Northwest Indian Fisheries Commission

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March 21, 2014

RECEIVED

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DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

Maia Bellon, Director
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Recommendations on NPDES Compliance Tools Rulemaking and Implementation of Human Health Criteria

Dear Director Bellon:

On behalf of the Northwest Indian Fisheries Commission, please find attached a technical paper providing recommendations on water quality compliance tools rule making and the implementation of proposed human health criteria. The attached recommendations were developed by the Coordinated Tribal Water Quality Program and informed by the NWIFC participation in the Governor's Creative Solutions Group. However, these recommendations are not intended to supplant or supersede any additional recommendations from our member-tribes.

It is also important to note that the attached recommendations were referenced by tribal leaders in correspondence to Governor Jay Inslee on March 14th, 2014, and are wholly consistent with the spirit and letter of the tribal leader's recommendations, presentations and messaging. Specifically, key tribal messages, which effectively summarize the recommendations include:

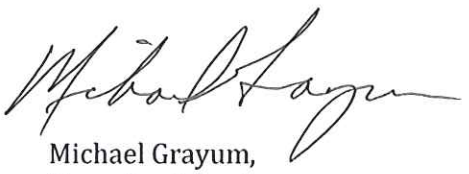
- **Develop compliance tools that are reasonable while moving towards the achievement of standards.** *We support provisions that will ensure measureable progress, achieve the highest level of water quality as soon as possible, and ensure protection of tribal lands, waters and resources.*
- **Maintain and enhance monitoring and other activities that support the implementation of the Clean Water Act.** *This includes the analysis of toxic chemicals in fish tissue, identification of impaired water bodies using those methods, and development of Total Maximum Daily Loads (TMDLs) to identify the sources of contamination and assign responsibilities.*
- **Develop consistency and improved coordination between clean-up and water quality programs.** *Washington State has a backlog of contaminated sites and tribes support accelerated efforts for clean-up, in conjunction with protective standards for both cleanup and prevention of new toxic chemicals.*

- **Advance efforts for the reduction of non-point source pollution.** *We agree that point source discharges are only a portion of the pollutant problems in Washington State. Therefore, we urge you to recognize the importance of a clear regulatory standard in advancing efforts to address non-point source pollution.*

Incorporation of these recommendations is critical to the protection of human health and natural resources.

Tribal technical staff will follow up with the Water Quality Program to clarify any subsequent questions regarding these recommendations, however, please do not hesitate to contact Fran Wilshusen or I, should you have any questions.

Sincerely,



Michael Grayum,
Executive Director

Enclosures

cc:
Commissioners
Coordinated Tribal Water Quality Program
Dennis McLerran, EPA Region 10 Regional Administrator
Heather Bartlett, Department of Ecology, Water Quality Program Manager

HUMAN HEALTH CRITERIA IMPLEMENTATION AND COMPLIANCE TOOLS RECOMMENDATIONS

Prepared by the Coordinated Tribal Water Quality Program

March 21, 2014

TABLE OF CONTENTS

1. **Human Health Criteria Implementation Recommendations** 2

Introduction 2

Relationship of Implementation Recommendations to Creative Solutions Group 2

Summary of Recommendations 2

Specific Implementation Recommendations 3

2. **Compliance Tools: Background, Key Issues and Recommendations** 6

Background 6

Why Do Compliance Tools Rules Matter? 6

Key Issues with Compliance Tools: 7

What tools get applied to what situations? 7

When is a variance needed? When is a discharger eligible to obtain a variance? 9

What are the eligibility requirements to obtain a variance? 10

What Conditions are included in the granting of a variance or compliance schedule? 11

How are tribes and the public notified about the use of compliance tools and variances? 13

Is decision to grant (and renew) a variance appealable, and if so how? 13

Are variances renewable? And if so, under what circumstances? 13

Are variances (and renewals if allowed) subject to EPA review and approval? 13

Recommendations for Rulemaking: 14

Intake Credit Recommendations 14

Compliance Schedule Recommendations 15

Variance Recommendations 18

1. Human Health Criteria Implementation Recommendations

Introduction

Relationship of Implementation Recommendations to Creative Solutions Group

The charge of the Governor's Creative Solutions Group (CSG) was largely twofold: 1) to develop holistic and effective solutions that will reduce toxics in the environment and protect human health; and 2) include feasible, durable, predictable, and effective compliance pathways for new and existing permitted dischargers that reduce the cost and complexity of obligations of point source dischargers.[1] However, the bulk of proposals discussed at the CSG included a trade-off between water quality standards development and enhanced toxic reduction efforts. For example, CSG discussion of topical areas such as enhanced Chemical Action Plans also entailed ample discussion of accompanying less stringent human health criteria, or narrative human health criteria.

The tribes did not generally support CSG or implementation proposals which were designed to be in lieu of CWA obligations to revise human health criteria. Instead, revised standards are needed that will serve as the hub of toxic reduction efforts to ensure that separate but related actions are consistent and coordinated, and are therefore a necessary element to a holistic and well integrated toxic reduction proposal. Practically speaking, water quality standards are necessary to set the clean water goals for any effort, and are also essential to monitoring and measuring progress, serve as a common denominator between reduction efforts, and support an adaptive management framework. Without these central functions, separate but related cleanup and prevention efforts will continue to be disjointed, resulting in inefficient and uncoordinated toxic reductions efforts.

The tribes unequivocal support for revised human health criteria, however, does not suggest that tribes are insensitive to the CWA burdens faced by various point source dischargers such as publically owned treatment works. It is fact that the current water quality regulatory schema is structured such that point sources are subject to fairly clear-cut requirements, while many nonpoint sources of the very same pollutants are often under or un-regulated.

Summary of Recommendations

The solution to the problem, i.e., the need for toxic pollutant reduction, is not to eliminate or whittle away what remaining water quality regulations exist, but instead to ensure that all sources of pollution *proportionately share the burden*. In this manner, it is possible to assure that toxics are getting addressed, and that sources are equitably sharing the burden to do so.

To accomplish these tasks - i.e. proportionately sharing the burden of toxic cleanup - a more integrated toxic reduction effort is needed. Specifically, the following three integral improvements to the existing clean water and toxic reduction systems should be considered: 1) *Better problem identification* - dedicated analysis of toxics loading through the continued monitoring and development of enhanced toxic Total Maximum Daily Loads (TMDLs); 2) *Sharing the burden* - improved allocation of responsibilities through the TMDL process, and 3) *Required action for all sources* - an enforceable means to implement the source allocations.

