

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 <a href="mailto:don.brown@illinois.gov">don.brown@illinois.gov</a> (via electronic mail)	Marie Tipsord Hearing Officer Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 <a href="mailto:marie.tipsord@illinois.gov">marie.tipsord@illinois.gov</a> (via electronic mail)
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**See Persons on Attached Service List**

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board the Illinois EPA's Responses to Questions asked at the October 10, 2017 Hearing, a copy of which is herewith served upon you.

Dated: November 14, 2017

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

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

**ILLINOIS EPA'S RESPONSES TO QUESTIONS ASKED AT THE OCTOBER  
10, 2017 HEARING**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through its attorneys, hereby submits its responses to questions asked at the October 0, 2017 hearing. The Agency responds as follows:

**Background**

Federal rules define a water quality standard variance at 40 CFR 131.3(o) as a time-limited designated use and criterion for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflects the highest attainable condition applicable throughout the specified time period. See Attachment A of the Agency's Statement of Reasons at 51036. Federal rules require states to retain the underlying designated use and criterion in their standards to apply to all other permits not addressed in the water quality standard variance, and for identifying threatened and impaired waters under the Clean Water Act section 303(d), and for establishing a Total Maximum Daily load. Id. Once the United States Environmental Protection Agency approves a water quality standard variance it applies for purposes of developing national pollutant discharge elimination system permit limits and requirements under 301(b)(1)(c) of the Clean Water Act. Id. The federal rules reinforce the requirements at 40 CFR 122.44(d)(1)(vii)(A) by specifying that any limitations and requirements necessary to implement the water quality standard variance must be included as enforceable conditions of the implementing national pollutant discharge elimination system permit. Id. Where a permittee cannot immediately meet the water quality based effluent limit derived from the terms of a water quality standard variance, the permitting authority can

decide whether to provide a permit compliance schedule so the permittee can remain in compliance with its national pollutant discharge elimination system permit. Id.

### Board's Questions

#### 104.500 Purpose

**Board Question 1.** Addressing 40 CFR §132: Please comment on addressing 40 CFR §132 in the proposed rule and whether time-limited water quality standard (TLWQS) for the Lake Michigan Basin should be included or excluded.

Under proposed Section 104.500, the rule would apply to standards set forth in 35 Ill. Adm. Code 302 and 303, which include the Lake Michigan Basin Water Quality Standards at Subpart E of Part 302.

40 CFR §131.21(b) states that the USEPA's approval of a State WQS shall be based on the requirements of 40 CFR §131.5, 131.6, and 132. 40 CFR §132 is the "Water Quality Guidance for the Great Lakes System". The proposed rule addresses the water quality variance provisions under 40 CFR §131, however, it does not address 40 CFR §132.

For WQS variances, USEPA explains,

For waters in the Great Lakes basin, states and authorized tribes must meet the requirements of both 40 CFR parts 131 and 132. The practical effect of this requirement is that, where regulations in 40 CFR §parts 131 and 132 overlap, the more stringent regulation applies. In some cases, the flexibilities and requirements in the national rule [at 40 CFR §131.14] will not be applicable to waters in the Great Lakes basin. For example, the GLWQG limits any WQS variance to a maximum term of five years (with the ability to obtain a subsequent WQS variance). Therefore, any WQS variance on waters that are subject to the GLWQG cannot exceed five years even though the final rule in 40 CFR §part 131 does not specify a maximum term. On the other hand, because GLWQG WQS variances cannot exceed five years, the requirements in the final rule that pertain to conducting reevaluations (for WQS variances greater than five years) are not applicable. 80 Fed. Reg. 51040 (August 21, 2015)

Appendix F of 40 CFR §132 for the Great Lakes System contains "Procedure 2: Variances from Water Quality Standards for Point Sources". Besides the maximum five- year term mentioned above, Part 132 variance procedures also include requirements to address endangered and threatened species and the State's antidegradation procedures.

These requirements are not specifically mentioned in IEPA's proposal

or 40 CFR §Part 131.14 from which IEPA's proposal was derived.

**Agency Response:** See 104.500(c). The Agency included language requiring that petitioners must meet both the regulations in 104.500 and 40 CFR 132 and where there is overlap, the more stringent regulation applies.

**Board Request:** Submit an explanation and examples for waterbody and watershed time-limited water quality standards.

**Agency Response:** Waterbody and waterbody segment variances are still new and USEPA is not aware of any states that have adopted one yet. One constant refrain in USEPA guidance on waterbody variances is that they are most appropriate where there are both point and non-point sources and all sources are willing to collaborate.

However, many states have expressed support and desire for such a tool now. An interested state or authorized tribe may use their discretion to pursue a waterbody variance wherever a water quality standard variance may be appropriate to deal with more significant or widespread pollution problems, such as where non-point sources are a major source of pollutant loadings. A waterbody variance could be particularly successful where the state or authorized tribe finds that both point and non-point sources are willing to collaborate on a strategy to resolve the pollution challenges in the waterbody.

Chapter 3 Issue Category: Variances Pages 3-290-3408 Response to Public Comments, Water Quality Standard Regulatory Revisions at 3-319 (August 2015). Provide this as an attachment for the Board\*\*\*

### 101.510 Severability

**Board Question 3:** To clarify Section 104.510, would the following change be acceptable to IEPA?

If any provision of this Subpart or its application to any person is adjudged invalid, the adjudication ~~does~~will not affect the validity of any other provision of this Subpart or the validity of this Subpart as a whole ~~or of any portion not adjudged invalid.~~

**Agency Response:** See 104.510. The Agency made the recommended changes.

### 104.515 Definitions

**Board Question 4:** To clarify Section 104.510, would the following change be acceptable to IEPA?

Unless defined in subsection (b), words ~~shall~~ have the ~~meaning as ascribed~~definitions provided in the Act and 35 Ill. Adm. Code 101. Subpart B.

**Agency Response:** See 104.515(a). The Agency made the recommended changes.

**Board Question 5:** Please comment on providing a definition of “highest attainable use” in the proposed rule like the one in the federal rule.

The proposed rule references to the terms “highest attainable condition,” “highest attainable interim criterion”, and “highest attainable interim use”. See proposed Sections 104.565(d)(4), 104.565(d)(4)(A)(i) and (B)(i). The federal rule also includes these terms but only defines “highest attainable use” in 40 CFR §131.3(m):

*Highest attainable use* is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the [Clean Water] Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.

Since the definition of “highest attainable use” provides the context for “highest attainable condition”, “highest attainable interim criterion, and “highest attainable interim use”, please comment on providing a definition of “highest attainable use” in the proposed rule like the one in the federal rule.

**Agency Response:** See 104.515(b). The Agency included the definition of “highest attainable use” as found in 40 CFR 131.3(m).

**Board Question 6:** Please see question 35 regarding non-101(a)(2) uses. Please comment on including a definition similar to 40 CFR §131.3(q) in the proposed rule.

The federal rule defines “Non-101(a)(2) use” under 40 CFR §131.3(q):

*Non-101(a)(2) use* is any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water.

**Agency Response:** See 104.515(b). The Agency included the definition of “Non-101(a)(2) use” as found in 40 CFR 131.3(q).

**Board Question 7:** Please comment on including a definition for “best management practices” in the proposed rule.

The term “best management practices” is used several times in the proposed rule, however, it is not defined anywhere in 35 Ill. Adm. Code. The term is also currently used in 35 Ill. Adm. Code 309.141(i)

under “Terms and Conditions of NPDES Permits”. The federal rule defines “best management practices” under 40 CFR §122.2 as follows:

*Best management practices* (“BMPs”) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of “waters of the United States.” BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

**Agency Response:** See 104.515(b). The Agency included the definition of “Best Management Practices” as found 40 CFR 122.2.

### 104.520 General Procedures

**Board Question 10:** Information on Individual Dischargers. Please comment on including provisions in the petition contents under proposed Section 104.530 that would clarify that individual permittees to be included under a multi-discharger variance need to submit their own information (e.g., public or private discharger, industrial classification, size, effluent quality, existing or needed treatment train, pollutant treatability, and available revenue). (See EPA-820-F-13-012.)

Proposed Section 104.520(b)(1)(B) would allow multiple dischargers to “act collectively as a single petitioner after the Board has established classes under Section 104.540.” The proposed Board Note “encourages persons addressing the same pollutants in the same waterbody, waterbody segment or watershed to join in filing a joint petition...”

In developing an analysis for multiple dischargers, USEPA notes that the demonstration should account 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:...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. . .” EPA-820-F-13-012 (March 2013) at 5-6.

**Agency Response:** See 104.530(d). The Agency added the requirement that for a multiple discharger, watershed, water body, or waterbody segment time-limited water quality standard, discharger specific information must be provided individually.

### 104.525 Stay

**Board Question 11:** To clarify language in Section 104.525(a)(3), would the following change be acceptable to IEPA?

~~any person who is a member of a class of dischargers that is identified in a Board order under Section 104.540 that concerns a petition for a time-limited water quality standard that was filed within 35 days after the effective date of the water quality standard from which relief is sought and who files a petition for a time-limited water quality standard before the deadline established for that class under Section 104.540 in that order.~~

**Agency Response:** See 104.525(a)(3). The Agency modified the language for clarity. It now reads:

any person who files a petition for a time-limited water quality standard before the deadline established in a Board order pursuant to Section 104.540. This person must be a member of a class of dischargers who have filed a time-limited water quality standard petition pursuant to Section 104.525(a)(1) or (a)(2) and have been identified in the Board's final order under Section 104.540.

**Board Question 12:** Please comment on whether Sections 104.525(b) and (c) should be replaced with:

- b) A stay of a water quality standard under this Section will remain in effect until the requested time-limited water quality standard:
  - 1) is granted and enters into effect; or
  - 2) is denied and all administrative and judicial appeals' rights are exhausted.

**Agency Response:** See 104.525(b). As this language is directly from 38.5(h) of the Act, the Agency is unable to remove the requirement that a stay continues after the Board adopts the time-limited water quality and the United States Environmental Protection Agency either approves or disapproves the time-limited water quality standard. However, for clarity the Agency deleted 104.525(b) and combined the requirements therein with 104.525(c). The Agency also modified the applicability of 104.525(c) to include both petitions and amended petitions.

