United States Environmental Protection Agency
Office of Water Mail Code 4305T
EPA-820-F-13-012 March 2013

Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers

Frequently Asked Questions

DISCLAIMER

These Frequently Asked Questions (FAQs) do not impose legally binding requirements on the EPA, states, tribes or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public. The Clean Water Act (CWA) provisions and the EPA regulations described in this document contain legally binding requirements. These FAQs do not constitute a regulation, nor do they change or substitute for any CWA provision or the EPA regulations.

The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of these FAQs and the appropriateness of their application to a particular situation. The EPA retains the discretion to adopt approaches on a case-by-case basis that differ from those described in these FAQs where appropriate. These FAQs are a living document and may be revised periodically without public notice. The EPA welcomes public input on these FAQs at any time.

1. Why is the EPA issuing these FAQs?

The EPA is issuing these FAQs to help address questions that arise when states and tribes[1] seek to streamline the adoption and approval of water quality standards (WQS) variances for pollutants that have an impact on multiple permittees (or dischargers). This occurs when groups of permittees are experiencing the same challenges in meeting their water quality based effluent limits (WQBELs) for the same pollutant, regardless of whether or not the permittees are located on the same waterbody. States and tribes that want to find ways to both improve the efficiency of their WQS adoption and approval process, and provide permittees with as much certainty as possible regarding their ultimate discharge requirements, may find these FAQs particularly helpful. While the EPA realizes there may be further questions about the implementation of multiple discharger variances, these FAQs

[1] "Tribal" and "tribes" refers to tribes authorized for treatment in a manner similar to a state (TAS) under section 518 of the Clean Water Act (CWA) for purposes of CWA section 303(c) water quality standards (WQS).

ED_002991_00014142-00001

are designed to help states and tribes evaluate the appropriateness of using a multiple discharger variance approach.

The federal water quality standards regulations at 40 CFR 131 and the federal permitting regulations at 40 CFR 122 provide for a number of tools for states and tribes that offer regulatory flexibility when implementing water quality management programs. These tools include site-specific criteria, revisions to designated uses, dilution allowances, permit compliance schedules, and WQS variances. Which regulatory tool is appropriate depends upon the circumstances.

2. What is a water quality standards variance?

A water quality standards variance is a time limited designated use and criterion (i.e., interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition[2] during the specified time period. As such, a variance requires a public process and EPA review and approval under CWA 303(c). While the designated use and criterion reflect what is ultimately attainable, the variance reflects the highest attainable condition for a specific timeframe and is therefore less stringent.[3] However, a state or tribe may adopt such interim requirements only if it is able to demonstrate that it is not feasible to attain the currently applicable designated use and criterion during the period of the variance due to one of the factors listed at 40 CFR 131.10(g).[4] Where the currently applicable designated use and criterion are not being met, WQS variances that reflect a less stringent, time limited designated use and criterion allow states, tribes and stakeholders additional time to implement adaptive management approaches to improve water quality, but still retain the currently applicable designated use as a long term goal for the waterbody. States have adopted, and EPA has approved, water quality standards variances that apply to individual dischargers, variances that apply to multiple dischargers, and variances that apply to entire waterbodies or segments.

The interim requirements specified in the variance apply only for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the pollutant(s), permittee(s) and /or waterbody or water body segment(s) covered by the variance. Specifically, the variance serves as the basis for the WQBEL in National Pollutant Discharge Elimination System (NPDES) permits. However, the interim requirements *do not replace* the designated use and criteria for the water body as a whole, therefore, any implementation of CWA section 303(d) to list impaired waters must continue to be based on the designated uses and criteria for the waterbody rather than the interim requirements.

---

[2] The highest attainable condition is the condition that is both feasible to attain and is closest to the protection afforded by the designated use and criteria.

[3] While variances are described as "time limited" and designated uses are implied to be "permanent," 40 CFR 131.20 requires that states and tribes hold public hearings for the purpose of reviewing the applicable water quality standards, including designated uses, and modifying them as appropriate.

[4] See Section 5.3 of the *Water Quality Standards Handbook EPA 823 B 94 005a, August 1994; Advanced Notice of Proposed Rule Making, Water Quality Standards Regulation, July 7, 1998 63 FR 36759.*

ED_002991_00014142-00002

3. When might a state or tribe want to adopt a WQS variance?

Many states and tribes have found that WQS variances are useful to consider when there is a new or more stringent effluent limit[5] as long as the state or tribe can also provide a demonstration that attaining the designated use and criterion is not feasible for the term of the variance, but the designated use and criterion may be attainable in the longer term. Example situations of when a variance may be appropriate include when:

- Attaining the designated use and criterion is not feasible under the current conditions (e.g., water quality-based controls required to meet the numeric nutrient criterion would result in substantial and widespread social and economic impact) but could be feasible should circumstances related to the attainability determination change (e.g., development of less expensive pollution control technology or a change in local economic conditions); or
- The state or tribe does not know whether the designated use and criterion may ultimately be attainable, but feasible progress toward attaining the designated use and criterion can still be made by implementing known controls and tracking environmental improvements (e.g., complex use attainability challenges involving legacy pollutants).

