**Straw Vote on Variance Language**

**Average Score: 3.6**

**Charles Logue (3)**

Andrea,

Thanks for the chance to discuss this further.  I’d give it a “3”, and the reason is it is a start, nice to see something in writing, and at the same time it is far too “soft” on the requirements for being granted a variance.  ACWA would rather see this language revised to get at our primary objective, moving towards net reduction in toxics being released into the environment.  I have done an initial revision to the proposed rule language in an attempt to capture that concept.

I’m sure that Dave, Peter, and Janet will have other suggestions as to how to take this and increase it’s usefulness.

Thanks

**Michael Campbell (2/3)**

I don’t recall all the distinctions among the voting numbers, but I think I’m a 2 or a 3.  The principal reason I’m not a 1 is that this proposal, although helpful and certainly not objectionable, doesn’t do much in itself to address the issues at hand.  As I read the proposal, it would essentially accomplish only two things:  (1) allow DEQ, rather than the EQC, to issue some variances and (2) extend the allowable length of a variance from 3 years to the effective term of an NPDES permit (up to 10 years).  Although the proposal would thereby eliminate two substantial barriers to the use of a variance, very substantial procedural and substantive barriers remain, including most importantly the requirement to meet one of the six substantive criteria for a variance.  Because of these remaining barriers, I don’t believe that these changes alone would make variances a useful tool.  I look forward to DEQ’s future proposal to address background pollutant issues, which I hope will incorporate the proposals that I’ve submitted previously or effectively address in some other fashion the concerns that underlie those proposals.

**Kathryn VanNatta (2/3)**

Northwest Pulp and Paper Association agrees with and seconds Michael Campbell’s comments below on the variance proposal and his comments on the rule language.

**Peter Ruffier (4.5)**

Upon further consideration, I would like to change my “vote” to a 4.5.  I started in on writing up some detailed comments on the variance documents, but stopped because I honestly don’t think it’s worth the time and effort.  While the variance approach may, in isolation, be an appropriate option to address issues with the implementation of revised human health related water quality standards, I feel that there are still too many outstanding significant policy and regulatory questions.  A few general comments:

* There has been a pretty consistent expression of skepticism from the group that variances will be an acceptable, practical means in Oregon to address the water quality standards issues.  I think EPA’s statements have only increased this skepticism.  And yet this is the only significant measure that has been proffered to facilitate implementation of the water quality standards resulting from an increased fish consumption rate.  I believe that the EPA needs to be more receptive and constructive in considering alternatives to the draft variance proposal, which will not be effective in the current configuration (specifically with respect to arbitrary timelines and limits on duration and scope of application).
* A variance approach *should* be one component of a broader series of mechanisms to implement new water quality standards.  We have not really discussed any other mechanisms.
* The variance process should include more prescriptive actions which need to be taken during the variance period, in order to ensure forward progress and some meaningful actions to reduce toxics.

**Dave Kliewer (4)**

 Although I am still the alternate for ACWA's participation in the process [since Charlie is still active till his departure on December 23 (the king is dead, long live the king)], I thought I'd offer my perspectives as well. I won't split points like Peter did, so I'd select 4 as my non-counting vote, but for the same reasons as Peter expressed below. I too am concerned that the current process will reach no constructive conclusion, either for the environment or the health of the fish consuming publics. Variances are a remedy without positive conclusion which apparently, as proposed, only provide a hiatus not a period of active resolution. They also only address one, relatively minor portion of the overall toxics problem in the state of Oregon, the point source sector. Until all contributors to the toxics problem are brought to the rule making (and potential enforcement) table, and are required to contribute in proportionate share to the effective resolution of the problem through toxics reduction, the environment and fishers will continue to be at risk.

Although I did review the variance white paper I did not write up specific comments, primarily because I don't think the variance concept is the right one to be detailing at this point. A variance might keep point sources out of immediate non-compliance when their permits are reissued under the new toxics standards. However, this process should be about finding effective solutions now, not just deferring the issue to five or ten years down the road.

