
Chapter 10

Variations to Permit Requirements and Other Regulatory Considerations

To address unique permitting situations, the CWA and NPDES regulations allow permit writers to grant variances under certain prescribed conditions. These variances may apply to either technology-based or water quality-based regulatory requirements. The variances available under the NPDES Program are described below.

The NPDES Program has also established certain requirements to ensure that NPDES permits address the statutory and regulatory requirements of other environmental programs. The permit writer should be aware of these other programs in developing permit conditions, and work with the regulatory agencies that oversee these programs. Section 10.3 describes these considerations.

10.1 Variations to Technology-Based Permit Requirements

In addition to specifying national goals for water pollution control, the CWA provides a mechanism for modification of the technology-based requirements of the CWA for exceptional cases. These modifications are called variances. Very specific data requirements must be met by an applicant before a variance may be granted. As

the term implies, a variance is the unusual situation, and the permit writer should not expect to routinely receive variance requests. Nevertheless, the permit writer should be aware of the major types of variances and the basic requirements for each, because the permit writer will most likely be the person to conduct the initial reviews of such requests before submitting them for review to the State Director (if applicable), the EPA Regional office, and EPA Headquarters. The permit writer should consult 40 CFR §124.62 for the procedures for decisions on the various types of variances.

With one exception (fundamentally different factors variance), a variance request must be submitted before the close of the public comment period of the permit. The following paragraphs discuss variances and the factors that should be considered in a technical review of the variance request.

10.1.1 Economic Variances

Section 301(c) of the CWA provides for a variance for nonconventional pollutants from BAT-based effluent limitations due to economic factors. Note that there are no implementing regulations for §301(c); rather, variance requests must be made and reviewed based on the statutory language in CWA §301(c). The variance may also apply to non-guideline limits in accordance with 40 CFR §122.21(m)(2)(ii). The request for the variance from effluent limitations developed from BAT guidelines is normally filed by the discharger during the public notice period for the draft permit. Other filing time periods may apply, as specified in 40 CFR §122.21(m)(2). The application must show that the modified requirements:

- Represent the maximum use of technology within the economic capability of the owner or operator; and
- Will result in further progress toward the no discharge goal.

The methodologies for determining economic capability for utilities is different than that used for other industries. Utilities should perform two financial calculations. Generally, EPA will only grant a variance if both tests indicate that the pollution control equipment is not economically achievable and the applicant can demonstrate “reasonable further progress.” Other industry categories must calculate three financial tests to determine if they are eligible on economic grounds for a 301(c) variance.

Guidance for conducting these financial tests is available from EPA's Office of Wastewater Management. Generally, EPA will only grant a variance if all three tests indicate that the required pollution control is not economically achievable and the applicant makes the requisite demonstration about "reasonable further progress."

With respect to the second requirement for a 301(c) modification (reasonable further progress toward the no-discharge goal), the applicant must, at a minimum, demonstrate compliance with all applicable BPT limitations and pertinent water quality standards. In addition, the proposed alternative must provide for a reasonable degree of improvement in the applicant's discharge.

10.1.2 Variations Based on Localized Environmental Factors

Section 301(g) of the CWA provides for a variance for certain nonconventional pollutants from BAT effluent guidelines due to localized environmental factors. These pollutants include ammonia, chlorine, color, iron, and total phenols. The discharger must file a variance application that meets the following requirements:

- The modified requirements must result in compliance with BPT and water quality standards of the receiving stream.
- No additional treatment will be required of other point or nonpoint source dischargers as a result of the variance approval.
- The modified requirements will not interfere with attainment or maintenance of water quality to protect public water supplies, or with protection and propagation of a balanced population of shellfish, fish, and wildfowl, and will allow recreational activities in and on the water. Also, the modified requirements will not result in quantities of pollutants that may reasonably be anticipated to pose an unacceptable risk to human health or the environment, cause acute or chronic toxicity, or promote synergistic properties.

