

**WATERKEEPERS WASHINGTON:  
COLUMBIA RIVERKEEPER · SPOKANE RIVERKEEPER ·  
PUGET SOUNDKEEPER ALLIANCE · NORTH SOUND BAYKEEPER**

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**RE: 2012 Surface Water Quality Standards Rule Revisions; Compliance  
Schedules and Variances**

Dear Mr. Susewind, Ms. Niemi, and Ms. Conklin:

In 2012, we celebrate the Clean Water Act's 40<sup>th</sup> anniversary and its many achievements for safe fishable, swimmable waters. We commend Department of Ecology (Ecology) for its efforts to initiate the process of amending the human health criteria for toxic pollutants. Stronger criteria will result in cleaner water and healthier citizens. We urge Ecology, however, not to create loopholes in water quality standard implementation rules that will offset the important protections that the department strives to obtain.

Ecology is in the process of developing amendments to Washington State's water quality standards that "will provide flexible and predictable regulatory tools that help entities comply with new source control requirements or discharge limits."<sup>1</sup> In recent months, Ecology held public workshops to describe the scope of this rulemaking. Columbia Riverkeeper, Puget Soundkeeper Alliance, North Sound Baykeeper, and Spokane Riverkeeper (collectively "Waterkeepers Washington") have a strong interest in the outcome of this process, which could significantly alter how Ecology issues NPDES permits and the amount of pollution, including toxic pollution, which enters Washington waters. For this reason, we are providing the following

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<sup>1</sup>Ecology Rulemaking Notice, Sediment Management Standards and Water Quality Standards, (Oct. 27, 2011).

input during the early stages of the rulemaking process. We hope to continue this dialogue as the rulemaking progresses.

As you are aware, last year our organizations joined a letter urging Ecology to initiate rulemaking on the human health criteria water quality standards *concurrent* with any rulemaking on excused compliance with water quality standards. We continue to believe that this approach, which the State of Oregon used during its recent Triennial Review, best serves the public interest in clean waterbodies and safe fish and shellfish. We will not, however, reiterate those concerns in this letter. Instead, this letter addresses specific input on Ecology's ongoing water quality standards rulemaking process for compliance schedules and variances.

## **I. 2012 Rulemaking: Variances and Compliance Schedules.**

At recent public workshops, Ecology shared its initial thoughts on amending the state's variance rule, WAC 173-201A-420, and compliance schedules rule, WAC 173-201A-510(4). Variances and compliance schedules are two mechanisms that allow a NPDES permit holder to discharge pollution at levels that violate state water quality criteria thereby avoiding the basic requirements of the Clean Water Act. Both are extreme measures. And both will result in toxic discharges that exceed safe levels. As required by the Clean Water Act, the state adopts and EPA approves criteria to protect existing uses<sup>2</sup> and designated uses,<sup>3</sup> including drinking water, fishing (*i.e.*, consuming fish), and swimming. Absent a compliance schedule or variance, NPDES permits must protect these uses. 40 C.F.R. § 122.44(d).

Like all Clean Water Act rulemakings, Ecology should approach the variance and compliance schedules rulemaking in accordance with the goal of the Clean Water Act: to eliminate discharges of pollution to our nation's rivers, lakes, and streams.<sup>4</sup> To accomplish this goal, the NPDES program is designed to incrementally ratchet back pollution over time.<sup>5</sup> The

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<sup>2</sup> 40 C.F.R. § 131.3(e) (defining "existing uses" as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.").

<sup>3</sup> 40 C.F.R. § 131.3(f) (defining "designated uses" as "those uses specified in water quality standards for each water body or segment whether or not they are being attained.").

<sup>4</sup> See 33 U.S.C. § 1251(a)(1) ("it is the national goal that the discharge of pollutants to navigable waters be eliminated by 1985."); see also 33 U.S.C. § 1251(a) (stating that the objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

<sup>5</sup> NPDES permits reduce pollution through: (a) technology based effluent limitations, and (b) water quality based effluent limitations, which are limits on how much pollution a permit holder can be lawfully discharge into a waterway. 33 U.S.C. § 1342. Section 402 requires the permitting agency to ensure that each permit complies with Section 301. 33 U.S.C. §1342(a)(1). Section 301, in turn, requires all discharges to achieve, at a minimum, technology-based effluent limitations for their discharges. 33 U.S.C. §§1311(b).<sup>5</sup> Each point source discharge must achieve "anymore stringent limitation... necessary to meet water quality standards." 33 U.S.C. §1311(b)(1)(C). In contrast to technology-based standards that focus on the type of discharger, water quality standards focus on the quality of the receiving water.

statute's action-forcing mechanisms—moving dischargers in the direction of reducing and eliminating pollution—are generally compromised by a state's variance and compliance schedule rules. The Clean Water Act can effectively be eviscerated if the variances and compliance schedules are extensive in time or effect. Given the action-forcing goal of the Clean Water Act, we provide the following specific comments on Ecology's rulemaking.

