationale document. That is each new or modified variance needs to stand on its own. Maryland's "Technical Documentation of the Evaluation of the Lower Chester River's . . . at the Bay TMDL Level of Effort Loads"(TD) stated "these 2 restoration variance are similar to restoration variance currently in place (and approved by EPA)." I suggest that these new or modified variances have their own rationale, not only because it is required under the WQS regulation but for clarity and transparency.)
    - A demonstration that meeting the standard is unattainable based on one of the factors specified in 40 C.F.R. § 131.10(g);
    - A demonstration that treatment more advanced than that required by sections 303(c)(2)(A) and (B) were considered, and that alternative effluent control strategies have been evaluated;
    - What is the interim DO criterion is for each of the variances. The state must specify uses and criteria to support those uses in the waterbody at all times (40 C.F.R. §§ 131.6(a) and (c), 131.10 and 131.11), the variance must identify the designated use and associated criteria to be in place for at least the term of the variance;
    - And an expiration date for the proposed variances. A variance is granted for a specific period of time and must be re-justified upon expiration. Establishing an expiration date will ensure that the conditions of a variance will be thoroughly re-evaluated and subject to a public review on a regular and predictable basis.

<u>Other Considerations</u>

- The EPA approved variances should be re-evaluated. In Maryland's 2005 response to comments, Maryland said that it would review the restoration variance during each triennial review (it also states this on its web site). Maryland during its last triennial to my knowledge did not review the existing variances. Maybe this review occurred outside the WQS process? If these variances have not been re-evaluated since their approval in 2005, I suggest that Maryland start a WQS review to determine and document for clarity and transparency (1) whether conditions have changed such that the designated use and criterion are now attainable; (2) whether new or additional information has become available to indicate that the designated use and criterion are not attainable in the future (i.e., data or information supports a use change/refinement); or (3) whether feasible progress is being made toward the designated use and criterion and that additional time is needed to make further progress

- Variances do not achieve water quality standards. EPA's guidance on variances says a WQS variance provides temporary relief from meeting WQS and is a temporary removal of designated

use. So by its very nature a variance does not achieve/cannot meet the WQS. I think we should remind ourselves that it is EPA's longstanding position that a variance cannot automatically replace the underlying use and criteria, even though the waterbody variance may apply to the entire waterbody. If the basis for the Maryland case has been previously verified and documented, we should for clarity, provide that documentation again in a clear and transparent way. For the record can some one who worked on the 2005 variance explain (maybe in a memo to the file) what the legal basis or what EPA's thinking was on these variances?

- EPA understands that it approved Maryland's variances in the past. But to provide clarity, promote consistency, and avoid conflicting interpretations of WQS variances Maryland should know that EPA is proposing in regulation to clarify its longstanding position of what is WQS variance. That is a WQS variance is a time-limited use and criterion for a specified pollutant(s), permittee(s), and/or water body that reflect the highest attainable condition during the specified time period. I suggest that Maryland consider these restoration variances as either waterbody variance or possibly a use change or even something else altogether (i.e. a change in listing methodology?). For example the TD states "[r]easonable further nutrient load reductions . . . would not result in attainment of Maryland's DO criterion in this deepest portion of the lower Chester River." Is this a use change? And the TD also states "allocations are adequate to restore the designated water uses and achieve applicable water quality standards throughout the Bay." Why is a variance needed if allocations are adequate to achieve applicable water quality standards? A variance should be used instead of removal of a use where the State believes the standard can be attained in a short period of time. To be clear a variance is not the right tool if you know that the use will not be attained "in the future." A variance is a tool that provides States time to make progress towards attaining a designated use and criteria. That is variances are different from changes to the designated use and associated criteria in that they are intended as a mechanism to provide time for states and stakeholders to implement adaptive management approaches that will improve water quality where the designated use and criterion currently in place are not being met, but still retain the designated use as a long term goal.

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