The permit writer should review the request to ensure that it complies with each of the requirements for this type of variance. This variance request involves a great deal of water quality assessment, including aquatic toxicity, mixing zone and dilution model analysis, and possible site-specific criterion development. In addition, many complex human health effects must be assessed, including carcinogenicity, teratogenicity, mutagenicity, bioaccumulation, and synergistic propensities. All permit

writers should use the EPA draft 301(g) technical guidance manual to assess a completed variance request. Typical industries that have applied for 301(g) variances include Iron and Steel Manufacturing, Steam Electric Power Generating, Inorganic Chemicals Manufacturing, Nonferrous Metals Manufacturing, Aluminum Forming, and Pesticides Manufacturing facilities.

10.1.3 Marine Discharge Variances

Section 301(h) of the CWA provides for variances from secondary treatment standards for POTWs that discharge into marine waters if the modified requirements do not interfere with the attainment or maintenance of water quality. EPA has promulgated specific regulations pertaining to CWA §301(h) that are provided in 40 CFR Part 125, Subpart G.

All 301(h) modified permits must contain the following specific permit conditions:

- Effluent limitations and mass loadings that will assure compliance with 40 CFR Part 125, Subpart G
- Compliance schedules for pretreatment program development, a nonindustrial toxics control program, and control of combined sewer overflows
- Monitoring program requirements that include biomonitoring, water quality, and effluent monitoring
- Reporting requirements that include the results of the monitoring programs.

Also, no new or substantially increased discharges from the point source of the affected pollutant can be released above that volume of discharge specified in the permit.

EPA has developed several guidance manuals related to 301(h) variances, including the *Revised Section 301(h) Technical Support Document*.⁷³

⁷³USEPA (1982). *Revised Section 301(h) Technical Support Document*. EPA-430/9-82-011. Office of Water.

10.1.4 Fundamentally Different Factors Variances

Section 301(n) of the CWA provides for variances based upon fundamentally different factors (FDF) for BAT and BCT pollutants while 40 CFR Part 125, Subpart D provides the regulatory authority for BPT variances. FDF variances for direct dischargers are available from effluent limitations guidelines for toxic, conventional, and nonconventional pollutants if the individual facility is found to be fundamentally different from the factors considered in establishing the effluent guidelines. There is no FDF variance allowed from NSPS. The FDF variance for BPT must be filed by the close of the public comment period under 40 CFR §124.10. The FDF variance for BAT or BCT must be requested by the discharger within 180 days of the guideline promulgation. Where a FDF variance request is approved, calculated alternative limits cannot be any less stringent than justified by the fundamental difference and cannot cause violations of water quality standards.

Factors needed to justify a BPT FDF variance must be related to a discharger's facilities, equipment, processes, and compliance cost that are different from those considered in the development of the guidelines. Factors for BAT and BCT variance requests are similar except that cost cannot be considered. Additional factors that cannot be considered for any FDF variance request include the feasibility of installing the necessary treatment within the given time frame, a claim that the limits cannot be achieved with the given technology (unless supported with data), the discharger's ability to pay, or the impact on local receiving water quality. The review or proposal of an FDF variance is completed on a case-by-case basis. The burden of proof lies with the entity requesting the variance.

10.1.5 Thermal Discharge Variances

Section 316(a) of the CWA provides for variances from effluent limitations for the thermal component of a discharge. Regulations for submitting and reviewing thermal discharge variance requests are promulgated at 40 CFR Part 125, Subpart H. Less stringent alternative thermal effluent limits may be included in permits if the discharger demonstrates that such effluent limits are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the discharge is

made, taking into account the cumulative impact of its thermal discharge together with all other significant impacts on the species affected.

10.1.6 Net Credits

In some cases, solely as a result of the level of pollutants in the intake water, facilities are faced with situations in which technology-based limits are difficult or impossible to meet with BAT/BCT technology. Under certain circumstances, the NPDES regulations allow credit for pollutants in intake water. The following requirements have been established in 40 CFR §122.45(g) for establishing net limitations:

- Credit for generic pollutants, such as BOD₅ or TSS, are only authorized where the constituents resulting in the effluent BOD₅ and the TSS are similar between the intake water and the discharge.
- Credit is only authorized up to the extent necessary to meet the applicable limitation or standard, with a maximum value equal to the influent concentration.
- Intake water must be taken from the same body of water into which the discharge is made.
- Net credits do not apply to the discharge of raw water clarifier sludge generated during the treatment of intake water.