[1] See *Creative Solutions Group a* Report to the Governors Informal Advisory Group, February 2014, Appendix 1.

SPECIFIC IMPLEMENTATION RECOMMENDATIONS

- ***Problem Identification*: watershed analysis of toxics loading through the continued monitoring of fish tissue and development of enhanced toxic TMDLs.**

  - ✓ **Dedicated funding for fish tissue sampling.** Identifying the problem is the beginning of any pollution control process. To be successful at cleanup and prevention, Washington State should continue to improve their understanding of toxics in the environment. While identifying sources of various toxic chemicals is essential for this understanding, e.g. via the Chemical Action Plan (CAP) process, it is also necessary that the state of Washington aggressively pursue an improved understanding of the presence of chemical pollutants in our specific aquatic environments. Washington State's fish tissue sampling is currently limited in geographic scope, and hampered by a limited budget. Washington State should commit to amplifying these efforts and ensure ongoing, dedicated funding. The state must also maintain the existing §303(d) listing policy to ensure integration of analysis with the CWA process.

  - ✓ **Enhanced TMDLs to provide a finer grained identification of sources within a specific geographic context.** As identified by the CSG, the CAP process is limited in its ability evaluate pollutant loading at the watershed geographic scale. In order to accurately identify the problems and subsequently equitably allocate responsibilities, it is necessary that watershed level TMDL studies are promptly developed, and done so in a manner that illuminates both the in water-column pollutant loading, as well as a watershed specific analysis of the sources and conveyances responsible. This would require a small departure from typical TMDLs, in that the loading analysis would need to be coupled with a CAP or CAP-like analysis of toxic sources in the watershed.

  - ✓ **Identify the controllable fraction.** Difficult toxics pollution issues are often associated with pollutant loading from aerial deposition or other conveyances that can be hard to control or treat, let alone regulate. However, before policy choices are made regarding the appropriate response to these difficult issues, work needs to be done to identify what extent of the problem *can be* controlled, and how. TMDLs - essentially watershed loading studies - should capture this controllable fraction, and be an important part of the initial steps toward addressing the problems within the scope of the state's jurisdiction.

  - ✓ **TMDL development on schedule.** Washington's Toxics TMDL development has been few and far between. Often toxics technical studies, while complete in their loading analysis, fall short of developing "allocations," as required by the TMDL process, and therefore never become true TMDLs. To ensure equitable distribution of the toxic burdens, watershed analyses must include actual Total Maximum Daily Load component, which includes a load allocation, reasonable assurances, etc.

- ***Share the Burden*: improved allocation of legal responsibilities through the TMDL process.** The TMDL process is the Clean Water Act system for adaptively managing water pollution on a watershed scale. The process includes a system for allocating pollution allowances - known as waste load allocations (point sources) and load allocations (nonpoint sources). This component of the TMDL process is necessary for allocating the appropriate share of the burden of pollutant cleanup and control.

- ✓ **Refined allocations applied to both point and nonpoint sources of toxics.** In order to improve the existing system, TMDLs need to do a better job of identifying, analyzing and describing nonpoint source pollution. The resultant analysis should then inform more refined load allocations to ensure that the burden of prevention and clean up is appropriately assigned. In this manner, to the extent that the nonpoint sources are in fact the bulk of problem within a given watershed context, then they will receive their proportional responsibilities to address them. Meanwhile the point sources will be relieved of extra liabilities, because the waste load allocation will only require the discharger to reduce pollutant loading based on their relative contribution, as identified by the TMDL.

- ✓ **Load allocations for cleanups to coordinate** National Pollutant Discharge Elimination System **(NPDES) and MTCA/CERCLA cleanups.** Cleanups often rely upon NPDES dischargers to keep pollutant loading low, in order to prevent recontamination and allow natural attenuation processes to occur unencumbered by additional loading. However, the current cleanup process has yet to hardwire in NDPES coordination. This increases the potential liability for both the cleanup and NDPES parties, as each provides a potential source of pollutant loading that the other may be responsible for. In order to promote a proportional share of the burden of regulatory responsibilities, as well as set corresponding cleanup and discharge levels, NDPES permits and cleanups need to consider the potential synergistic impacts. An enhanced TMDL watershed analysis provides such a vehicle for a more integrated/and coordinated process. One specific way of handling such coordination in the context of TMDLs would be to provide cleanups with load allocations.

- ✓ **Prescribe enforceable actions for nonpoint sources.** Another critical element of enhancing the current TMDL system to provide a more proportional share of the burden of regulatory responsibilities is to include more detail on the nonpoint source pollution controls necessary to achieve standards. For instance, TMDLs often result in very specific levels of treatment at the end of the pipe for point source dischargers as a result of newly developed water quality-based effluent limitations (WQBELs). Contrastingly, nonpoint sources are often not required to meet specific targets, and are left to implement, if at all, voluntary measures with no specific guidance as to their required level of performance. This approach, where point sources are required to meet specific targets and implement costly treatment, and other sources get to choose what types of measures, if any, they will implement, has resulted in a disparate treatment of point versus nonpoint sources. To address this, the TMDL process should be used to clearly describe best management practices for all sources that are known or proven to achieve water quality standards.

- ❖ ***Require Action*: An enforceable means to implement the allocations.** A final, significant step in the effort to improve the system is to ensure that nonpoint source allocations, much like point source allocations, are required to be implemented. To that end, TMDL-assigned responsibilities for nonpoint sources need to nest within existing regulatory structures to ensure that nonpoint sources of pollution have enforceable measures.

  - ✓ **Integrate CAP requirements.** Where applicable, CAP requirements could be integrated into the TMDL process to provide a watershed-specific chemical action. The integrated CAP requirements could also help provide specificity of the treatment or source control needed for the TMDL, as discussed above.

  - ✓ **Retain and strengthen enforcement authority over nonpoint sources.** The state's water pollution control act provides a means to regulate some nonpoint sources or conveyances of pollution. To the

extent that the enhanced TMDL or follow up work can clearly identify problems, state authority may be used to develop administrative orders to implement abatement activities for those problems. Unfortunately, this authority is currently under-implemented and often the subject of legislative proposals to whittle away or eliminate its use. Additional authorities authorizing chemical product bans may be a more effective approach for some sources, but legislative development and timely implementation cannot be achieved with existing authorities. Regardless of the constraints, the ability to require pollution controls for all sources is an essential part of ensuring a proportional sharing of the regulatory burden. Otherwise, there are no assurances that reductions will actually be achieved.

