



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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February 2, 2018

Ref: 8WP-CWQ

**SUBMITTED VIA WDEQ COMMENT PORTAL**

Gina Thompson  
Wyoming Department of Environmental Quality  
200 West 17<sup>th</sup> Street, Suite 400  
Cheyenne, Wyoming 82002

Re: EQC Notice, Proposed Rules, Water Quality Rules and Regulations, Chapter 1:  
Discharger-Specific Variance Provisions

Dear Ms. Thompson:

Thank you for the opportunity to review and provide comments on the Wyoming Department of Environmental Quality's (WDEQ's) proposal to add water quality standards (WQS) variance authorizing provisions to Chapter 1. The U.S. Environmental Protection Agency Region 8 Water Quality Unit received notice of the proposal on December 18, 2017. The proposed Section 37 provisions and definitions at Section 2(b)(x), (xxiii) and (xl) specify WDEQ's considerations when deciding whether to grant discharger-specific variances for ammonia and/or nutrients in situations where meeting a water quality-based effluent limit (WQBEL) derived from the underlying designated use and criteria would result in substantial widespread social and economic impacts.

The EPA supports Wyoming's adoption of WQS variance authorizing provisions if the state considers such provisions necessary under state law. Federal regulations do not require WQS variance authorizing provisions for a state to adopt a WQS variance (40 CFR § 131.14); however, the EPA has review and approval/disapproval authority when such general policies are adopted (40 CFR § 131.13). The EPA notes that its action on such authorizing provisions does not guarantee EPA approval of subsequent WQS variances adopted by the state pursuant to such provisions as any WQS variance must be consistent with 40 CFR §131.14.

The EPA appreciates WDEQ's revisions to its proposed rules in response to our comments and its thoughtful consideration of submitted comments as reflected in the response to comments documents. The EPA provided comments on earlier drafts of the proposed rule on March 27, 2017; June 22, 2017; and September 14, 2017. Two concerns remain.

**"90-day effective date"**

The first concern is regarding the following proposed language at Section 37(g):

(g) Following administrator approval and opportunity for appeal, the variance shall be submitted to EPA pursuant to the Clean Water Act. The variance shall become effective either upon EPA approval or 90 days after submittal, whichever comes first.

To ensure consistency with the Clean Water Act (CWA) and the EPA's implementing regulations at 40 CFR § 131, the EPA continues to recommend deleting the portion of Section 37(g) that states "The variance shall become effective either upon EPA approval or 90 days after submittal, whichever comes first." Generally, a state's water quality standard only becomes effective for CWA purposes upon EPA approval (40 CFR § 131.21(c)(2)). Therefore, a state water quality standards variance in effect under state law that is not approved by EPA is not effective for CWA purposes, including for purposes of developing National Pollutant Discharge Elimination System (NPDES) permit limitations under CWA Section 301(b)(1)(C). At three locations, the CWA implementing regulations describe the need for EPA approval for a variance to be effective for CWA purposes. The first is 40 CFR § 131.14, which states:

*A WQS variance is a water quality standard subject to EPA review and approval or disapproval.*

The second is 40 CFR § 131.14(a)(3), which states:

*A WQS variance, once adopted by the State and approved by EPA, shall be the applicable standard for purposes of the [Clean Water] Act under 40 CFR § 131.21(d)-(e).*

The third is 40 CFR § 131.21(c)(2), which answers the question "How do I determine which water quality standards are applicable for purposes of the Act?" with the following:

*If a State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or after May 30, 2000...then...**once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the Act...unless...EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect...in which case...the EPA promulgated water quality standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard** (emphasis added).*

As acknowledged in WDEQ's August 2017 Response to Comments document, CWA Section 303(c)(3) establishes a 60-day deadline for EPA to approve state WQS submissions that are consistent with the CWA and a 90-day deadline for EPA to disapprove state WQS submissions that are not consistent with the CWA. However, these deadlines do not render EPA approval unnecessary, automatic, or moot after the relevant statutory timeframe has elapsed (CWA Section 303(c), 40 CFR § 131.21(c)(2), 40 CFR § 131.14(a)). The EPA strives to meet its statutory deadlines by early review and engagement in WQS development processes.

#### **Section 37(h)(ii)**

The EPA's second concern is regarding the language at Section 37(h)(ii). The language states:

In circumstances where the reevaluation concludes that a modification to the interim effluent condition is necessary, the department shall modify the discharge permit accordingly.

The Preamble to the Final Rule for the EPA's 2015 WQS Regulatory Revisions regarding WQS variances (Preamble) states:

*Upon permit reissuance, the permitting authority will base the WQBEL on the more stringent interim WQS consistent with the NPDES permit regulation at 122.44(d)(vii)(A). Where the reevaluation identifies a condition less stringent than the highest attainable condition, the state or authorized tribe must revise the WQS variance consistent with the CWA requirements and obtain EPA approval of the WQS variance before the permitting authority can derive a WQBEL based on that newly identified highest attainable condition. 80 Fed. Reg. 51020, 51037 (Aug. 21, 2015)*

Additionally, the Preamble states:

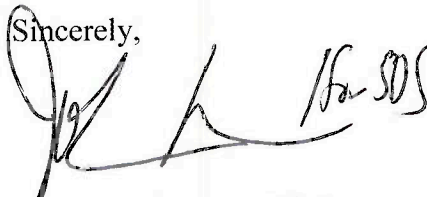
*To ensure that a WQS variance reflects the highest attainable condition throughout the WQS variance term, states and authorized tribes must adopt a provision specifying that the applicable interim WQS shall be either the highest attainable condition initially adopted, or a higher attainable condition later identified during any reevaluation. 80 Fed. Reg. at 51037.*

Wyoming's draft rules require the highest attainable condition to include both the "interim effluent condition that represents the great pollutant reduction achievable" and "developing and implementing a pollutant minimization program." It may be that a reevaluation identifies not only modifications to the interim effluent condition but also the pollutant minimization program as necessary. In order to be consistent with federal regulations as described above, the EPA recommends the phrase "more stringent highest attainable condition" replace the phrase "modification to the interim effluent condition" and "attainable" replace "necessary." In redline/strikeout format, this language would be

In circumstances where the reevaluation concludes that a ~~modification to the interim effluent~~ ~~more stringent highest attainable~~ condition is ~~necessary~~ ~~attainable~~, the department shall modify the discharge permit accordingly.

The EPA hopes that these comments are useful to you. Please contact Maggie Pierce at 303-312-6550 or [pierce.maggie@epa.gov](mailto:pierce.maggie@epa.gov) with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sandra D. Spence', with a stylized flourish at the end.

Sandra D. Spence, Chief  
Water Quality Unit