### 104.530 Petition Contents

**Board Question 13:** Please comment on whether the term "predecessors" in Section 104.530(a)(8) needs to be defined.

**Agency Response:** The term "predecessors" is intended to refer to the previous permit holder. The Agency does not believe the term needs to be defined in 104 as it is currently used in 104.204(b)(3) without confusion. However, if the Board believes it necessary, the Agency can draft a definition to be included in 101.202; Definition for Board's Procedural Rules.



**Board Question 14:** Please clarify whether word “name” in Section 104.530(a)(9) means the name of the permit holder.

**Agency Response:** See 104.530(a)(9). The Agency added the language “of the permit holder” to clarify that the requirement to identify by name means the name of the permit holder.

**Board Question 15:** To clarify Section 104.530(a)(11), would the following change be acceptable to IEPA?

a description and copy of all pollution minimization plans currently being implemented or ~~have been~~ implemented in the past

**Agency Response:** See 104.530(a)(11). The Agency made the recommended change.

**Board Question 16:** To clarify Section 104.530(a)(14), would the following change be acceptable to IEPA?

the proposed term of the time-limited water quality standard and justification that it that is only as long as necessary to achieve the highest attainable condition, which includes a description of the relationship between the proposed pollution control activities and the proposed term

**Agency Response:** See 104.530(a)(14). The Agency made the recommended change.

**Board Question 17:** To clarify Section 104.530(b)(1), would the following change be acceptable to IEPA?

identification and documentation of any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant or water quality parameter and watershed, water body, or waterbody segment specified in the time-limited water quality standard petition that could be implemented to make progress towards attaining the underlying designated use and criterion; and

**Agency Response:** See 104.530(b)(1). The Agency made the recommended change.

**Board Question 18:** To clarify Section 104.530(b)(2), would the following change be acceptable to IEPA?

if the petition is for an extension of an existing water quality standard, an explanation of the extent to which the best management practices for nonpoint source controls were implemented to address the pollutant or water quality parameter subject to the time-limited water quality standard and the water quality progress achieved

**Agency Response:** See 104.530(b)(2). The Agency made the recommended change. The

Agency also corrected a typo and included the words “time-limited” in the first line.

**Board Question 19:** Please clarify whether Sections 104.530(c) and (d) cover different potential situations –i.e. if a multi-discharger time-limited water quality standard can potentially be something other than a watershed, water body or waterbody segment time-limited water quality standard?

**Agency Response:** See 104.530(c). The Agency deleted Section 104.530(d) and modified 104.530(c) to include multiple discharger time-limited water quality standard petitions.

**Board Question 20:** Identification of Water Body - Please comment on revising the petition content requirements to include the name and some written identifying description of the water body/waterbody segment in addition to the map.

As proposed, Section 104.530 does not explicitly require the identification of the water body/waterbody segment to which the TLWQS would apply in the way that 40 CFR §131.14(b)(1)(i) does. Section 104.530 (a)(1)(4) requires a map but no written identification of the name, location, or some identifying description of the water body/waterbody segment.

Proposed Section 104.565(d)(1)(2)(A)(i) requires the Board to include “identification of the ...water body, or waterbody segment to which the time-limited water quality standard applies”. While a map is very helpful in locating and visualizing the waterbody or waterbody segment, it would not necessarily include a written description with names, locations, river miles, starting and ending points, etc. A map is also not used to specify receiving streams that would be subject to the TLWQS in an NPDES Permit. USEPA’s NPDES Permit Writers Manual does not mention the use of a map in identifying the receiving waters. USEPA, “NPDES Permit Writers’ Manual” (September 2010), EPA- 833-K-10-001.

**Agency Response:** See 530(a)(4). The Agency added the petition content requirement of including a written description of the watershed, water body, and/or waterbody segment along with the already required map of the proposed watershed, water body, or waterbody segment to which the time-limited water will apply.

**Board Question 21:** Identification of Currently Applicable WQS - Please comment on revising the petition content requirements to identify the currently applicable WQS under proposed Section 104.530.

The petition contents include “identification of the pollutant” (proposed section 104.530(a)(2)), but not the currently applicable water quality standard for that pollutant. Proposed section 104.530(a)(6) refers to “failure to meet the water quality standard” but the petition content requirements as proposed do not require the

specific water quality standard to be identified. USEPA's WQS Variance Building Tool lists the "currently applicable water quality standard" among the information to be assembled to apply for a WQS variance. EPA 820-F-17-016 (July 2017) at 1.

**Agency Response:** See 104.530(a)(2). The Agency made the recommended change.

**Board Question 22:** "All" Pollution Minimization Plans:

- (a) Is the requirement at proposed Section 104.530(a)(11) overly broad in requiring a petitioner to submit *all* pollution minimization plans that might have nothing to do with reduction in pollutant loadings to water?
- (b) To narrow the submission of plans to only those relating to water, should the definition in proposed Section 104.515 parallel the federal definition and include "in the context of this Part", such as the following language?

"Pollutant minimization program", in the context of this Part, means a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loading.

Proposed Section 104.530(a)(11) requires a "description and copy of all pollution minimization plans . . ." (Emphasis added.) The federal rule at 40 CFR §131.3(p) narrows the pollution minimization plans to just those "in the context of [40 CFR] 131.14" for water quality variances.

**Agency Response:** See 104.530(a)(11) and 104.515. The Agency included language in 104.530(a)(11) clarifying that petitioners need only to include the description and copy of all Pollution Minimization Programs currently being implement or implemented in the past that are relevant to the relief requested. In addition, the Agency included the definition of "Pollutant Minimization Program" as found in 40 CFR 131.3(p).

**Board Question 23:** Please comment on whether Section 104.530(a)(1)(6) is missing a word or phrase with respect to "compliance":

- (6) data describing the nature and extent of the present or anticipated failure to meet the water quality standard or standards and facts that support compliance with the water quality standards regulation or regulations cannot be achieved by any required compliance date;

**Agency Response:** See 104.530(a)(6). The Agency added the missing language with respect to "compliance."

**104.540 Board Established Classes and Deadlines**

**Board Question 26:** Please explain what IEPA means by “delineates the geographic scope of the time limited water quality standard” in Section 104.540 and whether such delineation follow from the IEPA response under Section 104.535 or recommendation under Section 104.550. Please also clarify which provision of the Act do you refer to in the Board’s authority to make such delineation.

**Agency Response:** See 104.540. The Agency modified this language to require the Board to identify the discharger, multiple discharger, watershed, waterbody, or waterbody segment to which the time-limited water quality applies rather than delineating the geographic scope of the time-limited water quality standard.

#### **104.545 Substantial Compliance Assessment**

**Board Question 29:** In that same Section, please also comment on whether it is appropriate to add after “40 CFR §131.14 and Section 38.5 of the Act” after “its substantial compliance with Section 104.530”, to be consistent with the requirements of the Act.

**Agency Response:** See 104.545(a). The Agency made the recommended change.

#### **104.550 Recommendation and Response**

**Board Question 30:** Please comment on whether it is appropriate, to clarify proposed language in Section 104.550(b)(3), to make the following change?

Agency’s recommendation whether the Board should adopt, adopt with conditions, or deny the ~~petitioner’s~~ requested time-limited water quality standard; and

**Agency Response:** See 104.550(b). The Agency modified this language to clarify it is the Agency’s recommendation that must include the list of items in 104.550(b)(1-5).

#### **104.555 Hearing**

**Board Question 31:** Please explain what IEPA means by “documentation” in Sections 104.555(b)(4).

**Agency Response:** See 104.555(b)(4). For clarity, the Agency included the term “supporting” to describe the type of documentation required to be made available.

**Board Question 32:** To clarify Section 104.555(f), would the following change be acceptable to IEPA?

During the hearing, the Hearing Officer ~~must~~will inform the audience of the issues involved in the decision to be made, ~~the considerations the Board will take into account,~~ and the information that is

particularly solicited from the public.

**Agency Response:** To comply with 40 CFR 25.5, the Agency recommends that the Board not delete the phrase “the considerations the Board will take into account.” This is to ensure compliance with 40 CFR 25.5. After discussions with USPEA, the Agency learned that “considerations” must include the entire record, as well as applicable State law and federal regulations.

**Board Question 33:** To clarify proposed language in Section 104.555(g), would the following change be acceptable to IEPA?

Public comments must be filed within 21 days after the hearing transcript is available, unless the Hearing Officer specifies a different date. Any person may file written comments in a time-limited water quality standard proceeding.

**Agency Response:** See 104.555(g). The Agency made the recommended change.

#### **104.560 Burden of Proof**

**Board Question 34:** Please explain what IEPA means by the “list of persons” in Section 104.565(d)(2)(A)(iii) and whether this the IEPA will provide such a list of person in in its response under Section 104.535 or its recommendation under Section 104.550.

**Agency Response:** See 104.550(b)(5). The Agency drafted language requiring the Agency’s recommendation to include a list of persons that are seeking coverage under the time-limited water quality standard at the time of the Board’s adoption.

**Board Question 35:** CWA Section 101(a)(2) and Non-101(a)(2) Uses - Please comment on proposing language that would differentiate the burden of proof for a TLWQS for 101(a)(2) and non-101(a)(2) uses under proposed section 104.560.

Under proposed Section 104.560(b), the burden of proof only addresses justification “that attainment of the designated use and criterion is not feasible”. This section is derived from the federal language at 40 CFR §131.14(b)(2)(i)(A) for “a use specified in section 101(a)(2) of the [Clean Water] Act”. Section 101(a)(2) specifies the following uses: “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water”. 33 USC 1251(a)(2).

The federal rules on WQS variances also define “non-101(a)(2)” uses, which are defined as “any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water. [See 40 CFR §131.3(q).] Non-101(a)(2) uses include “public water supplies, ...agricultural, industrial, and other purposes including

navigation.” *See* 40 CFR §131.10(a).

Under the federal rule, there is a different burden of proof for variances from section 101(a)(2) uses and non-101(a)(2) uses. While variances from 101(a)(2) uses require the State to demonstrate “that attaining the designated use and criterion is not feasible” [40 CFR §131.14(b)(2)(i)(A)], variances from non-101(a)(2) uses require the State to justify “how its consideration of the use and value of the water for those uses listed in 131.10(a) appropriately supports the WQS variance and term.” 40 CFR §131.14(b)(2)(i)(B)

While the same demonstration under 40 CFR §131.14(b)(2)(i)(A) can be used for both [*See* 40 CFR §131.14(b)(2)(i)(B).], the burden of proof is different as explained above.

**Agency Response:** See 104.560(b). The Agency included language from 40 C.F.R 131.14(b)(2)(i)(B) differentiating the demonstration for a TLWQS for 101(a)(2) and non-101(a)(2) uses.

