

Comparison of Final and Previously Applicable Rule

**Supplemental Information for
Water Quality Standards Regulatory Revisions Final Rule**

Comparison of Final Rule Language and Previously Applicable Rule Language

NOTE: THE FOLLOWING REGULATORY TEXT IS A COMPARISON OF THE FINAL RULE LANGUAGE AND THE PREVIOUSLY APPLICABLE RULE LANGUAGE. STRIKEOUTS INDICATE DELETION OF PREVIOUSLY APPLICABLE TEXT AND UNDERLINES INDICATE ADDITION OF FINAL REGULATORY TEXT.

THE TEXT BELOW SHOWS ONLY THE PROVISIONS AFFECTED BY THE REVISIONS IN THIS RULEMAKING. IT DOES NOT REPRESENT THE ENTIRETY OF THE PART 131 REGULATION.

PART 131—WATER QUALITY STANDARDS

§ 131.2 Purpose.

A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria ~~necessary to that~~ protect the designated uses. * * *

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§ 131.3 Definitions.

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(h) *Water quality limited segment* means any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-~~bases~~-based effluent limitations required by sections 301(b) and 306 of the Act.

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(j) *States* include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, ~~the Trust Territory of the Pacific Islands,~~ the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of water quality standards program.

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(m) *Highest attainable use* is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.

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(n) *Practicable*, in the context of § 131.12(a)(2)(ii), means technologically possible, able to be put into practice, and economically viable.

(o) *A water quality standards variance (WQS variance) is a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance.*

(p) *Pollutant Minimization Program*, in the context of § 131.14, is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

(q) *Non-101(a)(2) use* is any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water.

§ 131.5 EPA authority.

(a) * * *

(1) Whether the State has adopted designated water uses ~~which~~that are consistent with the requirements of the Clean Water Act;

(2) Whether the State has adopted criteria that protect the designated water uses based on sound scientific rationale consistent with § 131.11;

(3) Whether the State has adopted an antidegradation policy that is consistent with § 131.12, and whether any State adopted antidegradation implementation methods are consistent with § 131.12;

(4) Whether any State adopted WQS variance is consistent with § 131.14;

(5) Whether any State adopted provision authorizing the use of schedules of compliance for water quality-based effluent limits in NPDES permits is consistent with § 131.15;

~~(36)~~ Whether the State has followed ~~its~~applicable legal procedures for revising or adopting standards;

~~(47)~~ Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and

~~(58)~~ Whether the State submission meets the requirements included in § 131.6 of this part and, for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Act, the requirements of 40 CFR part 132.

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (a)(~~58~~) of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal

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standards under section 303(c)(4), and for Great Lakes States or Great Lakes Tribes under section 118(c)(2)(C) of the Act, if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (a)(58) of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

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§ 131.10 Designation of uses.

(a) Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. If adopting new or revised designated uses other than the uses specified in section 101(a)(2) of the Act, or removing designated uses, States must submit documentation justifying how their consideration of the use and value of water for those uses listed in this paragraph appropriately supports the State's action. A use attainability analysis may be used to satisfy this requirement. In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.

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~~(e) Prior to adding or removing any use, or establishing sub-categories of a use, the State shall provide notice and an opportunity for a public hearing under § 131.20(b) of this regulation.~~
[Removed and Reserved]

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(g) States may designate a use, or remove a ~~designated-use which~~that is not an existing use, if the State conducts a use attainability analysis as specified in § 131.10(j) that demonstrates 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: of one of the six factors in this paragraph. If a State adopts a new or revised water quality standard based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in § 131.3(m).

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(j) A State must conduct a use attainability analysis as described in § 131.3(g), and § 131.10(g), whenever:

- (1) The State designates for the first time, or has previously designated for a water body, uses that do not include the uses specified in section 101(a)(2) of the Act, or
- (2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act, to remove a sub-category of such a use, or to designate a sub-category ~~adopt subcategories~~ of such a use ~~uses specified in section 101(a)(2) of the Act which require that requires criteria~~ less stringent ~~criteria~~ than previously applicable.

