

**OFFICIAL STATEMENTS ON WHAT EPA EXPECTS FROM
INDIVIDUAL DISCHARGER OR MULTIPLE DISCHARGER VARIANCES**

Joint WQSMA/WQS Coordinators Mtg
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GROUP TASK – Review past statements in each section and develop a principle relating to each area that could be followed when granting variances to multiple dischargers at a broad scale (e.g. across a watershed).

Variances are WQS/Process

1. “EPA has approved State-adopted variances in the past and will continue to do so ifeach individual variance is included as part of the water quality standards.” (1994 WQS Handbook)
2. “the variance was subjected to public notice, opportunity for comment, and public hearing...The public notice should contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.” (1994 WQS Handbook)
3. “All variances and supporting information shall be submitted by the State or Tribe to the appropriate EPA regional office...EPA shall review the State or Tribe submittal for compliance with the CWA...All variances shall be appended to the State or Tribe WQS rules.” (1995 Great Lakes Initiative, Part 132)

Scope/applicability of variance

4. “Agency believes...essential elements of a variance...a variance is granted to an individual discharger for a specific pollutant(s) and does not otherwise modify the standards.” (1998 ANPRM)
5. “A WQS variance applies only to the permittee requesting the variance and only to the pollutant or pollutants specified in the variance.” (1995 Great Lakes Initiative, Part 132)
6. “the more stringent State criterion is maintained and is binding upon all other dischargers on the stream or stream segment.” (1994 WQS Handbook)
7. “A variance does not affect, or require the State or Tribe to modify, the corresponding water quality standard for the waterbody as a whole.” (1995 Great Lakes Initiative, Part 132)
8. “Multiple discharger variances (a variance that applies to multiple point sources discharging to the same water body) are also allowed under the Great Lakes Guidance.” (1998 ANPRM)
9. “In order to provide the most efficient short term relief to “ubiquitous” pollutants, EPA encourages States to consider multiple discharger specific variance requests on a watershed basis where appropriate.” (GLI SID)
10. “Traditionally, variances are specific to a pollutant and a facility. However, for situations where a number of NPDES dischargers are located in the same area or watershed and the circumstances for granting a variance are the same, states and authorized tribes may consider administering a multiple-discharger variance for a group of dischargers collectively. Such a group variance can be based on various scales and may depend largely on the rationale for adopting a variance for methylmercury. Possible applications of a group variance may include facilities with similar discharge processes, a watershed basis, particularly for states that issue NPDES permits on a watershed basis, or a broader geographic basis, analogous to a general NPDES permit...For example, Ohio adopted a statewide mercury variance applicable to point source dischargers in the state that

meet specified criteria. In addition, Michigan has authorized multiple discharger variances for mercury with permit requirements, including development and implementation of an MMP.” (EPA’s Methylmercury Guidance, 2010)

Factors for demonstrating the need for a variance

11. “The 1985 EPA Office of Water guidance explained that it would be appropriate to grant short-term variances to individual dischargers based on any of the six factors for removing a designated use as listed at §131.10(g).” (ANPRM and Memo to Water Division Directors March 15, 1985)
12. “Variance procedures involve the same substantive and procedural requirements as removing a designated use..., but unlike use removals, variances are both discharger and pollutant specific, are time-limited and do not forego the currently designated use.” (1994 WQS Handbook)
13. “State variance procedures, as part of State water quality standards, must be consistent with the substantive requirements of 40 CFR 131.” (1994 WQS Handbook)
14. “EPA has approved State-adopted variances in the past and will continue to do so ifthe State demonstrates that meeting the standard is unattainable based on one or more of the grounds outlined in 40 CFR 131.10(g) for removing a designated use.” (1994 WQS Handbook)
15. “Agency believes...essential elements of a variance...a variance should be granted only where there is a demonstration that one of the use removal factors (40 CFR 131.10(g)) has been satisfied.” (1998 ANPRM)
16. “A variance may be granted if The permittee demonstrates to the State or Tribe that attaining the WQS is not feasible because...” and lists out the same 6 factors at §131.10(g). (1995 Great Lakes Initiative, Part 132)

Other demonstration requirements

17. “EPA has approved State-adopted variances in the past and will continue to do so ifthe 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.” (1994 WQS Handbook)
18. “EPA has approved State and Tribal use of variances when the...State or Tribe demonstrates that advanced treatment and alternative effluent control strategies have been considered.” (1998 ANPRM which includes a variety of other citations)
19. “In the final Guidance, States and Tribes retain the discretion to define what specific information they will require in a permittee’s variance demonstration and application. States and Tribes also have the discretion to define the decision criteria to use when approving or disapproving a variance, as long as they are at least as stringent as the requirements in procedure 2 of appendix F and subject to EPA review and approval.” (GLI SID)
20. “A variance procedure should assure that: the public has sufficient information to comment on the appropriateness of a State’s or Tribe’s WQS variance process; EPA has sufficient details to determine if the State or Tribe procedures comply with the CWA and are approvable; and both EPA and the public have adequate information on which to judge State or Tribal compliance with its own procedures when making individual variance decisions.” (GLI SID)

