



# **TIME LIMITED WATER QUALITY STANDARDS?**

**NEW SECTION 38.5 OF THE ENVIRONMENTAL PROTECTION ACT**

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# Legal Disclaimer

- ▶ Information presented herein is for presentation purposes only and is not to be construed as legal advice, or the opinion of the Pollution Control Board, its members or staff

# Summary

- ▶ Preceding Illinois Water Quality Standard Variances
- ▶ Federal Water Quality Standard Variances
- ▶ New Illinois legislation (Section 38.5)
- ▶ Breaking down Section 38.5

# Regulatory Relief: Variance

- ▶ Consistent with federal law
- ▶ Individual variances beyond the limitations prescribed in the Act
- ▶ Arbitrary and unreasonable hardship

415 ILCS 5/35(a)

# Variations

- ▶ Board may impose Conditions
- ▶ 5 year limit (may extend from year to year)

415 ILCS 5/36

# Variations

Two step process:

1. Board final order
2. Transmittal to USEPA for review and approval

# USEPA Concern

- ▶ “The [Clean Water Act] and federal regulations do not allow states to remove uses or modify criteria simply because a state believes that such standards would impose an arbitrary or unreasonable hardship.”

March 15, 2013 Letter from Susan Hedman, Regional Administrator, Region 5, USEPA

PCB 12-94

# USEPA Concern

- ▶ “A state can only remove a designated use . . . if, among other things, the state demonstrates that it is not feasible to attain the designated use for one of the reasons specified at 40 CFR 131.10(g).”

March 15, 2013 Letter from Susan Hedman, Regional Administrator, Region 5, USEPA

PCB 12-94



# Designation of Uses - 40 CFR 131.10(g)

Not feasible because of one of six factors:

1. Pollutant concentrations
2. Intermittent or low flow conditions or water levels
3. Human caused conditions or sources of pollution
4. Dams, diversions or other types of hydrologic modifications
5. Physical conditions related to the natural features of the water body
6. Substantial and widespread economic and social impact

40 CFR 131.10(g)

# 40 CFR 131.14 - Water Quality Standards Variances

- ▶ Authorizes use of “water quality standards variances”
- ▶ Clarifies how water quality standards variances relate to other Clean Water Act programs
- ▶ Specifies the information that the state must adopt in any water quality standards variance

<https://www.federalregister.gov/documents/2015/08/21/2015-19821/water-quality-standards-regulatory-revisions>

# 40 CFR 131.14 - Water Quality Standards Variances

- ▶ Allows States to adopt water quality standard variances
- ▶ A water quality standard variance is
  - ▶ Subject to USEPA review
  - ▶ Identifies the highest attainable condition applicable

# USEPA Authority - 40 CFR 131.5

- ▶ USEPA reviews and either approves or disapproves state-adopted water quality standards
- ▶ Determines whether consistent with 40 CFR 131.14

40 CFR 131.5(a)(4)

# Disapproval of Water Quality Standard Variance

- ▶ If designated use and criterion can be achieved by implementing technology-based effluent limits required under the Clean Water Act

<https://www.federalregister.gov/documents/2015/08/21/2015-19821/water-quality-standards-regulatory-revisions>

# Public Act 99-937

- ▶ Introduced in February 2015
- ▶ House Floor Amendment added new Section 38.5

# Public Act 99-937

- ▶ Allows the Board to adopt, and conduct non-adjudicatory proceedings to adopt, a time-limited water quality standard for a watershed or one or more of the following:
  - ▶ Water bodies,
  - ▶ Waterbody segments, or
  - ▶ Dischargers

415 ILCS 5/38.5(a)

# Public Act 099-0937

- ▶ Passed both Houses December 1, 2016
- ▶ Governor Approved on February 24, 2017
- ▶ Effective Date: February 24, 2017



# What is a Time Limited Water Quality Standard?

- ▶ “Time-Limited Water Quality Standard” has the meaning ascribed to the term “water quality standards variance” in 40 CFR 131.3(o)

415 ILCS 5/3.488

# What is a Water Quality Standards Variance?

- ▶ 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 Water Quality Standards variance

40 CFR 131.3(o)

# Applicability

- ▶ A person who files a petition under Section 38.5
- ▶ A person who filed a petition for a Section 35 water quality standard variance pending on February 24, 2017