**Board Request:** Agency to make changes to the “Burden of Proof” Section.

**Agency Response:** See 104.520, 104.530, 104.550, 104.560, 105.565. The Agency updated the language throughout to say to “demonstration” rather than “burden of proof.”

#### **104.565 Opinion and Order**

**Board Question 36:** Permit Compliance Schedule - Please comment on including provisions in the proposed Petition Contents [Section 104.530] and Board Opinion and Order [Section 104.565] that clarify when the petitioner should propose a compliance schedule and the Board should include a permit compliance schedule in the TLWQS.

Under proposed Section 104.565(d)(3), the Board’s order would include requirements and conditions that apply throughout the term of the time-limited water quality standard. Although the length of the proposed term of a TLWQS must be “only as long as necessary” [proposed Section 104.530(a)(14)], the proposed rule does not mention including a permit compliance schedule in the NPDES permit. USEPA suggests addressing the use of a permit compliance schedule in developing a WQS variance.

USEPA, “Water Quality Standards Variance Building Tool – Frequently Asked Questions”, EPA 820-F-17-016 (July 2017).

**Agency Response:** Pursuant to the preamble to 40 CFR 131.14, Water Quality Standards Regulatory Revisions; Final Rule, the Board may designate a time-period to achieve the highest attainable condition in the time-limited water quality standard. The Board can establish an interim highest attainable condition. The Agency may then use its authority found at 35 Ill. Adm. Code 309.148 to incorporate a compliance schedule into the permit with appropriate milestones.

Moreover, states and authorized tribes must specify in the WQS variance itself the interim requirements reflecting the highest attainable condition. Where a permittee cannot immediately meet the WQBEL derived from the terms of a WQS variance, the permitting authority can decide whether to provide a permit compliance schedule (where authorized) so the permittee can remain in compliance with its NPDES permit. Any such compliance schedule must include a final effluent limit based on the applicable highest attainable condition and must require compliance with the permit's WQBEL "as soon as possible." If the compliance schedule exceeds one year, the permitting authority must include interim requirements and the dates for their achievement. For example, if the underlying criterion requires an NPDES WQBEL of 1 mg/L for pollutant X, but the permittee's current effluent quality is at 10 mg/L, the state or authorized tribe could adopt the highest attainable condition of 3 mg/L to be achieved at the end of 15 years and obtain EPA approval if they have met the requirements of § 131.14. Once approved by EPA, the highest attainable condition of 3 mg/L is the applicable criterion for purposes of deriving the NPDES WQBEL and developing the NPDES permit limits and requirements for the facility covered by the WQS variance. For this example, assume the permitting authority is developing the NPDES permit without allowing dilution (i.e., applying the criterion end of pipe). In this case, the facility will need 15 years to implement the activities necessary to meet the limit based on the 3 mg/L. The permitting authority could include a 15 year compliance schedule with a final effluent limit based on 3 mg/L and an enforceable sequence of actions that the permitting authority determines are necessary to achieve the final effluent limit. As discussed later in this section, the documentation that a state or authorized tribe provides to EPA justifying the term of the WQS variance informs the permitting authority when determining the enforceable sequence of actions. See Attachment A of the Agency's Statement of Reasons at 51036-7.

#### 104.570 USEPA Review

**Board Question 37:** To clarify Section 104.570(c)(4), would the following change be acceptable to IEPA?

~~If the Board concludes that a hearing would be advisable, a hearing must be held.~~  
If the Board may hold a hearing if it concludes, in its discretion,

**Agency Response:** See 104.570(c)(4). The Agency made the recommended change.

#### 104.580 Reevaluation

**Board Request:** Provide Board with citation to Wisconsin Variance

**Agency Response:** Link to Wisconsin Phosphorous multiple discharger water quality standard variance:

<http://dnr.wi.gov/topic/surfacewater/phosphorus/variance/>

**Board Request:** Clarify in the rule about reevaluation and what happens if the petitioner does nothing.

**Agency Response:** See 104.580(g). The Agency included language to clarify what happens if the petitioner does not a conduct a reevaluation of the time-limited water quality standard or if the results of the reevaluation are not submitted to the United States Environmental Protection Agency.

**Board Question 38: Demonstration that Permittees Still Qualify**

- (a) Please comment on including provisions in the reevaluation under Section 104.580 that would clarify that individual permittees to be included under a multi- discharger variance need to submit their own information (e.g., public or private discharger, industrial classification, size, effluent quality, existing or needed treatment train, pollutant treatability, available revenue, and feasible progress that has been made). (See EPA-820-F-13-012 at 5-6.)
- (b) Please comment on whether IEPA should be required to file a comment or recommendation regarding a proposed reevaluation.

Proposed Section 104.580 Reevaluation requires that the petitioner and any person granted a TLQWS file for a proposed reevaluation for TLWQS with terms greater than five years. Proposed Section 104.530(b)(2) requires renewals to address progress that has been made, and Sections 104.530(c) and (b) provide for the establishment of eligibility criteria to be used at the time of renewal.

USEPA states,

Any multiple discharger variance should . . . Provide that any renewal of a multiple discharger variance includes . . . 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. EPA-820-F-13- 012 (March 2013) at 5-6.

**Agency Response (a):** See 104.580(a)(2). The Agency added the requirement that for a multiple discharger, watershed, water body, or waterbody segment time-limited water quality standard, discharger specific information must be provided individually.

**Agency Response(b):** See 104.580(d). The Agency included language requiring the Agency to file a recommendation with the Board within 45



days after the petition files its proposed reevaluation with the Board. The Agency is also required to provide an analysis of the petitioner's proposed highest attainable condition.

**Simplifying and Clarifying Language**

**Board Question 1:** Section 38.5 of the Act uses the phrases “substantially compliant” and “substantial compliance”. The IEPA’s proposal includes both those phrases without further clarification on what constitutes “substantially compliant” and “substantial compliance”. Please clarify whether a definition of the terms “substantially” and “substantial” should be included in the rule to clarify the statutory language or if the terms should be removed.

**Agency Response:** See 104.515(b). The Agency included a definition for “Substantial Compliance.”

**Board Question 2:** Please comment whether the following changes would be acceptable to clarify the proposed language?

- (a) Replace “must” with “will” in the sections that refer to the Agency and Board actions, rather than obligations of regulated persons: including Section 104.505(c); 520(b)(2) and (4); 540; 545(a), (b), (c), (d)(2); 550 (a), (d); 555(a), (b)(2), (3) and (4), (c), (e), (f) and (h); 570(a), (c)(2)-(6); and 580 (b)-(e).
- (b) Remove “must” in the sections where it is unnecessary:
  - i. Replace “must apply” with “applies” in Section 104.525(c);
  - ii. Replace “must be” with “is” in Section 104.525(a);
  - iii. and replace “must continue” with “continues” in Sections 104.525(b), (c)(1), (2) and (3),
  - iv. Replace “must not be” with “is not” in Sections 104.525(d);
  - v. Replace “must comply with” with “is subject to” in Section 104.570(c)(5).

**Agency Response (a) and (b):** The Agency updated the draft language to reflect these changes.

**Board Questions:**

- (b) Replace the word “Part” with “Subpart” in Section 104.520(c).
- (c) Replace “and/or” with “or” in Board Note in Section 104.520.
- (d) Replace the word “under” with “as provided in” in Section 104.530(a)(15).

The Agency could not locate the term “under” in 104.530(a)(15).

- (e) Replace the word "required" with "necessary" in Section 104.530(a)(16).
- (f) Insert the word "designated" before the word "use" in Sections 104.560 B (1)-(4).
- (g) Replace "obtaining" with "requesting" in Section 104.575(b) and (c);
- (h) Replace "clerk" with "Clerk of the Board" in Section 104.580(b).

**Agency Response:** The Agency made the recommended changes except for (d) and (g):

- (d) The Agency could not locate the term "under" in 104.530(a)(15)
- (g) After consideration, the Agency is concerned if the word "obtaining" is replaced with the word "requesting," there will be confusion between the requirements of those requesting coverage and the requirements of those that actually receive coverage. Only those that obtain coverage from the Agency are subject to 104.575(b) and (c).

#### Attorney General's Questions

**AG Question 1:** Section 104.570 of the proposed rulemaking entitled "USEPA Review" requires that the Illinois EPA submit the time-limited water quality standard to the United States Environmental Protection Agency ("USEPA") for review and approval before such standard becomes effective for Clean Water Act purposes.

- a. In Subsection b), what is the timeframe within which the Illinois EPA must submit the decision of the USEPA regarding a time-limited water quality standard to the Board?
- b. Subsection c) addresses the steps should USEPA disapprove of the Board's decision regarding a time-limited water quality standard. What are the steps should USEPA approve of the Board's decision? When does a time-limited water quality standard become effective?
  - (i) Subsection c)6) provides that "[t]he Agency shall submit any order issued by the Board modifying a previously granted time-limited water quality standard to USEPA for review and approval." What occurs if the USEPA (i) approves or (ii) disapproves the Board's order modifying a previously granted time-limited water quality standard? When does the time-limited

water quality standard become effective?

**Agency Response (a):** This question was responded to at the hearing. See page 134 of the hearing transcript.

**Agency Response (b):** This question was responded to at the hearing. See pages 134 – 141 of the hearing transcript.

**Agency Response (i):** See 104.570(c)(6). The Agency included language clarifying that, as required in 104.570(b), the Agency will file the United States Environmental Protection Agency's decision with the Board. In addition, the Agency included language clarifying that any further United States Environmental Protection Agency disapprovals may be modified pursuant to 104.570(c).

**AG Question 2:** Section 104.580 of the proposed rulemaking entitled "Reevaluation" sets forth procedures when a time-limited water quality standard has a term greater than five years and the Board sets a schedule for reevaluation.

Subsection e) provides that "[t]he Agency shall submit the Board's reevaluation opinion and order to the United States Environmental Protection Agency for approval within 30 days of issuance of the Board's order." What occurs if the USEPA (i) approves or (ii) disapproves the Board's reevaluation opinion and order? When does the time-limited water quality standard become effective?