Properly applied, a WQS variance can lead to improved water quality over the duration of the variance and, in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the CWA.

4. What is the legal basis for a WQS variance?

The CWA specifies an interim goal that, "wherever attainable," water quality provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water. In implementing the CWA, the regulation at 40 CFR 131.10 establishes how a state or tribe may demonstrate that uses specified in CWA section 101(a)(2) or subcategories of such uses are not feasible to attain. In 1977, an EPA Office of General Counsel legal opinion considered the practice of temporarily downgrading the WQS as it applies to a specific permittee rather than permanently downgrading an entire water body or waterbody segment(s) and determined that such a practice is acceptable as long as it is adopted consistent with the substantive requirements for permanently downgrading a designated use. In other words, a state or tribe may change the standard in a more targeted way than a designated use change, so long as the state or tribe is able to show that achieving the standard is "unattainable" for the term of the variance. The state practice described in the Office of General Counsel legal opinion became known as adopting a "variance" to a water quality standard.

The EPA's regulation at 40 CFR 131.13 provides that variance policies are general policies affecting the application and implementation of WQS and that states and tribes may include variance policies in their state and tribal standards, at their discretion.[6] The EPA interprets its

[5] For example, when dischargers are faced with new or revised criteria, and/or when a reasonable potential analysis shows the need for a water quality based effluent limit.

[6] Section 40 CFR 131.13 further provides that such policies are subject to EPA review and approval.

ED_002991_00014142-00003

regulation to authorize the use of a WQS variance where a state or tribe meets the same procedural and substantive requirements as removing a designated use. Therefore, variances can be granted based on any one of the six factors listed at 40 CFR 131.10(g).

5. What are the factors a state or tribe can use to justify the need for a water quality standards variance?

As provided in §131.10(g), states and tribes "may remove a designated use which is *not* an existing use, as defined in 40 CFR 131.3, or establish sub-categories of a use if the state or tribe can demonstrate that attaining the designated use is not feasible because:

(1) Naturally occurring pollutant concentrations prevent the attainment of the use; or

(2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or

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

(4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or

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

(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact."

6. What is a Multiple Discharger Variance?

If a state or tribe believes that the designated use and criterion are unattainable as they apply to multiple permittees because they are all experiencing challenges in meeting their WQBELs for the same pollutant(s) for the same reason, regardless of whether or not they are located on the same waterbody, a state or tribe may streamline its WQS variance process. To do so, the state or tribe would adopt one variance that applies to all of these permittees (i.e., a multiple discharger variance) so long as the variance is consistent with the CWA and implementing regulation at 40 CFR 131.10 (for example, all the dischargers in the group cannot meet the required WQBEL to protect aquatic life for a period of time due to substantial and widespread economic and social impact).

The EPA recognized the utility of a multiple discharger variance, and its distinction from an individual discharger WQS variance in the "Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID; EPA–820–B–95–001; March 1995, p.

ED_002991_00014142-00004

238). The EPA also spoke to the use of multiple discharger variances in the "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule." 75 Fed. Reg. 75762, 75790 (December 6, 2010). It is important to note that multiple discharger variances may not be appropriate or practical for all situations, and may be highly dependent on the parameters considered and the number of affected permittees.

7. What should a state or tribe keep in mind when justifying the need for a multiple discharger variance?

In developing an analysis to justify the need for a multiple discharger variance, states and tribes should consider the following three principles. The variance and the justification:

(1) Must meet the same 40 CFR 131 regulatory requirements as an individual discharger WQS variance, and should consider any EPA guidance. Specifically, the state or tribe must fully demonstrate that a factor listed in 40 CFR 131.10(g) precludes attainment of a use specified in CWA 101(a)(2) for the entire variance period. When using 40 CFR 131.10(g)(6), this means that the documentation provided to support the variance must address both the substantial AND widespread components of the economic and social impacts of attaining the designated use and criterion.

