Electronic Filing: Received, Clerk's Office 10/2/2017

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REGULATORY RELIEF MECHANISMS:	)	PCB R18-018
PROPOSED NEW 35 ILL. ADM. CODE	)	(Rulemaking – Procedural)
PART 104, SUBPART E	)	

NOTICE OF FILING

To:

Don Brown, Clerk of the Board Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 don.brown@illinois.gov (via electronic mail)	Attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Pre-Filed Questions for the Illinois EPA Submitted by Midwest Generation, LLC, a copy of which is herewith served upon you.

Dated: October 2, 2017

MIDWEST GENERATION, LLC

By: /s/ Susan M. Franzetti

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Pre-Filed Questions for the Illinois EPA Submitted by Midwest Generation, LLC was electronically filed on October 2, 2017 with the following:

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and that copies were electronically sent on October 2, 2017 to the parties listed on the foregoing Service List.

Dated: October 2, 2017 /s/ Susan M. Franzetti

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REGULATORY RELIEF MECHANISMS:	)	R18-18
PROPOSED NEW 35 ILL. ADM. CODE	)	(Rulemaking – Procedural)
PART 104, SUBPART E	)	

PRE-FILED QUESTIONS FOR THE
ILLINOIS EPA SUBMITTED BY MIDWEST GENERATION, LLC

NOW COMES Midwest Generation, LLC ("MWG"), by and through its attorneys, Susan M. Franzetti and Vincent R. Angermeier, submits the following Pre-Filed Questions to the Illinois Environmental Protection Agency ("Agency") for presentation at the hearing scheduled in the above-referenced matter:

Procedural Nature of TLWQS Proceedings

1. Section 38.5(a) of the Illinois Environmental Protection Act (the "Act") provides in relevant part that the Board "may conduct non-adjudicatory proceedings to adopt a TLWQS." Section 101.108(a) of the Board's rules provides that "Board proceedings can generally be divided into two categories: rulemaking and adjudicatory proceedings." Section 101.108(c) identifies "Variance Petitions (35 Ill. Admin. Code 104)" as an example of an adjudicatory proceeding. Does the Agency interpret the use of the term "non-adjudicatory" in Section 38.5 of the Act as evidencing a legislative intent to create a third category of Board proceeding?

   a. Does placing these proposed rules in the adjudicatory proceedings section of the Board's Rules (Part 104) risk creating confusion as to the nature of a TLWQS variance proceeding?
   b. Did the Agency consider whether it would it be preferable to create a standalone "Part" of the Board's Rules to address TLWQS proceedings?

Multi-Discharger Variances

2. The Board Note to Section 104.520 notes that the Board has the power to join additional parties and consolidate petitions. Is it also intended that the Board have the power to

sever joined parties and/or break up previously consolidated petitions (*i.e.*, multi-discharger petitions), when appropriate?

3. Can the Board create subdockets in TLWQS variance proceedings?

4. The U.S. EPA has issued a guidance document concerning multi-discharger variance petitions. U.S. EPA, *Discharger-Specific Variances on a Broader Scale*, EPA-820-F-13-012, at 5 (Mar. 2013) (attached). The guidance suggests that, in multi-discharger variance petitions permittees should be grouped "based on specific characteristics or technical and economic scenarios that the permittees share (e.g., type of discharger (public or private), industrial classification, permittee size and/or effluent quality, treatment train (existing or needed), pollutant treatability, available revenue, whether or not the permittee can achieve a level of effluent quality comparable to the other permittees in the group, and/or waterbody or watershed characteristics) and conduct a separate analysis for each group." Do the proposed rules empower the Board to subdivide multi-discharger petitions in this way?

Assimilative Capacity

5. If a discharger only needs a variance because it claims another upstream discharger has used up the assimilative capacity of the waterbody for the particular pollutant(s) at issue, does this change anything about how the matter proceeds?

a. Does it potentially change what the essential elements are that the downstream discharger has to prove to get a TLWQS, such as requiring a showing that the upstream discharge is preventing the downstream discharger from achieving compliance with the water quality standard(s) at issue?
b. Does the downstream discharger bear the burden of proving that the assimilative capacity has been utilized by the upstream discharger?
c. In this situation, is the upstream discharger a necessary party to the proceeding?
d. How is it determined whether this situation should proceed as a multi-discharger proceeding, a waterbody proceeding or a single discharger proceeding?

Public Participation

6. What level of public participation is required under the federal regulations?

7. Is the level of public participation that is required under Section 38.5 of the Act the same as what is required under the federal regulations? If not, how does it differ?

