Wyoming Outdoor Council

POWDER RIVER BASIN
Resource Council

March 27, 2017

Lindsay Patterson
Department of Environmental Quality
Water Quality Division
200 West 17th St., Suite 400
Cheyenne, WY 82002

Re: Proposed Revisions to Chapter 1 – Variances

Dear Ms. Patterson:

Thank you for inviting public comment on the Department of Environmental Quality/Water Quality Division's (WQD) proposal to develop rules to allow for the issuance of discharger-specific variances to water quality based effluent limits (WQBEL) for ammonia, phosphorus and nitrogen. As described in its public notice, the WQD is proposing to amend Water Quality Rules and Regulations, Chapter 1, Surface Water Quality Standards, by adding a new Section 37, Discharger Specific Variances, and adding a new definition of "discharger specific variance." Under the proposed amendment, the WQD would be authorized to grant a variance to an existing water quality based effluent limit for ammonia, nitrogen and phosphorus for a period of up to 20 years in circumstances where meeting the water quality based effluent limit "would result in substantial and widespread economic social impacts in the area of the discharge. " We have several concerns, questions and recommendations regarding the proposed amendment, discussed in detail, below.

Founded in 1967, the Wyoming Outdoor Council is the state's oldest independent conservation organization. Our mission is to protect Wyoming's environment and quality of life for present and future generations. The Outdoor Council has approximately 5,700 members and supporters, the majority of whom reside in Wyoming.

The Powder River Basin Resource Council (Powder River), founded in 1973, is a grassroots landowner and conservation non-profit organization based in Sheridan, Wyoming. Powder River organizes Wyoming citizens to protect our agricultural heritage, rural lifestyle, and our unique land, mineral, water and clean air resources.

Powder River is committed to providing the information and tools necessary to give citizens an effective voice in decisions that will impact their environment and lifestyle.

Background

The U.S. EPA's water quality standards (WQS) rule authorizes states to adopt procedures for the issuance of variances. 40 CFR § 131.14; 80 Fed. Reg. 51020-51050 (August 21, 2015), Section II. E. at 51035. The preamble to the rule explains that, "variances are time limited and intended as a tool to facilitate water quality improvements. Id. at 51035. Variances are intended to be a mechanism to provide time for states, dischargers, and other stakeholders to implement adaptive management approaches that are aimed at improving water quality and ultimately attaining the designated use. Id. Variances are "customized WQS that identify the **highest attainable condition** applicable throughout the WQS variance term." Id. (emphasis added). Variances are narrow in scope and duration and are designed to make progress toward water quality goals. Id.

A water quality standards variance is considered to be a new or modified water quality standard subject to review and approval or disapproval by EPA, and must be reviewed on a triennial basis. 40 CFR § 131.14. Importantly, a variance may not be adopted if the underlying water quality standard/effluent limit can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Clean Water Act. § 131.14(a)(4).

The federal rule requires states to provide a quantifiable expression of the highest attainable condition, and provides the flexibility to express the highest attainable condition as numeric pollutant concentrations in ambient water, numeric effluent conditions, or other quantifiable expressions of pollutant reductions. 80 Fed. Reg. 51037. The draft rule proposed by WQD expresses the highest attainable condition as the interim effluent limit that reflects the "greatest pollutant reduction achievable" that can be achieved "without creating substantial and widespread economic impacts in the area where the discharge is located." Proposed Section 37(c)(ii). Once the greatest pollutant reduction achievable is determined, the discharger must comply with an interim effluent limit that reflects that level of pollution reduction during the term of the variance.

Variances may either be discharger specific, or applicable to a water body or waterbody segment. 40 CFR § 131.14(a). The amendment proposed by Wyoming is a discharger specific variance.

As explained in the preamble to the EPA rule, dischargers seeking variances must submit detailed information justifying (i) why the variance is needed; (ii) the term for the variance; and, the (iii) highest attainable condition. The rule proposed by WQD specifies that the documentation must include a "comprehensive alternatives analysis that demonstrates that the most cost-effective pollutant removal

alternative capable of achieving the water quality based effluent limit would create substantial and widespread economic and social impacts in the area where the discharge is located." Proposed Section 37(c)(i). The documentation must be sufficient to permit the agency to identify the greatest pollutant reduction achievable, and an interim effluent limit that reflects that level, that can be achieved without creating substantial and widespread economic and social impacts.