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(k) A State is not required to conduct a use attainability analysis ~~under this regulation whenever designating uses which include those specified in section 101(a)(2) of the Act.~~ whenever:

- (1) The State designates for the first time, or has previously designated for a water body, uses that include the uses specified in section 101(a)(2) of the Act, or
- (2) The State designates a sub-category of a use specified in section 101(a)(2) of the Act that requires criteria at least as stringent as previously applicable, or
- (3) The State wishes to remove or revise a designated use that is a non-101(a)(2) use. In this instance, as required by § 131.10(a), the State must submit documentation justifying how its consideration of the use and value of water for those uses listed in § 131.10(a) appropriately supports the State's action, which may be satisfied through a use attainability analysis.

§ 131.11 Criteria.

(a) * * *

- (2) *Toxic pollutants.* States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part ~~35~~130).

(b) ~~Form of criteria:~~ Form of criteria: In establishing criteria, States should:

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§ 131.12 Antidegradation policy and implementation methods.

(a) The State shall develop and adopt a statewide antidegradation policy ~~and identify the methods for implementing such policy pursuant to this subpart.~~ The antidegradation policy ~~and implementation methods~~ shall, at a minimum, be consistent with the following:

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- (2) Where the quality of the waters ~~exceed~~exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's

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continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(i) The State may identify waters for the protections describe in (a)(2) of this section on a parameter-by-parameter basis or on a water body-by-water body basis. Where the State identifies waters for antidegradation protection on a water body-by-water body basis, the State shall provide an opportunity for public involvement in any decisions about whether the protections described in (a)(2) of this section will be afforded to a water body, and the factors considered when making those decisions. Further, the State shall not exclude a water body from the protections described in (a)(2) of this section solely because water quality does not exceed levels necessary to support all of the uses specified in section 101(a)(2) of the Act.

(ii) Before allowing any lowering of high water quality, pursuant to (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation.

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(b) The State shall develop methods for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section. The State shall provide an opportunity for public involvement during the development and any subsequent revisions of the implementation methods, and shall make the methods available to the public.

§ 131.14 Water quality standards variances.

States may adopt WQS variances, as defined in § 131.3(o). Such a WQS variance is subject to the provisions of this section and public participation requirements at § 131.20(b). A WQS variance is a water quality standard subject to EPA review and approval or disapproval.

(a) *Applicability:*

- (1) A WQS variance may be adopted for a permittee(s) or water body/waterbody segment(s), but only applies to the permittee(s) or water body/waterbody segment(s) specified in the WQS variance.
- (2) Where a State adopts a WQS variance, the State must retain, in its standards, the underlying designated use and criterion addressed by the WQS variance, unless the State

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adopts and EPA approves a revision to the underlying designated use and criterion consistent with § 131.10 and § 131.11. All other applicable standards not specifically addressed by the WQS variance remain applicable.

- (3) A WQS variance, once adopted by the State and approved by EPA, shall be the applicable standard for purposes of the Act under 40 CFR 131.21(d)-(e), for the following limited purposes. An approved WQS variance applies for the purposes of developing NPDES permit limits and requirements under 301(b)(1)(C), where appropriate, consistent with paragraph (a)(1) of this section. States and other certifying entities may also use an approved WQS variance when issuing certifications under section 401 of the Act.
- (4) A State may not adopt WQS variances if the designated use and criterion addressed by the WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act.

(b) Requirements for Submission to EPA:

(1) A WQS variance must include:

(i) Identification of the pollutant(s) or water quality parameter(s), and the water body/waterbody segment(s) to which the WQS variance applies. Discharger(s)-specific WQS variances must also identify the permittee(s) subject to the WQS variance.

(ii) The requirements that apply throughout the term of the WQS variance. The requirements shall represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the WQS variance based on the documentation required in (b)(2) of this section. The requirements shall not result in any lowering of the currently attained ambient water quality, unless a WQS variance is necessary for restoration activities, consistent with paragraph (b)(2)(i)(A)(2) of this section. The State must specify the highest attainable condition of the water body or waterbody segment as a quantifiable expression that is one of the following:

(A) For discharger(s)-specific WQS variances:

- (1) The highest attainable interim criterion, or
- (2) The interim effluent condition that reflects the greatest pollutant reduction achievable, or
- (3) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program.

(B) For WQS variances applicable to a water body or waterbody segment:

- (1) The highest attainable interim use and interim criterion, or

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(2) If no additional feasible pollutant control technology can be identified, the interim use and interim criterion that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program.

