**340-041-0059**

**Water Quality Variances**

**[Inclusion of language to clarify intent and policy will be added here—** *i.e. provides a temporary mechanism by which permits can be written to meet a modified water quality standard, encourages maintenance of original standards as goals rather than removing designated uses and associated criteria that may be ultimately attainable, ensures the highest level of water quality achievable during the term of the variance, etc.***]**

 (1) Applicability. The Commission or Department may grant point source variances from the water quality standards in this Division where the requirements in sections (1) through (8) of this Rule are met.

(a) The water quality variance may apply only to the point source for which the variance is requested and only to the pollutant or pollutants specified in the variance; the underlying water quality standard otherwise remains in effect.

(b) A water quality standard variance may not be granted if:

(A) The standard will be attained by implementing technology-based effluent limits required under sections 301(b) and 306 of the federal Clean Water Act, and by the discharger implementing cost-effective and reasonable best management practices for nonpoint source control;

(B) The variance would likely jeopardize the continued existence of any threatened or endangered species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat;

(C) The variance would result in an unreasonable risk to health;

(D) A source requesting a variance is a new facility, unless a proposed variance for a new facility is necessary:

1. To prevent or mitigate a threat to public health or welfare;
2. For environmental restoration; or
3. For remedial action pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq. as amended through July 1, 2006), or the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. 6901 et seq. as amended through July 1, 2006).

 (2) Conditions to Grant a Variance. Before the Commission or Department may grant a variance, the permittee must demonstrate that attaining the water quality standard is not feasible for one of the following reasons:

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

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

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

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

(e) 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 unrelated to water quality preclude attainment of aquatic life protection uses;

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

(3) Variance Duration.

 (a) The duration of the variance period must be specified as part of each variance and shall not exceed the term of the NPDES permit. If the variance term is the same as the permit term, then the variance shall stay in effect as long as the permit is in effect. The permittee must be in compliance with the effluent limitation sufficient to meet the underlying water quality standard upon the expiration of the variance;

(b) The variance is effective only after EPA approval. The effective date will be specified in a NPDES permit or order.

 (4) Variance Submittal Requirements. To request a water quality standards variance, a permittee must submit the following information to the Department for approval:

(a) A demonstration that attaining the water quality standard for a specific pollutant is not feasible based on one or more of the conditions found in section (2) of this Rule;

(b) Sufficient water quality data and analyses to characterize ambient and discharge water pollutant concentrations; and

(c) A proposed pollutant minimization plan, including proposed pollutant offsets or trading and/or other proposed pollutant reduction activities; unless the Department makes a specific determination that such information is not required.

(5) Variance Permit Conditions.

The Department shall establish and incorporate into the discharger’s NPDES permit all conditions necessary to implement the approved variance. Such permit conditions shall, at a minimum, require:

 (a) A permit limit or requirement representing the best achievable effluent quality based on discharge monitoring and which is no less stringent than that achieved under the previous permit;

(b) The implementation of a pollutant minimization plan, pollutant offsets or trading, and/or other pollutant reduction activities submitted in accordance with section (4)(c) above;

(c) That reasonable progress is made toward attaining the underlying water quality standards through appropriate conditions to be determined by the Department. Such conditions may include, but may not be limited to, requirements for the permittee to conduct additional studies, monitoring or management practices.

 (6) Public Notification Requirements.

 (a) If the Department proposes to grant a variance, it must provide public notice of the proposed variance and an opportunity for public comment and hearing. The public notice requirement may be satisfied by including the proposed variance in the public notification of a draft NPDES permit;

(b) The Department will publish a list of all variances to state water quality standards that have been granted pursuant to this Rule. Newly granted variances will be added to this list within 30 days of their effective date. The list will identify: the person or entity to which the variance was granted; the underlying water quality standards to which the variance was granted; the water(s) affected; the effective date and duration of the variance; the allowable pollutant limit granted under the variance; and how to obtain additional information about the variance.

(7) Variance Renewals. A variance may be renewed if the permittee makes a renewed demonstration pursuant to section (2) of this Rule that attaining the water quality standard is not feasible, and demonstrates that all requirements of the variance are being met. Renewal of the variance shall be denied if the applicant does not comply with the conditions of the original variance or otherwise does not meet the requirements of this Rule.