8. In drafting the proposed regulations, how did the Agency decide that non-petitioners should be classified as "parties" to the proceeding?

9. Section 38.5 limits appeal rights to persons "adversely affected or threatened" by a final Board order. Do the general rules of standing apply to determine who is "adversely affected or threatened" by a final Board order?

Board Established Classes/Deadlines

10. Why did the Agency propose in Section 104.540 that the Board's order establishing classes and deadlines should be a "final order," rather than an interim order?

11. Do the proposed regulations prevent the Board from revising the class, geographic scope, or deadlines later in the proceedings?

12. In PCB 16-19, captioned *Midwest Generation v. IEPA*, after the filing of the Agency's response in which it suggested that the relief could be an individual, waterbody segment, or multi-discharger time-limited water quality standard, the Board entered an order establishing a "class of dischargers" consisting of "heated effluent dischargers into Chicago Sanitary and Ship Canal and Upper Dresden Island Pool, including Flint Hills, Midwest Generation (Will County Station, Joliet 9 Station and Joliet 29 Station), and Stepan Chemical . . . ." (Board Order April 12, 2017, p.2, a copy of which is attached):

a. What is the effect of establishing a "class of dischargers"?
b. Does the Board define a class of dischargers only in waterbody-specific variances, or does this also occur in multi-discharger petitions?

13. Does the Agency agree that the April 12, 2017 PCB 16-19 Order does not make a determination whether Flint Hills and the other identified dischargers in PCB 16-19 are proceeding as single-discharger petitions, as a combined multi-discharger petition, or as some other form of petition?

a. Under the proposed rules, when and how does the Board determine the type of TLWQS proceeding to be utilized?

b. If the decision on whether the proceeding is an individual, waterbody segment or multi-discharge TLWQS is not made before the 90-day deadline for filing the amended petition set forth in the April 12, 2017 Board Order, doesn't this leave unclear the substantive requirements that the amended petition must satisfy to be deemed in substantial compliance by the Board?

c. The Agency's March 16, 2017 response to the MWGen petition in PCB 16-19 references seeking input from the U.S. EPA concerning whether the petition should be an individual, waterbody segment or multi-discharger TLWQS. Has the U.S. EPA provided any definitive response to the Agency on this question?

14. The April 12, 2017 PCB 16-19 Order references Stepan Chemical and ExxonMobil, neither of whom have as of yet filed a TLWQS petition with the Board. Given that Section 38.5(b) provides in relevant part that: "A time-limited water quality standard may be sought by: (1) persons who filed with the Board a petition for a time-limited water quality standard under this Section," will entities like Stepan Chemical and ExxonMobil need to file either an individual petition or a joint petition with the Board in order to be eligible to receive a TLWQS?

15. If one or more of the entities referenced in the April 12, 2017 Board Order do not file an appearance in the proceeding or otherwise participate, does the Board have the authority to make the TLWQS applicable to that party? Does the answer to this question depend upon whether the "class of dischargers" designation renders the proceeding a waterbody-specific TLWQS proceeding or a multi-discharger proceeding?

16. Under the proposed rules, are each of the entities named in the Board's Order a "participant" in the proceeding regardless of whether they file or join in a TLWQS petition filed with the Board?

17. The April 12, 2017 PCB 16-19 Order states that Exxon Mobil is a "potentially-affected discharger, subject to the Agency's further evaluation." Do the proposed rules prescribe how and when the Agency will conduct the referenced "further evaluation"? If not, how and when does the Agency expect to complete this evaluation?

18. Can a petitioner file an amended petition before the Agency conducts its evaluation and determines whether Exxon Mobil is an affected discharger?

Filings

19. Under the proposed rules is there a point in time in a multi-discharger proceeding where the petitioners must file a document jointly, rather than individually?

20. If the U.S. EPA disapproves of a TLWQS adopted by the Board in a multi-discharger proceeding, do the proposed rules require that all of the dischargers named in the multi-discharger TLWQS join in a petition to modify filed with the Board or may only one or some of those dischargers file a petition to modify with the Board?

21. If the U.S. EPA disapproves of an adopted multi-discharger TLWQS, but not all of the petitioners file petitions to modify pursuant to Section 104.570(c) with the Board, is a petitioner who does not file a petition to modify no longer covered by a Board-issued, modified TLWQS that is approved by the U.S. EPA?

a. Is the Board authorized to decide a petition to modify even if all of the dischargers in a multi-discharger proceeding do not join in the petition to modify?

