**340-041-0059**

**Water Quality Variances**

 (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 (6) 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) Standards will be attained by all point source dischargers implementing effluent limitations required under sections 301(b) and 306 of the federal Clean Water Act and by nonpoint sources implementing cost-effective and reasonable best management practices; or

(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 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 until the permit is reissued or revoked. In no case shall an individual point source variance remain in effect greater than 10 years.

(d) The variance is effective only after EPA approval. The effective date will be specified in the variance or in an NPDES permit.

(2) Conditions to Grant a Variance. Before a variance is granted, the applicant 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 Application Submittal, Public Notice Requirements.

(a) An applicant for a water quality standards variance must submit a request for a variance to the department. The application must include all relevant information showing that the requirements for a variance have been satisfied. The burden is on the applicant to demonstrate that the designated use is unattainable for one of the reasons specified in section (2) of this rule.

(b) If the department preliminarily determines that grounds exist for granting a variance, it must provide public notice of the proposed variance and an opportunity for public comment. The public notice requirement may be satisfied by including the porposed variance in the public notice of a draft NPDES permit.

(4) Variance Requirements. Individual variances shall include one or more of the following requirements:

(a) Permit limits or requirements representing the currently achievable based on discharge monitoring ant that are no less stringent than that achieved under the previous permit,

(b) Permit limits or requirements representing the operation of all processes, treatment technologies and controls to meet applicable water quality criteria whenever they are achievable, and/or

(c) The performance of additional studies, monitoring or management practices; the development and implementation of a pollutant minimization plan; implementation of pollutant offsets or trading; and/or other requirements deemed necessary. These terms and conditions will be incorporated into the applicant's NPDES permit or department order.

(5) Variance Renewals. A variance may be renewed if the applicant reapplies and demonstrates that the conditions upon which the variance was granted continue to exist and that all requirements of the variance are being met. Renewal of the variance may 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.

(6) Notice of Variances. 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 indentify: the person or entity for which the variance was granted; the underlying water quality standards to which the variance was granted; the water(s) affected; the effective date and term of the variance; and how to obtain additional information about the variance.

(7) Variances for Multiple Discharges.

(a) The Commission may adopt variances for multiple dischargers and/or multiple pollutants as a provision of this rule.

(b) These variances must be justified based on the same conditions listed under section (2) above.

(c) These variances, as provisions of DEQ’s water quality standards, are not effective until they are approved by EPA.

**340-041-0061**

**Other Implementation of Water Quality Criteria**

1. ……………..

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

1. Background Concentration Allowance. 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.