- ✓ **Translate requirements into general permits where applicable.** The enhanced TMDLs should also seek to improve integration with general permits. Although general permits apply to point sources, they are often not given the same follow up responses as a result of the TMDL process, as individual NPDES permits do. Therefore, work should be done to improve translation of TMDL requirements to better nest with general permits, where effluent limitations are often expressed as narrative statements as opposed numeric criteria.

- ✓ **Apply NPDES compliance tools where appropriate.** For those situations where individual NPDES permit holders cannot comply with a waste load allocation and subsequent water quality based effluent limitations, the Washington State Department of Ecology (WDOE) should apply appropriate compliance tools to develop a timely and effective pathway to compliance (see section 2).

2. Compliance Tools: Background, Key Issues and Recommendations

Background

The compliance tools are various methods to help Clean Water Act (CWA) NPDES permits remain in compliance with the law while actions are conducted to achieve water quality standards (WQS). The tools usually apply when the permit holders have not achieved compliance with the WQS or are unlikely to remain in compliance. In some cases the tools help shield the permit holder from third party lawsuits under the CWA, or provide a pathway for permit holders to achieve compliance with the water quality standards. The three tools that are the subject of the rule making and these recommendations are defined below.

Variance: A water quality standards variance is a temporary use and criterion for a specified pollutant(s), permittee(s), and /or water body or water body segment that reflect the highest attainable condition during the specified time period [WQS Clarification, proposed rule, September 4, 2013, Fed. Register]. Put simply, a variance is a temporary water quality standard required to be reviewed and approved by EPA prior to taking effect. Upon expiration, the facility must achieve water quality standards. Variances were intended by EPA to be temporary in order for a facility to investigate whether or not it could achieve water quality standards and if so, how it could achieve water quality standards. The variance was intended to prevent immediate downgrading of the use if the water quality standards could not be achieved. If the water quality standards cannot be achieved, a use attainability analysis is required.

Compliance Schedule: A schedule of remedial measures included in a permit or an enforcement order, including an enforceable sequence of actions or operations leading to a compliance with an effluent limitation, or other limitation, prohibition or standard. See 40 CFR 122.47. In other words, it is a schedule to attain water quality standards. A compliance schedule typically is short-term in duration (one or two permit cycles) that includes a schedule of actions (investigations such as source identification studies, treatment feasibility studies) to meet the final effluent limitation. A compliance schedule differs from a variance in that a discharger may need more time to meet a final effluent limitation, *but it is known what specific actions can be taken to achieve the limit and how long it will take to attain the final limit.* In other words, the discharger knows they can achieve the water quality standard but they need more time. The removal of copper in a POTW effluent has been successfully done, for example, using a compliance schedule.

Intake Credit: An intake credit is a tool used to account for the level of a pollutant in the intake water of a facility when establishing a permit limit for the effluent of that facility. See 40 CFR 122.45(g). As typically used in federal permits and other states, intake credits have a limited applicability due to requirements that the intake pollutant must not be altered in such a way as to cause or contribute to an excursion of a water quality standard.

Why Do Compliance Tools Rules Matter?

Compliance tools rules will ultimately affect whether or not the new human health criteria and fish consumption rate or other water quality standards get implemented. The unintended consequence of this could result in a failure to protect tribal treaty reserved resources and the health of tribal members and all citizens of Washington State. The compliance tools also set the stage for addressing difficult NPDES and TMDL issues. Depending on how this stage gets set, there will be opportunity to either abuse discretion or establish a clear pathway to substantially

improve water quality in the short term and ultimately achieve compliance with water quality standards as intended when these tools were developed.

The good news is that there is opportunity, federal direction, and neighboring states' laws to provide ideas and examples on how to develop compliance tools rule language that will actually improve water quality at a faster pace than today, by tackling both permitted and un-permitted sources of pollutants. By specifically defining in rule language when, how, where, and under what circumstances these compliance tools are to be used will minimize risk, provide the greatest benefit to the resource, protect the health of tribal members as well as all people of the state, and avoid unintended consequences like contaminating cleanup sites or weakening benefits of habitat restoration sites.

KEY ISSUES WITH COMPLIANCE TOOLS:

WHAT TOOLS GET APPLIED TO WHAT SITUATIONS?

In many ways variances and compliance schedules provide similar functions, but their administrative and legal significance is quite different. In theory, both mechanisms should serve to bring permitees and water bodies into compliance with the WQS within a specific time frame. However, a variance is an actual temporary change to the WQS, which establishes new, albeit interim, water quality criteria in rule. It is typically applied when compliance with standards at the end of the term is unknown. Whereas, a compliance schedule is a non-rulemaking administrative procedure that can be incorporated into a permit or included as an element of an administrative order. It is typically employed when compliance with standards at the end of the term is anticipated.

Below are a few considerations of each tool.

Compliance Schedules

- Do not require a rule change.
- Can achieve water quality standards but need more time.
- Typically are included in a 5-year NPDES permit.
- Must meet water quality standards or compliance "as soon as possible". Factors for "as soon as possible" include: time needed to modify treatment facilities and O&M, and the permitting authority should not assume maximum allowable time in the state's authorizing provision.
- Must contain an enforceable sequence of actions and a final limit.
- Must make progress towards the final limit or WQS by taking interim actions with milestones if the schedule is longer than one year.
- Not allowed solely for the development of a TMDL, a WQS including a downgrading of a use (Use Attainability Analysis), or site-specific criteria.
- Can be appealed by permitee when contained in administrative order, but may not be appealed by a third party.
- Can also be appealed by both permitee and third party when included as part of a permit reissuance.
- Schedules are given and developed at the discretion of the WDOE.
- State WQS or implementing regulations must authorize compliance schedules before they are used. The permitting authority must determine a compliance schedule is "appropriate". Factors for "appropriate" include: how much time discharger had under prior permits, discharger's good faith effort, need for

modifications to treatment facilities or O&M, time needed to implement modifications, and whether the same treatment is needed as before to meet water quality based effluent limits.