Substantial Compliance Phase

22. Under the proposed rules, is it correct that under Section 104.545 a newly filed petition (as opposed to a "converted" petition under Section 104.520(a)(2)), is allowed at least two opportunities to obtain a finding of substantial compliance from the Board—first in the initially filed petition and then in an amended petition if the Board finds that the initial petition was not substantially compliant—before a stay expires?

23. Under the proposed rules, in the case of a petition that was originally filed before these rules were proposed and is hence converted under Section 104.520(a)(2), is it intended that a petitioner has a right to amend its petition to comply with the new rules and, if the Board does not find the amended petition compliant, the "converted" petitioner also gets the same opportunity to amend its petition (similar to a newly filed petition) before the stay would expire?

24. The Agency's Statement of Reasons says that "If a petition is not in substantial compliance, a petitioner may amend its petition until the Board established deadline pursuant to proposed Section 104.545." (Statement of Reasons, p.11) Is this intended to imply that the Petitioner(s) can amend their petition an unlimited number of times before the Section 104.540 deadline expires?

25. The Statement of Reasons goes on to say that "If the Board finds an amended petition is in substantial compliance before the deadline, the stay continues…." (Statement of Reasons, p.11) Did the Agency mean to say "If the Board finds an amended petition, filed before the deadline, is in substantial compliance, the stay continues…."?

26. Under the proposed rules, does the Board accept the petition's factual contentions as true in making its determination on the substantial compliance issue, similar to when a court is determining a motion to dismiss a complaint in state court? If so, is this standard of review addressed in the proposed rules or otherwise covered by a Board procedural rule?

Petitions to Modify Under Section 104.570(c)

27. Is it the Agency's intent that the standard of review that applies to a petition to modify under Section 104.570(c) is a *de novo* review by the Board? If so, should that be expressly stated in 104.570(c)?

Appeal Deadlines

28. If a party other than the petitioner files a motion to reconsider a Board order approving a TLWQS, and requests that the Board instead deny the TLWQS or impose stricter requirements as part of the TLWQS, must the Agency delay transmitting the adopted TLWQS to U.S. EPA (pursuant to Section 104.570(b)) until the motion to reconsider is resolved or does it have discretion as to how to proceed regarding the transmittal to U.S. EPA?

29. Does a "person adversely affected or threatened" by Board approval of a TLWQS under Section 104.565 immediately appeal the Board's decision in state court, without waiting for the U.S. EPA to complete its review?

30. If one or more petitioners in a multi-discharger petition do not want to appeal a Section 104.565 order, does this prevent the appeal from being filed?

31. If the U.S. EPA reviews an adopted multi-discharger variance and concludes that the variance is appropriate as to some, but not all, of the dischargers, do the proposed rules treat the "appropriate" dischargers as having an approved TLWQS variance?

31. Does a pending appeal of a U.S. EPA disapproval decision in federal court prevent the Board from considering a Petition to Modify under Section 104.570(c)?

32. If a stay is terminated by a U.S. EPA disapproval decision (Section 104.525(b)(2)(B)), and the Board modifies the adopted TLWQS variance under Section 105.570(c), does this put the stay back in effect while the modified TLWQS variance is reviewed by the U.S. EPA?

a. Explain why the Agency is proposing in the rules that the stay terminates even though the Board might receive a petition to modify that addresses the alleged deficiencies in the U.S. EPA disapproval.

b. Did the Agency consider the effect of those stays being unexpectedly terminated when it evaluated the economic reasonableness of these regulations? (See Statement of Reasons, p. 24)

c. Given that a U.S. EPA disapproval decision has the effect of terminating a stay, did the Agency consider the alternative approach of having the Board issue a

preliminary or tentative decision to be submitted to the U.S. EPA for comment upon the conclusion of the hearing and post-hearing briefing before the Board proceeds to enter a final decision that is then submitted to U.S. EPA for approval or disapproval?

33. Section 104.570(c)(6) requires a 30-day comment period. Does this prohibit the Board from approving the petition to modify in less than 30 days?

a. Is this third-party comment period required by federal law or Illinois law?
b. Did the Agency consider making the comment period consistent with the Board's general rule on responses to motions or, alternatively, leaving it to the discretion of the Board whether comments would be allowed and if so, the deadline for filing comments?

Thank you for your consideration. MWGen reserves the right to supplement these Pre-Filed Questions.