Variances with terms of greater than 5 years must be reevaluated on a specified frequency not less than every 5 years after EPA approval of the variance. 40 CFR § 131.14(b)(1)(v). The reevaluation must identify – using all existing and readily available information – the highest attainable condition, and provide opportunities to involve the public. Id. When developing procedures that authorize the grant of variances, the state "must adopt a provision specifying that the applicable interim WQS shall be either the highest attainable condition initially adopted, or a higher attainable condition later identified during any reevaluation." 40 CFR § 131.14(b)(1)(iii). This provision must be *self-implementing* so that if any reevaluation yields a more stringent attainable condition, that condition becomes the applicable interim WQS without additional action. 80 Fed. Reg. 51037. Conversely, "[w]here the reevaluation identifies a condition less stringent than the highest attainable condition, the state or authorized tribe must revise the WQS variance consistent with CWA requirements and obtain EPA approval of the WQS variance before the permitting authority can derive a WQBEL based on that newly identified highest attainable condition." Id. The results of the reevaluation must be submitted to EPA within 30 days of completion of the reevaluation. Id.

Specific Concerns

Although the WQD's proposed rule tracks the EPA's rule in many respects, we see areas where the state's rule could be improved and clarified.

A variance of up to 20 years is excessive and unnecessary

WDQ is proposing to allow the issuance of variances of up to 20 years with an opportunity for an unlimited number of renewals. We are concerned that the issuance of a variance of up to 20 years could undermine progress toward compliance with the applicable effluent limits or underlying water quality standards and therefore support reducing the maximum duration of a variance under the rule to 10 years, which was the EPA's recommendation in its draft Water Quality Standards rule. 78 Fed. Reg. 54518, 54534 (September 4, 2013). We are concerned that a discharger granted a variance for 20 years would lack sufficient incentives to seek and achieve meaningful pollutant reductions and would be temped to consider the variance as "problem solved" rather than a problem still needing to be solved. If the WQD insists on allowing variances of up to 20 years, we would recommend strengthening the procedures and process governing the 5-year reevaluations. This topic is discussed on pages 7-8, below.

Public vs. private dischargers

We appreciate the challenges faced by small municipalities bringing their POTWs into compliance with technology or water quality-based effluent limits. These challenges can be exacerbated by the upcoming adoption of more stringent criteria for ammonia, and new criteria for phosphorous and nitrogen expected in the future. Thus we support the limited use of narrowly crafted and time-limited CWA variances that could be granted to small towns to allow more time to come into compliance with applicable effluent limits. Due to limited resources, it appears that the state's smallest towns will face the greatest challenges with compliance; we therefore support the availability of variances to towns with small populations, but are reluctant to support expanding the availability of variances to Wyoming's largest cities.

On the other hand, we have difficulty accepting the notion that variances from Clean Water Act requirements should be available to private, for profit entities. Compliance with environmental (and other) laws is an accepted cost of doing business, and the costs of pollution controls should be borne by the polluter and not the general public. Moreover, the capital costs of pollution control technology can in most instances be written off. Since the passage of the Clean Water Act in 1972, Wyoming has prospered despite the absence of a process allowing for variances; we see no need to make them available now. The goal of the CWA is to reduce and ultimately end pollution of the nations' surface waters—variances for commercially owned dischargers would take us in the opposite direction.

The Need for a Pollutant Minimization Program

WDQ's proposed rule fails to include provisions requiring a discharger to implement a Pollutant Minimization Program, or PMP. According to EPA, a "Pollutant Minimization Program … is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings." 40 CFR § 131.3(p). A PMP is an essential element of EPA's variance rule: "Where the state or authorized tribe cannot identify an additional feasible pollutant control technology, this rule provides options for articulating the highest attainable condition using the greatest pollutant reduction achievable with optimization of currently installed pollutant control technologies and adoption and implementation of a Pollutant Minimization Program (PMP)." 80 Fed. Reg. 51037; 40 CFR § 131.14(b)(1)(ii)(A)(3). Regardless of the option selected by the WQD, a PMP should be required by WQD to ensure that the discharger has implemented all practicable pollution minimization measures as a condition of receiving a variance.

As described in the preamble to the EPA's final WQS rule:

> Pollutant control technologies represent a broad set of pollutant reduction options, such as process or raw materials changes and pollution prevention technologies, practices that reduce pollutants

> prior to entering the wastewater treatment system, or best management practices for restoration and mitigation of the water body. This option requires states and authorized tribes to adopt the PMP along with other elements that comprise the highest attainable condition. As part of the applicable WQS, the permitting authority must use the PMP (along with the quantifiable expression of the ``greatest pollutant reduction achievable'') to derive NPDES permit limits and requirements.