- Are not allowed for new dischargers[2].
- Per federal regulations, require compliance as soon as possible.
- Per State Statute RCW 90.48.605, may only exceed 10 years when it meets the four part test, which requires that a TMDL be in place.[3]
- Have been upheld in recent Ninth Circuit ruling as tool to allow new discharges to a water body with a TMDL, assuming the compliance schedules provide for the requisite loading capacity which allows the new discharge to achieve compliance with the standards. [4]
- Cannot be renewed.

Variances

- Constitute a rule change (i.e. a variance is a temporary water quality standard published in rule subject to both public notice and review and EPA review and approval prior to taking effect).
- Differs from compliance schedule in that it may be unknown what actions are needed or how long it will take to meet water quality standards.
- It was designed as a tool by EPA to prevent a permanent downgrade of a water quality standard. It sets interim criteria or a temporary water quality standard below the original standard.
- "Temporary" has been typically defined in other state codes and federal proposed rule and guidance lasting 5-10 years.
- Should be granted for the minimum time needed, as demonstrated by the discharger.
- Subject to public notice and review.
- Requires EPA review and approval prior to taking effect.
- May authorize new dischargers to discharge to impaired segments.
- May apply broader than a single discharger, such as water body segment or broader (i.e. statewide).
- Third party right to challenge in federal court.
- May be renewed per federal regulations.

Intake Credits

- The current Washington State's surface water quality standards rule (Chapter 173-201A WAC) does not include language on the use of intake credits as an implementation tool.
- Federal regulations allow for the use of intake credits to be applied to technology-based effluent limitations (40 CFR 122.45(g)).

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[2] See 40 CFR 122.47(a)(2) establishing that compliance schedules may only be given to new dischargers when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge.

[3] The Washington State Legislature established a four part test for when compliance schedules can be authorized by the department past 10 years:
(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) (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. RCW 90.48.605.

[4] Friends of Pinto Creek v. United States Environmental Protection Agency 504 F.3d 1007 (9th Cir. 2007)

- WDOE is considering adding language to the water quality standards rule on the use of intake credits for water quality-based effluent limits.
- Other states, such as Oregon, Great Lakes states, Ohio, etc., use intake credits for determining water quality-based effluent limits in permits.
- In Oregon and Michigan, the use of intake credits for water quality-based effluent limits is allowed only if the mass and concentration of a pollutant in a facility's effluent is not greater than the mass and concentration of the pollutant in the facility's intake water.
- WDOE is considering rule language to allow intake credits for water quality-based effluent limits with "no net addition" of the pollutant to the receiving water. This is similar to Oregon's rule, which has specific language on conditions for use and requirements in permits. (See OAR 340-045-0105).
- It is important that the water quality standards rule clarify when and how intake credits can be used to calculate a facility's water quality-based effluent limit. Otherwise, facilities will not have certainty on when WDOE will allow such a tool, nor will a pathway for clean water be implemented by the rule.

WHEN IS A VARIANCE NEEDED? WHEN IS A DISCHARGER ELIGIBLE TO OBTAIN A VARIANCE?

Rules should establish preconditions so that a variance is only applied in specialized situations and are not overused or abused. That is, applicants must make a showing that the variance is needed and then justify the need. All alternatives must be analyzed before considering a variance "appropriate." For example, as a precondition, an applicant for a variance must have figured out whether an alternative approach would be a better means of addressing the compliance problem, e.g. source reduction, study of treatment capabilities, or relocating an outfall. They must provide this alternatives analysis to WDOE. Additionally, the discharge must be characterized and a justification must be made that all cost effective and reasonable measures have been implemented for non-point sources of the pollutant under which the applicant has control. There are many situations where a variance might not be appropriate. For a variance to be justified, it must meet one of the six criteria in 40 CFR 131.10(g)[5]. At this time, it is not clear how the impacts of delayed compliance with WQS on tribal health, economics, and resources will be factored into eligibility (especially for condition 6). If the polluter uses the substantial and widespread economic and social impact factor (40 CFR 131. 10(g)(6)) as the basis for requesting a variance, the EPA has developed guidance for completing an economic impacts analysis that is suggested to be used in order for the variance to be authorized. It is comprehensive in scope and requires more than a simple cost-benefit comparison (http://water.epa.gov/scitech/swguidance/standards/economics/upload/usespublic.xlsx).

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[5] **(g)** States may remove a designated use which is *not* an existing use, as defined in §131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because:
(1) Naturally occurring pollutant concentrations prevent the attainment of the use; or
(2) 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 without violating State water conservation requirements to enable uses to be met; or
(3) 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; or
(4) 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 that would result in the attainment of the use; or
(5) 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 the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

There are other considerations found in state and federal law which must be implemented prior to a discharger obtaining a variance. For example, according to RCW 90.48.520, dischargers must use AKART to control toxics in their wastewaters:

> In order to improve water quality by controlling toxicants in wastewater, WDOE shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require all known, available, and reasonable methods to control toxicants in the applicant's wastewater. Such conditions may include, but are not limited to: (1) limits on the discharge of specific chemicals, and (2) limits on the overall toxicity of the effluent. The toxicity of the effluent shall be determined by techniques such as chronic or acute bioassays. Such conditions shall be required regardless of the quality of receiving water and regardless of the minimum water quality standards. In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.

WHAT ARE THE ELIGIBILITY REQUIREMENTS TO OBTAIN A VARIANCE?

In order for a variance to be considered, the discharger must demonstrate that the following conditions have at least been considered. Some of the conditions set forth below cannot be pre-determined until a full variance request with supporting documentation has been submitted to WDOE. The discharger must provide information that demonstrates, to the extent possible that: Technology-based controls are insufficient to meet water quality-based effluent limits. Technology-based effluent limitations (TBELS) are developed for industry using either the National Effluent Limitation Guidelines (40 CFR Parts 405-499) or best professional judgment and are based on standard industrial categories. TBELs for municipal facilities are derived from secondary treatment standards. The discharger should do this by describing the technology to treat the pollutant, whether or not this technology has been installed, and if so what the removal rate for the pollutant is that has been achieved, as demonstrated in discharge monitoring reports. Additional criteria are discussed below.

- **No jeopardy to endangered species.** Granting the variance cannot likely jeopardize the continued existence of any threatened or endangered species listed under ESA, or result in the destruction or adverse modification of such species' critical habitat. EPA leads the consultation process and will coordinate with the Services. This condition presents an excellent opportunity for Tribes to provide fisheries survey data and water quality data to EPA and the Services regarding the impact the variance may have on threatened or endangered species and their habitat.