Duration of a Variance

21. “A variance is a short-term exemption from meeting otherwise applicable water quality standards.” (1998 ANPRM)

22. "A WQS variance shall not exceed five years or the term of the NPDES permit, whichever is less."
(1995 Great Lakes Initiative, Part 132)

23. "the variance is granted for a specific period of time..." (1994 WQS Handbook)

Expectations for the discharger during its variance

24. "the discharger who is given a variance for one particular constituent is required to meet the applicable criteria for other constituents." (1994 WQS Handbook)

25. "EPA has approved State-adopted variances in the past and will continue to do so if ... reasonable progress is being made toward meeting the standards." (1994 WQS Handbook)

26. "Agency believes...essential elements of a variance...a variance identifies and justifies the numerical criteria that will apply during the existence of the variance." (1998 ANPRM)

27. "Agency believes...essential elements of a variance...a variance is established as close to the underlying numerical criteria as is possible." (1998 ANPRM)

28. "EPA's current thinking is that the regulation may need to articulate...explicit statement requiring the highest level of water quality achievable under the relaxed, interim standard during the period of the variance." (1998 ANPRM)

29. "Agency believes...essential elements of a variance...a variance does not exempt the discharger from compliance with applicable technology or other water quality based limits." (ANPRM)

30. "Agency believes...essential elements of a variance...a variance does not affect effluent limitations for other dischargers." (1998 ANPRM)

31. The decision on a variance request "...shall include all permit conditions needed to implement those parts of the variance so approved. Such permit conditions shall, at a minimum, require...

- compliance with an initial effluent limitation which, at the time the variance is granted, represents the level currently achievable by the permittee, and which is no less stringent than that achieved under the previous permit,"
- That reasonable progress be made toward attaining the water quality standards for the waterbody as a whole through appropriate conditions,
- When the duration of a variance is shorter than the duration of a permit, compliance with an effluent limitation sufficient to meet the underlying water quality standard, upon the expiration of said variance,
- A provision that allows the permitting authority to reopen and modify the permit based on any State or Tribal triennial water quality standards revisions to the variance." (1995 Great Lakes Initiative, Part 132)

Limitations on a variance – new/recommencing dischargers, T& E species, Existing uses

32. "This [variance] provision shall not apply to new Great Lakes dischargers or recommencing dischargers." (1995 Great Lakes Initiative, Part 132)

33. "Variances are not intended to allow water quality that is already below standards to be further degraded, which would be the case if new or recommencing dischargers add increased loads of a pollutant to a waterbody." (GLI SID)

34. "EPA's current thinking is that the regulation may need to articulate....explicit statement that the granting of a variance may not result in any loss of impairment of an existing use." (1998 ANPRM)

35. "A variance shall not be granted that would likely jeopardize the continued existence of any endangered or threatened species listed under Section 4 of the Endangered Species Act (ESA) or result in the destruction or adverse modification of such species' critical habitat." (1995 Great Lakes Initiative, Part 132)

Limitations on variances – BMPS for nonpoint source control

36. "EPA's current thinking is that the regulation may need to articulate....explicit statement that a variance shall not be granted if standards will be attained by implementing cost-effective and reasonable best management practices for nonpoint source control." (1998 ANPRM)
37. "A WQS variance shall not be granted if standards will be attained by implementing effluent limits required under sections 301(b) and 306 of the Clean Water Act (CWA) and by the permittee implementing cost-effective and reasonable best management practices for nonpoint source control." (1995 Great Lakes Initiative, Part 132).
38. "...the BMPs that must be implemented before a variance may be granted should be limited to those that may be implemented by a particular discharger....the purpose of a variances are to improve water quality as much as possible by requiring effluent limitations that represent the level of water quality achievable by the permittee. If the permittee can implement cost-effective and reasonable BMPs for nonpoint sources, over which it has control, that will attain water quality standards, the permittee should implement those BMPs rather than requesting a variance for its point source discharge. If implementing such BMPs will improve water quality but not meet the standards, implementation by the permittee will result in a reduced variance request and an overall improvement in water quality." (GLI SID)

Review/Renewal

39. "...the variance...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.)" (1994 WQS Handbook)
40. "A State or Tribe shall review, and modify as necessary, WQS variances as part of each water quality standards review pursuant to section 303(c) of the CWA." (1995 Great Lakes Initiative, Part 132)
41. "Agency believes...essential elements of a variance...a variance is reviewed every three years, at a minimum, and extended only where the conditions for granting the variance still apply." (1998 ANPRM)
42. "A variance may be renewed....the permittee shall again demonstrate that attaining WQS is not feasible based on the requirements...The permittee's application shall also contain information concerning its compliance with the conditions incorporated into its permit as part of the original variance...Renewal of a variance may be denied if the permittee did not comply with the conditions of the original variance." (1995 Great Lakes Initiative, Part 132)
43. "the discharger either must meet the standard upon expiration of this time period or must make a new demonstration of 'unattainability.'" (1994 WQS Handbook)
44. "Agency believes...essential elements of a variance...upon expiration, of the variance, the underlying numerical criteria have the full regulatory effect." (1998 ANPRM)