Respectfully submitted,

MIDWEST GENERATION, LLC

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United States
Environmental Protection Agency

Office of Water
Mail Code 4305T

EPA-820-F-13-012
March 2013

Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers

Frequently Asked Questions

DISCLAIMER

These Frequently Asked Questions (FAQs) do not impose legally binding requirements on the EPA, states, tribes or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public. The Clean Water Act (CWA) provisions and the EPA regulations described in this document contain legally binding requirements. These FAQs do not constitute a regulation, nor do they change or substitute for any CWA provision or the EPA regulations.

The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of these FAQs and the appropriateness of their application to a particular situation. The EPA retains the discretion to adopt approaches on a case-by-case basis that differ from those described in these FAQs where appropriate. These FAQs are a living document and may be revised periodically without public notice. The EPA welcomes public input on these FAQs at any time.

1. Why is the EPA issuing these FAQs?

The EPA is issuing these FAQs to help address questions that arise when states and tribes[1] seek to streamline the adoption and approval of water quality standards (WQS) variances for pollutants that have an impact on multiple permittees (or dischargers). This occurs when groups of permittees are experiencing the same challenges in meeting their water quality based effluent limits (WQBELs) for the same pollutant, regardless of whether or not the permittees are located on the same waterbody. States and tribes that want to find ways to both improve the efficiency of their WQS adoption and approval process, and provide permittees with as much certainty as possible regarding their ultimate discharge requirements, may find these FAQs particularly helpful. While the EPA realizes there may be further questions about the implementation of multiple discharger variances, these FAQs

[1] "Tribal" and "tribes" refers to tribes authorized for treatment in a manner similar to a state (TAS) under section 518 of the Clean Water Act (CWA) for purposes of CWA section 303(c) water quality standards (WQS).

are designed to help states and tribes evaluate the appropriateness of using a multiple discharger variance approach.

The federal water quality standards regulations at 40 CFR 131 and the federal permitting regulations at 40 CFR 122 provide for a number of tools for states and tribes that offer regulatory flexibility when implementing water quality management programs. These tools include site-specific criteria, revisions to designated uses, dilution allowances, permit compliance schedules, and WQS variances. Which regulatory tool is appropriate depends upon the circumstances.

2. What is a water quality standards variance?

A water quality standards variance is a time limited designated use and criterion (i.e., interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition[2] during the specified time period. As such, a variance requires a public process and EPA review and approval under CWA 303(c). While the designated use and criterion reflect what is ultimately attainable, the variance reflects the highest attainable condition for a specific timeframe and is therefore less stringent.[3] However, a state or tribe may adopt such interim requirements only if it is able to demonstrate that it is not feasible to attain the currently applicable designated use and criterion during the period of the variance due to one of the factors listed at 40 CFR 131.10(g).[4] Where the currently applicable designated use and criterion are not being met, WQS variances that reflect a less stringent, time limited designated use and criterion allow states, tribes and stakeholders additional time to implement adaptive management approaches to improve water quality, but still retain the currently applicable designated use as a long term goal for the waterbody. States have adopted, and EPA has approved, water quality standards variances that apply to individual dischargers, variances that apply to multiple dischargers, and variances that apply to entire waterbodies or segments.

The interim requirements specified in the variance apply only for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the pollutant(s), permittee(s) and /or waterbody or water body segment(s) covered by the variance. Specifically, the variance serves as the basis for the WQBEL in National Pollutant Discharge Elimination System (NPDES) permits. However, the interim requirements *do not replace* the designated use and criteria for the water body as a whole, therefore, any implementation of CWA section 303(d) to list impaired waters must continue to be based on the designated uses and criteria for the waterbody rather than the interim requirements.

[2] The highest attainable condition is the condition that is both feasible to attain and is closest to the protection afforded by the designated use and criteria.

[3] While variances are described as “time limited” and designated uses are implied to be “permanent,” 40 CFR 131.20 requires that states and tribes hold public hearings for the purpose of reviewing the applicable water quality standards, including designated uses, and modifying them as appropriate.

[4] See Section 5.3 of the *Water Quality Standards Handbook EPA 823 B 94 005a, August 1994; Advanced Notice of Proposed Rule Making, Water Quality Standards Regulation, July 7, 1998 63 FR 36759.*

3. When might a state or tribe want to adopt a WQS variance?

Many states and tribes have found that WQS variances are useful to consider when there is a new or more stringent effluent limit[5] as long as the state or tribe can also provide a demonstration that attaining the designated use and criterion is not feasible for the term of the variance, but the designated use and criterion may be attainable in the longer term. Example situations of when a variance may be appropriate include when:

- Attaining the designated use and criterion is not feasible under the current conditions (e.g., water quality-based controls required to meet the numeric nutrient criterion would result in substantial and widespread social and economic impact) but could be feasible should circumstances related to the attainability determination change (e.g., development of less expensive pollution control technology or a change in local economic conditions); or
- The state or tribe does not know whether the designated use and criterion may ultimately be attainable, but feasible progress toward attaining the designated use and criterion can still be made by implementing known controls and tracking environmental improvements (e.g., complex use attainability challenges involving legacy pollutants).

