

June 8, 2010

To: DEQ Staff  
From: Nina Bell, Northwest Environmental Advocates  
Re: Variances

Here are a list of issues that, as far as I can see, DEQ has yet to address regarding variances. My other comments are submitted in the text of the Variance issue paper, May 12<sup>th</sup> draft.

### **GLI-Related**

1. DEQ points to and relies upon the GLI but has not explained how the GLI applies to Oregon when Oregon is not a GLI state.
2. DEQ points to portions of the GLI but EPA has specifically cautioned against using portions of the GLI without considering the appropriate context (ANPRM at 36759). EPA's reasoning becomes clear when one compares the proposed provisions of Oregon's variance procedure with the GLI. The GLI provisions related to variances include aspects that Oregon is not proposing to include in its rules, such as: a mandatory three-year review (GLI Pt. 132, App F, Procedure 2 §B); a permit reopener provision (GLI Pt. 132, App F, Procedure 2 §F.4); a requirement that the permittee characterize the extent of any increased risk to human health and the environment from granting the variance compared to the underlying water quality standards (GLI Pt. 132, App F, Procedure 2 §C.2.b); a requirement that the State conclude that such an increased risk is consistent with protection of public health, safety, and welfare (GLI Pt. 132, App F, Procedure 2 §C.2.b); a requirement for reasonable progress towards attaining standards (GLI Pt. 132, App F, Procedure 2 §F.2); an explicit reference to meeting the antidegradation policy (GLI Pt. 132, App F, Procedure 2 §C.2.a); a prohibition against variances for new or recommending dischargers (GLI Pt. 132, App F, Procedure 2 §A.1); and a requirement that all conditions be incorporated into the permit of the applicant seeking the variance (GLI Pt. 132, App F, Procedure 2 §G). Instead, DEQ proposes to cherry pick portions of the GLI that would make issuing variances less onerous, without concurrently ensuring appropriate environmental and human health protections. DEQ has not explained why it thinks this is appropriate or legal.
3. Under the GLI, NPDES-permitted point sources face a host of restrictions that are a backdrop to the GLI variance procedures. Specifically, the GLI limits the expected load reductions from nonpoint sources that states can assume in issuing TMDLs. The GLI requires that these load allocations for nonpoint sources be set at existing pollutant loadings if changes, i.e. reductions, are not expected to occur (GLI Pt. 132, App F, Procedure 3 §B.3.b.i & ii). In other words, TMDLs issued in GLI states are not allowed to factor unrealistic and unexpected pollutant load reductions from nonpoint sources, thereby increasing expected load reductions from point sources. In contrast, Oregon TMDLs routinely assume significant reductions by nonpoint sources in establishing WLA. Similarly, TMDLs in GLI states must account for accumulation of toxics in

sediments (GLI Pt. 132, App F, Procedure 3 §B.7) and there are severe restrictions on mixing zones for bioaccumulative chemicals of concern (GLI Pt. 132, App F, Procedure 3 §C.1) among other stringent provisions that apply to NPDES dischargers. DEQ has not explained its rationale for cherry picking portions of the GLI without taking into consideration the far more onerous requirements the GLI places on NPDES sources.

### **Time period of variances and triennial review.**

1. EPA has consistently defined variances as lasting for three years, sometimes up to five. *See, e.g.*, 2001 CSO Guidance at 34; Guidance for State Implementation of WQS for CWA Section 303(c) (2) (B)1988 at 6; Definition of WQS Terms 1979 at 1; National Assessment of State Variance Procedures 1990 at 1.
2. Where it has allowed variances to last beyond three years, it has not allowed them to be longer than five years. *See, e.g.*, GLI Pt. 132, App F, Procedure 2 §B; 2001 CSO Guidance at 34.
3. Where a variance is allowed to go beyond three years, a three-year review from the date of the last triennial review submission to EPA is required. *See, e.g.*, 40 CFR §131.20(a); GLI Pt. 132, App F, Procedure 2 §B; 2001 CSO Guidance at 34; 1993 WQS Handbook at 5.3; GLI SID Sec. VIII.B.2.c; 1998 WQS ANPRM at 36759; 1992 Memorandum Re: Request for Views on Allowable Duration of Water Quality Standards Variances at 2; 1983 Three-Year WQS Reviews at 1.
4. In order that this triennial review be meaningful, where a variance is allowed to go beyond three years, a reopener clause is required in associated NPDES permits. *See, e.g.*, GLI Pt. 132, App F, Procedure 2 §F.4; GLI SID Sec. VIII.B.2.c.
5. Likewise, in order that the triennial review be meaningful, the variance holder should be required to obtain information that can be used in that review. (See “reasonable progress” section below.) The conditions of a variance for CSO-affected waters emphasizes the importance of obtaining new information. 2001 CSO Guidance at 34. The GLI also explicitly notes that a renewal of a variance is subject to all of the same findings and procedures as an original variance. GLI Pt. 132, App F, Procedure 2 §H; *See also* 1998 WQS ANPRM at 36759; 1992 Memorandum Re: Request for Views at 3. EPA regulations require the triennial re-examination of waterbodies with downgraded uses which is what a variance is. 40 CFR §131.20(a).
6. No EPA regulation or guidance authorizes variances to ride with administrative extensions of NPDES permits. Instead, variances are to be for “a specific period of time.” Handbook at 5-12. A variance that is of unlimited duration because it runs with an administrative extension is, by definition, not for a specific period of time. It is for an unlimited and unspecified period of time. A provision allowing this would contradict the concept that a variance is temporary or short-term because once a permittee has submitted a timely application for renewal, a permit can be administratively extended forever.