- **No unreasonable risk to human health.** For human health criteria toxics criteria, the analysis will focus on the potential impact from the pollutant levels that would be allowed by the variance compared with the applicable water quality based effluent limitation. For human health criteria, this condition is also based on the extent to which fish accumulate the pollutant over time and people's long term exposure to the pollutant. The WDOE should take this into account in addition to fish consumption and drinking water exposure routes.

- **No removal of an existing use.** The increase in pollutant loads will be evaluated regarding the impacts on maintaining existing uses. Data regarding the uses that have been achieved as well as water quality to support the existing uses will be evaluated.

- **Conforms with antidegradation policy and procedures.** WDOE requires that AKART is applied at a minimum for all activities likely to contribute a lowering of water quality for all waters of the state, and for waters of a higher quality than the criteria, any lowering of water quality must be "necessary" and "in the overriding public interest" (WAC 173-201A-300). WDOE does not have antidegradation procedures in rule. DOE must develop Tier 1 and Tier 2 procedures for conducting antidegradation reviews subject to EPA review and public notice requirements.

- **Protection of downstream tribal lands and resources.** Consistent with the decision in City of Albuquerque v Browner, NPDES dischargers cannot violate downstream tribal water quality standards. A variance should not operate to authorize this fundamental provision of law.

WHAT CONDITIONS ARE INCLUDED IN THE GRANTING OF A VARIANCE OR COMPLIANCE SCHEDULE?

There are numerous issues regarding whether variances and compliance schedules will in fact result in eventual compliance with WQS or just serve as a temporary shield for noncompliance with the WQS. Major issues include the following, discussed below.

- **What is the duration of the variance?** Most states issue variances within discharge permits, with the permits expiring after five years. The permit can contain reopeners for modification based on triennial water quality standards applicable to the variance. Also, if a renewal is requested, the request is typically made a year in advance of the expiration of the permit. Typically, there are also provisions for administrative extensions of permits, with the variance duration extended as well. This can extend the term of the variance indefinitely. Variances were intended to allow additional time to meet water quality standards in order to prevent a permanent downgrade of a WQS. As such, they were intended to be a temporary change in WQS, which would be subject to EPA review and approval ***as a water quality standard.*** Most states have stuck to a 5 year schedule for the duration of a variance whether it is contained within a permit or not. Recently, EPA suggested a duration of 10 years or two NPDES permit cycles in their draft proposed WQS rule. In a major deviation from other states and federal direction, Washington State is strongly considering extending variances explicitly to 40 years or 8 permit cycles. This time frame is largely driven by dischargers who argue that variance durations should be synchronous with financial planning horizons or that there are pollutants (i.e. legacy pollutants and conventional parameters like temperature) that take a longer time period to remedy.

- **When is a variance needed?** The use of a variance is limited to situations where it is not feasible to require a discharger to meet more stringent water quality based limits or treatment requirements. Applicants typically are required to make a showing of need or justify why they need a variance by stating at least one of six conditions listed in 40 CFR 131.10(g) prevents attainment of meeting WQS. To justify need, an applicant needs discharge data, needs to control other sources of the pollutant using cost-

effective and reasonable best management practices, and reduce the pollutant in the discharge to as close to the underlying standard as possible. This is typically done by first developing a pollutant minimization plan.

- **What are the goals of a variance?** A variance provides the discharger more time to assess whether or not they can meet standards. This does not mean that it should take 40 years to evaluate *if* a discharger can meet WQS. The WDOE must evaluate the extent of any increased risk to human health and the environment associated with granting the variance and if the new interim or revised WQS and permit limits will result in the *"highest level of water quality as soon as possible?"* And how are those levels derived and assured? Numeric or quantitative interim effluent permit limits provide better assurances for evaluating *"highest level of water quality"* than narrative or qualitative effluent limits.

- **Does the variance require, and the permit contain a clear path and schedule to achieve compliance with the water quality standard (i.e. source identification study, treatment feasibility analysis, pollutant minimization plan)?** Does it contain the following provisions listed below?
  - ❖ Explicit statement that both identifies and justifies the numerical criteria that will apply during the duration of the variance.
  - ❖ Explicit statement that the variance is established as close to the numeric criteria (water quality standard) as possible.
  - ❖ Explicit statement that a variance does not exempt a discharger from compliance with applicable technology or other water quality based limits.
  - ❖ Explicit statement in the variance that provides incentive to the discharger to control sources of pollution flowing into the facility (i.e. from homes to wastewater treatment plants).
  - ❖ A final effluent limitation sufficient to meet the WQS/criteria upon the expiration of the variance.
  - ❖ A provision allowing the agency to re-open and modify the permit based on triennial water quality standards revisions applicable to the variance, which are subject to EPA review and approval.
  - ❖ An explicit statement about the terms of an administrative extension of the permit containing a variance.

- **Are the conditions different for different types of variances?** WDOE is contemplating individual vs multiple discharger variances as well as water body-specific and state-wide variances. In cases where water body-wide pollution control and clean-up is coordinated through the variance process, longer timelines may be reasonable. For individual discharger variances, timelines to correspond with the 5 year permit cycle are more appropriate. It is clear one size does not fit all and that the applicable provisions of the variance including duration need to be tied to the specific circumstance.

- **Does the variance identify and document cost-effective and reasonable BMPs for nonpoint sources that could be implemented waterbody-wide to make progress toward attaining the designated use and criterion?** In many cases, variances that cover multiple sources should include a compliance schedule and milestones for implementation of both point and nonpoint source pollution control measures.

HOW ARE TRIBES AND THE PUBLIC NOTIFIED ABOUT THE USE OF COMPLIANCE TOOLS AND VARIANCES?

What type of public process is used prior to issuing a variance? Will tribes receive special notice? One suggestion is to ensure that tribes a given direct notice of the variance application submittal, public comment period, notice of preliminary determination. Additionally notice requirements should conform to state APA requirements for rule making. Other suggestions are discussed below.

- Variances granted by the WDOE shall be subject to EPA and public review at least every 3 years (in conjunction with the triennial review process). Review of variances is important because variances can be modified, extended, or suspended (if the rule language provided such a provision). This is consistent with federal regulations at 40 CFR 131.20, which require that any water body with water quality standards that do not include uses specified in Section 101(a)(2) of the CWA be re-examined every 3 years to evaluate if any new information indicates that the uses specified in Section 101(a)(2) of the CWA are attainable.