80 Fed. Reg. 51037.

The preamble to the EPA's WQS *draft* rule explains that:

> Rather than identifying the highest attainable interim use and interim numeric criterion, a state or tribe may choose to specify in its variance that the applicable interim water quality standard shall be defined by a numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance. Adopting a numeric effluent condition that reflects the highest attainable condition is reasonable because the resulting instream concentration reflects the highest attainable interim use and interim criterion and, therefore, the interim numeric effluent condition is acting as a surrogate for the interim use and interim criterion. If current effluent quality represents the highest attainable condition for a specific permittee(s), then this would become the interim requirement during the term of the variance. In situations where a variance addresses a pollutant(s) for which no feasible wastewater treatment option can be identified, an interim numeric water quality-based effluent condition reflecting the levels currently achievable and a requirement to develop and implement a Pollutant Minimization Program (PMP) together would constitute the highest attainable effluent condition.

78 Fed. Reg. 54518, 54534 (September 4, 2013).

By adopting the second option available under the EPA rule, §131.14(b)(1)(ii)(A)(2) ("The interim effluent condition that reflects the greatest pollutant reduction achievable"), the WQD's proposed rule improperly builds into the process an assumption that the current effluent quality at the facility seeking the variance represents the "highest attainable condition." But that may or may not be the case. Whether existing effluent quality represents the highest attainable condition is a fact-based determination that must be made using all available information, and should not be written into the WQD's rule as the *de facto* standard. The WQD rule should be revised to allow for the possibility that the existing effluent quality falls short of representing the highest attainable condition, and should provide for the development of a PMP in those situations.

Definition of discharger specific variance

As part of this rule making, the WQD proposes the following definition: "'Discharger specific variance' means a time-limited designated use and criterion granted to a specific permittee that reflects the greatest pollutant reduction achievable."

To more accurately express the requirement that achieving the highest attainable condition is the standard for the grant of variances, we recommend that the definition be revised as follows:

"'Discharger specific variance' means a temporary change to a designated use and water quality criterion granted to a specific permittee that reflects the highest attainable interim effluent condition based on the greatest pollutant reduction achievable with optimization of currently installed pollutant control technologies and adoption and implementation of a Pollutant Minimization Program (PMP).

Documentation requirements should be specified

We believe the rule would be strengthened by the addition of a section that describes the specific documentation that must be provided by the permittee, based on the requirements of the EPA rule. For example, proposed Section 37(f) requires that, "[t]he duration of the variance shall only be as long as necessary to achieve the underlying ammonia and/or nutrient effluent limit." Although this is a requirement derived from the EPA rule, the EPA rule also requires the discharger to provide:

> Documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition. Such documentation must justify the term of the WQS variance by describing the pollutant control activities to achieve the highest attainable condition, including those activities identified through a Pollutant Minimization Program, which serve as milestones for the WQS variance.

40 CFR § 131.14(b)(2)(ii).

Adding language to the WQD rule that requires this additional documentation would serve two important objectives: the additional information would facilitate public review and likely expedite approval by EPA.

Qualifications of document preparers

We recommend that the rule (or subsequently related guidance documents) specify that the information provided to the WQD to support the variance request should be prepared by licensed professionals in the fields of civil engineering and accounting.

The issuance of a variance should be discretionary

As proposed, Section 37(c) states that, "a variance shall be granted" if the circumstances described in 37(c)(i) and (ii) are met. We believe this is wrong. Under the EPA rule, the issuance of a variance is a discretionary act and not required: "States may adopt WQS variances, as defined in § 131.3(o). 40 CFR § 131.14. We suggest that the word "shall" in 37(c) be changed to "may" to clarify that the issuance of a variance resides within the discretionary powers of the agency. Even where the circumstances described in 37(c)(i) and (ii) are met, there may reasons (e.g., the presence of a threatened or endangered species) that would militate against the issuance of a variance.

The WQD Should Strengthen the Requirements for Reevaluation of Variances

A robust and transparent reevaluation process is essential to ensure that continued progress is being made by the discharger to reduce pollution needed to achieve the underlying water quality standards. In an effort to ensure that a variance did not become the de facto water quality standard, the EPA's draft WQS rule had proposed a maximum variance term of 10 years, but in response to public comment, the 10-year maximum term was removed from the final rule, due in part to the perceived robustness of the reevaluation process. The EPA concluded that:

> [E]stablishing specific reevaluation requirements for WQS variances longer than five years is the best way to achieve EPA's policy objective of active, thorough, and transparent reevaluation by states and authorized tribes while minimizing rulemaking burden. The reevaluation requirements in this rule eliminate the need to specify a maximum WQS variance term because they ensure the highest attainable condition is always the applicable WQS throughout the WQS variance term, thus driving incremental improvements toward the underlying designated use. These requirements also ensure the public has an opportunity to provide input throughout the WQS variance term.