## Requirement to protect existing uses.

1. EPA has stated repeatedly that variances are subject to the “same substantive and procedural requirements as removing a designated use.” *See, e.g.*, WQS Handbook at 5.3; Economic Guidance for WQS 1995 at 1-3. The requirement to protect existing uses in the issuance of variances derives from several sources. First, existing use protection is the floor of water quality, below which State standards may not go and variances are changes to water quality standards. Handbook; 1985 Questions & Answers on Antidegradation. This is encoded in the requirement to classify existing uses (40 CFR §131.10) as well as the antidegradation provisions to protect those uses (§131.12), which must be read together (ANPRM at 36752).
2. Existing use protection is specifically noted, twice, in EPA regulations concerning the removal of designated uses, the same provision that is used for variances. EPA notes that the protection of existing uses is a site-specific exercise, which is wholly consistent with the issuance of variances. ANPRM at 36752.
3. EPA considers protection of existing uses as essential in issuing variances. *See, e.g.*, 2001 CSO Guidance at 34, citing 40 CFR §131.10(h)(1); ANPRM at 36759, 36760. EPA notes that it is the necessity of preserving existing uses, as well as making reasonable progress towards ultimate attainment, that requires the conditions of a variance to be set as close as possible to the designated uses and “always retained at the level needed to preserve the existing use.” CSO Guidance at 34. These conditions include various prohibitions, control requirements, monitoring, and evaluation. CSO Guidance at 35.
4. The requirement to protect existing uses pursuant to the antidegradation policy applies during triennial reviews/WQS changes, of which a variance is one (Questions & Answers) as well as the issuance of NPDES permits (Handbook).
5. The six factors of §131.10(g) cannot be read outside the context of the text of 40 CFR §131.10(g), of §131.10(h), and of the antidegradation policy. Similarly, the GLI explicitly requires that in addition to the six factors, the variance seeker show the antidegradation requirements have been met. GLI Pt. 132, App F, Procedure 2 §C.2.a; GLI SID Sec. VIII.B.3.c.
6. Permits issued pursuant to variances must still comply with antidegradation requirements, including existing use protection. Guidance for Implementation at 6. A variance applies to the applicable criterion and does not modify the application of the existing use and designated use provisions of the water quality standard. Definition of WQS Terms 1979 at 1.
7. The evaluation of whether existing uses are protected cannot be on the basis of today’s uses and today’s water quality and whether a permittee proposes to change its loading. The definition of existing use is quite clear and it pertains to uses and water quality to support those uses since November 28, 1975. It is not a Tier II evaluation.

## **Requirement for all cost-effective and reasonable nonpoint source controls.**

1. EPA has stated repeatedly that variances are subject to the “same substantive and procedural requirements as removing a designated use.” *See, e.g.*, Handbook at 5.3; Economic Guidance at 1-3; CSO Guidance at 34. The designated use removal provisions require the use of “all cost-effective and reasonable nonpoint source controls.” 40 CFR §131.10(h)(2). This provision applies to issuance of a variance as a temporary removal of designated uses governed by the same EPA regulations. ANPRM at 36760.
2. In the GLI, this requirement was interpreted to mean that BMPs must be implemented (1) by the discharger (2) before a variance is granted, two requirements that are specific to the GLI. GLI Pt. 132, App F, Procedure 2 §A.3. In contrast, the national regulations are consistent with, and identical to, the Tier II antidegradation protection language which applies to nonpoint sources outside the control of any individual point sources. Interpretation of Federal Antidegradation Regulatory Requirement 1994 at 2. Because the use removal provisions apply to waterbodies and variances apply only to the specific discharger seeking the temporary suspension of one or more standards or criteria, DEQ cannot suspend requirements of the water quality standards on other sources – point or nonpoint – as an outcome of the variance. Therefore, the BMP requirements of 40 CFR §131.10(h)(2) apply to all sources in the consideration of a variance application. While EPA states that the GLI BMP requirements on permittees seeking variances must be met *prior* to issuance of the variance, the clear language of 40 CFR §131.10(h)(2) discusses the State finding that designated uses “will be attained . . .by implementing [nonpoint source controls],” a finding related to future attainability. While Oregon is not required to have enforceable controls on nonpoint sources, where it does have such controls, they must be implemented as part of the Tier II protections. Interpretation at 2. The same requirement applies to removing designated uses through the provisions of 40 CFR §131.10.
3. EPA notes that in issuing variances, the economic impacts that can be considered are those that result from treatment beyond that required by technology-based regulations. This includes both technology-based limits on point source discharges as well as BMPs to nonpoint sources. Economic Guidance at 1-1.

