



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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Water Docket, Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

ATTENTION: DOCKET ID NO. EPA-HQ-OW-2010-0606

The Department of Ecology (Ecology) appreciates the opportunity to comment on EPA's draft water quality standards regulation. Changes to the federal water quality standards regulations can affect a state's water quality program, the regulated entities within the state, and the waters and uses that the regulations are developed to protect. We trust that EPA will consider the effects of the proposed federal changes on Washington, as well as other states and entities, as you make final changes.

Of particular concern to Ecology is the newly proposed language on variances that places a ten year limit on the length of time a variance can be issued. Washington is currently in the process of a water quality standards rule revision to adopt human health criteria. We are also considering revisions to the implementation tools section to help with the achievement of these new human health criteria as well as other standards that require long term fixes, such as growing trees in riparian areas to achieve temperature criteria. The new human health criteria will present significant challenges to meeting numeric limits for widespread and pervasive chemicals such as mercury, arsenic and PCBs. Washington is exploring different ways to use variances to achieve long term compliance and progress. Variances are the key tool (possibly the only tool) under the Clean Water Act, short of changing designated uses and criteria, which can provide some regulatory certainty to facilities that will be faced with implementing pollutant reduction strategies for these challenging pollutants.

Our goal is to establish rules for implementation tools that will require specific actions intended to achieve toxics reduction. Because of this, there will be real, substantial, long term costs to implement pollution reduction control strategies and new technology. Those costs will require facilities to look at long term funding, and we do not believe that ten years is long enough on which to base these significant business and funding decisions.

An additional concern we have with the proposed ten-year limitation on variances is based on the significant procedures and requirements that Washington needs to follow and fulfill with any rule revision. These requirements are costly to the state and hence the public. The cost of

conducting a water quality standards rule revision, with subsequent submittal to EPA for Clean Water Act approval, is a resource intensive process. This focus of resources will limit our ability to address other water quality standards work since we expect the variance work associated with new human health criteria to be an additional workload we have not yet realized. As part of our rule effort we will be required to look at the costs of this work, and we believe those costs will be significant if it is limited to a ten-year schedule.

We believe the best approach for setting a time limit on a variance would be to do it at the time that the variance itself is being developed and approved. At the same time, we recognize that all variances will need measurable milestones for implementation actions, so we are not suggesting an open-ended process with no deliverables. We agree with the need to clarify process deliverables around variances and suggest that EPA focus instead on that, and refrain from setting a time-limited duration to be used across the nation. Other states might not be facing the same issues as Washington, but could have other standards issues that would also necessitate flexibility in timeframes.

Given the pressure our state will be facing to comply with new and current water quality standards, we encourage EPA to seriously consider some of the regulatory situations that are playing out in the Pacific Northwest. Without the regulatory certainty that longer term variances can provide, Ecology may be forced prematurely to look at changes in designated uses as a means to provide that certainty. We would prefer to develop long-term and adaptive pollution control programs that could be facilitated by longer term variances.

Comments on the draft federal water quality standards regulations are attached.

Sincerely,

Melissa Gildersleeve
Watershed Management Section Manager

Attachment

ATTACHMENT: Washington Comments on EPA proposed changed to the federal water quality standards, CFR 131

1. Administrator's determination that new and revised WQS are necessary (CFR 131.22)

Ecology is in favor of this clarification because it should provide transparency for when EPA actually means to make a CWA 303(c)(4)(B) determination. Ecology recommends that this section should also require that the administrator's determination be accompanied by a document demonstrating the legal requirement (law or regulation) prompting the determination and the requirement for the proposal and promulgation.

2. Designated uses

The proposed federal definition for "highest attainable use" addresses the named Clean Water Act 101(a)(2) uses, but omits the overarching concept of restoration of the integrity of the nation's waters that is part of section 101(a). The concept of restoration includes the concept of the return to an earlier and/or natural condition. In many water bodies, the section 101(a)(2) uses do not reflect the natural conditions of a water body, and states should have the ability to choose whether they want to work toward attainment of a non-natural section 101(a)(2) use (such as further development of a perennial warm water fishery present in an area that is naturally an intermittent flow stream without fish), or, restoration or maintenance of a natural system for water bodies where the natural condition is not reflected by the CWA 101(a)(2) uses. Ecology recommends that this definition be expanded to add language that encompasses the concept of "Clean Water Act 101(a)(2) uses *and/or* the natural condition (or restoration of the integrity of the water)."

3. Triennial reviews

Ecology recommends that EPA does not revise 40CFR131.20(a) to include requirements associated with 304(a) guidance values. Adding the discussion of EPA's 304(a) guidance values to the CFR will require states to review EPA's entire list of recommended criteria during every state triennial review. Trying to conduct such a requirement every three years is neither reasonable nor feasible given the workload and timeframes associated with such a requirement. EPA's recommended criteria are guidance values developed to assist states in the protection of designated uses, but may incorporate scientific rationale, policy, and risk management choices that are different from those made by individual states. Adding this specific requirement creates an additional workload for states and could increase liability for both the states and EPA if the extent to which it is complied with is called into question. The current language already addresses the designated uses and attainability of designated uses, and the language at 40CFR131.11(b) already speaks to how states can use the 304(a) guidance as well as a state's ability to modify the 304(a) guidance.