**Nina Bell (5)**

Combined with the white paper I would have to say I am at a 5 because even where there is language that mimics the federal requirements, it’s obvious that DEQ has no intention of following it.  It appears to me that DEQ is ignoring the federal regulations (quite possibly with the support of EPA) and picking and choosing things out of the GLI, which EPA specifically warns against in the ANPRM.

**Lauren Goldberg**

Thank you for considering Columbia Riverkeeper's (CRK) comments on the variance language and white paper.  On December 15, Northwest Environmental Advocates (NWEA) submitted extensive comments on the white paper and variance language.  CRK fully endorses these detailed comments and requests that DEQ carefully consider and respond to NWEA's comment submissions.  Additionally, CRK requests that DEQ designate ample time at the next RWG to discuss and respond to the issues raised in comments received by RWG members.   At this time, CRK does not support the draft variance rule language.

Issues of significant concern in the draft rule language include:

1) Absence of Public Hearing Requirement: Variances constitute "water quality standards."  In turn, the public participation requirements that apply to water quality standards apply equally to variances.  DEQ must revise the draft rulemaking language to reflect the public participation requirements of 40 CFR 131.20(b) and 40 CFR 131.10(h).  Variances require public hearings.

2) Aquatic Life Criteria: The rationale for revising variances for human health criteria pollutants does not apply to the unchanged aquatic life criteria.  Moreover, DEQ has not vetted the implications of revising Oregon's variance language for aquatic life criteria.  At this time, the revisions to the variance language reflect an implementation tool for adopting an accurate fish consumption rate in Oregon.  The rationale for revising, and in turn easing the accessibility to, variances is in no way associated with aquatic life criteria.  In the context of this rulemaking, DEQ is obligated to follow the EQC's directive.  That directive does not address increasing the accessibility to and ease in obtaining variances for water quality standards that protect aquatic life.

3) Multidischarger variance: CRK is troubled by the ambiguous and incongruent multidischarger provision tacked on to the latest variance language draft. To date, DEQ's discussion of multidischarger variances has been limited to soliciting the RWG's input on the question of whether situations exist where a mutlidischarger variance would be appropriate.   At this late date, DEQ is including a multidischarger variance without justifying its purpose and providing language that ensures its consistency with the CWA.  Allowing multidischarger variances has significant water quality implications and DEQ's short section in the draft language falls short of justifying, or a the very least including safeguards, to protect water quality.

4) Applicability of Variances to New Facilities and Expanded Industrial Activities: RWG members have raised the question of whether the variance rule could apply to new facilities.  This issues had not been discussed at any meeting.  For example, DEQ had not explain why it is appropriate to authorize a new facility to discharge pollution that exceeds a WQS, but obtain a variance to make the discharge "legal."  This is an important point: at its core, how does DEQ justify allowing variances for new facilities given CWA sec. 101(a) ("The objective of this Act is to **restore** and **maintain** the chemical, physical, and biological integrity of the Nation's waters")?   Similarly, the purpose of the rulemaking is to protect human health and improve water quality.  While implementation tools are part of the rulemaking package, DEQ is not obligated to reach so far as to allow additional water quality degradation in the form of new facilities with new pollutant discharges that exceed WQS.

5) Removal of Existing Uses:   NWEA's discusses this point at length.   CRK wants to highlight the need for DEQ's prompt response.

6) Background Pollutants Language: Draft language for OAR 340-041-0061 states: " '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."  What does "not including additives"?  Will DEQ consider defining this?

7) Variance Timing: CRK appreciates that DEQ is proposing to align the term of a variance with, at most, a permit term.  CRK requests that DEQ remove any language that would allow a variance to stay in effect for longer than one permit term.

Again, CRK appreciates the time DEQ is investing in building a variance rule that achieves the EQC directive and complies with the Clean Water Act.   Thank you for considering these comments.  Please feel free to call me if you would like to discuss an aspect of NWEA's comments (which CRK endorses) or the highlighted comments noted above.  Happy Holidays and Happy New Year.

Lauren Goldberg
Staff Attorney, Columbia Riverkeeper
724 Oak Street
Hood River, OR 97031
541.965.0985
[www.columbiariverkeeper.org](http://www.columbiariverkeeper.org)