## **Multiple source variances.**

1. Every EPA guidance document discussing variances refers to them as specific to individual dischargers. *See, e.g.*, ANPRM at 36759; National Assessment at 1. One reason is that a variance must establish a replacement criterion that is as close to the underlying applicable criterion as possible which by its very nature is a site-specific finding. ANPRM at 36759. Even the GLI does not sanction multiple source variances but explicitly discusses individual permit holders. GLI Pt. 132, App F, Procedure 2 §A. The GLI preamble describes Procedure 2 as allowing variances “applicable to individual existing Great Lakes dischargers.” Preamble at 15,376. In describing the applicability of Procedure 2, the GLI specifies that a variance “applies only to the permittee requesting

the variance.” Procedure 2, § A. Every other provision in the GLI makes reference to variances applying to individual permittees (conditions to grant a variance, submission of a variance application, public notice, and the final decision on a variance request). GLI at §§ C, D, E, F. In Michigan, EPA settled a lawsuit challenging EPA’s approval of a multi-source variance for mercury with an agreement the state would establish the waste load allocations for permit holders on an individual basis.

2. There is no regulatory provision that allows for multiple source variances (which is limited to sources discharging to the same waterbody) despite EPA statements suggesting that such a device could be used under GLI regulations. ANPRM at 36759.

#### **New sources seeking variances.**

1. The GLI prohibits the application for variances to new or recommencing sources. GLI Pt. 132, App F, Procedure 2 §A.1.

#### **Reasonable progress towards attainment and variance renewal.**

1. EPA believes that variances can be used to implement protection actions, assess their results, study the water quality problem to better understand it. *See, e.g.*, Handbook at 5.3; ANPRM at 36758-60. Likewise, DEQ has stated that the only difference between a source with a compliance schedule and a source with a variance is that the latter is not able to commit to a date certain by which it can meet waste load allocations. In order that this policy may be carried out, conditions for pollution control and monitoring must be included in the variance and incorporated into the applicable NPDES permit. This gives meaning to the stated notion that variances are “short-term” exemptions from meeting standards.
2. The required triennial review is a time to evaluate whether the conditions of the variance have been met and the conditions the variance was based upon still apply. ANPRM at 36759.
3. Renewal is not automatic but, rather, requires a new affirmative showing by the applicant. ANPRM at 36759; GLI.

#### **A variance must include a replacement criterion.**

1. A variance is a change to the water quality standards. Therefore, it must include a criterion that applies during the pendency of the variance, not just a WQBEL that is incorporated into the relevant NPDES permit. ANPRM at 36759; Handbook at 5-11. In fact, it is contrary to the requirements of sections 301(b)(1)(C) and 402(a)(1) of the CWA to issue a variance to an effluent limit. National Assessment of State Variance Procedures 1990 at 7.

#### **Applicability of Endangered Species Act**

1. DEQ has taken the position that consultation on the variance rule will be limited and that the substantive consultation will occur on any rulemaking for specific variances. It is mistaken. EPA is required to engage in consultation on the underlying rule. To the extent that DEQ makes the rules regarding variances that affect aquatic species potentially of unlimited length (to run with any administrative extensions), it will be difficult for the Services to find that the rule provides sufficient protection for threatened and endangered species.

### **Applicability to Non-Human Health Toxic Criteria**

1. DEQ has proposed to alter the variance policy to accommodate more stringent human health criteria by making variances longer term, easier to obtain, and available from the Department rather than the Commission. In doing so, it has proposed to sweep the rest of Oregon's standards into this new policy. As written, the new policy would allow long-term exemptions – actually of potentially unlimited duration – from water quality standards for aquatic life protection, including those that affect threatened and endangered species, without the Commission's involvement. DEQ has refused to discuss this major policy change. Moreover, it has proposed to include in the rules a provision allowing multiple discharger variances or multiple waterbody variances, thereby opening the door to variances that might exempt all NPDES permit holders from compliance with standards on widespread pollution issues, such as temperature.