**Agency Response:** See 104.580. USEPA does not review and approve or disapprove the results of a WQS variance (time-limited water quality standard) reevaluation in cases where the reevaluation identifies a stringent or more stringent attainable condition. See 80 FR 51038 (August 21, 2015). To ensure that a WQS variance (time-limited water quality standard) reflects the highest attainable condition throughout the WQS variance (time-limited water quality standard) term, states and authorized tribes must adopt a provision specifying that the applicable interim WQS (time-limited water quality standard) shall be either the highest attainable condition initially adopted, or a higher attainable condition later identified during any reevaluation (See proposed rule 104.565(d)(5)). Id. at 51037. The rule requires such a provision only for WQS variances (time-limited water quality standard) longer than five years. Id. This provision must be self- implementing, so that if any reevaluation yields a more stringent attainable condition, that condition becomes the applicable interim WQS (time-limited water quality standard) without additional action. Id. Upon permit reissuance, the permitting authority will base the WQBEL on the more stringent interim WQS consistent with the NPDES permit regulation at § 122.44(d)(vii)(A). Where the reevaluation identifies a condition less stringent than the highest attainable condition, the state or authorized tribe must revise the WQS variance (time-limited water quality standard) consistent with CWA requirements and obtain EPA approval of the WQS variance (time-limited water quality standard) before the permitting authority can derive a WQBEL based on that

newly identified highest attainable condition. Id.

### Midwest Generation Questions

#### Procedural Nature of TLWQS Proceedings

**MG Question 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 be preferable to create a standalone "Part" of the Board's Rules to address TLWQS proceedings?

**Agency Response:** The Agency used the term "non-adjudicatory" in the legislation to maintain consistency with language in 40 CFR 25.5. Time-limited water quality standards are subject to the public participation requirement in 40 C.F.R. 131.20(b) to hold a public hearing in accordance with 40 CFR 25. 40 C.F.R. 131.14. It was the Agency's intention to clarify that a time-limited water quality standard proceeding is not an adjudicatory proceeding or a rulemaking as defined by the Board's rules. If there is confusion as to the nature of a time-limited water quality standard proceeding, the Agency is not opposed to suggestions with respect to moving the proposed rule to another Part or creating a standalone Part.

#### Public Participation

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

**Agency Response:** See 104.520, 104.545(e), and 104.565(e). After considering comments, the Agency modified the use of the term "parties" to "participants." The Agency's intent is to allow non-petitioners to be "participants" in a time-limited water quality standard proceeding. Time-limited water quality standards are subject to the public participation requirement in 40 C.F.R. 131.20(b) to hold a public hearing in accordance with 40 CFR 25. 40 C.F.R. 131.14.

The purpose of the 40 CFR 131.10(b) is to implement the Clean Water Act and provide an opportunity for meaningful public input when states or authorized tribes develop water quality standard, which is an important step to ensure that adopted water quality standards reflect full consideration of the relevant issues raised by the public. 80 FR 51042 (2015).

The Agency believes by allowing non-petitioners to be “participants” in the time-limited water quality standard proceeding, the requirement of allowing for meaningful public input will have been met.

**MG Question 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?

**Agency Response:** At this time, the Agency is unsure what is meant by “general rules of standing.” Once the question is clarified the Agency will attempt to provide a response.

#### **Substantial Compliance Phase**

**MG Question 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?

**Agency Response:** See 104.525 and 104.545. In 104.525, the Agency deleted 104.525(b) and combined the requirements therein with 104.525(c). For clarity, the Agency also modified the applicability of 104.525(c) and 104.545 to include both petitions and amended petitions.

**MG Question 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?

**Agency Response:** When making their decision, the Board will consider all available information in the administrative record.

#### **Petitions to Modify Under Section 104.570(c)**

**MG Question 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)?

**Agency Response:** A “de novo review” is a standard of review that is exercised by a reviewing court/body. Trial courts and administrative tribunals do not exercise “de novo review”; instead they weigh the evidence to see if the petitioner has met his/her burden of proof.

**Appeal Deadlines**

**MG Question 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?

**Agency Answer:** Any person who is adversely affected or threatened by a final Board order entered to obtain judicial review of the Board order by filing a petition for review within 35 days after the date the Board order was served on the person affected by the order. 415 ILCS 5/38.5(j). The Agency is not aware of any regulation precluding an appeal from being filed if one or more petitioners in multi-discharger petition do not want to appeal a Section 104.565 order.

**MG Question 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?

**Agency Response:** See 104.570(c)(6). The Agency reduced the comment period to 21 days. Time-limited water quality standards are subject to the public participation requirement in 40 C.F.R 131.20(b). 40 CFR 131.14. At a minimum, states are to follow the provisions of state law and the United States Environmental Protection Agency’s public participation regulations at 40 CFR part 25. See 80 FR 51043. The purpose of these requirements is to implement the Clean Water Act and provide an opportunity for meaningful public input. Id at 51042. The Agency believes that by providing at least a 21-day comment period after a petition to modified is filed with the Board, the requirement of allowing for meaningful public input will have been met.

**Other**

To address additional concerns raised, the Agency modified language in both Section 104.520(b)(1) and Section 104.540. A summary of the changes are as follows:

**104.520(b)(1)(B):** The Agency clarified that for multiple discharger, watershed, water body, and waterbody segment time-limited water quality standards, a discharger or group of dischargers seeking the time-limited water quality standard may act individually or collectively as a single petitioner when filing a time limited water quality standard petition

before the Board, provided they can meet the demonstration requirements as specified Section 104.560.

**104.520(b)(1)(C):** The Agency included language providing for a multiple discharger, watershed, water body, and waterbody segment time-limited water quality standard, a petitioner may decide at any time to withdraw from a collectively filed petition, and may then file its own individual time-limited water quality standard petition or rejoin a previously filed time-limited water quality standard petition. Additionally, the Agency included language that a petitioner's decision to withdraw from or rejoin a previously filed time-limited water quality standard petition does not invalidate an otherwise valid stay granted under Section 104.525.

**104.520 BOARD  
NOTE 2:**

The Agency included a second Board Note in this Section clarifying that lack of action by one or more dischargers shall not affect the ability of the Board to consider or act on a time-limited water quality standard petition filed before the Board.

**104.540 BOARD  
NOTE:**

The Agency included a Board Note clarifying that the Board retains authority to extend deadlines adopted under Section 104.540 upon a showing of good cause by the petitioner.





TITLE 35: ENVIRONMENTAL PROTECTION  
SUBTITLE A: GENERAL PROVISIONS  
CHAPTER I: POLLUTION CONTROL BOARD

PART 104  
REGULATORY RELIEF MECHANISMS

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104.102	Severability
104.104	Definitions
104.106	Petitions and Hearings

SUBPART B: VARIANCES

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SUBPART C: PROVISIONAL VARIANCES

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**SUBPART D: ADJUSTED STANDARDS**

Section	
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104.420	Request for Public Hearing
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104.424	Hearing Notice
104.426	Burden of Proof
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**SUBPART E: TIME-LIMITED WATER QUALITY STANDARDS**

<u>Section</u>	
<u>104.500</u>	<u>Purpose</u>
<u>104.505</u>	<u>Applicability and Use</u>
<u>104.510</u>	<u>Severability</u>
<u>104.515</u>	<u>Definitions</u>
<u>104.520</u>	<u>General Procedures</u>
<u>104.525</u>	<u>Stay</u>
<u>104.530</u>	<u>Petition Contents</u>
<u>104.535</u>	<u>Agency Response</u>
<u>104.540</u>	<u>Board Established Classes and Deadlines</u>
<u>104.545</u>	<u>Substantial Compliance Assessment</u>
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<u>104.565</u>	<u>Opinion and Order</u>
<u>104.570</u>	<u>USEPA Approval</u>
<u>104.575</u>	<u>Coverage Under Existing Time-Limited Water Quality Standards</u>

<u>104.580</u>	<u>Reevaluation</u>
<u>104.585</u>	<u>Appeal Rights</u>
<u>104.590</u>	<u>Extension</u>

AUTHORITY: Subparts B and C: Implementing Sections 5, 35, 36, 37 and 38 of the Environmental Protection Act (Act) [415 ILCS 5/5, 35, 36, 37, and 38] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27]. Subpart D: Implementing Sections 5, 14.2(c), 22.4, 27, 28, 28.1, 28.5 and 39.5 of the Act [415 ILCS 5/5, 14.2(c), 22.4, 27, 28, 28.1, 28.5 and 39.5] and authorized by Sections 26 and 27 of the Act [415 ILCS 5/26 and 27]. Subpart E: Implementing and authorized by Sections 4, 5, and 38.5 of the Act [415 ILCS 5/5 and 38.5].

SOURCE: Subpart B: Originally adopted as Chapter I: Procedural Rules, Part IV: Variances, in R70-4, at 1 PCB 43, October 8, 1970; amended in R77-16, 29 PCB 503, at 2 Ill. Reg. 16, p. 3, effective May 1974; amended in R79-9, 35 PCB 433, at 3 Ill. Reg. 51, p. 128, effective December 7, 1979; amended in R80-12, 40 PCB 451, at 5 Ill. Reg. 2763, effective March 2, 1981; codified at 6 Ill. Reg. 8357; amended in R84-10, 62 PCB 87, at 9 Ill. Reg. 1409, effective January 16, 1985; old Part repealed, new Part adopted in R00-20 at 25 Ill. Reg. 613, effective January 1, 2001; amended in R04-24 at 29 Ill. Reg. 8803, effective June 8, 2005; amended in R14-21 at 39 Ill. Reg. 2357, effective January 27, 2015; amended in R15-20 at 39 Ill. Reg. 12905, effective September 8, 2015; amended in R16-17 at 40 Ill. Reg. 7973, effective May 20, 2016; amended in \_\_\_ - \_\_\_ at \_\_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

#### SUBPART E: TIME-LIMITED WATER QUALITY STANDARD

##### Section 104.500 Purpose

- a) This Subpart sets forth procedures for obtaining a time-limited water quality standard. A time-limited water quality standard provides relief from water quality standards as set forth in 35 Ill Adm. Code 302 and 303.
  - b) For waters in the Great Lakes basin, petitioners must meet the requirements of both this Subpart and 40 C.F.R. 132. Where regulations in this Subpart and 40 C.F.R. 132 overlap, the more stringent regulation applies.
- cb) This Subpart must be read in conjunction with 35 Ill. Adm. Code 101. In the event of a conflict between the requirements of 35 Ill. Adm. Code 101 and those of this Subpart, the provisions of this Subpart apply.

(Source: Added at \_\_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

##### Section 104.505 Applicability and Use

- a) A time-limited water quality standard proceeding is a non-adjudicatory proceeding.
- b) A time-limited water quality standard may be adopted for a single discharger, multiple dischargers, a watershed, water body, or a waterbody segment.

