The language in this preliminary draft is formatted to be easy to read.
The formal draft CR 102 draft will look different by virtue of formatting.

Washington Department of Ecology, Water Quality Program

Implementation Tools Language

Preliminary Draft—WAC 173-201A

September 30, 2014

New definitions in WAC 173-201A-020:

"Compliance Schedule" or "Schedule Of Compliance" is a schedule of remedial measures included in a permit or an order, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with an effluent limit, other prohibition, or standard.

"**Intake credit**" is a procedure for establishing effluent limits in waste discharge permits issued pursuant to the National Pollutant Discharge Elimination System that take into account the amount of a pollutant that is present in public waters, at the time of water withdrawal by the discharger or other facility supplying the discharger with intake water.

"Variance" is a temporary modification to the designated use and associated water quality criteria based on the factors specified in 40 CFR 131.10(g), and must be adopted by rule.

New and revised language are found on the following pages for:

- Revisions to WAC 173-201A-420 Variance
- New section at WAC 173-201A-460 Intake Credits
- Revisions to WAC 173-201A-510(4) Compliance Schedules

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WAC 173-201A-420 Variance

[Preliminary draft revisions to WAC 173-201A-420 are shown below by deleting the current section and replacing with newly proposed language. To more easily review current variance language, see: http://app.leg.wa.gov/WAC/default.aspx?cite=173-201A-420]

WAC 173-201A-420 Variance. ~~(1) The criteria established in WAC 173-201A-200 through 173-201A-260 and 173-201A-600 through 173-201A-612 may be modified for individual facilities, or stretches of waters, through the use of a variance. Variances may be approved by the department when:~~

~~(a) The modification is consistent with the requirements of federal law (currently 40 CFR131.10(g) and 131.10(h));~~

~~(b) The water body is assigned variances for specific criteria and all other applicable criteria must be met; and~~

~~(c) Reasonable progress is being made toward meeting the original criteria.~~

~~(2) The decision to approve a variance is subject to a public and intergovernmental involvement process.~~

~~(3) The department may issue a variance for up to five years, and may renew the variance after providing for another opportunity for public and intergovernmental involvement and review.~~

~~(4) Variances are not in effect until they have been incorporated into this chapter and approved by the USEPA.~~

New preliminary draft language:

(1) **General Provisions.** The criteria established in WAC 173-201A-200 through 173-201A-260 and 173-201A-600 through 173-201A-612 may be modified for individual facilities, a group of facilities, or stretches of waters, through the use of a variance. The following conditions apply when considering issuance of a variance:

(a) A variance may be considered when the standards are expected to be attained by the end of the variance period, or, the attainable use cannot be reliably determined.

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(b) The variance applies to specific parameters and all other applicable standards remain in effect for the water body.

(c) The modification must be consistent with the requirements of federal regulations (currently 40 CFR 131.10(g) and 131.10(h)).

(d) Reasonable progress must be made toward meeting the original standards during the variance period.

(e) A variance renewal may be considered if the renewal request meets the above conditions.

(2) **Types of Variances**. Upon request or on its own initiative, the department will consider granting the following types of variances to existing water quality standards:

(a) An individual variance is a designated use and parameter-specific change to the standard(s) of the receiving water body for a specific discharger. The temporary standard(s) only apply at the point(s) of compliance for the individual facility.

(b) A multi-discharger variance is a designated use and parameter-specific change to the standard(s) of any water body that receives discharges from a permitted facility defined within the scope of the multi-discharger variance. All permitted dischargers that are defined within the scope of the variance may be covered under the variance that is granted by the department, provided all requirements of the variance are met.

(c) A water body variance is a designated use and parameter-specific change to the standard(s) for a stretch of waters. All dischargers of the specific parameter and within the geographic scope defined in the water body variance may be covered under the variance.

(3) **Requirements**. Any entity initiating a variance request or applying for coverage for an individual, multi-discharger, or water body variance must submit the following information to the department:

(a) The pollutant(s) and designated use(s) proposed to be modified by the variance, and the proposed duration of the variance.

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(b) A demonstration that attaining the water quality standard for a specific pollutant is not feasible for the requested duration of the variance based on one or more of the conditions found in 40 CFR 131.10(g) and 131.10(h).

(c) An evaluation of treatment or alternative actions that were considered to meet effluent limits based on the original water quality criteria, and a description of why these options are not technically, economically, or otherwise feasible.

(d) Sufficient water quality data and analyses to characterize receiving and discharge water pollutant concentrations.

(e) A description and schedule of actions that the discharger(s) proposes to ensure the original water quality standard(s) are met or the highest attainable use is attained within the variance period. Dischargers are also required to submit a schedule for development and implementation of a pollutant minimization plan for the subject pollutant(s).