Properly applied, a WQS variance can lead to improved water quality over the duration of the variance and, in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the CWA.

4. What is the legal basis for a WQS variance?

The CWA specifies an interim goal that, "wherever attainable," water quality provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water. In implementing the CWA, the regulation at 40 CFR 131.10 establishes how a state or tribe may demonstrate that uses specified in CWA section 101(a)(2) or subcategories of such uses are not feasible to attain. In 1977, an EPA Office of General Counsel legal opinion considered the practice of temporarily downgrading the WQS as it applies to a specific permittee rather than permanently downgrading an entire water body or waterbody segment(s) and determined that such a practice is acceptable as long as it is adopted consistent with the substantive requirements for permanently downgrading a designated use. In other words, a state or tribe may change the standard in a more targeted way than a designated use change, so long as the state or tribe is able to show that achieving the standard is "unattainable" for the term of the variance. The state practice described in the Office of General Counsel legal opinion became known as adopting a "variance" to a water quality standard.

The EPA's regulation at 40 CFR 131.13 provides that variance policies are general policies affecting the application and implementation of WQS and that states and tribes may include variance policies in their state and tribal standards, at their discretion.[6] The EPA interprets its

[5] For example, when dischargers are faced with new or revised criteria, and/or when a reasonable potential analysis shows the need for a water quality based effluent limit.
[6] Section 40 CFR 131.13 further provides that such policies are subject to EPA review and approval.

regulation to authorize the use of a WQS variance where a state or tribe meets the same procedural and substantive requirements as removing a designated use. Therefore, variances can be granted based on any one of the six factors listed at 40 CFR 131.10(g).

5. What are the factors a state or tribe can use to justify the need for a water quality standards variance?

As provided in §131.10(g), states and tribes "may remove a designated use which is *not* an existing use, as defined in 40 CFR 131.3, or establish sub-categories of a use if the state or tribe can demonstrate that attaining the designated use is not feasible because:

(1) Naturally occurring pollutant concentrations prevent the attainment of the use; or

(2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or

(3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

(4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or

(5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact."

6. What is a Multiple Discharger Variance?

If a state or tribe believes that the designated use and criterion are unattainable as they apply to multiple permittees because they are all experiencing challenges in meeting their WQBELs for the same pollutant(s) for the same reason, regardless of whether or not they are located on the same waterbody, a state or tribe may streamline its WQS variance process. To do so, the state or tribe would adopt one variance that applies to all of these permittees (i.e., a multiple discharger variance) so long as the variance is consistent with the CWA and implementing regulation at 40 CFR 131.10 (for example, all the dischargers in the group cannot meet the required WQBEL to protect aquatic life for a period of time due to substantial and widespread economic and social impact).

The EPA recognized the utility of a multiple discharger variance, and its distinction from an individual discharger WQS variance in the "Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID; EPA–820–B–95–001; March 1995, p.

238). The EPA also spoke to the use of multiple discharger variances in the "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule." 75 Fed. Reg. 75762, 75790 (December 6, 2010). It is important to note that multiple discharger variances may not be appropriate or practical for all situations, and may be highly dependent on the parameters considered and the number of affected permittees.

7. What should a state or tribe keep in mind when justifying the need for a multiple discharger variance?

In developing an analysis to justify the need for a multiple discharger variance, states and tribes should consider the following three principles. The variance and the justification:

(1) Must meet the same 40 CFR 131 regulatory requirements as an individual discharger WQS variance, and should consider any EPA guidance. Specifically, the state or tribe must fully demonstrate that a factor listed in 40 CFR 131.10(g) precludes attainment of a use specified in CWA 101(a)(2) for the entire variance period. When using 40 CFR 131.10(g)(6), this means that the documentation provided to support the variance must address both the substantial AND widespread components of the economic and social impacts of attaining the designated use and criterion.