- c) The extent and coverage of a time-limited water quality standard will shall be set forth in the Board's order as specified in Section 104.565 of this Part.
- d) A time-limited water quality standard, once adopted by the Board and approved by United States Environmental Protection Agency, will shall be the applicable standard for the purposes of the Clean Water Act in developing National Pollutant Discharge Elimination System permit limits and requirements pursuant to 35 Ill. Adm. Code Part 309 for the term of the time-limited water quality standard. Any limitations and requirements necessary to implement the time-limited water quality standard will shall be included as enforceable conditions of the National Pollutant Discharge Elimination System permit for any permittee granted coverage under the time-limited water quality standard by the Board or Agency.
- e) The Agency may use an approved time-limited water quality standard when issuing certifications under Section 401 of the Clean Water Act.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_\_)

#### **Section 104.510 Severability**

If any provision of this Part or its application to any person is adjudged invalid, the adjudication will does not affect the validity of any other provision of this Subpart or the validity of this Subpart this Part as a whole or of any portion not adjudged invalid.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_\_)

#### **Section 104.515 Definitions**

- a) Unless defined in subsection (b) of this Section, words shall have the definitions provided meaning as defined in the Act and 35 Ill. Adm. Code 101. Subpart B.
- b) The following definitions shall apply to this subpart:

"Best management practices" (BMPs) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage,

"Highest Attainable Use" is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Clean Water Act and attainable, based on the evaluation of the factors in 40 C.F.R. 131.10(g) that preclude(s) attainment of the use and any other information or

analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Clean Water Act and sub-categories of such a use are not attainable.

“Non-101(a)(2) use” is any use unrelated to the protection and propagation of fish, shellfish, wildlife, or recreation in or on the water.

“Pollutant Minimization Program” in the context of this Part means a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loading.

“Substantial Compliance” means compliance with substantial or essential requirements of 40 CFR 131.14, Section 38.5 of the Act, and 104.530.

A “Time-limited water quality standard” means a time-limited designated use and criterion for a specific pollutant or water quality parameter that reflects the highest attainable condition during the term of the time-limited water quality standard.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_)

#### **Section 104.520 General Procedures**

- a) A time-limited water quality standard may be sought for multiple uses and multiple parameters by:
- 1) persons who file with the Board a petition for a time-limited water quality standard under Section 38.5 of the Act; and
  - 2) persons who have a pending petition on February 24, 2017 for a variance from a water quality standard under Section 35 of the Act converted into a petition for a time-limited water quality standard pursuant to Section 38.5 of the Act.
- b) Participants Parties
- 1) Petitioner.
    - A) For a single discharger time-limited water quality standard, the person seeking the time-limited water quality standard must be named the Petitioner.
    - B) For multiple discharger, watershed, water body, and waterbody segment time-limited water quality standards, a ~~all~~ dischargers or group of dischargers seeking the time-limited water quality

standard may act individually or collectively as a single petitioner petitioner when filing a time limited water quality standard petition before the Board after the Board has established classes pursuant to Section 104.540, provided they can meet the demonstration requirements as specified Section 104.560.

C) For multiple discharger, watershed, water body, or waterbody segment time-limited water quality standards, a petitioner may decide at any time to withdraw from a collectively filed petition, and may then file its own individual time-limited water quality standard petition or rejoin a previously filed time-limited water quality standard petition. A petitioner's decision to withdraw from or rejoin a previously filed time-limited water quality standard petition does not invalidate an otherwise valid stay granted under Section 104.525.

2) The Agency will ~~shall~~ be a participant.

3) Any person may become a participant in the time-limited water quality standard proceeding.

4) The Board will ~~shall~~ develop and maintain a notice list of persons and organizations that have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by any covered activity. The Board will ~~shall~~ include in the notice list all dischargers or classes of dischargers affected by the water quality standard requested in the petition or amended petition as identified by the Agency pursuant to Section 104.535(b)(1).

c) Filing and Service. Unless otherwise provided by this Subpart ~~Part~~, all documents must be served and filed in accordance with 35 Ill. Adm. Code 101. Subpart C.

BOARD NOTE 1: The Board encourages persons addressing the same pollutants in the same waterbody, waterbody segment or watershed to join in filing a joint petition whenever possible, collectively making satisfying the demonstration burden of proof as outlined in Section 104.555. When multiple petitions addressing the same pollutants in the same waterbody, waterbody segment or watershed are filed separately, the Board may join additional parties pursuant to 35 Ill. Adm. Code 101.403 and/or to consolidate the petitions pursuant to 35 Ill. Adm. code 101.406. The Board also may also incorporate materials and evidence filed in support of one petition as evidence in support of a petition addressing similar issues. 35 Ill. Adm. Code 101.306.

BOARD NOTE 2: Lack of action by one or more dischargers shall not affect the ability of the Board to consider or act on a time-limited water quality standard petition filed before the Board.

(Source: Added at \_\_ Ill. Reg.\_\_\_\_, effective \_\_\_\_\_)

Section 104.525 Stay

- a) The effectiveness of a water quality standard from which relief is sought is shall be stayed as to the following persons from the effective date of the water quality standard until the stay is terminated as provided in this Section:
- 1) any person who has a petition for a variance seeking relief from a water quality standard under Section 35 of the Act converted into a petition for a time-limited water quality standard under Section 38.5 of the Act;
  - 2) any person who files a petition for a time-limited water quality standard within 35 days after the effective date of the water quality standard from which relief is sought; and
  - 3) any person who files a petition for a time-limited water quality standard before the deadline established in a Board order pursuant to Section 104.540. This person must be a member of a class of dischargers who have filed a time-limited water quality standard petition pursuant to Section 104.525(a)(1) or (a)(2) and have been identified in the Board's final order under Section 104.540. ~~any person who is a member of a class of dischargers that is identified in a Board order under Section 104.540 of this Part that concerns a petition for a time-limited water quality standard that was filed within 35 days after the effective date of the water quality standard from which relief is sought and who files a petition for a time limited water quality standard before the deadline established for that class under Section 104.540 of this Part.~~
- b) ~~For any person for which the effectiveness of the water quality standard is stayed under subsection (a), and the Board has determined that his or her petition is in substantial compliance as provided in Section 104.545, the stay shall continue until the Board:~~
- 1) ~~denies the petition and all rights to judicial review of the Board's order denying the petition are exhausted; or~~
  - 2) ~~adopts the time limited water quality standard and the United States Environmental Protection Agency either:~~
    - A) ~~approves the time limited water quality standard; or~~
    - B) ~~disapproves the time limited water quality standard for failure to comply with 40 C.F.R. 131.14.~~
- be) For any person for which the effectiveness of the water quality standard is stayed under subsection (a), and the Board has determined that his or her petition is not in substantial compliance as provided in Section 104.545, the following shall applies:

- 1) if the person files a petition or an amended petition by the deadline established by the Board in Section 104.540, and the petition or amended petition is in substantial compliance as provided in Section 104.545 then the stay shall continue until the Board:
    - A) denies the petition or amended petition and all rights to judicial review of the Board's order denying the petition or amended petition are exhausted; or
    - B) adopts the time-limited water quality standard and the United States Environmental Protection Agency either:
      - i) approves the time-limited water quality standard; or
      - ii) disapproves the time-limited water quality standard for failure to comply with 40 C.F.R. 131.14.
  - 2) if the person files an amended petition by the deadline established by the Board in Section 104.540, but the amended petition is not in substantial compliance as provided in Section 104.545, then the Board will shall deny the amended petition, and the stay shall continue until all rights to judicial review are exhausted.
  - 3) if the person fails to file an amended petition by the deadline established by the Board in Section 104.540, the Board will shall dismiss the original petition and the stay shall continue until all rights to judicial review are exhausted.
- c) If a person other than a person described in subsection (a) of this Section files a petition for a time-limited water quality standard, then the effectiveness of the water quality standard from which relief is sought is shall not be stayed as to that person, but the person may proceed with his or her petition for a time-limited water quality standard by complying with 40 C.F.R. 131.14, Section 38.5 of the Act, and the rules under this Part.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

### Section 104.530 Petition Contents

- a) All time-limited water quality standard petitions or amended petitions must include:
  - 1) A statement indicating the type of time-limited water quality standard sought:



- A) single discharger,
  - B) multiple dischargers, or
  - C) watershed, water body, or waterbody segment;
- 2) identification of the pollutant or water quality parameter the currently applicable water quality standard for the pollutant or parameter for which a time-limited water quality standard is sought;
  - 3) the location of the petitioner's activity and the location of the points of its discharge;
  - 4) a map of the proposed watershed, water body, or waterbody segment to which the time-limited water quality standard will apply, including a written description of the watershed, water body, and/or waterbody segment including the associated segment code;
  - 5) designated uses of the waterbody or waterbody segment identified in subsection (a)(4) of this Section;
  - 6) data describing the nature and extent of the present or anticipated failure to meet the water quality standard or standards and facts that support Petitioner's argument that compliance with the water quality standards regulation or regulations cannot be achieved by any required compliance date;
  - 7) a demonstration that attainment of the designated use(s) and criterion(ia) is not feasible throughout the term of the time-limited water quality standard because of one or more of the factors listed in Section 104.560(ba) of this Part.
  - 8) an identification, including the Board's docket number, of any prior water quality standards variances/time-limited water quality standards issued to the petitioner, watershed, water body, waterbody segment, and if known, the petitioner's predecessors, concerning similar relief;
  - 9) an identification, by name of the permit holder and permit number, of the permits held by dischargers which may be affected by the adoption of the time-limited water quality standard;
  - 10) an identification and description of any process, activity, or source that contributes to a violation of a water quality standard, including the material used in that process or activity

- 11) a description and copy of all ~~P~~ollution ~~M~~inimization Programs ~~plans~~ that are, relevant to the relief requested and are, currently being implemented or ~~have been~~ were implemented in the past;
  - 12) the proposed highest attainable condition of the watershed, water body, or waterbody segment identified in subsection (a)(4) expressed as set forth in Section 104.565(d)(4), including projected changes in the highest attainable condition throughout the proposed term of the time-limited water quality standard;
  - 13) a demonstration of the pollutant control activities proposed to achieve the highest attainable condition, including those activities identified through a Pollutant Minimization Program;
  - 14) the proposed term of the time-limited water quality standard and justification that it ~~that~~ is only as long as necessary to achieve the highest attainable condition, which includes a description of the relationship between the proposed pollution control activities and the proposed term;
  - 15) a proposed reevaluation schedule to reevaluate the highest attainable condition during the term of the time-limited water quality standard if the proposed term of the time-limited water quality standard is longer than five years pursuant to Section 104.580; and
  - 16) any other documentation necessary ~~required~~ to support the petitioner's demonstration as specified ~~burden of proof~~ in Section 104.560 of this Part.
- b) For a watershed, water body or waterbody segment time-limited water quality standard, the petition or amended petition must also include:
- 1) identification and documentation of any cost-effective and reasonable best management practices for non-point source controls related to the pollutant or water quality parameter and watershed, water body, or waterbody segment specified in the time-limited water quality standard petition that could be implemented to make progress towards attaining the underlying designated use and criterion; and
  - 2) if the petition is for an extension of an existing time-limited water quality standard, an explanation of the extent to which the best management practices for non-point source controls were implemented to address the pollutant or water quality parameter subject to the time-limited water quality standard and the water quality progress achieved.
  - c) For a watershed, water body, ~~or~~ waterbody segment, or a multiple discharger time-limited water quality standard, the petition or amended petition may also include proposed eligibility criteria to be adopted by the

Board to be used at the time of renewal or modification of an individual's federal National Pollutant Discharge Elimination System permit or at the time an individual files an application for certification under Section 401 of the federal Clean Water Act to obtain coverage under a Board-approved time-limited water quality standard.

d) For multiple discharger, watershed, water body, or waterbody segment time-limited water quality standards, discharger specific information must be provided individually.