(iii) A statement providing that the requirements of the WQS variance are either the highest attainable condition identified at the time of the adoption of the WQS variance, or the highest attainable condition later identified during any reevaluation consistent with (b)(1)(v) of this section, whichever is more stringent.

(iv) The term of the WQS variance, expressed as an interval of time from the date of EPA approval or a specific date. The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition and consistent with the demonstration provided in paragraph (b)(2) of this section. The State may adopt a subsequent WQS variance consistent with this section.

(v) For a WQS variance with a term greater than five years, a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and a provision specifying how the State intends to obtain public input on the reevaluation. Such reevaluations must occur no less frequently than every five years after EPA approval of the WQS variance and the results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation.

(vi) A provision that the WQS variance will no longer be the applicable water quality standard for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by (b)(1)(v) of this section.

(2) The supporting documentation must include:

(i) Documentation demonstrating the need for a WQS variance.

(A) For a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such a use, the State must demonstrate that attaining the designated use and criterion is not feasible throughout the term of the WQS variance because:

(1) One of the factors listed in § 131.10(g) is met, or

(2) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.

(B) For a WQS variance to a non-101(a)(2) use, the State must submit documentation justifying how its consideration of the use and value of the water for those uses listed

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in § 131.10(a) appropriately supports the WQS variance and term. A demonstration consistent with (b)(2)(i)(A) of this section may be used to satisfy this requirement.

(ii) Documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition. Such documentation must justify the term of the WQS variance by describing the pollutant control activities to achieve the highest attainable condition, including those activities identified through a Pollutant Minimization Program, which serve as milestones for the WQS variance.

(iii) In addition to (i) and (ii) of this section, for a WQS variance that applies to a water body or waterbody segment:

(A) Identification and documentation of any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) or water quality parameter(s) and water body or waterbody segment(s) specified in the WQS variance that could be implemented to make progress towards attaining the underlying designated use and criterion. A State must provide public notice and comment for any such documentation.

(B) Any subsequent WQS variance for a water body or waterbody segment must include documentation of whether and to what extent best management practices for nonpoint source controls were implemented to address the pollutant(s) or water quality parameter(s) subject to the WQS variance and the water quality progress achieved.

(c) *Implementing WQS variances in NPDES permits:* A WQS variance serves as the applicable water quality standard for implementing NPDES permitting requirements pursuant to § 122.44(d) for the term of the WQS variance. Any limitations and requirements necessary to implement the WQS variance shall be included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance.

§ 131.15 Authorizing the use of schedules of compliance for water quality-based effluent limits in NPDES permits.

If a State intends to authorize the use of schedules of compliance for water quality-based effluent limits in NPDES permits, the State must adopt a permit compliance schedule authorizing provision. Such authorizing provision is a water quality standard subject to EPA review and approval under section 303 of the Act and must be consistent with sections 502(17) and 301(b)(1)(C) of the Act.

§ 131.20 State review and revision of water quality standards.

(a) *State review.* The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards adopted pursuant to §§

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131.10—131.15 and Federally promulgated water quality standards and, as appropriate, modifying and adopting standards. ~~Any water body~~ The State shall also re-examine any waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process. In addition, if a State does not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section 304(a) criteria recommendations, then the State shall provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with CWA section 303(c)(1) and the requirements of § 131.20(c).

(b) Public participation. The State shall hold one or more a-public ~~hearing~~ hearings for the purpose of reviewing water quality standards as well as when revising water quality standards, in accordance with provisions of State law, ~~EPA's water quality management regulation (40 CFR 130.3(b)(6))~~ and EPA's public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

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§ 131.22 EPA promulgation of water quality standards.

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(b) The Administrator may also propose and promulgate a regulation, applicable to one or more ~~States~~ navigable waters, setting forth a new or revised standard upon determining such a standard is necessary to meet the requirements of the Act. To constitute an Administrator's determination that a new or revised standard is necessary to meet the requirements of the Act, such determination must:

(1) Be signed by the Administrator or his or her duly authorized delegate, and

(2) Contain a statement that the document constitutes an Administrator's determination under section 303(c)(4)(B) of the Act.

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§ 131.34 Kansas.