Permit writers are authorized to grant net credits for the quantity of pollutants in the intake water where the applicable effluent guidelines specify that the guidelines are to be applied on a net basis or where the pollution control technology would, if properly installed and operated, meet applicable effluent guidelines limitations and standards in the absence of the pollutants in the intake waters.

10.2 Variances to Water Quality-Based Permit Requirements

Several types of variances exist that may change the fundamental basis of water quality-based effluent limitations, specifically:

- Site-specific water quality criteria modification,
- Designated use reclassification, and
- Water quality standard variance.

Each of these variances are described below.

10.2.1 Site-Specific Water Quality Criteria Modification

Section 304(a) of the CWA recommends procedures for States to develop water quality criteria. The State does have the option of modifying water quality criteria on a site-specific basis. Setting site-specific criteria may be appropriate where background water quality parameters, such as pH, hardness, temperature, and color appear to differ significantly from the laboratory water used to develop the CWA §304(a) criteria; or the types of local aquatic organisms differ significantly from those actually tested in developing the CWA §304(a) criteria. Modifications change water quality criteria permanently, while maintaining the existing designated uses.

10.2.2 Designated Use Reclassification

Once a use has been designated for a particular water body or segment, the water body or water body segment cannot be reclassified for a different use except under specific conditions. To remove a designated use, as specified in Section 101(a)(2) of the CWA, the State must perform a use attainability analysis pursuant to 40 CFR §131.10(j). The *Water Quality Standards Handbook: Second Edition*⁷⁴ discusses use attainability analyses in greater detail. Reclassifying a water body causes a permanent change in the water quality standard for that water body.

10.2.3 Water Quality Standard Variance

Water quality standard variances require similar substantive and procedural requirements as removing a designated use, but unlike use removal, variances are both discharger and pollutant specific, are time-limited, and do not forego the currently designated use of a water body. A variance is appropriate where the State believes that the standard can be ultimately attained. By maintaining the standard rather than changing it, the State will assure that further progress is made in improving the water quality and attaining the standard. State-adopted variances have been approved by EPA where, among other things, the State demonstrates, consistent with 40 CFR Part 131, that meeting the standard is unattainable based on one or more of the grounds outlined in 40 CFR §131.10(g). The variance is granted for a specified period of time

⁷⁴USEPA (1994). *Water Quality Standards Handbook: Second Edition*. EPA 823-B-94-005a. Office of Water.

and rejustified at least every 3 years as reasonable progress is made toward meeting the standards.

Modifications of or variances to water quality standards have several effects on permit limits. Specifically, these variances change the fundamental basis of water quality-based effluent limits, potentially impacting the reasonable potential determination and possibly resulting in more or less stringent limitations. It is the permit writer's responsibility to ensure that the variance is properly reflected in the NPDES permit.

10.3 Additional Programmatic Considerations and Requirements

This section addresses additional programmatic requirements that must be considered during permit development. These requirements include anti-backsliding and compliance with other Federal laws.

10.3.1 Anti-Backsliding

In general, the term "anti-backsliding" refers to a statutory provision that prohibits the renewal, reissuance, or modification of an existing NPDES permit that contains effluents limits, permit conditions, or standards that are less stringent than those established in the previous permit. There are, however, exceptions to the prohibition—determining the applicability and circumstances of the exceptions requires a familiarity with both the statutory and regulatory language that addresses the issue of "anti-backsliding."

Section 402(o) of the Clean Water Act establishes express statutory language prohibiting the backsliding of effluent limitations. Section 402(o) consists of three main parts. **First**, section 402(o)(1) prohibits (subject to exceptions in sections 303(d)(4) and/or 402(o)(2)) the relaxation of effluent limitations for two situations:

- (1) When a permittee seeks to revise a technology-based effluent limitation based on best professional judgment to reflect a subsequently promulgated effluent guideline which is less stringent, and

- (2) When a permittee seeks relaxation of an effluent limitation which is based upon a State treatment standard or water quality standard.