~~For a multiple discharger time limited water quality standard, the petition may include proposed eligibility criteria to be adopted by the Board to be used at the time of renewal or modification of an individual's federal National Pollutant Discharge Elimination System permit or at the time an individual files an application for certification under Section 401 of the federal Clean Water Act to obtain coverage under a Board approved time limited water quality standard.~~

(Source: Added at Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_ )

### Section 104.535 Agency Response

- a) The Agency will ~~must~~ file a response with the Board within 21 days after the filing of the initial petition.
- b) The Agency response will ~~must~~:
- 1) identify the discharger or classes of dischargers, including applicable permit numbers, affected by the water quality standard or standards from which relief is sought in the petition;
  - 2) identify the watershed, water bodies, or waterbody segments, including the receiving stream, affected by the water quality standard or standards from which relief is sought in the petition;
  - 3) identify the appropriate type of time-limited water quality standard, based on factors, such as the nature of the pollutant, the condition of the affected water body, and the number and type of dischargers; and
  - 4) recommend prompt deadlines by which each class of dischargers identified in subsection (b)(1) must file a ~~substantially compliant~~ petition in substantial compliance to stay the effectiveness of a water quality standard or standards pursuant to Section 104.525.
- c) The petitioner or any person may file a question or response to the Agency's response within 14 days after the Agency files its response.

(Source: Added at Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_ )

**Section 104.540 Board Established Classes and Deadlines**

Within 30 days after receipt of a response from the Agency under Section 104.535 of this Part, the Board will ~~shall~~ enter a final order which delineates the geographic scope of identifies the discharger, multiple discharger, watershed, waterbody, or waterbody segment to which the time-limited water quality standard applies, and establishes the discharger or classes of dischargers that may be covered by the time-limited water quality standard and prompt deadlines by which the discharger and dischargers in the identified classes must, for the purposes of the stay, file with the Board either:

- a) a petition for a time-limited water quality standard, if the petition has not been previously filed; or
- b) an amended petition for a time-limited water quality standard, if the petition has been previously filed and it is necessary to file an amended petition to maintain a stay under Section 104.525 of this Part.

BOARD NOTE: The Board retains the authority to extend deadlines adopted under Section 104.540 of this Part upon a showing of good cause by the petitioner.

(Source: Added at Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

**Section 104.545 Substantial Compliance Assessment**

- a) As soon as practicable after entering an order under Section 104.540 of this Part, the Board will ~~shall~~ conduct an evaluation of the petition to assess its substantial compliance with Section 104.530, 40 C.F.R 131.14, and Section 38.5 of the Act.
- b) If the Board determines in a final order that the petition or amended petition is in substantial compliance, the Agency will ~~shall~~ file a recommendation pursuant to Section 104.550.
- c) If the Board determines in an interim order that the petition or amended petition is not in substantial compliance, then the Board will ~~shall~~ identify the deficiencies in the petition or amended petition that must be corrected for the petition to be in substantial compliance with Section 104.530.
- d) If effectiveness of the water quality standard from which relief is sought is stayed pursuant to Section 104.525 and the Board determines in an interim order that the petition or amended petition is not in substantial compliance then:
  - 1) the petitioner must file an amended petition by the deadlines adopted by the Board pursuant to Section 104.540 of this Part; and

- 2) the Board will ~~shall~~ enter, after the deadlines established pursuant to Section 104.540, a final order that determines whether the amended petition is in substantial compliance with Section 104.530.
- e) Any participant party may file a motion for reconsideration pursuant to 35 Ill. Adm. Code 101.520 of a final Board order determining whether the amended petition is in substantial compliance with Section 104.530 of this Part.

(Source: Added at Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

### Section 104.550 Recommendation and Response

- a) Unless otherwise ordered by the hearing officer or the Board, the Agency will ~~must~~ file a recommendation with the Board within 45 days after the Board determines that a petition is in substantial compliance pursuant to Section 104.545.
- b) At a minimum, the Agency's recommendation will ~~must~~ include:
- 1) The Agency's analysis of
    - A) whether the petitioner ~~made met~~ its demonstration burden of proof as specified in Section 104.560 of this Part, including petitioner's proposed highest attainable condition. ~~of the watershed, water body, or waterbody segment;~~
    - B) whether the proposed time-limited water quality standard is consistent with applicable federal laws and regulations, and satisfies the requirements of Section 38.5 of the Act and the rules under this Part; and
    - C) the petitioner's proposed eligibility criteria to be adopted by the Board to be used at the time of renewal or modification of an individual's federal National Pollutant Discharge Elimination System permit or at the time an individual files an application for certification under Section 401 of the federal Clean Water Act to obtain coverage under a Board-approved time-limited water quality standard, when applicable;
  - 2) any information the Agency believes relevant to the disposition of the petition, including any past or pending enforcement actions against petitioner;
  - 3) whether the Board should adopt, adopt with conditions, or deny the petitioner's requested time-limited water quality standard;~~and~~

- 4) the Agency's recommended term of the time-limited water quality standard;
  - 5) a list of persons that are seeking coverage under the time-limited water quality standard at the time of the Board's adoption.
- c) The petitioner or any person may file a question or response to the Agency's recommendation within 14 days after the Agency files its recommendation.
  - d) Concurrent with the filing of the recommendation with the Board, the Agency will ~~shall~~ transmit a copy of its recommendation, including a copy of the time-limited water quality standard petition, to USEPA.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_\_)

### **Section 104.555 Hearing**

- a) The Board will ~~shall~~ hold a public hearing on the petition.
- b) Hearing Notice
  - 1) The Hearing Officer will schedule the hearing, and give the petitioner, participants, and those individuals on the notice list maintained by the Board pursuant to Section 104.520(b)(4) at least 45 days written notice of a hearing.
  - 2) The Clerk will ~~shall~~ publicize notice both on the Board's website and in a newspaper of general circulation in the county where the facility or pollution source is located at least 45 days prior to the hearing, ~~within 45 days of the hearing.~~
  - 3) The notice will ~~shall~~ identify the matters to be discussed at the hearing and will ~~shall~~ include information on the availability of relevant materials and procedures for obtaining further information.
  - 4) For a watershed, water body, or waterbody segment time-limited water quality standard, the notice will ~~shall~~ include at a minimum, a contact with the Illinois Pollution Control and a link to a website where the identification and supporting documentation of any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant or water quality parameter and water body or waterbody segment specified in the petitioned time-limited water quality standard that could be implemented to make progress towards attaining the underlying designated use and criterion can be found.

- c) The Board will ~~shall~~ make the following available to the public at least 30 days before the hearing:
  - 1) reports, documents, and data relevant to the discussion at the public hearing;
  - 2) the Agency recommendation; and
  - 3) for watershed, waterbody, and water body segment time-limited water quality standard petitions, the proposed best management practices for non-point source controls.
- d) Except as otherwise provided in this Section, the hearings will be conducted pursuant to 35 Ill. Adm. Code 101.Subpart F.
- e) The Hearing Officer will ~~shall~~ schedule witnesses in advance to ensure maximum participation and allotment of adequate time. The Hearing Officer will ~~shall~~ reserve some time for unscheduled testimony and may consider reserving blocks of time for major categories of witnesses.
- f) During the hearing, the Hearing Officer will ~~shall~~ inform the audience of the issues involved in the decision to be made, the considerations the Board will take into account, and the information which is particularly solicited from the public.
- g) Public comments must be filed within 21 days after the hearing transcript is available unless the Hearing Officer specifies a different date. Any person may file written comments in a time-limited water quality standard proceeding.
- h) The Illinois EPA will ~~shall~~ notify USEPA of the availability of the hearing transcript and inform USEPA of the comment deadline.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

#### Section 104.560 Demonstration

- a) ~~The burden of proof is on the petitioner.~~
- ba) For a time-limited water quality standard to a use specified in section 101(a)(2) of the Clean Water Act or a subcategory of such a use, the petitioner must provide justification that attainment of the designated use and criterion is not feasible throughout the term of the time-limited water quality standard because of one of the following factors:
  - 1) Naturally occurring pollutant concentrations prevent the attainment of the designated use;

- 2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the designated 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;
  - 3) Human caused conditions or sources of pollution prevent the attainment of the designated use and cannot be remedied or would cause more environmental damage to correct than to leave in place;
  - 4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the designated 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 designated use;
  - 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;
  - 6) Controls more stringent than those required by Sections 301(b) and 306 of the Clean Water Act would result in substantial and widespread economic and social impact; or
  - 7) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.
- b) For a time-limited water quality standard to a non-101(a)(2) use, the Petitioner must provide justification how its consideration of the use and value of the water for those listed in 40 C.F.R. 131.10(a) appropriately supports the time-limited water quality standard and term. Justification consistent with (b)(1-7) of this subsection maybe used to satisfy this requirement.
- c) The petitioner must demonstrate that the term of the time-limited water quality standard is only as long as necessary to achieve the highest attainable condition. Such demonstration must justify the term of the time-limited water quality standard by describing the pollutant control activities to achieve the highest attainable condition, including those activities through a Pollutant Minimization Program.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_\_)