- WDOE must issue a final decision regarding the variance request that conforms to the procedural requirements of the state APA.

IS DECISION TO GRANT (AND RENEW) A VARIANCE APPEALABLE, AND IF SO HOW?

Variances require a rule change to the water quality standards; compliance schedules do not. Since variances are rule changes, they can be challenged in state and federal court and they must conform to the APA and CWA. Compliance schedules can be challenged in the course of permit review and renewal at the state level or in federal court as a matter of citizen suit challenge to the permit. However, it may be prudent for rule language to expressly state the appeals process, and when there is final agency action.

ARE VARIANCES RENEWABLE? AND IF SO, UNDER WHAT CIRCUMSTANCES?

Under most cases, variances should only be extended or renewed where the conditions for granting the variance still apply (i.e. economic). Other important considerations include whether variance conditions in permits are fully satisfied, and whether new monitoring data supports the continuation. Therefore, continued sediment, water and tissue sampling is a necessary component of the variance process. Permit noncompliance should not be a justification for variance renewal. Agency determination of renewal should be subject to public notice and review, and be appealable (i.e. particularly for tribes where treaty areas are affected).

ARE VARIANCES (AND RENEWALS IF ALLOWED) SUBJECT TO EPA REVIEW AND APPROVAL?

Section 303(c) of the CWA requires that all new or modified water quality standards be subject to EPA review and approval/disapproval. Federal regulations further require that policies such as variances and mixing zones be viewed by EPA. See 40 CFR 131.13. WDOE has suggested a programmatic approach to variances, which would include EPA review and approval of the criteria for granting variances, but not the variances specifically. This programmatic approach could prove to be problematic because tribes would lose the opportunity for federal oversight of specific variances that may affect tribal treaty rights. This approach could also circumvent ESA review,

as well as preclude opportunities to challenge variances in federal court as opposed to state pollution control hearings board. The public process would be circumvented as well. Each variance involves a specific fact case and should be reviewed by EPA based on the specific circumstances.

RECOMMENDATIONS FOR RULEMAKING

To provide certainty in a "pathway to compliance", expectations must be clearly articulated in rule language, applied consistently and enforced. This provides reasonable assurances to both tribes and dischargers that procedures are in place to allow compliance with permits, while real improvements to water quality are being effectuated across the state in the short-term. To enable tribes to assess impacts to resources and tribal people, notification must be provided directly when variances and other compliance tools are applied for and approved by WDOE and EPA. All applicable information should also be included.

The following recommendations are in response to the options presented at WDOE's Water Quality Standards Public Meeting on November 6, 2013.

INTAKE CREDIT RECOMMENDATIONS

WDOE presented the option to add language for the use of intake credits for water quality-based effluent limits as similar to what Oregon and the Great Lakes Initiative allow. This provision would allow for an accounting of the mass and/or concentration of a pollutant in a facility's intake water when calculating an effluent limit for that pollutant. The provision would include "no net addition" of the intake pollutant, meaning the mass and concentration of a pollutant in a facility's effluent would be equal to or less than the mass and concentration of the pollutant in the facility's intake water.

Recommendation: Sole "option" described above, with modification. Add language for use of intake credits for water quality-based effluent limits to the Surface Water Quality Standards rule ONLY if the rule includes specific language to clarify the following conditions and requirements listed below.

1. Clarify conditions that must be met in order for intake credits to be considered for determining the reasonable potential of a facility's effluent to cause or contribute to an excursion of a water quality standard ("reasonable potential"). Similar conditions should be required as written in Oregon's rule (OAR 340-045-0105(2) (a)). These conditions include the following:
    a. The facility withdraws 100 percent of the intake water from the same surface water body as the receiving water. The condition of "same water body" shall be defined in the rule with similar provisions as Oregon's rule (OAR 340-045-0105 (1) (b));
    b. The facility does not contribute any additional mass of the pollutant to its wastewater within the facility or in the final effluent;
    c. The facility does not alter the intake pollutant chemically or physically, such that it would cause adverse water quality impacts that would not occur if the pollutants were left in-stream;
    d. The facility does not increase the intake pollutant concentration or mass at the point of discharge as compared to the intake concentration; and
    e. The timing and location of the facility's discharge would not cause adverse water quality impacts to occur that would not occur if the intake pollutant were left in-stream.
2. When intake credits are used in a determination of no "reasonable potential", clarify the following requirements.

a. The NPDES permit evaluation report shall document the determination of no "reasonable potential";
b. The permit shall require monitoring data to maintain the "reasonable potential" determination during the permit term; and
c. The permit shall contain a re-opener statement to allow for new information that changes any of the conditions listed in item 1 above.

3. Clarify conditions that must be met in order for intake credits to be used for establishing water quality-based effluent limits. Similar conditions should be required as written in Oregon's rule (OAR 340-045-0105(3) (a)). These conditions include the following:
   a. The facility withdraws 100 percent of the intake water from the same surface water body as the receiving water. The condition of "same water body" shall be defined in the rule with similar provisions to Oregon's rule (OAR 340-045-0105 (1) (b));
   b. The observed ambient maximum background concentration and the intake water concentration of the pollutant exceed the most stringent applicable water quality criterion for that pollutant;
   c. The facility does not alter the intake pollutant chemically or physically, such that it would cause adverse water quality impacts that would not occur if the pollutants were left in-stream;
   d. The facility does not increase the intake pollutant concentration and mass at the point of discharge, as compared to the intake concentration and mass; and
   e. The timing and location of the facility's discharge would not cause adverse water quality impacts to occur that would not occur if the intake pollutant were left in-stream.
4. When intake credits are used to establish a water quality-based effluent limit, clarify the following requirements.
   a. The NPDES permit evaluation report shall document the conditions listed in item 3 above (similar to OAR 340-045-0105(3) (a)).
   b. The NPDES permit shall require monitoring data and specificity on how to utilize the monitoring data to evaluate the conditions listed in item 3 above.
5. Permit limits using intake credits for a pollutant must be consistent with requirements of waste load allocations or other provisions for that pollutant in a TMDL that has been approved by EPA for the applicable receiving water.
6. Where a TMDL has not been completed for an intake pollutant with a Category 5 303(d) impairment, the following conditions shall apply in order to use an intake credit to establish a water quality-based effluent limit;
   a. The Department shall initiate a TMDL for the intake pollutant in the applicable water body and complete the TMDL within the term of the permit; and
   b. The Department will incorporate measures and requirements of the TMDL for the intake pollutant into the next reissuance of the permit.
7. In addition to the above, effluent limits must be established to comply with all other applicable State and Federal law and regulations including technology-based requirements and anti-degradation policies.
8. Where the Department determines that the proper operation of a facility's treatment system allows for removal of an intake water pollutant, the Department may establish effluent limitations that reflect a lower mass and concentration of the pollutant than the amount present in the intake.