### **A. Compliance Schedules.**

Washington's current compliance schedules rule provides that compliance schedules "may in no case exceed ten years, and shall generally not exceed the term of any permit." WAC 173-201A-510(4). In 2009, the Washington State Legislature directed Ecology to amend the state's water quality standards to allow for compliance schedules in excess of ten years if necessary to implement allocations under a TMDL. Specifically, the Legislature enacted RCW 90.48.605 which states:

The department [of Ecology] shall amend the state water quality standards to authorize compliance schedules in excess of ten years for discharge permits issued under this chapter that implement allocations contained in a total maximum daily load under certain circumstances. Any such amendment must be submitted to the United States environmental protection agency under the clean water act. Compliance schedules for the permits may exceed ten years if the department determines that:

- (1) The permittee is meeting its requirements under the total maximum daily load as soon as possible;
- (2) The actions proposed in the compliance schedule are sufficient to achieve water quality standards as soon as possible;
- (3) A compliance schedule is appropriate; and
- (4) The permittee is not able to meet its waste load allocation solely by controlling and treating its own effluent.

The current rulemaking effort is a direct response to this legislation.

In recent public workshops, Ecology presented possible changes to the state's compliance schedules rule, which include:

- Extending the maximum compliance schedule to twenty years for circumstances specified in RCW 90.48.605.
- Integrating the factors specified in RCW 90.48.605(1) – (4) into rule.
- Requiring that all infrastructure and legal agreements be in place within the first ten years of the compliance schedule.

Waterkeepers Washington provides the following input on the compliance schedules rulemaking:

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- **Retain Current Prohibition on Compliance Schedules for New Discharges.** WAC 173-201A-501(4)(a) states: “Schedules of compliance may not be issued for new discharges.” Consistent with the goals of Clean Water Act and sound public policy, Waterkeepers Washington urges Ecology to retain the prohibition on compliance schedules for new dischargers. As the state’s 303(d) list and TMDLs reflect, water quality in Washington State is already severely degraded by **existing** point and nonpoint discharges. By prohibiting compliance schedules for new discharges in the current rule, Ecology made the reasonable determination that new discharges must comply with water quality criteria. This decision carries out the Clean Water Act’s objective of “maintain[ing]” the “chemical, physical, and biological integrity of the Nation’s waters” and should be retained in any amended rule.
- **Retain Current Language that Compliance Schedules “[S]hall generally not exceed the term of any permit.”** WAC 173-201A-510(4)(c) states: “Schedules of compliance may in no case exceed ten years, and *shall generally not exceed the term of any permit.*” (emphasis added). Regardless of Ecology’s decision on the maximum time for compliance schedules, the department should retain the rule’s current language that compliance schedules should generally not exceed the term of any permit. In addition, the department should specify the rare circumstances when a compliance schedule beyond five years is warranted. Together, retaining the five year directive and specifying narrow circumstances when longer compliance schedules are permissible effectuate the Clean Water Act’s objective of reducing pollution in five-year increments by reviewing and reissuing NPDES permits.
- **Doubling the Maximum Allowable Duration for Compliance Schedules for TMDL Implementation is Not Appropriate.** Ecology proposes extending the maximum allowable duration of a compliance schedule from ten years to twenty years for permits implementing TMDL allocations. While the Legislature directed Ecology to authorize compliance schedules in excess of ten years, the department’s decision to *double* the allowable time for a compliance schedule is not warranted.

Compliance schedules allow pollution discharges that violate water quality criteria, including criteria for toxic, bioaccumulative pollutants. In light of the statutory NPDES permit term (five years) and degraded condition of a waterbody subject to a TMDL, twenty year compliance schedules for all criteria are inappropriate and fail to meet the requirement of 40 CFR § 122.47(a)(1). *See* 40 CFR § 122.47(a)(1) (“[a]ny schedules of compliance . . . shall require compliance *as soon as possible.*”) (emphasis added).

