

Checklist For Evaluating State Submission Of Discharger-Specific Water Quality Standards Variances

NOTES: This checklist is only for evaluating discharger-specific¹ water quality standards (WQS) variances. It does not apply to WQS variances applicable to a water body or waterbody segment, which have different or additional requirements. WQS variances for discharges into waters in the Great Lakes System must meet the requirements of both 40 CFR Parts 131 and 132. Where regulations in these parts overlap, the more stringent regulation applies.

GENERAL REQUIREMENTS FOR A DISCHARGER-SPECIFIC WATER QUALITY STANDARDS VARIANCE:

- ☐ It is infeasible to meet a water quality-based effluent limit (WQBEL) that is as stringent as necessary to meet the applicable WQS but may be feasible to meet such a WQBEL in the future (*80 FR 51020 (August 21, 2015)*).
- ☐ Retains the underlying designated use and criterion. All other WQS not specifically addressed by the WQS variance continue to apply for all CWA purposes (*40 CFR 131.14(a)(2)*).
- ☐ Will not result in any lowering of currently attained ambient water quality, unless the WQS variance will be used for restoration activities (*40 CFR 131.14(b)(1)(ii)*).
- ☐ Applicable standard only for purposes of developing NPDES permit limits and requirements for the permittee(s) specified in the WQS variance (*40 CFR 131.14(a)(3)*).
- ☐ May be used when issuing CWA section 401 certifications (*40 CFR 131.14(a)(3)*).
- ☐ Meets public participation requirements at § 131.20(b) (*40 CFR 131.14*).

CHECKLIST OF WHAT THE STATE SUBMISSION TO EPA MUST INCLUDE:

A. A LEGALLY BINDING WQS VARIANCE MUST INCLUDE THE FOLLOWING:

- ☐ The identity of the pollutant(s) or water quality parameter(s) to which the WQS variance applies (*40 CFR 131.14(b)(1)(i)*);
- ☐ The discharger(s) or permittee(s) subject to the WQS variance² (*40 CFR 131.14(b)(1)(i)*);

¹ Discharger-specific WQS variances may be for either a single discharger or multiple dischargers (see EPA's FAQ for multiple discharger variances at <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100IRYU.PDF?Dockey=P100IRYU.PDF>).

² As an alternative to identifying the specific dischargers at the time of adoption of a WQS variance for multiple dischargers, states and authorized tribes may adopt specific eligibility requirements in the WQS variance. This will make clear what characteristics a discharger must have in order to be subject to the WQS variance for multiple dischargers. It is EPA's expectation that states and authorized tribes that choose to identify the dischargers in this manner will subsequently make a list of the facilities covered by the WQS variance publicly available (e.g., posted on the state or authorized tribal website). It may be appropriate for a state or authorized tribe to adopt one WQS variance that applies to multiple dischargers experiencing the same challenges in meeting their WQBELs for the same pollutant so long as each discharger is required to meet the highest attainable condition during the term of the variance and the variance is otherwise consistent with the CWA and §131.14. A multiple discharger WQS variance may not be appropriate or practical for all situations and can be highly dependent on the applicable pollutants, parameters, and/or permittees.

- The term of the WQS variance that is only as long as necessary to achieve the highest attainable condition and consistent with the documentation submitted by the state to justify the term of the WQS variance (*40 CFR 131.14(b)(1)(iv)*);
- A highest attainable condition specified as a quantifiable expression in one of the following ways (*40 CFR 131.14(b)(1)(ii)(A)(1-3)*):
 - a highest attainable interim criterion; or,
 - an interim effluent condition that reflects the greatest pollutant reduction achievable; or,
 - 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 adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program¹;

For WQS variances longer than 5 years:

- The frequency of reevaluation (at least once every 5 years) and how the state plans to obtain public input on the reevaluation (*40 CFR 131.14(b)(1)(v)*);
- A provision specifying that the highest attainable condition shall be either the highest attainable condition identified at the time of the adoption, or any higher attainable condition later identified during any reevaluation, whichever is more stringent (*40 CFR 131.14(b)(1)(iii)*); and,
- A provision specifying that if the state does not complete a reevaluation at the specified frequency or does not submit to EPA the results of a reevaluation within 30 days of completion of the reevaluation, the underlying designated use and associated criterion, rather than the WQS variance, will be the applicable water quality standard for CWA purposes until such time the state completes and submits the reevaluation to EPA (*40 CFR 131.14(b)(1)(vi)*).

B. SUPPORTING DOCUMENTATION THAT MUST INCLUDE:

- For a WQS variance to a CWA section 101(a)(2) use, a demonstration that attaining the underlying designated use is not feasible throughout the term of the WQS variance because of at least one of the factors listed in § 131.10(g) or because of the restoration-related factor listed in § 131.14(b)(2)(i)(A)(2) (*40 CFR 131.14(b)(2)(i)(A)*);
- For a WQS variance to a non-101(a)(2)² use, a documentation justifying how the state's consideration of the use and value of the water for those uses listed in §131.10(a) supports the WQS variance and term (this may also be satisfied by a demonstration consistent with §131.14(b)(2)(i)(A)) (*40 CFR 131.14(b)(2)(i)(B)*); and,
- Documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition by describing the pollutant control activities to achieve highest attainable condition (*40 CFR 131.14(b)(2)(ii)*).

¹ Defined in 40 CFR 131.3(p) as a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

² Defined in 40 CFR 131.3(q) as any use unrelated to the protection and propagation of fish, shellfish, and wildlife or recreation in or on the water.