80 Fed. Reg. 51039.

To ensure adequate opportunities for public participation in the reevaluation process, the EPA's WQS rule requires a variance to contain a "provision specifying how the State intends to obtain public input on the reevaluation." 40 CFR § 131.14(b)(1)(v). In contrast, proposed Section 37(g)(iii) states merely that "[t]he public shall be provided a minimum of 30 days to review and comment on the reevaluation." We recommend that this section be strengthened to express how the WQD intends to solicit public comment, for example: "The WQD shall solicit public comment using all available methods, including but not limited to electronic notice to appropriate list serves, publication in local and statewide newspapers and websites, and shall provide a minimum of 30 days to review and comment on the

reevaluation." We also recommend that the WQD provide in its rule governing reevaluations an opportunity for a public hearing if requested by 25 or more individuals or by established non-governmental organizations.

Proposed Section 37(g) provides that "[t]he department shall reevaluate each variance at least every five years using all existing and readily available information." This section omits language contained in the EPA rule that is critical to the proper operation of the variance program. The EPA rule states that "[f]or a WQS variance with a term greater than 5 years, a specified frequency to reevaluate the highest attainable condition using all existing and readily available information…" 40 CFR § 131.14(b)(1)(v). The critical difference is that the EPA rule specifically requires an evaluation of the highest attainable condition, based on an investigation of whether pollution reduction methods and/or technologies may have become available during the 5 year term of the variance that could now be incorporated into the next term. However, rather than seeking interim progress, the WQD's rule appears to be structured in such a way that places the focus on whether the underlying water quality standard can be met by cost effective pollution control measures without causing substantial and widespread rather than on whether there may be cost effective pollution control measures that can be implemented in the next 5-year term that can achieve incremental progress toward meeting the standards. To obtain a renewal, the applicant should be required to demonstrate that reasonable efforts and progress are being made to ratchet down pollutants entering surface waters throughout the term of the variance.

Due to the length of the maximum proposed variance term (up to 20 years) and the possibility for an unlimited number of renewals, we are very concerned that the WQD could issue what amounts to a blank check for 20 years (or longer based on unlimited renewals) to a facility to discharge pollutants to Wyoming's surface waters without including adequate incentives to compel pollution reduction actions. The EPA rule is designed to address this concern; we hope the WQD rule can be modified to clearly express the intent of variances is to improve water quality:

> The final rule requirements ensure that the public has the opportunity to work with states and authorized tribes in a predictable and timely manner to search for new or updated data and information specific to the WQS variance that could indicate a more stringent highest attainable condition exists than the state or authorized tribe originally adopted. ``New or updated data and information'' include, but are not limited to, new information on pollutant control technologies, changes in pollutant sources, flow or water levels, economic conditions, and BMPs that impact the highest attainable condition.

80 Fed. Reg. 51039.

The information, data, analyses, etc., submitted by the variance holder in connection with a reevaluation, and any information developed by the WQD in response, should be readily available to the public free of charge and without having to request the records under the Wyoming Public Records Act.

We suggest a review of Proposed Section 37(g)(i)(D). It states: "If the requirements identified in this paragraph are not met, the variance shall expire and the permittee shall be required to meet the water quality based effluent limits." We have two comments:

1. To ensure clarity, rather than saying "this paragraph," we recommend including a reference to the specific section.
2. Will non-compliance with the terms of the variance result in expiration of the variance as suggested by this section?

The rule should clarify that a variance is subject to triennial review.

The preamble to the EPA WQS rule, and the rule itself, states that: "WQS variances remain subject to the triennial review and public participation requirements specified in Sec. 131.20." 80 Fed. Reg. 51039; 40 CFR § 131.14. The WQD's rule should specify that variances that revise designated uses and/or water quality criterion shall be subject to triennial review.

Variances should not lower existing quality or impair existing uses.

The rule should clarify that a discharger specific variance issued under proposed Section 37 shall not result in the lowering of the currently attained ambient water quality, or impair existing uses. 40 CFR § 131.14(b)(1)(ii).

Anti-degradation policy

We recommend that the WQD include a provision in Section 37 that would require the permittee to address how the issuance of a variance would comply with the DEQ/WQD's September, 2013, antidegradation implementation policy and procedures.

Supporting documentation: Frequently Asked Questions

We recommend that the FAQs be revised to clarify that not only will a variance result in a change to water quality based effluent limits, but also in changes to a designated use or to a water quality criterion, or both, for the term of the variance. We believe it is important for the public to fully understand the ramifications of this proposal, and suggest a clear explanation of the consequences of the grant of a variance would be helpful, for example, by explaining that a variance could result in the removal of protection for aquatic life, primary contact recreation, or drinking water for 20 years.

Thank you for considering these comments. Please keep us apprised of any future public comment opportunities regarding the proposed amendments to Chapter 1. We would be happy to meet with you at a mutually convenient time to discuss our concerns.

Sincerely,

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