**Section 104.565 Opinion and Order**



- a) Where the Board adopts a time-limited water quality standard, the Board will ~~shall~~ maintain, in its water quality standards, the underlying designated use and criterion addressed by the time-limited water quality standard, unless the Board adopts and United States Environmental Protection Agency approves a revision to the underlying designated use and criterion consistent with 40 C.F.R. §131.10 and §131.11.
- b) A time-limited water quality standard may not be adopted if the designated use and criterion addressed by the time-limited water quality standard can be achieved by implementing technology based effluent limits required under Sections 301(b) and 306 of the Clean Water Act and 35 Ill. Adm. Code Part 304.
- c) The Board may not adopt a time-limited water quality standard if petitioner fails to ~~make~~ meet its demonstration burden of proof as set forth in Section 104.560 of this Part.
- d) All orders adopting a time-limited water quality standard must include:
  - 1) Identification of the pollutant or water quality parameter;
  - 2) Applicability
    - A) Watershed, Water Body, Waterbody Segment, and Multiple Discharger
      - i) identification of the watershed, water body, or waterbody segment to which the time-limited water quality standard applies;
      - ii) eligibility criteria that may be used by new or existing dischargers or classes of dischargers to obtain coverage under the time-limited water quality standard during its duration; and
      - iii) the list of persons covered under the time-limited water quality standard at the time of the Board's adoption.
    - B) Single Discharger
      - i) identification of the water body, or waterbody segment to which the time-limited water quality standard applies; and
      - ii) the person covered under the time-limited water quality standard.

- 3) The time-limited water quality standard requirements and conditions that apply throughout the term of the time-limited water quality standard
  - A) shall represent the highest attainable condition of the watershed, water body, or waterbody segment applicable throughout the term of the time-limited water quality standard based on petitioner's demonstration required by Section 104.560; and
  - B) shall not result in any lowering of the currently attained ambient water quality, unless the petitioner demonstrates that a time-limited water quality standard is necessary for restoration activities pursuant to Section 104.560(ba)(7).
  
- 4) The highest attainable condition of the waterbody or water segment as a quantifiable expression of one of the following:
  - A) For a single discharger and a multiple discharger time-limited water quality standard:
    - i) The highest attainable interim criterion;
    - ii) The interim effluent condition that reflects the greatest pollutant reduction achievable; or
    - iii) 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 Board adopts the time-limited water quality standard, and the adoption and implementation of a Pollutant Minimization Program.
  - B) For a time-limited water quality standard applicable to a watershed, water body, or a waterbody segment:
    - i) The highest attainable interim use and interim criterion; or
    - ii) If no additional feasible pollutant control technology can be identified, the interim use and interim criterion that reflect the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the Board adopts the time-limited water quality standard, and the adoption and implementation of a Pollutant Minimization Program.

- 5) A statement providing that the requirements of time-limited water quality standard are either the highest attainable condition identified at the time of the adoption of the time-limited water quality standard, or the highest attainable condition later identified during any reevaluation consistent with Section 104.580 of this Part, whichever is more stringent.
  - 6) The term of the time-limited water quality standard, expressed as an interval of time from the date of United States Environmental Protection Agency approval or a specific date.
  - 7) For a time-limited water quality standard with a term greater than five years, a specified frequency to reevaluate the highest attainable condition pursuant Section 104.580, that must occur no less frequently than every five years after both Board and United States Environmental Protection Agency approval of the time-limited water quality standard.
  - 8) A provision that the time-limited water quality standard will no longer be the applicable water quality standard for purposes of the Clean Water Act if the petitioner does not conduct a reevaluation consistent with the frequency specified in the time-limited water quality standard or the results are not submitted to the United States Environmental Protection Agency as required by Section 104.580.
- e) Any participant party may file a motion for reconsideration pursuant to the rules in Section 101.520 of a final Board order entered pursuant to this Section.

(Source: Added at \_\_ Ill. Reg.\_\_\_\_, effective \_\_\_\_\_)

#### Section 104.570 USEPA Review

- a) Before a time-limited water quality standard becomes effective for Clean Water Act purposes, the Agency will ~~must~~ submit the time-limited water quality standard to the United States Environmental Protection Agency and obtain the United States Environmental Protection Agency's approval in accordance with Section 303(c) of the Clean Water Act and 40 C.F.R. §§131.20 and 131.21.
- b) The Agency will ~~shall~~ file the United States Environmental Protection Agency's decision with the Board as soon as practicable.
- c) If United States Environmental Protection Agency disapproves of a Board adopted time-limited water quality standard, the petitioner may file a Petition to Modify a Time-Limited Water Quality Standard.
  - 1) The petition to modify shall address all deficiencies raised by United States Environmental Protection Agency and shall be served on all parties

- to the Board's proceeding adopting the time-limited water quality standard.
- 2) The Board will ~~shall~~ automatically incorporate the record from the Board's proceeding adopting the time-limited water quality standard.
  - 3) The Board will ~~shall~~ accept public comments for at least 2130 days after a petition to modify is filed.
  - 4) ~~If~~The Board may hold a hearing if it concludes, in its discretion, concludes that a hearing would be advisable, ~~then a hearing shall be held.~~
  - 5) Unless otherwise ordered by the hearing officer or the Board, the Agency will file a recommendation with the Board within 45 days after the petition to modify is filed with the Board.
- 65) Any order issued by the Board modifying a previously granted time-limited water quality standard is subject to ~~shall comply with~~ Section 104.565.
  - 76) The Agency will ~~shall~~ submit any order issued by the Board modifying a previously granted time-limited water quality standard to the United States Environmental Protection Agency USEPA for review and approval as soon as practicable. As required in subsection b) of this Section, the Agency will file the United States Environmental Protection Agency's decision with the Board. Any further United States Environmental Protection Agency disapprovals may be modified pursuant to this subsection.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_\_)

#### **Section 104.575 Coverage Under Board-Approved Time-Limited Water Quality Standard**

- a) Any discharger that has not obtained a time-limited water quality standard may obtain coverage under a Board-approved time-limited water quality standard by satisfying, at the time of renewal or modification of that person's federal National Pollutant Discharge Elimination System (NPDES) permit or at the time the person files an application for certification under Section 401 of the federal Clean Water Act, the Board-approved criteria for coverage under the time-limited water quality standard.
- b) Any applicant obtaining coverage under a Board-approved time-limited water quality standard must comply with the requirements and conditions that apply

throughout the term of the time-limited water quality standard established pursuant to Section 104.565(d)(3) of this Part.

- c) Any applicant obtaining coverage under a Board-approved time-limited water quality standard must participate in any reevaluations conducted pursuant to Section 104.580 of this Part.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_\_)

### **Section 104.580 Reevaluation**

- a) Proposed reevaluation. When a time-limited water quality standard has a term greater than five years and the Board accordingly sets a schedule for reevaluation:
- 1) The petitioner and any person granted coverage under Section 104.575 must file its proposed reevaluation with the Board according to the reevaluation frequency set forth in the Board's order adopting the time-limited water quality standard pursuant to Section 104.565(d)(7).
  - 2) For multiple discharger, watershed, water body, or waterbody segment time-limited water quality standards, discharger specific information must be provided individually.
  - 3) Petitioner must serve one copy of the proposed reevaluation on the Agency, each participant, and each member of the notice list maintained by the Board pursuant to Section 104.520(b)(4) of this Part.
  - 4) The proposed reevaluation must assess the highest attainable condition using all existing and readily available information.
- b) The Clerk of the Board ~~clerk~~ will ~~shall~~ publicize notice of the proposed reevaluation on the Board's website and in a newspaper of general circulation in the county where the facility or pollution source is located.
- c) The Board will ~~shall~~ accept public comments for a period no less ~~not shorter~~ than 30 days.
- d) The Agency will file a recommendation with the Board within 45 days after the petitioner files its proposed reevaluation with the Board. At a minimum, the Agency will provide an analysis of the petitioner's proposed highest attainable condition.
- e) The Board will ~~shall~~ reevaluate the highest attainable conditions using all existing and readily available information.

- 1) If any reevaluation yields a more stringent attainable condition, that condition becomes the applicable interim time-limited water quality standard without additional action.
- 2) Where the reevaluation identifies a condition less stringent than the highest attainable condition, the Board must:
  - A) revise the time-limited water quality standard consistent with applicable federal laws and regulations, satisfy the requirements of Section 38.5 of the Act and rules under this Part; and
  - B) obtain USPEA approval before the time-limited water quality standard becomes effective for Clean Water Act purposes.
- f) The Agency will ~~shall~~ submit the Board's reevaluation opinion and order to the United States Environmental Protection Agency ~~for approval~~ within 30 days of issuance of the Board's order.
- g) A time-limited water quality standard will no longer be the applicable water quality standard for purposes of the Clean Water Act if the petitioner does not conduct a reevaluation consistent with the frequency specified in the Board's Order pursuant to 104.565 or the results are not submitted to the United States Environmental Protection Agency as required by this Section.

(Source: Added at \_\_ Ill. Reg. \_\_\_\_, effective \_\_\_\_\_)

#### **Section 104.585 Appeal Rights**

*Any person who is adversely affected or threatened by a final Board order entered pursuant to this Subpart may obtain judicial review of the Board order by filing a petition for review within 35 days after the date the Board order was served on the person affected by the order, under the provisions of the Administrative Review Law, and the rules adopted pursuant thereto, except that review shall be afforded directly in the appellate court for the district in which the cause of action arose and not in the circuit court. For purposes of judicial review under this Section, a person is deemed to have been served with the Board's final order on the date on which the order is first published by the Board on its website. [415 ILCS 5/38.5(j)].*

#### **Section 104.590 Extension**

- a) If, at the end of the time-limited water quality standard, the underlying designated use remains unattainable, the petitioner may seek an extension of an existing time-limited water quality standard, consistent with the requirements of this Subpart.