(f) If the variance is for a water body or stretch of water, the following information must also be provided to the department:

(i) The results from a pollutant source assessment that quantifies the contribution of pollution from permitted sources and nonpermitted sources;

(ii) All cost-effective and reasonable best management practices for permitted sources that address the pollutant the variance is based upon; and

(iii) Best management practices for non-permitted sources that meet the requirements of RCW 90.48.

(g) Any additional information the department deems necessary to evaluate the application.

(4) **Public Review & Notification.** The decision to grant a variance is a formal rule-making subject to a public and intergovernmental involvement process.

(a) The department will provide notice of the proposed variance and consult with Indian tribes or other states that have jurisdiction over adjacent and downstream waters of the proposed variance.

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(b) The department shall maintain and make publically available a list of dischargers that are covered under the variances that are in effect.

(5) **Period during which the Variance is in effect.** A variance is a temporary modification to the designated use and associated water quality criteria.

(a) Each variance will be granted for the minimum time estimated to meet the original standard(s) or, if during the period of the variance it is determined that a designated use cannot be attained, then a use attainability analysis (WAC 173-201A-440) will be initiated.

(b) The ability to apply a variance in permits or other actions may be terminated by the department as a result of a mandatory interim review.

(c) Variances are in effect after they have been incorporated into this chapter and approved by the USEPA.

(6**) Contents of a Variance**. At a minimum a variance adopted into rule will include the following:

(a) The time period for which the variance is applicable.

(b) The geographic area or specific waters in which the variance is applicable.

(c) A description of the permitted and unpermitted dischargers covered by the variance.

(d) Identification of required actions and a schedule, including any measurable milestones, for all pollution sources (permitted and unpermitted) subject to the variance. Dischargers are required to use adaptive management to fine tune and update actions, schedules, and milestones in order to achieve the goals of the variance.

(e) A provision allowing the department to reopen and modify any permits and to revise BMP requirements for unpermitted dischargers as a result of the mandatory interim review of the variance (see section 8 below).

(7) **Variance Permit Conditions**. The department must establish and incorporate into NPDES permits all conditions necessary to implement and enforce an approved variance, including:

(a) Effluent limits that represent currently achieved or achievable effluent conditions, or effluent limits that are sufficient to meet the original water quality standard upon expiration of the variance;

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(b) Monitoring and reporting requirements; and

(c) A provision allowing the department to reopen and modify the permits based on the mandatory interim review of the variance.

(8) **Mandatory Interim Review.** The department will conduct an interim review of each variance at least once every 5 years after the variance is adopted and approved to determine that conditions of the variance are being met and to evaluate whether the variance is still necessary.

(a) Review process for individual discharger and multi discharge variances:

(i) The review shall be coordinated with the public review process of the permit renewal if the variance is being implemented in a permit.

(ii) The review will be focused on the discharger's compliance with permit conditions that are required by the variance as well as an evaluation of whether the variance is still necessary.

(b) Review process for water body variances:

(i) Variances for stretches of waters will be reviewed in a public process conducted by the department every 5 years after initial adoption of the variance into rule.

(ii) The review will evaluate whether the variance is still necessary, any new information on sources of the pollutant that indicates that reductions could be made that would allow water quality standards to be met in a shorter time frame, as well as any new information that indicates water quality improvements may require more time.

(c) A variance that applies to a permit will be shortened or terminated if the review determines that:

(i) The conditions and requirements of the variance and associated permit requirements have not been complied with (unless reasons outside the control of the discharger prevented meeting any condition or requirement); or,

(ii) Water quality standards could be met in a shorter time frame, based on new information submitted to the department.

WAC 173-201A-460 Intake Credits

[Preliminary draft of a new section added at WAC 173-201A-460.]

WAC 173-201A-460 Intake Credits. (1) **General Provisions.** The following provisions apply to the consideration of intake credits in determining reasonable potential and establishing water quality based effluent limits (WQBELs) for waste discharge permits issued pursuant to the National Pollutant Discharge Elimination System.

(a) An "intake pollutant" is the amount of a pollutant that is present in public waters (including groundwater as provided in subsection (d), below), at the time of water withdrawal by the discharger or other facility supplying the discharger with intake water.

(b) An intake pollutant must be from the "same body of water" as the discharge in order to be eligible for an intake credit. An intake pollutant is considered to be from the "same body of water" as the discharge if the department finds that the intake pollutant would have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee. This finding may be deemed established if:

(i) The background concentration of the pollutant in the receiving water (excluding any amount of the pollutant in the facility's discharge) is similar to that in the intake water; and

(ii) There is a direct hydrological connection between the intake and discharge points.

(c) The department may also consider other site-specific factors relevant to the transport and fate of the pollutant to make the finding in a particular case that a pollutant would or would not have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee.

(d) An intake pollutant from groundwater may be considered to be from the "same body of water" if the department determines that the pollutant would have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee.