415 ILCS 5/38.5(b), (c)

# Applicability

- ▶ Dischargers seeking coverage during the time-limited water quality standard duration for criteria established by Board decision

415 ILCS 5/38.5(i)

# Timeline

- ▶ Person files a petition or has a water variance petition converted

415 ILCS 5/38.5(b)

# Timeline

- ▶ Illinois Environmental Protection Agency Response:
  1. Identifies discharger
  2. Identifies the watershed, water bodies, or waterbody segments
  3. Identifies the appropriate type of time-limited water quality standard
  4. Recommends, for the purposes of subsection (h), prompt deadlines

415 ILCS 5/38.5(e)

# Timeline

- ▶ Board final order establishes:
  1. Discharger or classes of dischargers
  2. Prompt deadlines to file petition

415 ILCS 5/38.5(f)

# Timeline

- ▶ Board must “as soon as practicable” evaluate the current petition to assess substantial compliance with 40 CFR 131.14, Section 38.5, and rules adopted pursuant to that section

415 ILCS 5/38.5(g)



# Timeline

- ▶ If Board determines no substantial compliance
  - ▶ Interim order identifying deficiencies
  - ▶ Amended petition due by deadline set in final order

415 ILCS 5/38.5(h)(3)

# Timeline

- ▶ If no substantial compliance after amended petition
  - ▶ Board order denying petition

415 ILCS 5/38.5(h)(5)

- ▶ If no amended petition filed, Board will dismiss the petition

415 ILCS 5/38.5(h)(6)

# Timeline

- ▶ If Board determines substantial compliance
  - ▶ Agency shall file a recommendation concerning the petition

415 ILCS 5/38.5(g)

- ▶ Case proceeds until Board
  - ▶ denies petition or
  - ▶ adopts time-limited water quality standard, and USEPA review

415 ILCS 5/38.5(h)(4)

# Stay

- ▶ Effectiveness of a water quality standard is stayed as to
  - ▶ Petition for variance seeking relief under Section 35 of the Act
  - ▶ Petition for a time-limited water quality standard within 35 days
  - ▶ Any qualifying discharger identified by a Board order who files a petition before established deadline

415 ILCS 5/38.5(h)(1)

# Stay

- ▶ Stay continues until
  - ▶ Petition is denied and all rights to judicial review are exhausted
  - ▶ Time-limited water quality standard is adopted and USEPA review

415 ILCS 5/38.5(h)(2), (4)-(6)

# Stay

- ▶ If a person other than the three described previously files a petition for a time-limited water quality standard, then the effectiveness of the water quality standard from which relief is sought shall not be stayed as to that person

415 ILCS 5/38.5(h)(7)

# Rules

- ▶ IEPA shall propose rules within six months of effective date
- ▶ Board shall adopt rules no later than nine months after receiving IEPA proposal

415 ILCS 5/38.5(k)

# Rules

- ▶ Until rules effective, Board may adopt time-limited water quality standards to the full extent allowed under Section 38.5 and 40 CFR 131.14

415 ILCS 5/38.5(k)



# Hearings

- ▶ Open to public
- ▶ Comply with 40 CFR 131.14, including
  - ▶ Public notice and participation requirements referenced in 40 CFR 25 and 40 CFR 131.20(b)
  - ▶ Section 38.5
  - ▶ Rules adopted under Section 38.5

415 ILCS 5/38.5(d)

# Water Quality Standards Variances Submissions

- ▶ Requirements include:
  - ▶ Identify pollutant or water quality parameters, and water body to which the variance applies
  - ▶ Requirements that apply throughout the term of the variance
  - ▶ Term of the variance
  - ▶ Supporting documentation

40 CFR 131.14

# Judicial Review

- ▶ Petition for review within 35 days after the date the Board order was served
  - ▶ Served on the date published to website

415 ILCS 5/38.5(j)

# Administrative Procedure Act

- ▶ Public Act created new Section 5 ILCS 100/1-5(c)(4.5)
  - ▶ Section 5-35 of the Illinois Administrative Procedure Act does not apply
  - ▶ Repeated in 415 ILCS 5/38.5(l)

# Pollution Control Board Action

- ▶ <http://www.ipcb.state.il.us/>
- ▶ View Cases → Case Type
- ▶ Time-Limited WQS

Time-Limited Water Quality Standards?  
→  
Time-Limited Water Quality Standards!

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