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(c) Water quality standard variances. ~~(1)~~ The Regional Administrator, EPA Region 7, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of § 131.14 ~~this paragraph (c)~~ are met. ~~A water quality standard variance applies only to the permittee requesting the variance and only to the pollutant or~~

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~~pollutants specified in the variance; the underlying water quality standard otherwise remains in effect.~~

~~(2) A water quality standard variance shall not be granted if:~~

~~(i) Standards will be attained by implementing effluent limitations required under sections 301(b) and 306 of the CWA and by the permittee implementing reasonable best management practices for nonpoint source control; or~~

~~(ii) The variance would likely jeopardize the continued existence of any threatened or endangered species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat.~~

~~(3) Subject to paragraph (c)(2) of this section, a water quality standards variance may be granted if the applicant demonstrates to EPA that attaining the water quality standard is not feasible because:~~

~~(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 water body to its original condition or to operate such modification in a way which would result in the attainment of the use; or~~

~~(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 CWA would result in substantial and widespread economic and social impact.~~

~~(4) Procedures. An applicant for a water quality standards variance shall submit a request to the Regional Administrator of EPA Region 7. The application shall include all relevant information showing that the requirements for a variance have been satisfied. The burden is on the applicant to demonstrate to EPA's satisfaction that the designated use is unattainable for one of the reasons specified in paragraph (c)(3) of this section. If the Regional Administrator preliminarily determines that grounds exist for granting a variance, he shall provide public notice of the proposed variance and provide an opportunity for public comment. Any activities required as a condition of the Regional Administrator's granting of a variance shall be included as conditions of the NPDES permit for the applicant. These terms and conditions shall be incorporated into the~~

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~~applicant's NPDES permit through the permit reissuance process or through a modification of the permit pursuant to the applicable permit modification provisions of Kansas' NPDES program.~~

~~(5) A variance may not exceed 3 years or the term of the NPDES permit, whichever is less. A variance may be renewed if the applicant reapplies and demonstrates that the use in question is still not attainable. Renewal of the variance may be denied if the applicant did not comply with the conditions of the original variance, or otherwise does not meet the requirements of this section.~~

§ 131.40 Puerto Rico.

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~~(c) *Water quality standard variances.* (1) The Regional Administrator, EPA Region 2, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of [§ 131.14](#) ~~this paragraph (c)~~ are met. ~~A water quality standard variance applies only to the permittee requesting the variance and only to the pollutant or pollutants specified in the variance; the underlying water quality standard otherwise remains in effect.~~~~

~~(2) A water quality standard variance shall not be granted if:~~

~~(i) Standards will be attained by implementing effluent limitations required under sections 301(b) and 306 of the CWA and by the permittee implementing reasonable best management practices for nonpoint source control; or~~

~~(ii) The variance would likely jeopardize the continued existence of any threatened or endangered species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat.~~

~~(3) A water quality standards variance may be granted if the applicant demonstrates to EPA that attaining the water quality standard is not feasible because:~~

~~(i) Naturally occurring pollutant concentrations prevent the attainment of the use;~~

~~(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 Commonwealth water conservation requirements to enable uses to be met;~~

~~(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;~~

~~(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 which would result in the attainment of the use;~~

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~~(v) Physical conditions related to the natural features of the waterbody, 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 CWA would result in substantial and widespread economic and social impact.~~

~~(4) Procedures. An applicant for a water quality standards variance shall submit a request to the Regional Administrator of EPA Region 2. The application shall include all relevant information showing that the requirements for a variance have been met. The applicant must demonstrate that the designated use is unattainable for one of the reasons specified in paragraph (c)(3) of this section. If the Regional Administrator preliminarily determines that grounds exist for granting a variance, he/she shall provide public notice of the proposed variance and provide an opportunity for public comment. Any activities required as a condition of the Regional Administrator's granting of a variance shall be included as conditions of the NPDES permit for the applicant. These terms and conditions shall be incorporated into the applicant's NPDES permit through the permit reissuance process or through a modification of the permit pursuant to the applicable permit modification provisions of Puerto Rico's NPDES program.~~

~~(5) A variance may not exceed five years or the term of the NPDES permit, whichever is less. A variance may be renewed if the applicant reapplies and demonstrates that the use in question is still not attainable. Renewal of the variance may be denied if the applicant did not comply with the conditions of the original variance, or otherwise does not meet the requirements of this section.~~