Second, Section 402(o)(2) outlines specific exceptions to the general prohibition against establishment of less stringent effluent limitations. Codified in the NPDES regulations at 40 CFR 122.44(l), Section 402(o)(2) provided that the establishment of less stringent limits may be allowed where:

- (1) There have been material and substantial alternations or additions to the permitted facility which justify this relaxation.
- (2) New information (other than revised regulations, guidance, or test methods) is available that was not available at the time of permit issuance which would have justified a less stringent effluent limitation.
- (3) Technical mistakes or mistaken interpretations of the law were made in issuing the permit under Section 402(a)(1)(b).
- (4) Good cause exists due to events beyond the permittee's control (e.g., acts of God) and for which there is no reasonably available remedy.
- (5) The permit has been modified under 40 CFR §122.62, or a variance has been granted.
- (6) The permittee has installed and properly operated and maintained required treatment facilities but still has been unable to meet the permit limitations (relaxation may only be allowed to the treatment levels actually achieved).

Although the statute identified six exceptions where effluent limitations may be relaxed, the language specifically stated that exceptions 3 and 5 (as listed above) do not apply to water quality-based effluent limitations. Thus, exceptions 3 and 5 would only apply to technology-based effluent limitations derived using best professional judgment.

Third, Section 402(o)(3) prohibits the relaxation of effluent limitations in all cases if a revised effluent limitation would result in a violation of applicable effluent limitation guidelines or water quality standards, including antidegradation requirements. Thus, even if any of the backsliding exceptions outlined in either the statute or

regulations are applicable and met, Section 402(o)(3) acts as a floor and restricts the extent to which effluent limitations may be relaxed. This requirement affirms existing provisions of the CWA that require permit limits, standards, and conditions to ensure compliance with applicable technology-based limits and water quality standards.

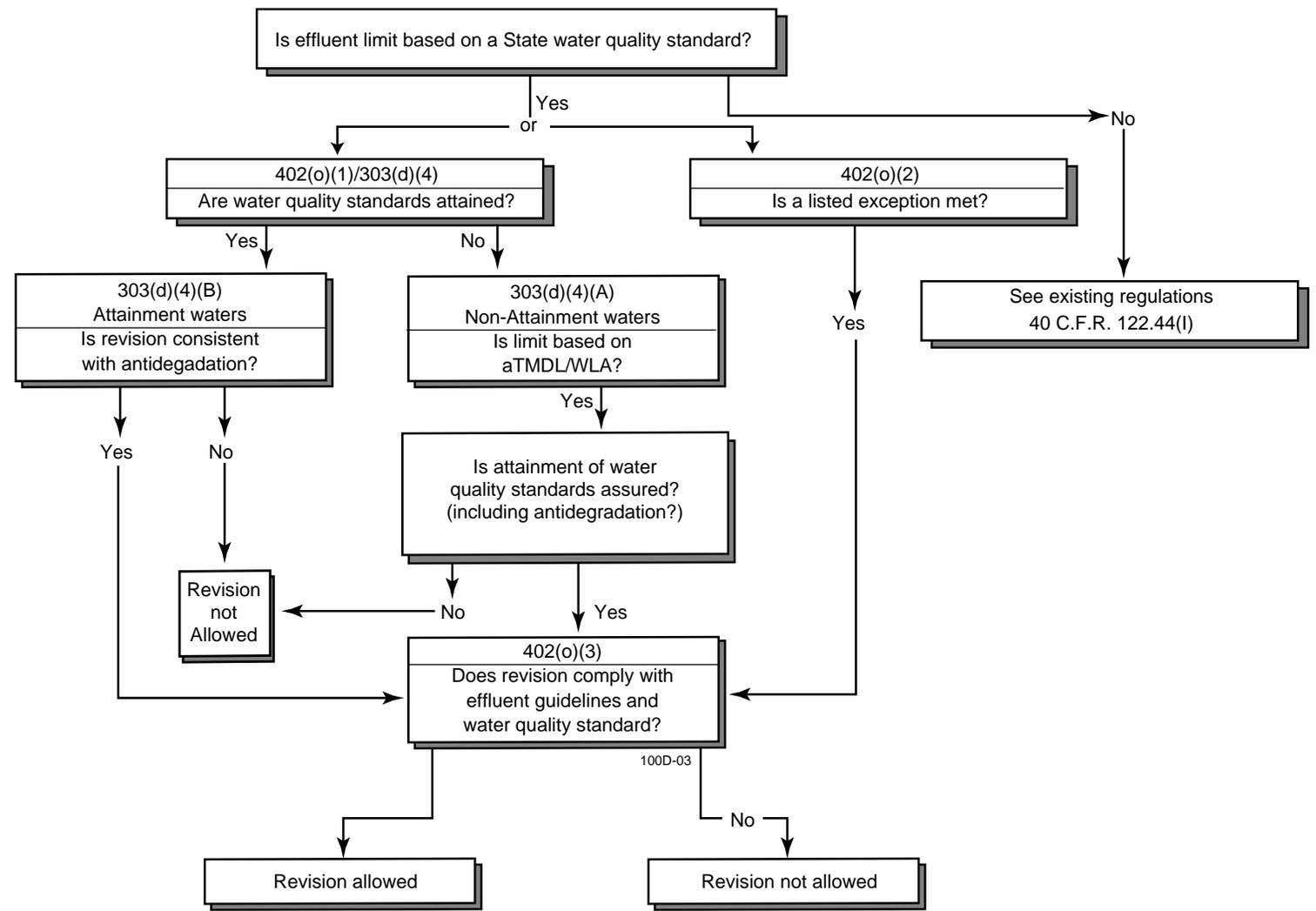
EPA's current regulations which address the issue of anti-backsliding reflect the prohibition imposed by Section 402(o) for the first situation; revision of existing BPJ-based permit limitations to reflect subsequently issued effluent guidelines (40 CFR 122.44(l)(2)). However, the regulations have not been revised to reflect the prohibition of backsliding for the second situation: relaxation of effluent limitations established on the basis of Sections 301(b)(1)(C) or 303(d) or (3). EPA believes the water quality provisions must be implemented based upon interpretation of the CWA in the meantime. As such, the remainder of the discussion on anti-backsliding provisions will focus on clarifying the intent of the statute as it relates to relaxation of water quality-based effluent limitations. In addition, **Exhibit 10-1** provides a graphical interpretation of the backsliding provisions as they related to the relaxation of WQBELs.