In addition, as part of its effort to amend the duration of compliance schedules, Ecology should amend the WAC 173-201A-420 to incorporate the requirements of 40 CFR § 122.47(a): a compliance schedule must require compliance “not later than the applicable statutory deadline under the CWA.” *See* 40 CFR § 122.47(a)(1) (“Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.”).

- **Affirm that Compliance Schedules are Not Appropriate Based on Time to Develop a TMDL or UAA.** EPA provides clear guidance on whether a compliance schedule is ever appropriate based on time needed to develop a TMDL or UAA: it is not. *See id.* at 4 (stating “[a] compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate . . . .” and “[a] compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate . . . .”); *see also* EPA NPDES Permit Writers’ Manual at 9-9 (Sept. 2010). In turn, Ecology should amend the compliance schedules rule to clearly state that the department may not issue a compliance schedule based on the time needed for Ecology to develop a TMDL or UAA.
- **Restricting Compliance Schedules for Waters that are Not Meeting One or More Standard or Designated Use.** Waterkeepers Washington urges Ecology to amend the compliance schedule rule to ensure that compliance schedules do not result in additional pollution to impaired waterbodies (*i.e.*, a waterbody that currently is not meeting water quality standards designed to protect aquatic life and/or human health). By restricting the use of compliance schedules for impaired waterbodies, Ecology would advance the state’s interest in ensuring that water quality does not become further degraded during the period of time between a 303(d) listing and a TMDL.

## B. Variances.

Although not authorized by the Clean Water Act, EPA began allowing variances, or waivers from compliance with water quality standards, in 1976.<sup>6</sup> Today, EPA requires that variances comply with the minimum requirements of 40 C.F.R. §§ 131.10(g), 131.13, and EPA guidance. EPA’s NPDES Permit Writers’ Manual (Manual) explains:

Water quality standard variances are changes to water quality standards and have similar substantive and procedural requirements as what are required to remove a designated use. Unlike use removal, variances are time-limited and do not permanently remove the current designated use of a waterbody.<sup>7</sup>

The Manual further explains that “[a] variance is granted for a specified period and must be reevaluated at least every 3 years as reasonable progress is made toward meeting the standards.”<sup>8</sup> According to a recent nationwide review by EPA, states infrequently grant variances and

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<sup>6</sup> *See* Decision of the General Counsel No. 58 (June 22, 1976). The CWA includes no *carte blanche* authorization for variances from compliance with water quality standards. The Act authorizes variances and waivers from compliance with water quality standards in limited circumstance. *See* 33 U.S.C. §§ 1311(c), (g), (n); 33 U.S.C. § 1326(a); *see also Riverkeeper v. EPA*, 358 F.3d 174 (2d Cir. 2004) (discussing limited authorization of waivers from compliance with standards under CWA).

<sup>7</sup> EPA NPDES Permit Writers’ Manual, Ch. 6 at 6-10 (Sept. 2010).

<sup>8</sup> *Id.*

Washington has never issued a variance.<sup>9</sup> In fact, EPA Region 10 has approved less than five variances, and none of the variance terms exceeded five years.

Ecology's recent public workshops provide preliminary information on possible revisions to the variance rule, including:

- **Duration and Renewal.** Washington's current variance rule caps variances at five years, but allows for renewals. Ecology is considering authorizing variances that last up to three to four decades. Variances would be reviewed as part of a public process every five years, and would be revoked if no longer needed. EPA would be involved in this review.
- **Interim Pollution Controls.** Under the current rule, Ecology may approve the variance when "[r]easonable progress is being made toward meeting the original criteria."<sup>10</sup> Ecology is also considering requiring pollution control activities in permits and orders.

Waterkeepers Washington provides the following input on amending the variance rule:

- **Duration of Variances.** In the same year that the Clean Water Act celebrates its 40<sup>th</sup> anniversary, Ecology proposes authorizing variances for up to forty years. This calls into serious question Washington's understanding of the point of the Clean Water Act. Allowing variances for multiple decades—let alone one decade—runs counter to the limited role of variances under the Act: to serve as short-term, temporary exemptions to compliance with water quality standards. Specifically, Ecology's proposal to allow three to four decade-long variances flies in the face of the Clean Water Act, EPA policy, and the tremendous scientific and technological strides made in the forty years since Congress enacted the Clean Water Act. Waterkeepers Washington strongly opposes any effort to extend authorized variance terms beyond five years, the statutory term of a NPDES permit.