(2) Should ensure that any overall demonstration is conducted in a manner that accounts for as much individual permittee information as possible. A permittee that could not qualify for an individual WQS variance should not qualify for a multiple discharger variance. The demonstration should:

- Apply only to permittees experiencing the same challenges in meeting WQBELs for the same pollutant(s), criteria and designated uses.
- Group permittees based on specific characteristics or technical and economic scenarios that the permittees share (e.g., type of discharger (public or private), industrial classification, permittee size and/or effluent quality, treatment train (existing or needed), pollutant treatability, available revenue, whether or not the permittee can achieve a level of effluent quality comparable to the other permittees in the group, and/or waterbody or watershed characteristics) and conduct a separate analysis for each group.[7] The more homogeneous a group is in terms of factors affecting attainability of the designated use and criterion, the more credible the multiple discharger variance will be.
- Collect sufficient information for each individual permittee, including engineering analyses and financial information, to adequately support the specification of permittee groups for each individual permittee to be covered by the variance (e.g. estimated costs that each permittee may experience, permittee specific revenue).

[7] The EPA recommends that the state or tribe develop a separate variance for each group (even when going through the same rulemaking procedure) so that if questions arise for one group, it does not jeopardize approval for the others.

(3) Should consider an individual variance for a particular permittee if it does not fit with any of the group characteristics (e.g., private vs. public dischargers, large vs. small permittee, or permittees with a parent company vs. those without).

8. What should a state or tribe keep in mind when adopting a multiple discharger variance pursuant to state/tribal law?

Any multiple discharger variance should:

(1) Include a justifiable expiration date, consistent with the analysis provided, for each permittee or group of permittees covered by the variance. After the expiration date, each permittee in the group will be subject to the applicable water quality standards, or obtain EPA approval on a variance renewal. If the variance will expire during the permit term, the permitting authority must either include an appropriate WQBEL that will apply at the expiration of the variance or include a reopener clause such that the WQBEL may be revised in order for that permit to derive from and comply with WQS the entire permit term.

(2) Provide that any renewal of a multiple discharger variance includes a new demonstration that the designated use and criterion are not feasible to attain during the term of the renewed variance, and documentation of the feasible progress that has been made by each permittee covered by the renewal. In addition, individual permittees will be reevaluated to determine if they continue to qualify under their group designation. Permittees that no longer qualify will cease to be covered by the multiple discharger variance.

It is important to note that even though the duration of a variance may be longer than 3 years, a variance is a water quality standard that must be reviewed every 3 years, consistent with 40 CFR 131.20 (a).

9. What must a state or tribe keep in mind when determining the appropriate interim requirements for a multiple discharger variance?

As with any WQS variance, the interim requirements will need to reflect the highest attainable condition during the term of the variance. The highest attainable condition may be expressed as the highest attainable interim use and criterion[8] or highest attainable effluent

[8] Section 131.6(a) requires that each state's water quality standards submitted to EPA for review must include "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." CWA section 101(a)(2) establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water," wherever attainable. Section 303(c)(2)(A) requires state water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]." EPA's regulations at 40 CFR part 131 interpret and implement these CWA provisions as creating a "rebuttable presumption" that requires state water quality standards to provide for all of the uses specified in Section 101(a)(2) of the Act, unless those uses are shown by a use attainability analysis to be unattainable. Section 131.10(g) and 131.10(j) authorizes a state to remove protection for a use specified in 101(a)(2) (or subcategory of such a use) if the state can demonstrate that one of the attainability factors is met. Once the presumption is rebutted, the state must still adopt, under 131.6(a), "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." In order to comply with this provision, states will

condition for a permittee(s) during the term of the variance. For example, this could be accomplished by specifying in the variance a numeric value that reflects the highest water quality that a discharger could achieve (beyond their technology-based effluent limits) during the term of the variance.[9] In general, interim requirements should be established on a permittee specific basis (particularly when demonstrating that the applicable designated use is unattainable based on 40 CFR 131.10(g)(6)), but there may be instances where establishing requirements for a group of permittees may be appropriate (e.g., with "legacy pollutants", or when hydrologic conditions have been modified). EPA notes that some states have included additional interim requirements, such as requirements to research advances in wastewater treatment or improved management practices, to conduct wastewater treatability studies, to define demonstrated performance of wastewater treatment or other control methods.

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need to adopt designated uses that continue to serve the 101(a)(2) goal by protecting for the highest attainable use unless the state has shown that no use specified in 101(a)(2) or no subcategory of such uses are attainable.

[9] This is a reasonable alternative to adopting an interim designated use and criterion because the resulting instream concentration reflects the highest attainable interim use and interim criterion.