EPA has consistently interpreted Section 402(o)(1) of the CWA to allow relaxation of water quality-based effluent limitations (WQBELs) if either the requirements of Section 402(o)(2) or section 303(d)(4) are met. These two provisions constitute independent exceptions to the prohibition against relaxation of permit limits. If either is met, relaxation is permissible.

Section 303(d)(4) has two parts: paragraph (A) which applies to "non-attainment waters" and paragraph (B) which applies to "attainment waters."

- **Non-attainment water**—Section 303(d)(4)(A) allows establishment of less stringent WQBEL when the receiving water has been identified as not meeting applicable water quality standards (i.e., a "nonattainment water"), if the permittee meets two conditions. First, the existing WQBEL must have been based on a total maximum daily load (TMDL) or other wasteload allocation (WLA) established under Section 303. Second, relaxation of a WQBEL is only allowed if attainment of water quality standards must be ensured.
- **Attainment water**—Section 303(d)(4)(B) applies to waters where the water quality equals or exceeds levels necessary to protect the designated use, or to otherwise meet applicable water quality standards (i.e., an "attainment

EXHIBIT 10-1 Anti-Backsliding Rules Relating to Water Quality-Based Effluent Limitations



water”). Under Section 303(d)(4)(B), WQBELs may only be relaxed where the action is consistent with State’s anti-degradation policy.

As previously mentioned, Section 402(o)(2) outlines specific exceptions to the general prohibition against backsliding from WQBELs. These exceptions are independent of the Section 303(d)(4) exception discussed above and are also applicable to the backsliding of BPJ limits to reflect subsequently promulgated less stringent guidelines.

Finally, all other types of backsliding [for example, backsliding from effluent guideline-derived limits, from new source performance standards, from existing BPJ limits to new BPJ limits, or from water quality-related standards or conditions (except for effluent limitations)] remain unaffected by the 1987 WQA amendments and EPA’s existing regulations at 40 CFR 122.44(l)(1) will continue to govern them. This is because Section 402(o) only prohibits the backsliding of “effluent limits,” not other standards or conditions such as monitoring frequency or changes in species or protocol for whole effluent toxicity (WET) testing. The relaxation of all other types of standards or conditions contained in a permit are, however, subject to EPA’s existing backsliding regulations at 40 CFR 122.41(l)(1). Under these regulations, a permittee must meet a cause for modification in order to allow relaxation.