While potentially illegal under the CWA, EPA guidance consistently states that variances are short-term exemptions from meeting the otherwise applicable water quality standards.<sup>11</sup> For example, EPA's 1998 Federal Register notice on variance rulemaking summarizes EPA guidance, stating: "the principal difference between a variance and a

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<sup>9</sup> See EPA Variance Compendium, App. A (Jan. 24, 2011).

<sup>10</sup> WAC 173-201A-420(1)(c).

<sup>11</sup> See e.g., EPA Memo by Catherine A. Winter, Attorney, Water Division, to Dale Vodehnal, Chief, Water Quality Division at 2 (Jan. 24, 1992) ("Variances have been accepted by EPA under circumstances in which downgrading of standards would be permitted, on the grounds that a variance granted to particular dischargers for a limited duration is environmentally preferable to permanent downgrading of the whole segment.").

downgrade of a designated use is that a variance is *temporary*.”<sup>12</sup> EPA further explains that “[b]ecause a variance is temporary, it actively supports the improved water quality goal, and it can, under appropriate circumstances serve as an environmentally preferable alternative to what otherwise might become a permanent change in a designated use.”<sup>13</sup>

The Clean Water Act requires three-year reviews of water quality standards and limits NPDES permits to five-year terms. Because variances are a creature of EPA rule, and not the Clean Water Act, EPA has yet to establish a specific time limit for variances. Nonetheless, EPA guidance has repeatedly described variances as “short term” waivers, and states working to implement more stringent water quality standards have retained three and five year variance terms.

For example, in the multi-state effort to significantly reduce toxics in the Great Lakes—the Great Lakes Initiative (GLI)—EPA approved a five year variance limit.<sup>14</sup> As EPA’s recent Variance Compendium highlights, most states limit variance terms to three to five years.<sup>15</sup> EPA’s compendium illustrates that, if Ecology proceeded to rulemaking on a multi-decade variance rule, the state would be an extreme outlier. It is not clear how Ecology could build an administrative record to support why Washington pollution dischargers would require multi-decade variance terms.

While some EPA regions have authorized lengthy variance rules, which have gone unchallenged by stakeholders, this is not to say that such authorizations are consistent with the Clean Water Act or effectuate the Act’s goal of eliminating pollution. Ecology’s revised variance rule should require that a variance: (1) include an express expiration date, and (2) may only be authorized for up to three years.

- **Variance “Review Process” vs. “Expiration.”** Ecology is considering requiring that variances be “reviewed” as part of a public process every five years. Presumably, the department intends for this process to coincide with the five year NPDES permit renewal process. Simply put, variance “review” is no substitute for the process and actions required of EPA when a variance *expires*.<sup>16</sup>

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<sup>12</sup> 63 Fed. Reg. 129, 36759 (July 7, 1998) (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> The Water Quality Guidance for the Great Lakes System (Great Lakes Guidance), 56 Fed. Reg. 15366 (Mar. 23, 1995); 40 CFR § 132.

<sup>15</sup> EPA Variance Compendium, App. A (Jan. 24, 2011).

<sup>16</sup> Given Ecology’s current NPDES permit backlog, Waterkeepers Washington question whether the review would in fact occur every five years. Ecology currently has a major problem with backlogged NPDES permits, with some

- **Variations for Individual Discharges.** There is no regulatory provision that allows for multiple source variations. Ecology should amend the variance rule to expressly state that variations can only be issued to an individual discharger. EPA guidance consistently states that variations are for individual dischargers, not suspending water quality standards across a waterbody or waterbody segment.<sup>17</sup> One reason for this 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. 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.<sup>18</sup>
- **Variations for New Sources or Expanded Discharges.** To the extent that variations have a role in implementing the Clean Water Act’s objective, the role is narrow: to provide a short-term, temporary bridge for dischargers to come into compliance with new effluent limits or technology requirements (and only as demonstrated necessary to actually meet those new limits or technology requirements). In turn, variations are not appropriate regulatory tools where new sources, recommencing dischargers, or expanding dischargers cannot comply with water quality standards. For example, under EPA’s GLI Guidance, variations are not available for new or recommencing discharges. Waterkeepers Washington recommends that Ecology adopt a similar prohibition on variations for new or expanded discharges.
- **Granting Variations may not Result in any Loss of Impairment of an Existing Use.** According to EPA guidance, it is only appropriate to grant variations in situations that would also qualify for use removal or adoption of a use subcategory pursuant to the requirements of 40 C.F.R. § 131.10(g).<sup>19</sup> 40 C.F.R. § 131.10(g) authorizes removal of a designated use that is *not an existing use* only if attaining the designated use is not feasible because of the any of the six factors in 40 C.F.R. § 131.10(g) and only after

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NPDES permits that are over two decades old. In turn, a variance “review” is no substitute for—and far from equivalent to—a variance *expiring*, Ecology undertaking the process to reissue a variance, and EPA taking formal action on the variance.