- b) A petition to extend a time-limited water quality standard previously granted by the Board is a new petition for a time-limited water quality standard before the Board, and must be filed in accordance with this Subpart and 35 Ill. Adm. Code 101.Subpart C, including payment of the filing fee pursuant to Section 104.520(c) of this Part and 35 Ill. Adm. Code 101.302(e)(6).
- c) In addition to the requirements of Section 104.530, the petition for extension of the time-limited water quality standard must contain:
- 1) A detailed explanation showing that satisfactory progress toward attaining the designated use has been made during the term of the prior time-limited water quality standard and that additional time is needed to make further progress;
  - 2) a demonstration of whether conditions have changed such that the designated use and criterion are not attainable;
  - 3) a demonstration of whether new or additional information has become available to indicate that the designated use and criterion are not attainable in the future;
  - 4) documentation showing that the requirements and conditions established by the Board that applied throughout the term of the prior time-limited water quality standard have been fully met, or, if any requirement or condition has not been fully met, a detailed explanation of the reason or reasons that the requirement has not been fully met; and
  - 5) a motion to incorporate any material from the record of the prior time-limited water quality standard proceeding in accordance with 35 Ill. Adm. Code 101.306.

(Source: Added at \_\_ Ill. Reg.\_\_\_\_, effective \_\_\_\_\_)





ATTACHMENT A



## **CHAPTER 3**

# **Issue Category: Variances**

**Pages 3-290 – 3-408**

**Response to Public Comments**

**Water Quality Standard Regulatory Revisions**

**August, 2015**

**40 CFR Part 131**

**Docket #: EPA-HQ-OQ-2010-0606**

**This document is part of a larger document.**

## Essay 8.a – Variances: General Support

### A. General Support

The U.S. Environmental Protection Agency (EPA) thanks the commenters for supporting the concept of providing for water quality standards (WQS) variances in the regulation and for the time, effort and thought commenters invested in providing the EPA with meaningful input.

### B. Requirements Result in Additional Administrative Burden

EPA revised the proposed rule to minimize administrative burden while also fulfilling EPA's regulatory objectives. EPA estimates of the potential incremental burden and cost associated with the final rule are summarized in the rule preamble. The complete economic analysis (EA) to the final rule can be obtained from docket No. EPA-HQ-OW-2010-0606. Further discussion of comments on the EA can be found in Essay 12.b.

### C. Water Quality Standards Variance Adoption and Streamlining and Multiple Discharger Variances

Each WQS variance is, itself, a change to WQS because it represents a change to the desired condition of a water body (albeit limited in time and scope) and/ or mandates how it will be expressed in the future. Clean Water Act (CWA) section 303(c) and EPA's implementing regulation at section 131.5 specify that EPA must review and approve or disapprove any new or revised WQS. States and authorized tribes must adopt any WQS variance into their WQS because the National Pollutant Discharge Elimination System (NPDES) permit regulation at section 122.44(d)(vii)(A) requires the permitting authority to develop water quality-based effluent limits (WQBELs) that derive from and comply with all applicable WQS. If a state or authorized tribe does not adopt a WQS variance as a legally binding WQS, the permitting authority would be unable to reflect the less stringent interim WQS of the WQS variance in the NPDES permit. See also EPA's response to code 8.f.i – Variances Applicability: Scope for a full discussion on why WQS variances are WQS.

Although states and authorized tribes must adopt a WQS variance into state WQS, there are ways for a state or authorized tribe to streamline the WQS variance process and reduce the administrative burden associated with adopting WQS variances as legally binding WQS. As explained in the preamble to today's rule, a state or authorized tribe could adopt a single WQS variance for more than one discharger if all the dischargers are experiencing challenges meeting their WQBELs for the same pollutant for the same reason, even if they are not discharging to the same water body. In this situation, the state or authorized tribe may grant one variance that applies to all these dischargers (i.e., a multiple discharger variance) so long as the variance is consistent with the CWA and implementing regulations. The EPA recognized the utility of multiple discharger variances and their distinction from individual discharger variances in the "Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID; EPA-820-B-95-001; March 1995). The EPA provided further clarification regarding multiple discharger variances in the "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule" (75 FR 75790, December 6, 2010). More recently in March 2013, the EPA provided a set of frequently asked questions (FAQ) to assist states and tribes in developing appropriate justifications for multiple discharger variances (see: Discharger-specific Variances on a Broader Scale: Developing

Based on comments, EPA refined the regulatory structure of the final rule to better promote progress by including provisions for WQS variances that maximize accountability while minimizing rulemaking burden for all WQS variances. See section II.E of the preamble to the final rule for more discussion on the regulatory structure of section 131.14.

EPA agrees with the comment that a particular state or authorized tribe may not find the concept of waterbody variances useful or may not be ready to use this tool. States and authorized tribes do not need to utilize WQS variances (waterbody variances or other) as they are a discretionary aspect of the WQS program. However, many states have expressed support and desire for such a tool now. An interested state or authorized tribe may use their discretion to pursue a waterbody variance wherever a WQS variance may be appropriate to deal with more significant or widespread pollution problems, such as where NPS are a major source of pollutant loadings. A waterbody variance could be particularly successful where the state or authorized tribe finds that both point and NPS are willing to collaborate on a strategy to resolve the pollution challenges in the waterbody. If a total maximum daily load (TMDL) has been developed, a state or authorized tribe could choose to utilize a waterbody variance as a regulatory framework within which to establish a TMDL implementation plan specifying requirements, actions and/or milestones for which both point and NPS are accountable to achieve the waste load and load allocations of the TMDL and interim targets for the water body. A waterbody variance could also be useful in situations where the state or authorized tribe does not know whether the designated use and criterion can be attained, but feasible progress toward attaining the designated use and criterion can still be made by implementing known controls and tracking environmental improvements. For example, a state or authorized tribe could adopt a waterbody variance for a persistent organic pollutant in a situation where all dischargers to the waterbody are already implementing pollutant control technologies with the greatest pollutant reduction that is feasible. In such a case, section 131.14(b)(1)(ii)(B)(2) provides for the option of adopting a waterbody variance that requires the permittees to maintain their current pollutant control technology and implement a pollutant minimization program (PMP) while the state addresses NPS of the pollutant.

In situations where a state or authorized tribe uses a waterbody variance to address point and NPS, EPA also recognizes the need for additional accountability. In addition to the provisions that EPA added to the final rule that apply to all WQS variances to maximize accountability and to achieve progress towards the underlying designated use and criteria, the final rule includes several provisions to ensure that a state or tribe consider all sources of the specified pollutant(s) when developing a waterbody variance with input from their public. For example, under the final regulations at section 131.14(b)(1)(ii)(B), EPA has made it clear that the articulation of the HAC for a waterbody variance is different than the articulation for discharger(s)-specific WQS variances because a waterbody variance expresses the desired condition of the entire water body or waterbody segment for the particular pollutant(s) and time period (for limited CWA purposes) and therefore, EPA does not allow the flexibility to express the HAC as an effluent condition. Where a state or authorized tribe chooses to submit a waterbody variance for EPA approval, EPA expects the submission to include the identified HAC during the term of the WQS variance to take into account feasible reductions and pollutant minimization actions. These additional provisions plus the provisions discussed below to increase transparency and consideration of NPS, address concerns by some commenters who criticized waterbody variances for not having rigorous enough requirements for the granting of such variances and sufficient assurances for progress during the term of the variance. EPA carefully considered these comments and developed its final regulations with these comments in mind, intending to ensure that waterbody variances would only be used in appropriate situations and would result in the highest water quality attainable during the term of the variance.

EPA also included provisions intended to increase transparency and consideration of multiple sources of the pollutant(s), including NPS, as they can have a significant influence on whether the designated use and associated criteria for the entire water body are attainable. Specifically, EPA is requiring identification and documentation of any cost-effective and reasonable best management practices (BMPs) for NPS controls related to the pollutant(s) or water quality parameter(s) and water body or waterbody segment(s) specified in the waterbody variance that could be implemented to make progress towards attaining the underlying designated use and criterion. This includes a requirement that states and authorized tribes provide public notice and comment for any such documentation. Also, any subsequent WQS variance for a water body or waterbody segment must include documentation of whether and to what extent BMPs were implemented to address the pollutant(s) or water quality parameter(s) subject to the waterbody variance and the water quality progress achieved. Because waterbody variances relate to the entire water body or waterbody segment and will likely require the cooperation of both point- and NPS of the pollutant(s), these requirements may help identify potential actions that facilitate meeting the HAC specified in the waterbody variance. In addition, requiring states and authorized tribes to provide the public with information about the potential impact of controlling NPS of pollutants increases public transparency and will help inform the re-evaluation process (required in the final rule for any WQS variances greater than five years). See also Response Essay 8.g.v for discussion on the requirement related to BMPs for NPS for waterbody variances.

#### D. Water Quality Standards Variances and “Narrowed” Clean Water Act Purposes

In response to comments on limiting the use of WQS variances to CWA section 402 (NPDES permitting) and when issuing certifications under section 401 of the Act, and not applying variances for TMDL development under CWA sections 303(d) and 305(b), see EPA’s response to code 8.f.ii – Variances Applicability: Approved Variances and Permitting and 303(d).

EPA does not agree with the commenter who states that EPA’s proposed provision to ensure that states and authorized tribes retain the underlying standard in their WQS while still allowing the WQS variance to apply for limited CWA purposes is in conflict with the requirements of CWA section 303(c)(3). The commenter argues that section 131.21(d) “precludes EPA from utilizing a bifurcated approach for implementing WQS by allowing the most recently adopted and approved WQS for a water body (or portion of a water body) to be used for one purpose of the Act and a previously adopted and approved ...WQS for the same waters... to be used for another use of the Act.” EPA does not agree with this commenter’s limiting interpretation of the Act and regulation, and believes the Agency has the authority to apply variances for limited CWA purposes as has been its longstanding practice to do so. That said, the final regulations include section 131.14(a)(3) to make clear that when an approved WQS variance is in place, the applicable standard under sections 131.21(d)-(e) is the WQS variance for developing NPDES permit limits and requirements under 301(b)(1)(C) and for when states or other certifying entities issue certifications under CWA section 401. This addition of section 131.14(a)(3) modifies the interpretation of “applicable standard” for applying sections 131.21(d)-(e) and CWA section 303(c)(3) for WQS variances. To the extent that this is a change in regulatory interpretation, EPA may do so through notice and comment rulemaking as the Agency has done in this rulemaking.

**CERTIFICATE OF SERVICE**

I, Sara G. Terranova, Assistant Counsel for the Illinois EPA, herein certifies that I have served a copy of the foregoing Notice of Filing and the Illinois EPA's Response to Questions Raised at the October 10, 2017 Hearing, upon persons listed on the Service List, by electronic filing with the Illinois Pollution Control Board on November 14, 2017.

Dated: November 14, 2017

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