4. Antidegradation

Washington updated antidegradation provisions in 2003 that were approved by EPA in 2007. While we believe we are meeting the federal intent of antidegradation, we want to emphasize

that states should continue to be given discretion in how they administer their antidegradation policies. In particular, the addition of new language in paragraph 131.12 (b) (2) is problematic because it appears to limit how the state can make a finding that lowering the water quality is necessary after conducting an alternatives analysis and raises questions about how this will be interpreted, who will conduct the analysis, and who will implement. These are issues that should be left to the individual state's discretion. Concerns include:

- Washington standards already require that an alternatives analysis be done as part of the Tier II analysis, but we are not specific about which alternative must be used; this is evaluated on a case-specific basis.
- The current federal proposed language has the state doing the alternative analysis, while our state-adopted language requires that the applicant provide this information. The state then reviews and evaluates the analysis along with the information provided to determine if the lowering of water quality is in the overriding public interest.
- The statement that “if the state can identify any-practicable alternatives, the state must choose one of those alternatives...” is problematic, again because it is not the state that would be doing the analysis and then implementing the action, but the applicant. Without further definition of what constitutes “any practicable alternative” it is not clear whether cost effectiveness or feasibility could be considered and weighed against the environmental improvements that would be gained. For example, an identified alternative might require significant additional expense for minimal additional water quality improvement. State discretion must be retained in making these decisions based on information as a whole rather than on just one facet of the Tier II analysis.

5. Variances

EPA is proposing significant new language under this new section to address variances. Clarification of when and how variances can be used is needed, given the significant challenges that states face in trying to regulate legacy and pervasive pollutants that are not easily controlled within the legal framework of the CWA. However, we urge EPA not to place restrictions on using variances that will negate the ability to use this important tool while dischargers are working towards meeting increasingly stringent, difficult to achieve standards. Comments include:

- Under section 131.14(b)(1)(iii), Submission requirements, new language requires that variances expire after 10 years. Ecology strongly opposes EPA placing an arbitrary time limit on a variance. Time limits should be a part of each variance that is adopted by the state and subsequently approved by EPA. Decisions on time limits should be specific to the variance being issued. To do otherwise would create potentially unnecessary administrative burdens on both the state and EPA, and not provide the needed certainty to the regulated discharger for pollutants that are legacy and/or pervasive.
- The ten-year limit for variances in the draft regulation with the allowance for renewal of the variance after ten years does not provide certainty for long-term financial and pollutant reduction planning, and furthermore removes any flexibility states currently have on specifying extended periods for variances beyond ten years. Ecology

recommends that EPA not specify the duration of the variance and instead include language that requires interim reviews of variances at specific periods (e.g., every five years) during the life of a variance.

- EPA should consider allowing states the authority to issue variances programmatically. EPA could approve a state variance development and approval process described in state standards and allow the state, under clear conditions, to issue a variance through rule-making, without discrete EPA approval. For example, if a state were to adopt procedures and requirements for issuing waterbody-specific or multi-discharger variances in their water quality standards and obtained EPA approval, then subsequent individual variances could be issued by the state under the framework of the approved water quality standards without having to obtain individual EPA approval. The state could use its NPDES delegated authority to issue and manage the individual variances, including the public processes that are built into that program. This would allow administrative efficiencies for both the state and EPA while at the same time providing a fully transparent public process through the NPDES program.
- The draft variance language requires development of a numeric interim criterion for the area covered by the variance. Ecology agrees that interim criteria should be developed for waters covered by a variance. However, the requirement for numeric criteria may not be desirable or feasible for some waters. EPA regulations allow the use of narrative criteria for toxics (40CFR131.11(2)). Ecology recommends that EPA include the term “narrative or numeric criteria” in the draft regulation instead of “numeric criteria.”
- Ecology recommends that EPA omit language requiring that the highest attainable interim use and interim criterion be used during the variance. Ecology agrees that the time period during which a variance is in effect should be as short as possible. As commented above and in the cover letter, Ecology thinks variances should be long enough to either (1) attain the designed use or meet criteria, or, (2) reach a level of use or water quality that is the highest attainable. If the timeline of a variance is developed to attain the use and/or criterion (or the highest attainable use/and or water quality) at the end of the variance period, then logically the water body will be out of compliance with the interim use and criterion for much of the term of the variance until the final state is reached. In situations where longer term variances are used, this creates an untenable compliance situation for states and dischargers. Washington recommends that EPA omit the “highest attainable” language from these draft sections and instead simply refer to “interim use and interim criterion.” This is an area where states will need to have flexibility to develop uses and criteria that work best for each situation.

6. Compliance schedules

EPA proposed revisions to 131.15 on compliance schedule authorizing provisions clarifies that such provisions are subject to EPA review and approval as a water quality standard, but that individual compliance schedules are not. This is a good clarification.