<sup>17</sup> *Id.*; see also EPA, Criteria and Standards Division, Office of Water Regulations and Standards, National Assessment of State Variance Procedures at 1 (Nov. 1990) (stating “[v]ariations would be granted an individual discharger. The discharger-specific element of the variance policy evolved because the Agency developed the variance mechanism to ensure that permits issued complied with the Clean Water Act.”).

<sup>18</sup> *Nat’l Wildlife Fed’n v. Johnson*, Case No. 06-12423 (E.D. Mich. Nov. 30, 2007) (consent decree).

<sup>19</sup> Memo by Edwin L. Johnson, Director, EPA Office of Water Regulations and Standards, to EPA Water Division Directors, *Variations in Water Quality Standards* (Mar. 15, 1985) at 1 (“As long as any temporary water quality standards modification conforms to the requirements established in Section 131.10(g) of the regulation for downgrading uses, such an approach is acceptable as it would lead to only a temporary change to a water quality standard rather than a permanent downgrade . . .”).



Ecology performs a full case by case analysis, subject to full public process. Variances, therefore, must protect the existing use.

To ensure that Washington's variance rule is consistent with EPA requirements, Waterkeepers Washington recommends that Ecology amend the variance rule to expressly state that a variance is only permissible if it protects the existing use.

- **Other Interim Pollution Reduction Requirements.** Waterkeepers Washington supports Ecology's proposal to require pollution control activities in permits and orders when the department issues a variance. This is consistent with EPA guidance and sound public policy. Oregon recently amended its variance rule to include detailed interim pollution reduction requirements during the term of a variance.<sup>20</sup> Waterkeepers Washington recommends that Ecology take a similar approach: include an express statement in the amended variance rule that requires the highest level of water quality achievable under the relaxed, interim standard during the period of the variance.
- **Public Notice Requirements.** Variances constitute "water quality standards." In turn, the public participation requirements that apply to water quality standards apply equally to variances.<sup>21</sup> Waterkeepers Washington recommends that Ecology amend the variance rule to expressly include these public involvement requirements.

## II. Summary.

Washington Waterkeeper's appreciate Ecology's consideration of our organizations' input on the compliance schedule and variance rulemaking. This input is briefly summarized below.

### *Compliance Schedules*

- Waterkeepers Washington strongly supports retaining the current prohibition on compliance schedules for new dischargers in any amendments to the rule.
- Ecology's proposal to double the maximum allowable duration for compliance schedules for TMDL implementation is wholly inconsistent with the basic requirements of the Clean Water Act.
- Consistent with EPA guidance, Ecology should affirm that compliance schedules are not appropriate based on time to develop a TMDL or UAA.
- To ensure that water quality is not further degraded pending a TMDL, Ecology should restrict the use of compliance schedules for impaired waterbodies.

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<sup>20</sup> See OAR 340-041-0059(5).

<sup>21</sup> See 40 CFR § 131.20(b); 40 CFR § 131.10(h).

## *Variances*

- Allowing variances for multiple decades—let alone one decade—runs counter to the limited role of variances under the Act: to serve as short-term, temporary exemptions to compliance with water quality standards. Ecology’s revised variance rule should retain the current rule language and require that a variance: (1) include an express expiration date, and (2) may only be authorized for up to five years.
- Ecology should amend the variance rule to expressly state that variances can only be issued to an individual discharger.
- Ecology should amend the variance rule to prohibit variances for new sources, recommencing dischargers, or expanding dischargers.
- If a variance is issued, Waterkeepers Washington supports enforceable and specific discharge limits that ratchet down pollution over the life of the permit.
- Ecology should amend the variance rule to expressly include the public involvement requirements for adoption of water quality standards.

We look forward to a continued dialogue with Ecology as the rulemaking progresses. Thank you in advance for considering these preliminary comments.

Sincerely,

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