Example 1

Scenario:

- A POTW seeks to relax its WQBEL for pollutant X.
- Current permit limitation is based on the TMDL and WLA for the POTW developed in accordance with 40 CFR 130.7.
- The POTW is in compliance with its existing limitation and the applicable water quality standards for pollutant X is attained.
- The POTW has developed new models with new river flow information, which indicate that the water quality standards for pollutant X would be maintained with a relaxed permit limitation.
- May the effluent limitation for pollutant X be relaxed?

Answer:

Possibly. Under the interpretation discussed above, WQBELs may be relaxed where one of the exceptions in §402(o)(1) or 40 CFR 122.44(l)(2) are met. In this case, although new information is being relied on to request the modification, §402(o)(2) will not justify the request unless the State reduces the pollutant loadings from other point sources or non-point sources of pollution. This is because, as discussed above, paragraph §402(o)(2) restricts the use of new information to cases where there is a decrease in the amount of pollutants being discharged.

The §402(o)(1) exceptions, on the other hand, may justify the request. In this case, the paragraph (o)(1) exception that is relevant is the reference to §303(d)(4)(B). It provides that for receiving waters that where water quality standards are attained, permit limitations based on a TMDL/WLA or other permit standard may be relaxed only if a State's antidegradation policy are met.

Example 2

Scenario:

- The State has established a technology-based treatment standard for fecal coliform pursuant to §301(b)(1)(C).
- The State later relaxes this standard.
- A POTW, which has been in violation of this limit, requests a revision of its permit limit for fecal coliform to reflect the new standard.
- Water quality standards for fecal coliform are not being attained.
- Models show that attainment of water quality standards will be assured if the POTW complies with a revised, relaxed permit limitation for fecal coliform.
- There was no TMDL or WLA performed because the standard was a State technology-based standard.
- May the permit limitation be relaxed?

Answer:

No. Under §402(o)(1), the applicable provision is §303(d)(4)(A). This subsection does not authorize backsliding in this case because it only applies to permit limitations based on a TMDL/WLA. Here, the limitation in question is based on a type of State treatment standard.

Furthermore, if the permit sought to apply the §402(o)(2) exceptions, the new information provision would not allow the revision. New information does not include "revised regulations."

Example 3**Scenario:**

- The State has a narrative water quality criterion of “no toxics in toxic amounts.”
- On the basis of WET testing data or other information, the State finds reasonable potential to exceed the narrative water quality criterion and imposes a WET limitation under 40 CFR 122.44(d)(1)(v).
- The permittee determines that pollutant Z is the cause of the WET in its discharge.
- The permittee can demonstrate through sufficient data (including WET testing data) that an effluent limitation for pollutant Z will assure compliance with the narrative water quality standards as well as the State's numeric criteria for pollutant Z as required by 40 CFR 122.44(d)(1)(v).
- May the State modify the permit to delete the WET limitation and to add the limitation for pollutant Z?

Answer:

§303(d)(4) may justify this action. The applicable provision of §303(d)(4) is §303(d)(4)(B) because the narrative water quality standards is currently attained. (The permittee is currently complying with the existing WET limitation to attain and maintain the State's narrative water quality standards.) Under §303(d)(4)(B), the permittee may backslide so long as antidegradation requirements will be met, and the relaxed limitation will not cause a violation of any effluent limitations guidelines and water quality standards applicable to the discharge. In this case, this appears likely because the discharger can demonstrate that the new limitation for pollutant Z will assure compliance with applicable narrative as well as numeric water quality standards.

Example 4**Scenario:**

- An industrial permittee seeks to revise its WQBEL of 1000 mg/L for TSS to 6000 mg/L, its actual discharge level.
- The current permit limitation is based upon a TMDL and WLA for the permittee, which were developed in accordance with 40 CFR 130.7.
- The water quality standards for TSS are not being attained.
- A permit limit of 6000 mg/L is consistent with applicable effluent guidelines.
- New modeling information shows that the water quality standards for TSS will be attained with a permit limitation of 4000 mg/L.
- May the permit limitation be revised from 1000 mg/L to 6000 mg/L?