(2) Should ensure that any overall demonstration is conducted in a manner that accounts for as much individual permittee information as possible. A permittee that could not qualify for an individual WQS variance should not qualify for a multiple discharger variance. The demonstration should:

- Apply only to permittees experiencing the same challenges in meeting WQBELs for the same pollutant(s), criteria and designated uses.
- Group permittees based on specific characteristics or technical and economic scenarios that the permittees share (e.g., type of discharger (public or private), industrial classification, permittee size and/or effluent quality, treatment train (existing or needed), pollutant treatability, available revenue, whether or not the permittee can achieve a level of effluent quality comparable to the other permittees in the group, and/or waterbody or watershed characteristics) and conduct a separate analysis for each group.[7] The more homogeneous a group is in terms of factors affecting attainability of the designated use and criterion, the more credible the multiple discharger variance will be.
- Collect sufficient information for each individual permittee, including engineering analyses and financial information, to adequately support the specification of permittee groups for each individual permittee to be covered by the variance (e.g. estimated costs that each permittee may experience, permittee specific revenue).

[7] The EPA recommends that the state or tribe develop a separate variance for each group (even when going through the same rulemaking procedure) so that if questions arise for one group, it does not jeopardize approval for the others.

ED_002991_00014142-00005

(3) Should consider an individual variance for a particular permittee if it does not fit with any of the group characteristics (e.g., private vs. public dischargers, large vs. small permittee, or permittees with a parent company vs. those without).

8. What should a state or tribe keep in mind when adopting a multiple discharger variance pursuant to state/tribal law?

Any multiple discharger variance should:

(1) Include a justifiable expiration date, consistent with the analysis provided, for each permittee or group of permittees covered by the variance. After the expiration date, each permittee in the group will be subject to the applicable water quality standards, or obtain EPA approval on a variance renewal. If the variance will expire during the permit term, the permitting authority must either include an appropriate WQBEL that will apply at the expiration of the variance or include a reopener clause such that the WQBEL may be revised in order for that permit to derive from and comply with WQS the entire permit term.

(2) Provide that any renewal of a multiple discharger variance includes a new demonstration that the designated use and criterion are not feasible to attain during the term of the renewed variance, and documentation of the feasible progress that has been made by each permittee covered by the renewal. In addition, individual permittees will be reevaluated to determine if they continue to qualify under their group designation. Permittees that no longer qualify will cease to be covered by the multiple discharger variance.

It is important to note that even though the duration of a variance may be longer than 3 years, a variance is a water quality standard that must be reviewed every 3 years, consistent with 40 CFR 131.20 (a).

9. What must a state or tribe keep in mind when determining the appropriate interim requirements for a multiple discharger variance?

As with any WQS variance, the interim requirements will need to reflect the highest attainable condition during the term of the variance. The highest attainable condition may be expressed as the highest attainable interim use and criterion[8] or highest attainable effluent

[8] Section 131.6(a) requires that each state's water quality standards submitted to EPA for review must include "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." CWA section 101(a)(2) establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water," wherever attainable. Section 303(c)(2)(A) requires state water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]." EPA's regulations at 40 CFR part 131 interpret and implement these CWA provisions as creating a "rebuttable presumption" that requires state water quality standards to provide for all of the uses specified in Section 101(a)(2) of the Act, unless those uses are shown by a use attainability analysis to be unattainable. Section 131.10(g) and 131.10(j) authorizes a state to remove protection for a use specified in 101(a)(2) (or subcategory of such a use) if the state can demonstrate that one of the attainability factors is met. Once the presumption is rebutted, the state must still adopt, under 131.6(a), "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." In order to comply with this provision, states will

ED_002991_00014142-00006

condition for a permittee(s) during the term of the variance. For example, this could be accomplished by specifying in the variance a numeric value that reflects the highest water quality that a discharger could achieve (beyond their technology-based effluent limits) during the term of the variance.[9] In general, interim requirements should be established on a permittee specific basis (particularly when demonstrating that the applicable designated use is unattainable based on 40 CFR 131.10(g)(6)), but there may be instances where establishing requirements for a group of permittees may be appropriate (e.g., with "legacy pollutants", or when hydrologic conditions have been modified). EPA notes that some states have included additional interim requirements, such as requirements to research advances in wastewater treatment or improved management practices, to conduct wastewater treatability studies, to define demonstrated performance of wastewater treatment or other control methods.

---

need to adopt designated uses that continue to serve the 101(a)(2) goal by protecting for the highest attainable use unless the state has shown that no use specified in 101(a)(2) or no subcategory of such uses are attainable.

[9] This is a reasonable alternative to adopting an interim designated use and criterion because the resulting instream concentration reflects the highest attainable interim use and interim criterion.

ED_002991_00014142-00007