CALIFORNIA COASTKEEPER ALLIANCE

Public Comment
Statewide Water Quality Standards Variance Policy
Deadline: 2/3/17 12 noon

February 3, 2017

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SWRCB Clerk

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comment Letter - Variance Policy – Scoping Comments

Dear Chair Marcus and Board Members:

On behalf of the California Coastkeeper Alliance, representing California Waterkeeper groups spanning the coast from the Oregon border to San Diego, we appreciate the opportunity to comment on the proposed Variance Policy. CCKA and its member Waterkeepers work to protect waters throughout the state for the benefit of California communities and ecosystems. To strictly comply with the Clean Water Act's (CWA) requirement to protect all beneficial uses, California should not allow for water quality standard (WQS) variances. WQS variances cause pollution hotspots and will delay reasonably available actions necessary to clean up waterbodies. If the State Water Board proceeds with a Variance Policy, we advise that the Policy be extremely limited in scope and fully comply with the CWA, federal regulations, the Porter-Cologne Act, and State Policy.

The CWA is a "comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[1] Pursuant to CWA Section 303, California must adopt and implement water quality standards to protect navigable waters within its borders, subject to oversight and approval by the EPA.[2] According to EPA:

> A water quality standard defines the water quality goals of a waterbody, or portion thereof, by *designating the use or uses to be made of the water*, by *setting criteria* necessary to protect the uses, *and* by *preventing degradation* of water quality through antidegradation provisions. States adopt water quality standards to protect public health or welfare, *enhance the quality of water*, and serve the purposes of the Clean Water Act.[3]

The CWA requires that water quality standards be "established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."[4]

Sound interpretation and implementation of the CWA through State rulemaking is essential to restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Water quality standards are the core regulations under the CWA that the public depends on to ensure our nation's waters are swimmable, drinkable and fishable. Any modification to water quality standards must be undertaken with extreme care to ensure that there will be no weakening of CWA protections for human health and the

[1] *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).
[2] 33 U.S.C. §1313.
[3] EPA, Water Quality Standards Handbook: Second Edition Int-8 (1993) (emphasis added).
[4] 33 U.S.C. §1313(c)(2)(A).

environment. Implementation of the comprehensive scheme of the Act is the best means for achieving fishable, swimmable, and drinkable waters in California during our lifetimes, and creation of programs for variances from that scheme may delay achievement of those goals indefinitely.

If California chooses to use variances, to comply with the CWA, federal regulations, the Porter-Cologne Act, and State policy, the State Water Board must at a minimum incorporate the following into a Variance Policy:

(1) Allow a variance only if it is consistent with the substantive and procedural requirements of permanently downgrading a designated use;
(2) Limit the scope of the Variance Policy to allow only for variances to WQS for specific dischargers rather than an entire waterbody.
(3) Make variances as short as possible and reevaluated every three years;
(4) Require dischargers to meet the WQS by the end of the variance period; and
(5) Comply with the Antidegredation and Antibacksliding Policies.

1. The State Water Board should not adopt a Variance Policy, or only allow a variance that is consistent with the substantive and procedural requirements for permanently downgrading a designated use.

At the outset, variances from WQS do not comply with the CWA's strict requirement to adopt and enforce WQS to protect all beneficial uses.[5] However, federal regulations currently allow states to adopt WQS variances if they comply with or are more stringent than the requirements in 40 C.F.R. §131.13. This section currently provides that "[s]tates may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval."[6]

As a national leader in environmental protection, California should choose not to allow for WQS variances. First, variances essentially allow for "sacrifice zones" in our waters, where the State condones turning a blind eye to exceedances of WQS. Unfortunately, in practice, we know that pollution hot spots, which a variance would cause, often occur in environmental justice communities that are already over-burdened with pollution. There is nothing in the federal regulations or the State Water Board's proposal that would require that variances not be allowed in environmental justice communities. Second, variances should not be permitted to ensure an even playing field between dischargers; every discharger should have to comply with the WQS. Third, granting a WQS variance for a waterbody or a segment of a waterbody is unnecessary and contrary to specific requirements in the CWA. CWA section 303(d) already provides a mechanism to get water bodies that do not attain WQS back in compliance.[7] Granting a variance to a waterbody undermines this specific statutory process.