Compliance Schedule Rule Alternatives Considered by WDOE (November 6th presentation) include the following options below.

Option 1: Delete the 10 year time limit. Require shortest time frame possible on a case specific basis.

Option 2: Add language to allow 20 year compliance schedule for facilities where there has been a TMDL to address a specific pollutant (2010 legislative language).

Option 3: Add language to provide 20 year compliance schedule for areas that do not have a TMDL (goes beyond 2010 legislative intent).

RECOMMENDATION: Option 1 with modification -

For non-TMDL waters: Require shortest timeframe possible on a case-by-case basis. Schedules of compliance may in no case exceed ten years, and shall generally not exceed the term of any permit. When appropriate and as soon as possible, the compliance schedule shall lead to compliance with the state water quality standards and the CWA and implementing regulations. Whenever narrative limits are employed in the use of a compliance schedule, the schedule should also include accompanying interim numeric effluent limits.

For TMDL waters: Compliance schedules may not exceed the 10 year timeline, unless permitees meet the requirements of the four part test established in RCW 90.48.605(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. If the permitee meets the 4 part test requirements, compliance schedules must be the shortest timeframe possible on a case-by-case basis, but not longer than a maximum of 15 years, whichever is less (as long as it is not later than the applicable statutory deadline under the CWA 40 CFR 122.47(a)(1) – see Hanlon Memorandum provisions below). When appropriate and as soon as possible, the compliance schedule shall lead to compliance with the state water quality standards, CWA and implementing regulations. Whenever narrative limits are employed in the use of a compliance schedule, the schedule should also include accompanying interim numeric effluent limits.

The rule language for compliance schedules in both non-TMDL and TMDL waters alike should incorporate as much of the Hanlon Memorandum language or intent as possible (See Hanlon Memorandum, stamped date May 10, 2007, entitled "Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits"). See below provisions of the Memorandum.

1. "When appropriate," NPDES permits may include "a schedule of compliance leading to compliance with CWA and regulations ... as soon as possible, but not later than the applicable statutory deadline under the CWA." (40 CFR 122.47(a)(1)). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. (40 CFR 122.47(a)(3)).

2. Any compliance schedule contained in an NPDES permit must be an "enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation ["WQBEL"]" as required by the definition of "schedule of compliance" in section 502(17) of the CWA. *See also* 40 CFR 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable state or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17) and EPA regulations at 40 CFR 122.2, 122.44(d) and 122.44(d)(l)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 CFR 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule "will lead to compliance with an effluent limitation ... " "to meet water quality standards" by the end of the compliance schedule as required by sections 301(b)(l)(C) and 502(17) of the CWA. *See also 40* CFR 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 CFR 124.8), that a compliance schedule is "appropriate" and that compliance with the final WQBEL is required "as soon as possible." *See* 40 CFR 122.47(a), 122.47(a)(l).

7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 CFR 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 CFR 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL "as soon as possible," as required by 40 CFR I22.47(a)(l) include: consideration of the steps

needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State's authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate.

VARIANCE RECOMMENDATIONS

Variance Timeline – Duration Alternatives Considered by WDOE (November 6th presentation) include the following options below.

Option 1 – Specific to the variance being proposed.

Option 2 – Set in rule the expectation that the variance could not exceed a specific time period (eg. 40 years or some other specified duration).

Option 3 – Do not specify in rule how long a variance can be in effect.

RECOMMENDATION: Option 2 with modification. The duration should be set in rule to provide certainty that it cannot exceed a specific time period. Consistent with other states' rules and the large body of federal documentation (i.e. directives, memoranda, guidance and draft proposed federal WQS rules) on this matter, variances, as temporary water quality standards, should not exceed 10 years (or 2 permit cycles). The rule under development should apply only to individual dischargers and include the following: limitations on eligibility and applicability, demonstration of need, conditions for granting, submittal requirements, public notice and review, and EPA review and approval. Specifically, the rule should contain the following provisions.

1. Clear definition of variance in the rule – A variance is a temporary change in the designated use and/or criteria that must be granted based on the factors specified in 40 CFR 131.10(g). It must meet the same regulatory requirements as removing a designated use and because it is a water quality standard requires EPA approval before it can be effective for CWA purposes (40 CFR 131.21(c)).
2. The variance only applies to the individual point source permit and pollutant(s), while the underlying water quality standards otherwise remain in effect.
3. The permittee must attain the highest achievable water quality as close to the water quality standard as possible during the term of the variance.

4. Conforms to antidegradation rules[6]. In order to protect existing uses, WDOE must ensure that variances will conform to tier I and II antidegradation rules. In order to do so, WDOE will also need to develop tier I procedures.
5. WDOE cannot issue a variance if:
    a. The underlying water quality standard can be met by implementing technology-based effluent limits and best management practices for non-point source control. Additionally, must implement RCW 90.48.520;
    b. The variance would likely jeopardize the continued existence of any threatened or endangered species under the Endangered Species Act or result in the destruction or adverse modification of such species critical habitat;
    c. The variance would result in a violation of downstream water quality standards of another state or tribe.
    d. The conditions allowed by the variance would result in an unreasonable risk to human health; or
    e. A point source does not have a currently effectives NPDES permit, unless the variance is necessary to prevent or mitigate a threat to human health or welfare or to allow a water quality or habitat restoration project that may cause short-term exceedances but result in long term benefits that enhances the support of aquatic life uses.
6. Conditions Necessary before Granting a Variance include the following requirements.
    a. No existing use will be impaired or removed – the permittee must demonstrate this condition.
    b. Attainment of the water quality standard during the term of the variance is not feasible for one or more of the following reasons, as specified in 40 CFR 131.10(g):
        i. Naturally occurring pollutant concentrations prevent the attainment of the use; or
        ii. 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 without violating state water conservation requirements to enable uses to be met; or
        iii. 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; or
        iv. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the waterbody to its original condition or to operate such modification in a way that would result in the attainment of the use; or