Answer:

No. However, the permit limitation could be relaxed to 4000 mg/L under either §402(o)(1) or the §402(o)(2) exceptions.

The water quality standards for TSS is not currently being attained. Therefore, under §402(o)(1), the applicable exception is §303(d)(4)(A). In this case, the permitting authority may allow backsliding to 4000 mg/L because the existing effluent limitation is based upon a TMDL/WLA and the data shows that attainment of the water quality standards is assured with a permit limitation of 4000 mg/L (but not with a limitation of 6000 mg/L).

Alternatively, under §402(o)(2), new information can be relied on to relax permit limitations where there is a reduction in pollutant loadings and, pursuant to §402(o)(3), where water quality standards are complied with. Again, water quality standards are being met in this case, and there also will be a reduction in actual pollutant loadings since the new proposed permit level of 4000 mg/L will represent a real reduction compared with the actual discharge levels of 6000 mg/L.

10.3.2 Considerations for Other Federal Laws

This section addresses several Federal laws that impact NPDES permitting. It is noteworthy that the requirements imposed under several of these statutes (e.g., the NHPA, ESA, FWCA, and NEPA, discussed below), only apply to Federal or federally supported actions (e.g., EPA issuance of permits). Under these particular statutes, purely State actions are not regulated. However, many States may have enacted State legislation that is modeled on Federal law and, therefore, it is prudent to review State law in these areas prior to preparing a NPDES permit.

National Historic Preservation Act Amendments of 1992

The National Historic Preservation Act (NHPA) establishes Federal programs to preserve the historical and cultural foundations of the nation. Regulations under Section 106 of this Act require any Federal agency, in consultation with the Advisory Council on Historic Preservation, to take into account the effect of proposed Federal or Federally assisted undertakings on architectural, archeological, historic, or cultural resources listed, or eligible for listing, on the National Register of Historic Places. This has been interpreted (see EPA Memorandum dated March 15, 1994, from Steven A. Herman, Assistant Administrator to Carol Browner, Administrator, entitled “EPA Policy Decision of a Strategy For, and Interim Compliance with the National Historic Preservation Act Amendments”) to mean that consultations must be made for direct EPA actions and for individual State actions that EPA funds under its programs. However, for State actions not directly funded by EPA under EPA-authorized programs, consultation would occur on a voluntary basis.

To date, guidance for the permit writer in considering the NHPA requirements is not available. In general, the permit writer must ensure that the proposed discharge to be authorized under the NPDES permit will not have an adverse effect on a site listed, or eligible for listing, on the National Register of Historic Places. The permit writer may want to require that the permittee show that sufficient research has been conducted to identify whether a site on the Register is located within the area. Sufficient research should include review of the National Register and information gathering from local governments, Indian tribes, public and private organizations, and the State Historic Preservation Officer (36 CFR Part 880). An evaluation of potential effects should be documented. Written documentation of the evaluation should be

submitted to the State Historic Preservation Office and included in the permit file and fact sheet.

Endangered Species Act of 1973

The goal of the Endangered Species Act (ESA) of 1973 is to provide protection and support in the conservation and recovery of threatened and endangered species and the ecosystem on which they depend. Section 7 of the ESA requires Federal agencies to ensure that any action authorized, funded, or carried out by a Federal agency not jeopardize the continued existence of a listed or candidate species or result in the destruction or adverse modification of its habitat. Since the issuance of NPDES permits by EPA is a Federal action, consideration of a permitted discharge and its effect on any threatened and/or endangered species is appropriate. Section 9 of the ESA prohibits the “taking” of any listed endangered and/or threatened species.

The ESA regulations require that consultation with the National Marine Fisheries Service (NMFS) and/or the Fish and Wildlife Service (FWS), as appropriate, occur when the Federal activity is one which may effect an endangered and/or threatened species or habitat. Effect is defined as both detrimental and beneficial. Consultations may be either informal or formal. An informal consultation determines if an action is, or is not, likely to adversely effect the species. A formal consultation is required if the findings show that there is a likelihood for adverse impacts and evaluates if the proposed action is likely to jeopardize the continued existence of the species. It is EPA’s responsibility to ensure that consultation occurs, however, a non-Federal representative may be designated for the informal consultation (i.e., the permittee).

