From:	Mark Barath
To:	Richard Batiuk
Subject:	Re: MD WQS Briefing for Shawn - Thursday August 23 3:45pm
Date:	08/15/2012 01:49 PM

Rich:
What the WQS Handbook has to say about variance: Next email will have parts of MD WQS dealing with restoration variance.

Updated Information

- Case Studies of Alternatives to Use Removal (2005) (PDF) (14 pp, 830K) - These case studies, developed by States and EPA, present initial examples of approaches and tools that provide potential alternatives to changing long-term underlying designated uses and criteria.
- Advanced Notice of Proposed Rulemaking for Water Quality Standards (1998): See pages 36759 to 36761 for information on EPA's thinking in 1998 on EPA approval of variances, the situations where they might be appropriate, and the use of variances (and similar tools) to meet water quality standards

5.3 Variances From Water Quality Standards

EPA first formally indicated allowability of State WQS variance provisions in Decision of the General Counsel No. 44, dated June 22, 1976 (PDF) (8 pp., 338 K), which specifically considered an Illinois variance provision, and expanded upon the acceptability of State WQS variance procedures in Decision of the General Counsel No. 58 (OGC No. 58) (PDF) (11 pp., 533 K), dated March 29, 1977 (published, in part, at 44 F.R. 39508 (July 6, 1979)). Subsequent guidance has elaborated on or clarified the policy over the years. For example, the Director of EPA's Criteria and Standards Division transmitted EPA's definition of a WQS variance (PDF) (1 pp., 78 K) to the Regional WQS Coordinators on July 3, 1979, and on March 15, 1985, the Director of the Office of Water Regulations and Standards, responding to questions raised on WQS variances, issued a reinterpretation of the factors that could be considered when granting variances (PDF) (2 pp., 13 K). Variance procedures involve the same substantive and procedural requirements as removing a designated use (see section 2.7, this Handbook), but unlike use removal, variances are both discharger and pollutant specific, are time-limited, and do not forego the currently designated use.

A variance should be used instead of removal of a use where the State believes the standard can ultimately be attained. By maintaining the standard rather than changing it, the State will assure that further progress is made in improving water quality and attaining the standard. With a variance, NPDES permits may be written such that reasonable progress is made toward attaining the standards without violating section 402(a)(l) of the Act, which requires that NPDES permits must meet the applicable water quality standards.

State variance procedures, as part of State water quality standards, must be consistent with the substantive requirements of 40 CFR 131. EPA has approved State-adopted variances in the past and will continue to do so if:

- each individual variance is included as part of the water quality standard;

- the State demonstrates that meeting the standard is unattainable based on one or more of the grounds outlined in 40 CFR 13 1.10(g) for removing a designated use;
- the justification submitted by the State includes documentation that treatment more advanced than that required by sections 303(c)(2)(A) and (B) has been carefully considered, and that alternative effluent control strategies have been evaluated;
- the more stringent State criterion is maintained and is binding upon all other dischargers on the stream or stream segment;
- the discharger who is given a variance for one particular constituent is required to meet the applicable criteria for other constituents;
- the variance is granted for a specific period of time and must be rejustified upon expiration but at least every 3 years (Note: the 3-year limit is derived from the triennial review requirements of section 303(c) of the Act.);
- the discharger either must meet the standard upon the expiration of this time period or must make a new demonstration of "unattainability";
- reasonable progress is being made toward meeting the standards; and
- the variance was subjected to public notice, opportunity for comment, and public hearing. (See section 303(c)(l) and 40 CFR 131.20.) The public notice should contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.

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