**OPTION 2 DISCUSSED ON 1/15/10 CONFERENCE CALL**

(8) Individual variances for background pollutants. The Department expects that the justification for a variance required in (2)(a) and (2)(c) would be met and that a source would qualify for a variance under the following circumstances:

(a) The pollutant concentration in the intake water body exceeds an applicable human health water quality criterion due to naturally occurring pollutant concentrations, human-caused conditions or sources of pollution, or a combination of naturally occurring and human-caused conditions or sources of pollution;

(b) The mass of the pollutant in the discharge does not exceed the mass that is attributable to the pollutant in the facility’s intake water;

(c) The increase in the pollutant’s concentration after mixing with the water body does not increase the concentration in the water body by more than three percent;

(d) The cumulative increase in the pollutant’s concentration under variances granted under this paragraph (8)(d) at any point in the water body after discharges mix with the water body does not exceed ten percent;

(e) The discharge of the pollutant complies with all applicable technology-based effluent limits, other applicable water quality standards, and the provisions of any applicable total maximum daily load; and

(f) No other technologically and economically feasible means that would not have significant adverse environmental consequences are available to the source to reduce the pollutant concentration in its discharge to the applicable water quality criterion.

(9) Variances for Multiple Dischargers or Water Bodies.

(a) If the Department determines that a multiple discharger or water body variance is necessary to address widespread water quality standards compliance issues, including the presence of human-caused or naturally high background levels of pollutants in a watershed, the Commission may adopt a variance for multiple dischargers or water bodies through a separate rule provision.

(b) Before a multiple discharger or water body variance is adopted, the Department must demonstrate that attaining the water quality standard(s) is not feasible for one of the reasons identified in section (2) of this Rule;

(c) A multiple discharger or water body variance must include: the applicability and duration of the variance; the procedures for dischargers to follow in applying for coverage under the variance; any permit conditions necessary to implement the variance; and renewal requirements;

(d) A multiple discharger or water body variance, as a provision of DEQ’s water quality standards, is not effective until it is approved by EPA.

**OPTION 1 DISCUSSED ON 1/15/10 CONFERENCE CALL**

**340-041-0061**

**Other Implementation of Water Quality Criteria**

1. ……………..

*[Section 2 below will replace the current variance language]*

1. Multiple Discharger Variance for Non-Contact Cooling Facilities. With the adoption of this rule, the Commission determines that permittees which use multiple pass cooling and cannot meet the water quality toxic criteria for human health due to either natural or human-caused pollutants which already exceed water quality criteria in a waterbody will not be required to meet calculated water quality-based effluent limits. For purposes of this section, “multiple pass cooling water” means water used for cooling that does not come into direct contact with any raw material, intermediate product, final product or waste product, not including additives, and makes at least two passes for the purpose of removing waste heat. The alternative requirements and information required to be submitted by the permittee are described in the following subsections.
2. Findings of the Commission.
3. The Commission finds that where pollutant levels exceed human health criteria and are of natural origin, and where those pollutants are in the facility’s intake water, and the facility uses a non-contact multiple pass cooling system, that the naturally-occurring pollutant levels result in the facility being unable to meet the applicable water quality standards addressing human health toxic pollutants. Further, the Commission finds that remedying these naturally-occurring pollutants would result in unwarranted environmental impact on other water quality standards parameters, including temperature, and could adversely impact water quantity.
4. The Commission finds that where pollutant levels exceed human health criteria and are of human origin, and where those pollutants are in the facility’s intake water, and the facility uses a non-contact multiple pass cooling system, that the anthropogenic pollutant levels result in the facility being unable to meet the applicable water quality standards addressing human health toxic pollutants. Further, the Commission finds that remedying these pollutants of human origin would result in unwarranted environmental impact on other water quality standards parameters, including temperature, and could adversely impact water quantity.
5. Conditions to Grant a Background Concentration Allowance. Permittees will be covered under this provision and the conditions and requirements described in this section will be included in their NPDES permit where the following conditions exist;
6. The mass of the pollutant in the discharge does not exceed the mass that is attributable to the pollutant in the facility’s intake water;

1. The increase in the pollutant’s concentration after complete mixing with the waterbody does not significantly increase the concentration in the waterbody;
2. Remedies to reduce the pollutant of concern would cause more environmental damage to correct than to leave in place; and
3. The pollutant's concentration after mixing with the waterbody does not pose an unreasonable risk to human health.
4. Demonstration for Request. An applicant is required to submit documentation and data necessary to support a background concentration allowance. The application must be included with the applicant’s renewal application and include all relevant information that demonstrates the following;
5. Sufficient data to characterize natural or human-caused background pollutant contributions to water quality criteria violations; and
6. Treatment or alternative options considered to meet water quality standards, and a description of why these options are not technically feasible;
7. [Others?]
8. The facility must continue to achieve the lowest effluent concentration possible under current operations and treatment based on facility-specific data.
9. If the Department finds that the facility meets the requirements of this section, the terms and conditions described in this section will be included in the facility’s NPDES permit for the duration of the permit. DEQ may extend coverage under this provision in subsequent permit terms upon review of updated information submitted in renewal applications.