To date, EPA has not yet entered into a national agreement with NMFS or FWS on the scope of consultation requirements for NPDES permits. Until then, EPA permit writers should review the ESA consultation regulations (50 CFR §402) and coordinate with the Region’s ESA coordinator (if such a position has been established in a particular Region) and the FWS/NMFS office(s) located nearest the site. In evaluating the effects of a discharge upon endangered or threatened species, the study should identify the listed and candidate species and their habitats which occur in the area of the discharge. This information can be obtained from discussions with local FWS/ NMFS biologists. The proposed permit limits can then be compared to any existing

toxicological data and/or impacts data available for the species. Cumulative, combined, and independent effects should be evaluated. Additional species-specific information can be obtained through discussions with the local wildlife and aquatic biologists who are experts on a particular species (e.g., EPA, FWS/NMFS, State Conservation, universities).

It is EPA's position that permits issued under State law are not subject to ESA consultation because they are not Federal Actions. However, State NPDES Programs should have some process in place to consider potential effects on endangered and threatened species and their habitat if they are known to occur in the area of the discharge to ensure those discharges do not result in takes of listed species.

Biological Evaluations (informal) or Biological Assessments (formal) should be submitted to the FWS/NMFS for review and approval. This documentation and any decisions from the FWS/NMFS would become part of the permit documentation.

Wild and Scenic Rivers Act

The 1968 Wild and Scenic Rivers Act protected selected rivers from construction of dams and excessive commercial development. It declared that "the established national policy of dam and other construction at appropriate section of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or section thereof in their free-flowing condition" [Section (1)(b)]. The Act defines three classes of protected river (wild river; scenic river; recreational river) and spells out in considerable detail the management restrictions to be established for these rivers. A corridor of land on each side of a protected river is also protected. The corridor is to average no more than 320 acres per linear mile of river through the protected stretch. The rights of landowners within this corridor are maintained, subject to restrictions on the type of development allowed. Rivers are "studied" and may be protected for up to three years during the study period during which a river has the status of a protected river.

Coastal Zone Management Act

The 1972 Coastal Zone Management Act (CZMA) and amendments require and encourage the coastal states of the United States to adopt and enforce land-use plans for the lands and water adjacent to their coasts. “Coastal states,” according to the Act, include those adjacent to the Atlantic, Pacific or Arctic oceans, the Gulf of Mexico, or one or more of the Great Lakes. These States are required to adopt coastal management plans which designate boundaries, identify areas of particular concern, and establish an inventory of permitted uses and an enforcement mechanism. Beach access, emergency planning and erosion control also must be addressed in the plans. EPA and other Federal agencies must coordinate their activities on coastal lands with State CZMA plans.

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) of 1934 requires mitigation for the loss of wildlife habitat due to the construction of Federal water resources projects. It requires designers of Federal dams, reservoirs, and irrigation works to include the costs and benefits to fish and wildlife when determining the benefit/cost ratio of a project. It requires EPA and other Federal agencies to consult with State and Federal wildlife and fisheries agencies in order to minimize the impacts of the activity on fish and wildlife. The Act specifically calls for ongoing studies by the United States Department of the Interior on the effects of waterborne sewage and industrial wastes on fish and wildlife.

National Environmental Policy Act

The 1967 National Environmental Policy Act established a Federal framework for policy decisions regarding Federal actions that will have a significant effect on the environment. “Federal” actions generally include projects undertaken by the Federal government, as well as non-Federal actions eligible for Federal assistance and non-Federal actions that require Federal permits or approvals. Thus, NEPA requirements apply to NPDES permits issued by EPA to new sources in non-delegated States. The Act’s most important provision is Section 102(2)(c), requiring Federal agencies such as EPA to file an Environmental Impact Statement (EIS) on all “proposals for legislation and other major Federal actions significantly affecting the quality of the

human environment.” The definition of what constitutes such actions is an ongoing discussion. The Act establishes a framework for cooperation between the United States government at all levels, and other countries on environmental matters. It also established the Council on Environmental Quality.