Compilation of RWG Workgroup Comments Received by DEQ

*Via e-mail*

**1. ACWA—Dave Kliewer**

Jennifer (Andrea):

Thank you for the additional opportunity to comment on the materials and discussion from the last RWG meeting. I represent ACWA, but since I have had little time since the meeting to develop these comments much less shop them with others at ACWA, please take these in a spirit similar to verbal comments I might provide at the meeting itself. I'm sure others will chime in with corrections or comments if I stray too far from the broader ACWA intent.

As your email below requests, the focus of these comments is the two variance documents from the May 20 RWG meeting: "NPDES Tools for Human Health Toxics Rulemaking" and "Toxics Rulemaking: DEQ recommendation on addressing work group issues associated with revised variance regulatory language." Some progress has been made through these documents, especially in outlining implementation of variances.  Section I "Implementation Information" provides some structure and detail regarding how the variance process might practically work. Of course the individual applications of that guidance will be the true measure of its usefulness and completeness.  Since, as pointed out in these documents, the State of Oregon has never issued a variance for this purpose before, there is no practical experience with what might work or not. It's hard to place reliance on such a process. Also EPA's approval continues to be a significant wild card in the acceptability of the approaches as proposed.

Our most significant concern, however, continues to be the short-term nature of variances, especially given the significant effort needed to document and justify their issuance, reissuance or extension. Although the proposal to extend from a three-year to a five-year period to match associated NPDES permit cycling makes good, practical sense,  that is still too short of a period for facilities planned and designed for 20-50 life expectancies. Reissuance as provided by the documents will only come with an updated "finding of unattainability", an extensive and expensive proposition especially for variances under the criterion #6 (economic hardship). Also variances as proposed would be issued for each pollutant and each use impacted, compounding the complexity of the application process.

As I noted before there is much more information in the documents about implementation. Will that information form the basis of an IMD? Will that IMD be completed coincident with the rules for variances? They should be two parts of the same proceeding. The IMD should include information about the Pollutant Minimization Plans (PMP). Critical to the PMP description will be guidance about what constitutes MEP for those plans. PMPs are critical for providing progress in improving water quality even as the variances run. ACWA's earlier comments reflected concerns that variances could be considered a hiatus from making such progress: The PMPs would assure progress.

One of the remedies listed in the potential "Source Reduction" options in the PMP description is Offsets/Trading. More description is needed to explain how trading might work in situations involving persistent and toxic materials. Also Use Attainability Analysis (UAA) is offered as an off ramp from continuous variance reissuance, but past experience argues against UAA as a practical solution.

Again, thank you for the additional opportunity to comment. Let me know if you have any questions about this email.

Dave Kliewer

ACWA

**2. Northwest Pulp & Paper – Kathryn VanNatta**



June 3, 2010

**TO:**           DEQ Staff

**FROM:**      Kathryn VanNatta

**SUBJECT:**  NWPPA Comments on DEQ WQS Process and Documents

Please consider the comments below on behalf of participants Kathryn VanNatta and Rich Garber.

Overarching Comments

1. DEQ must concentrate all current agency work on disseminating and explaining June 1, 2010, EPA action on the 2004 Toxics Water Quality Standards to regulated entities and the public.
2. DEQ should immediately address and disseminate any policy and regulatory implications for DEQ’s currently contemplated rulemaking on Toxic WQS based on EPA’s approval action.
3. DEQ then should concentrate all agency work on the point source aspects and implementation measures for the Human Health Toxics WQS.  NWPPA believes the policy advisory process and it expansion to nonpoint source issues has become a large, cumbersome and time consuming process for the amount of available DEQ resources.  The recent EPA action has only added additional items to DEQ’s workload.

Variances

* Variances should be an implementation tool option of last resort.    Rules need to be structured in such a way that they are legally defensible.  We have concerns that they risk placing each  facility in a political process when issued/renewed.
* Variances process as written is burdensome to the regulated community and should be streamlined. DEQ should review the overall process and look for opportunities for debottlenecking and reducing duplicate data collection with current permit requirements.
* Variances should not be structured as to have industrial facilities placed with a overwhelming burden of proof to prove the negative.
* Variances should last the life of the permit.   Language should be modified.
* Variances should be allowed for new facilities.  Language should be modified.
* DEQ should be able to issue variances without EQC approval.
* Variances will be more difficult for industrial facilities to qualify for — based on EPA economic guidance --- DEQ must  consider these implications in assessing the relative value of the variance  implementation tool.

[Comments received from NWPPA on TMDLs and antidegradation are included on the non-NPDES response compilation document]

**3. Michael Campbell**

Jennifer:

Thank you very much for inviting comments on the May 12, 2010, draft issue paper on variances.  The draft reflects much effort and thoughtful analysis of difficult issues by you and your staff.  Unfortunately, those efforts and analyses demonstrate why the variance process is unlikely to be a useful NPDES permit implementation tool, particularly for addressing the “background” pollutant issues that will be exacerbated by the new, more stringent human health criteria.  Going forward, I believe the NPDES workgroup should focus its efforts on the only remaining implementation tool that might substantially address the background pollutant problem—incorporating into the criteria themselves allowances for background pollutants that are protective of human health.

As the draft issue paper notes, the water quality variance process has never been used in Oregon, even though the process has been available for decades, and there is an existing Oregon variance rule.  The draft issue paper recommends a number of changes to the rule, but only two of these changes would make the process more attractive to NPDES permittees and DEQ:

1.  DEQ would have the authority to approve variances without the approval of the EQC (but still subject, of course, to EPA approval).

2.  The maximum length of a variance would increase from 3 years to the NPDES permit term (a maximum of 5 years plus any administrative extension).

I support these changes for the reasons stated in the draft issue paper, but they are too insubstantial to make the variance process much less difficult and cumbersome than it is now.  Moreover, the draft issue paper recommends several changes that would make obtaining a variance even more difficult:  *e.g.*, prohibiting a variance for most new discharges, requiring a pollutant minimization plan and consideration of nonpoint source offsets, requiring a demonstration of no loss of existing uses.  Although most of these “new” restrictions and requirements implicitly might be applied under the existing rule, they further limit DEQ’s discretion and add to the already extraordinary burden on applicants for a variance.

More fundamentally, DEQ has no ability to expand the six narrow grounds that EPA has specified for granting a variance.  The draft issue paper suggests that the “background” pollutant problems that the workgroup has discussed could qualify for a variance under two or three of these grounds, but that isn’t obvious from their language, and EPA Region 10 has not provided any substantial assurances on this issue.  (An early suggestion in the workgroup that the rule be written to specify background pollutant scenarios that would be deemed to satisfy one of these grounds didn’t gain any traction.)

Again, I am not opposed to improvements in the variance rule.  There may be circumstances in which those improvements might facilitate the use of a variance to solve a water quality compliance problem.  But I do not believe that an improved variance rule (even accompanied by a “Great Lakes” intake credit rule) can address to any substantial degree the EQC’s directive to develop environmentally meaningful and cost-effective NPDES implementation tools.

Thanks.

--Michael