



Ohio Administrative Code

Rule 901:10-3-08 Variances.

Effective: September 1, 2011

(A) A variance may be requested in accordance with section 301 or section 302 of the Federal Water Pollution Control Act. A request for a variance will be decided upon by the director, but the director's decision shall not be incorporated into any term or condition of a NPDES permit until the United States environmental protection agency regional administrator grants or denies the request for a variance or, in the case of variances under paragraph (B)(4) or (B)(5) of this rule, the administrator grants or denies the request for a variance.

(B) The regional administrator may deny, forward or submit to the United States environmental protection agency office director for water enforcement and permits a recommendation for approval for a request for a variance listed in paragraph (B) of this rule that has been forwarded by the director:

(1) Extensions based on delay in completion of a publicly owned treatment works provided that the extension meets the requirements of section 301(i) of the act;

(2) Extensions based on the use of innovative technology where effluent reduction will be significantly reduced with significantly reduced cost. The variances may provide an extended two-year period to comply provided that the extension meets the requirements of section 301(k) of the act;

(3) A variance based on the economic capability of the applicant provided that the variance shall meet the requirements of section 301(c) of the act. The owner or operator must show progress in reductions with the maximum use of technology while utilizing economic capability;

(4) A variance based on the presence of "fundamentally different factors" or "FDF" that meets the requirements of section 301(n) of the act. A FDF variance is not timely unless filed when effluent limits are to be modified in a rulemaking procedure. A FDF variance shall be "no less stringent a limit than justified by fundamental differences" while also demonstrating that the existing limit will



cause adverse affect; or

(5) A variance that meets the requirements of section 301(g) of the act for nonconventional pollutants that include ammonia, chlorine, color, iron, and total phenols.

(6) A variance based on water quality related effluent limitations under section 302(b) of the act applies only to the owner or operator requesting the variance and only to the pollutant or pollutants specified in the variance. A variance does not affect or require corresponding changes to the water quality standard for the waterbody as a whole.

(a) Eligibility. The owner or operator is not eligible for a variance under this paragraph if the following apply:

(i) The owner or operator is a new discharger or the owner or operator of a facility that commenced a discharge after March 23, 1997.

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

(iii) If standards will be attained by implementing effluent limits required under sections 301 (b) and 306 of the act and by the owner or operator implementing cost-effective and reasonable best management practices for nonpoint source control.

(b) Timeframe for variances. A water quality based variance issued under paragraph (B)(6) of this rule shall not exceed five years or the term of the NPDES permit whichever is less. A water quality based variance shall be reviewed and modified if necessary as part of each water quality standards review pursuant to section 303(c) of the act.

(c) Conditions to grant a variance. A variance may be granted if:

(i) The owner or operator demonstrates to the director that attaining the water quality standard is not feasible because:



- (a) Naturally occurring pollutant concentrations prevent the attainment of the water quality standard;
 - (b) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the water quality standard, unless these conditions may be compensated for by the discharge of a sufficient volume of effluent to enable the water quality standard to be met without violating water conservation requirements;
 - (c) Human-caused conditions or sources of pollution prevent the attainment of the water quality standard and cannot be remedied, or would cause more environmental damage to correct than to leave in place;
 - (d) Dams, diversions or other types of hydrologic modifications preclude the attainment of the water quality standard, 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 water quality standard;
 - (e) Physical condition 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 chemical water quality, preclude attainment of the water quality standard; or
 - (f) 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.
- (ii) In addition to the requirements of paragraph (B)(6)(c)(i) of this rule the owner or operator shall also:
- (a) Show that the variance requested conforms to the requirements of the antidegradation policy as set forth in section 6111.12 of the Revised Code; and
 - (b) Characterize the extent of any increased risk to human health and the environment associated with granting the variance compared with compliance with the water quality standard absent the variance, such that the director is able to conclude that any such increased risk is consistent with the protection of the public health, safety and welfare.



(d) Submittal of the variance application. The owner or operator shall submit an application for a variance to the director. The application shall include:

(i) All relevant information demonstrating that attaining the water quality standard is not feasible based on one or more of the conditions in paragraphs (B)(6)(c)(i) and (B)(6)(c)(ii) of this rule.

(e) Public notice of preliminary decision. Upon receipt of a complete application for a variance and upon making a preliminary decision regarding the variance the director shall provide public notice of the request and preliminary decision for a public comment pursuant to the procedures set forth in Chapter 901:10-6 of the Administrative Code. The director shall notify the other Great Lakes States and Tribes of the preliminary decision for discharges in the Lake Erie basin. This public notice requirement may be satisfied by including the supporting information for the variance and the preliminary decision in the public notice of the draft NPDES permit.

(7) The director shall issue a final decision on the variance request within ninety days of the expiration of the public comment period required in paragraph (B)(6)(e) of this rule. If the director decides to grant or deny a variance then the director shall do so in accordance with Chapter 119. of the Revised Code. If all or part of the variance is approved by the director, the decision shall include all permit conditions needed to implement those parts of the variance so approved. Such permit conditions shall, at a minimum, require:

(a) Compliance with an initial effluent limitation which, at the time the variance is granted, represents the level currently achievable by the owner or operator and which is no less stringent than that achieved under the previous permit;

(b) That reasonable progress be made toward attaining the water quality standards for the waterbody as a whole through appropriate conditions;

(c) When the duration of a variance is shorter than the duration of a permit, compliance with an effluent limitation sufficient to meet the underlying water quality standard, upon the expiration of said variance; and



(d) A provision that allows the director to reopen and modify the permits based on any triennial water quality standards revisions to the variance.

The director shall deny a variance request if the permittee fails to make the demonstrations required under paragraph (B)(6)(c) of this rule.

(8) Incorporating into the permit. The director shall establish and incorporate into the NPDES permit all conditions needed to implement the variance as determined in paragraph (B)(7) of this rule.

(9) Renewal of the variance. A variance may be renewed subject to the requirements of paragraph (B)(8) of this rule. As part of any renewal application, the owner or operator shall again demonstrate that attaining a water quality standard is not feasible based on the requirements of paragraph (B)(6)(c) of this rule. The application shall also contain information concerning compliance with the conditions incorporated into its permit as part of the original variance pursuant to paragraphs (B)(7) and (B)(8) of this rule. Renewal of a variance may be denied if the owner or operator did not comply with the conditions of the original variance.

(10) All variances and supporting information shall be submitted by the director to the regional administrator and shall include:

(a) Relevant applications as set forth in paragraph (B)(6)(d) of this rule;

(b) Public comments and records of any public hearings pursuant to paragraph (B)(6)(e) of this rule;

(c) The final decision of the director; and

(d) The NPDES permit.

(e) Information required by this paragraph shall be submitted by the director within thirty days of the date of the final variance decision. The information required by paragraph (B)(6)(d) of this rule shall be submitted in accordance with the terms of the memorandum of agreement with the regional administrator pursuant to 40 CFR 123.24.



(11) All variances shall be transmitted to the Ohio environmental protection agency and appended to the water quality standard rules adopted in accordance with section 6111.041 of the Revised Code.

(C) The United States environmental protection agency regional administrator or the United States environmental protection agency office of the director for water enforcement and permits may approve or deny any variance request submitted under paragraph (B) of this rule. If the regional administrator or office director approves the variance, the director may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance has been approved or denied shall identify the applicable procedures for appealing that decision. An owner or operator shall be afforded an appeal of the decision in accordance with 40 C.F.R. section 124.64 and Chapter 119. of the Revised Code.