[6] See WAC 173-201A-300-330; see also WAC 173-200-030 for groundwater antidegradation

v. 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 the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

vi. Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

6. Variance submittal requirements detailed in rule should include the following provisions.

   a. Verification that attaining the water quality standard for a specified pollutant is not feasible.

   b. A description of treatments and alternatives (Alternatives Identification Plan) considered to meet the limits based on the underlying water quality standard, and a description why these are not technically, economically or otherwise feasible. This plan shall be signed by a professional engineer.

   c. Pollutant Source Investigation or Pollutant Minimization Plan – the first steps in demonstrating that a facility is reducing pollutants in the discharge to as close to the underlying water quality standard as possible is to develop a pollutant minimization plan with implementation schedule. Actions such as pre-treatment, source reduction, treatment taken to reduce pollutants and show reasonable progress in meeting the underlying water quality standard are necessary for the agency to make a determination on the variance request.

   d. Every permit holder must meet technology–based effluent limits. If technology-based effluent limits are not sufficient to meet WQS, WDOE determines the water quality based effluent limits and the permittee must exhaust all options for meeting the water quality-effluent based limit. Additionally, dischargers must meet AKART requirements for "toxicants" specified RCW 90.48.520.

   e. Sufficient discharge data and analyses to characterize ambient and discharge pollutant concentrations.

   f. Cost effective and reasonable best management practices for nonpoint sources under the control of the discharger that addresses the pollutant the variance is based upon.

7. The duration of the variance shall not exceed ten years. Permits containing variances shall not be administratively extended. When the duration of the variance is less than the term of an NPDES permit, the permittee must be in compliance with the specified effluent limitation sufficient to meet the underlying water quality standard upon the expiration of the variance. A variance is effective only after EPA approval.

8. Permit requirements in the rule should include the following provisions.

a. The permittee must attain the highest achievable water quality as close to the water quality standard as possible.

b. The permit requirements will require the permitee to meet a series of activities, to achieve the highest water quality possible, while working towards attaining the underlying water quality-based effluent limit or treatment requirement. These permit requirements include the following elements.

   i. A schedule of variance activities.

   ii. Updated Pollutant Minimization Plan, including specific actions that would result in progress toward meeting the underlying water quality-based effluent limit over the term of the variance.

   iii. Annual progress reports.

   iv. Monitoring, including downstream monitoring to assess the effectiveness of treatment.

Notification requirements in the rule should include the following provisions.

i) Direct notice to tribes at time of: submittal, public comment, and final determination.

ii) If WDOE proposes to grant a variance, it must provide notice to the public and affected tribes and hold a public hearing.

iii) WDOE will publish a list of variances and all supporting documentation pursuant to this rule on its website. Newly approved variances will be added to this list within 30 days of their effective date.

9. Variance renewal requirements in the rule should include the following provisions.

a) A variance may be renewed if:

   i) The permittee makes a renewed demonstration that attaining the water quality standard continues to be infeasible; and

   ii) The permittee updates plans specified in Section 10 and submits any other applicable supporting documentation, showing reasonable progress in improving water quality; and

   iii) The permittee fully complies with all variance conditions and schedules.

b) A variance renewal shall be approved by the Department Director and EPA.

Variance Timelines – Alternatives considered by WDOE (November 6th presentation) include the following options.

Option 1 – Variance review timeline set by when specific permit comes up for renewal.

Option 2 – The actual variance sets a specific time/process for review.

Option 3 – Put into rule a specific review schedule and process.

Recommendation: Option 3. For achieving certainty in "a pathway to compliance" that leads to measurable improvements to waters of the state and protection of public health, the variance review schedule and process should be put into the rule. Articulating procedural requirements as well as timelines provides dischargers with a clear pathway to compliance with permits; holds them accountable; and is transparent, clear, and consistent in application. This rule would be applied to individual dischargers only.

Suggestions for the rule include the following. The discharger makes a renewed demonstration that attaining the water quality standard continues to not be feasible in accordance with federal criteria. The permit application for renewal is required 180 days prior to expiration of the permit. The discharger must substantiate the request by providing discharge monitoring data, treatment/control information, other source control measures, etc. The discharger must also demonstrate that all conditions of the variance, pollutant minimization plans and activities, interim limits to "achieve the highest water quality possible" and all other requirements of the variance have been met. A variance would then only be in effect after EPA approval. The effective date and duration of the variance would be specified in the NPDES permit.

Variances approved within tribal U&A hunting and fishing areas should be sent directly to tribal contacts. The following information should be included: the discharger; the underlying water quality standard addressed by the variance; the waters of the state to which the variance applies; the effective date and duration of the variance; the allowable pollutant effluent limit granted under the variance; and how to obtain additional information about the variance. (See Oregon Variance Rule – OAR 340-041-0059).

Multiple Discharger, Waterbody and State-wide Variances

Permit Specific Challenges - *WDOE – "Some situations will need more than 10 years to attain compliance with WQS".*

Response - Because of the complexity and potentially far reaching unintended consequences of variances allowed for multiple dischargers, water bodies, and statewide waters, WDOE should not develop rules for these types of variances at this time. Variance rule language should be developed, as stated above, for individual dischargers only. For the problem chemicals like arsenic, mercury, PCBs/Dioxins, much more work needs to be done before a rule might be developed that would apply water body-wide or statewide as this effort would require an extended timeframe, thus rules governing these types of pollutants should be set aside at this time. Rules shouldn't be too broad to try and accommodate these problem chemicals so there is a one size fits all approach. Assessment

phases of possible TMDLs should also be considered to characterize the problem before an appropriate remedy can be developed.

WDOE – "Would like to encourage toxic reduction activities versus the other option of changing a use on the water body – giving up".

Response –. Build on what WDOE did with the multiple-phased toxics investigation and identify and implement low hanging fruit or actions and controls that can be implemented in the near term. See section 1 for more information and suggestions.

A dedicated monitoring fund

Monitoring funds are needed to monitor waters of the state to determine receiving water characteristics for those pollutants that will be included in variances and compliance tools. Data is imperative for toxics and other parameters so that antidegradation policies and reviews can be validated, existing uses protected, and the highest water quality possible is achieved. The State of Minnesota is doing this successfully.