In the alternative, the Variance Policy should allow the use of variances in only limited circumstances and require that a variance for any WQS meets the requirements for permanently downgrading a designated use. According to the Water Quality Standard Handbook, EPA allows variances as long as:

- Each individual variance is included as part of the water quality standard;
- The State demonstrates that meeting the standard is unattainable based on one or more of the grounds outlined in 40 CFR 131.10(g) for removing a designated use;
- The justification submitted by the State includes documentation that treatment more advanced than that required by sections 303(c)(2)(A) and (B) has been carefully considered, and that alternative effluent control strategies have been evaluated;
- The more stringent State criterion is maintained and is binding upon all other dischargers on the stream or stream segment;
- The discharger who is given a variance for one particular constituent is required to meet the applicable criteria for other constituents;

[5] 33 U.S.C. §§ 1251(a), 1252(a), 1312(a), 1313(c), 1342(a).
[6] 40 C.F.R. §131.13.
[7] 33 U.S.C. § 1313(d); *see infra* section 2.

- The variance is granted for a specific period of time and must be justified upon expiration but at least every 3 years (Note: the 3-year limit is derived from the triennial review requirements of section 303(c) of the Act.);
- The discharger either must meet the standard upon the expiration of this time period or must make a new demonstration of "unattainability";
- Reasonable progress is being made toward meeting the standards; and
- The variance was subjected to public notice, opportunity for comment, and public hearing. (See section 303(c)(l) and 40 CFR 131.20.) The public notice should contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.

The Variance Policy must meet all of those specific requirements.

EPA's longstanding interpretation is that variances should only be allowed if they are "adopted consistent with the substantive and procedural requirements for permanently downgrading a designated use," i.e. based on the factors in 40 C.F.R. §131.10(g).[8] This section requires the State to prepare a "use attainability analysis" showing that a waterbody cannot attain a use because of one of six factors listed.[9] Until very recently, EPA has applied this requirement for a variance of any WQS; however, EPA has recently changed this policy to only require a use attainability analysis for variances to a use specified in CWA section 101(a)(2), i.e., "protection and propagation of fish shellfish, and wildlife" and "recreation in and on the water."[10] For all other uses, including public drinking water supplies, the State need only demonstrate that the use and value was considered.[11]

There is no valid justification for differentiating between CWA section 101(a)(2) uses and other uses. Certainly, protecting public drinking water supplies is of paramount public concern, especially for California because we face extreme droughts and lack of drinking water supplies as a result. Excusing compliance with WQS that protect that use should not be taken lightly. Despite federal regulations, adopting a variance to any WQS should go through the same process outlined in 40 C.F.R. section 131.10(g).

The State Water Board should require that all variances be adopted consistent with the substantive and procedural requirements for permanently downgrading a designated use," i.e. based on the factors in 40 C.F.R. §131.10(g).

2. *The State Water Board should limit the scope of the Variance Policy to allow only for variances to WQS for specific dischargers rather than an entire waterbody.*

Under Section 303(c), water quality standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." A Variance Policy should not allow for a downgrading of water quality standards for all permittees, for an entire waterbody or for specific pollutants without regard to the impact public health or designated uses.

We are concerned that the proposed Variance Policy will increase the use of variances to avoid taking actions that are reasonably available to address water quality impairments. The CWA provides extensive mechanisms for the State to utilize in addressing impaired waters, and these provisions, when fully

[8] 78 Federal Register 54,531. This interpretation is repeated in the Water Quality Standards Handbook which states that variances will only be allowed if "the State demonstrates that meeting the standard is unattainable based on one or more of the grounds outlined in 40 CFR 131.10(g) for removing a designated use."
[9] 40 C.F.R. § 131.10(g).
[10] 40 C.F.R. § 131.14(2)(i).
[11] 40 C.F.R. § 131.14(2)(ii).

implemented, actually move us forward in addressing waterbodies that are not meeting water quality standards.[12] Variances, on the other hand, simply reduce water quality protection for a set time period, and do not assist the State in meeting water quality standards.

The use of variances will delay actions necessary to clean up waterbodies, such as Total Maximum Daily Load ("TMDL") development and implementation. Development and implementation of TMDLs is already delayed across the State, and the State Water Board should not adopt any regulation that will interfere with efforts to address impaired waters. The TMDL and permitting process are the proper methods for dealing with waters that are not meeting water quality standards. Moreover, permittees that cannot comply with these requirements may obtain compliance schedules that include reasonable timelines and an enforceable sequence of actions that will bring them into compliance as described below. Given this approach to addressing impaired waters it is unclear why variances are necessary at all.