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(2) **Consideration of Intake Pollutants.**

(a) The department may determine if there is reasonable potential for the discharge of an identified intake pollutant to cause or contribute to an exceedance of a narrative or numeric water quality criterion. If a reasonable potential exists, then water quality-based effluent limits may be established where a discharger demonstrates that the following conditions are met:

(i) The facility withdraws the intake water containing the pollutant from the same body of water into which the discharge is made;

(ii) The ambient background concentration of the pollutant does not meet the most stringent applicable water quality criterion for that pollutant;

(iii) The facility does not alter the identified intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutants were left in-stream;

(iv) The timing and location of the discharge would not cause adverse water quality impacts to occur that would not occur if the identified intake pollutant were left in-stream;

(v) For the purpose of determining reasonable potential, the facility does not contribute any additional mass of the identified intake pollutant to its wastewater; and

(vi) For the purpose of determining water quality-based effluent limits; the facility does not increase the identified intake pollutant concentration at the point of discharge as compared to the pollutant concentration in the intake water. A discharger may add mass of the pollutant to its waste stream if an equal or greater mass is removed prior to discharge, so there is no net addition of the pollutant in the discharge compared to the intake water;

(b) Upon a finding under subsection (a) of this section that an intake pollutant in the discharge does not cause, have the reasonable potential to cause, or contribute to an excursion above an applicable water quality standard, the department is not required to include a water quality-based effluent limit for the identified intake pollutant in the facility's permit.

(c) Where intake water for a facility is provided by a municipal water supply system and the supplier provides treatment of the raw water that removes an intake water pollutant, the concentration of the intake water pollutant will be determined at the point where the water enters the water supplier's distribution system.

(d) Where a facility discharges intake pollutants from multiple sources that originate from the receiving water body and from other water bodies, the department may derive an effluent limit reflecting the flow-weighted amount of each source of the pollutant provided that conditions in (a) through (c) above are met and adequate monitoring to determine compliance can be established and is included in the permit.

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WAC 173-201A-510(4): General allowance for compliance schedules

[*Preliminary draft revisions to the current section at WAC 173-201A-501(4) are shown in underline and strikeout. To more easily review compliance schedule language currently in rule, see: http://app.leg.wa.gov/WAC/default.aspx?cite=173-201A-510*]

(4) **General allowance for compliance schedules.**

(a) Permits and orders ~~and directives of~~ issued by the department for existing discharges may include a schedule for achieving compliance with effluent limits and water quality standards~~criteria contained in this chapter~~ that apply to:

(i) Aquatic life uses and

(ii) Uses other than aquatic life.

(b) S~~uch s~~chedules of compliance shall be developed to ensure final compliance with all water quality-based effluent limits and the water quality standards in the shortest practicable time. ~~Decisions regarding~~ The department will decide whether to issue schedules of compliance ~~will be made~~ on a case-by-case basis ~~by the department~~. Schedules of compliance may not be issued for new discharges. Examples of schedules of compliance that may be ~~to allow for~~ issued include:

(i) Construction of necessary treatment capability;

(ii) implementation of necessary best management practices;

(iii) implementation of additional storm water best management practices for discharges determined not to meet water quality ~~criteria~~ standards following implementation of an initial set of best management practices; and

(iv) completion of necessary water quality studies related to implementation of permit requirements to meet effluent limits~~; or (v) resolution of a pending water quality standards' issue through rule-making action~~.

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(~~b~~c) For the period of time during which compliance with water quality ~~criteria~~ standards is deferred, interim effluent ~~limitations~~limits shall be formally established, based on the best professional judgment of the department. Interim effluent ~~limitations~~ limits may be numeric or nonnumeric~~, or both~~(e.g., construction of necessary facilities by a specified date as contained in an order or permit), or both.

(~~c~~d) Prior to establishing a schedule of compliance, the department shall require the discharger to evaluate the possibility of achieving water quality ~~criteria~~ standards via non-construction changes (e.g., facility operation, pollution prevention). Schedules of compliance ~~may in no case exceed ten years,~~ shall meet requirements in WAC 173-220-140 and shall require compliance with the specified requirements as soon as practicable. Compliance schedules shall generally not exceed the term of any permit unless the department determines that a longer time period is needed to come into compliance with the applicable water quality standards.

(e) When an approved total maximum daily load, or TMDL, has established waste load allocations for permitted dischargers, a longer period of time for a compliance schedule may be authorized if the department has determined that:

(i) The permittee is not able to meet its waste load allocation in the TMDL solely by controlling and treating its own effluent;

(ii) The permittee has made significant progress to reduce pollutant loading during the term of the permit;

(iii) The permittee is meeting all of its requirements under the TMDL as soon as possible; and

(iv) Actions specified in the compliance schedule are sufficient to achieve water quality standards as soon as possible.

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