If the State Water Board does adopt a Variance Policy, it should only allow for variances for specific dischargers, rather than variances for water bodes or segments thereof. A variance for a waterbody contradicts the specific requirements in CWA section 303(d) and undermines the TMDL process. It is unclear how the two process would, in fact, work together. A variance does not excuse a WQS for purposes of a State's compliance with 303(d).[13] Therefore, if the State did approve a WQS variance for a particular waterbody, the State would still need to list that waterbody as impaired and begin the TMDL process. These processes clearly contradict one another. Moreover, a variance for a waterbody, unlike the TMDL, excuses compliance with the WQS but does not provide a plan to come into attainment. In all likelihood, the waterbody will still be out of attainment at the end of the variance period.[14]

Historically, EPA allowed variances only for discharges, defining a variance as "the practice of temporarily downgrading the WQS as it applies to a specific discharger rather than permanently downgrading an entire waterbody or waterbody segment(s)."[15] Under existing variance guidance, a "discharger who is given a variance for one particular constituent is required to meet the applicable criteria for all other constituents. The variance is given for a limited time period and the discharger must either meet the WQS upon the expiration of this time period or the state or tribe must adopt a new variance or re-justify the current variance subject to EPA review and approval."[16] While we do not fully agree with a discharger-specific variance, it does not create the same conflicts with specific processes in the CWA.

The State Water Board should limit the scope of variances to the practice of temporarily downgrading the WQS as it applies to a specific discharger rather than downgrading an entire waterbody or waterbody segment(s).

3. The State Water Board should make variances as short as possible and reevaluate them every three years during triennial reviews.

WQS variances must only be as long as necessary, and the EPA requires that any term greater than five years needs to be revaluated. However, the State Water Board should review any variance at least every three years as mandated by Section 303(c) for all water quality standards.

The State Water Board should not excuse a WQS seasonally. It is our understanding that the proposed Variance Policy is to accommodate cities that want a variance for Rec-1 standards during the rainy months due to bacteria runoff from stormwater. It is important to note that the federal variance regulations do not allow excusing a WQS for a certain period of the year every year or seasonally. The

[12] *See* 33 U.S.C. § 1313(d).
[13] 40 C.F.R. § 131.14(1)(a)(2).
[14] 40 C.F.R. section 131.14(2)(iii) requires documentation showing how the waterbody will be brought back into compliance with the WQS and designated use. It is unclear how the State will do this without going through the TMDL process.
[15] 78 Federal Register 54,531.
[16] 78 Federal Register 54,531.

regulations require compliance with the WQS at the end of the variance period.

When approving variances the State Water Board should require a mechanism by which dischargers or waterbodies will meet the WQS by the end of the variance period. Additionally, the discharger or the waterbody must meet the highest attainable condition during the variance period; at the end of the variance period, the discharger or waterbody must meet the WQS. [17]

4. The State Water Board must comply with the Antidegredation and Antibacksliding Policies when adopting a variance.

According to the State Water Board's Administrative Procedures Update 90, the Regional Boards must consider the need to include a finding that specifies that water quality degradation is permissible when balanced against benefit to the public of the activity in question. The determination as to whether a finding is needed must be made when issuing, reissuing, amending, or revising an NPDES permit. When adopting any variance, the Water Boards must make findings that specifically state that the Regional Board has considered antidegredation pursuant to 40 CFR 131.12 and State Board Resolution No. 68-16 and finds that the permitted discharge is consistent with those provisions.

If the Regional Board finds that a variance is consistent with the conditions established in the State policy and the federal regulation, the findings should indicate:

(1) The pollutants that will lower water quality;
(2) The socioeconomic and public benefits that result from lowered water quality; and
(3) The beneficial uses that will be acted.

Moreover, the Clean Water Act contains "anti-backsliding" provisions that prohibit relaxation of permit terms upon renewal. The Clean Water Act requires that, for effluent limitations based on a state water quality standard, "a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit," unless certain exceptions apply.[18] It also states that "[i]n no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of [water quality standards]."[19]

In order to comply with the CWA, federal regulations, and State policy, the State Water Board shall evaluate any proposed variance in compliance with the Antidegredation and Antibacksliding Policies.

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To strictly comply with the CWA's requirement to protect all beneficial uses, California should not allow for WQS variances. If the State Water Board proceeds with a Variance Policy, we advise that it be extremely limited in scope and fully comply with the CWA, federal regulations, the Porter-Cologne Act, and State Policy.

Sincerely,

Sean Bothwell
Policy Director
California Coastkeeper Alliance

[17] We recognize that 40 C.F.R. section 131.14(2)(ii) requires "documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition." However, the highest attainable condition must be achieved during the variance period. (*See id*.; *see also id*. at § 131.14(1)(b)(ii).) WQS must be achieved at the end of the variance period.
[18] 33 U.S.C. § 1342(o)(1), (2).
[19] *Id.* § 1342(o)(3).