

# Water Quality Standards Variances

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R10 WQS MEETING  
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# Disclaimers

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- **This presentation does not:**
  - Impose any binding requirements
  - Determine the obligations of the regulated community
  - Change or substitute for any statutory provision or regulation requirement
  - Represent, change or substitute for any Agency policy or guidance
  - Control in any case of conflict between this discussion and statute, regulation, policy or guidance

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# Objectives

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1. Review the basics of a Water Quality Standards (WQS) variance
2. Understand how using a WQS variance can help to get real improvements in water quality
3. Decide if a WQS variance is the right tool for your situation
4. Understand how WQS variances relate to other Clean Water Act (CWA) tools

# What is a WQS Variance?

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# A WQS Variance is:

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A time-limited designated use and criterion:

- for a specific pollutant
- from a specific source or for a specific water body
- that reflects the highest attainable condition for a specific time period.

A regulatory mechanism that **allows progress toward attaining a designated use and criterion that is not currently attainable**.

Transparent path, accountable progress

# Statutory Basis for WQS Variances

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## Sec. 101 of the Clean Water Act

- (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.
  - (1) ...
  - (2) it is the national goal that **wherever attainable**, an interim goal of water quality which provides for...

## Interpretation

- The goal is to make water quality better
- This goal may not always be readily attainable

# Types of Variances

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## Discharger Specific Variances:

- Individual Variance – Pertains to a variance written and approved for a single discharger
- Multi-discharger Variance – Pertains to a variance written and approved for multiple dischargers experiencing similar challenges. Dischargers do not need to be in the same waterbody (See EPA's March 2013 FAQ on Multiple Discharger Variances).

Waterbody or Waterbody Segment Variance – Pertains to a variance written and approved for an entire waterbody or waterbody segment. Establishes a time limited use and criterion for the entire waterbody/waterbody segment. All sources to the waterbody must be assessed including both point and non-point sources.

# How Can WQS Variances Lead to Real Improvements in Water Quality?

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# When WQS Variances Can Be Useful

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Incremental water quality improvements can be made even though:

- The designated use and criterion is not attainable now, but the state or authorized tribe believes it can be in the future, or
- The feasibility of attaining the designated use and criterion in the future is uncertain, but feasible progress towards attaining the designated use can still be made by implementing known controls and tracking environmental improvements

# Variances: Transparent Path, with Accountable Progress

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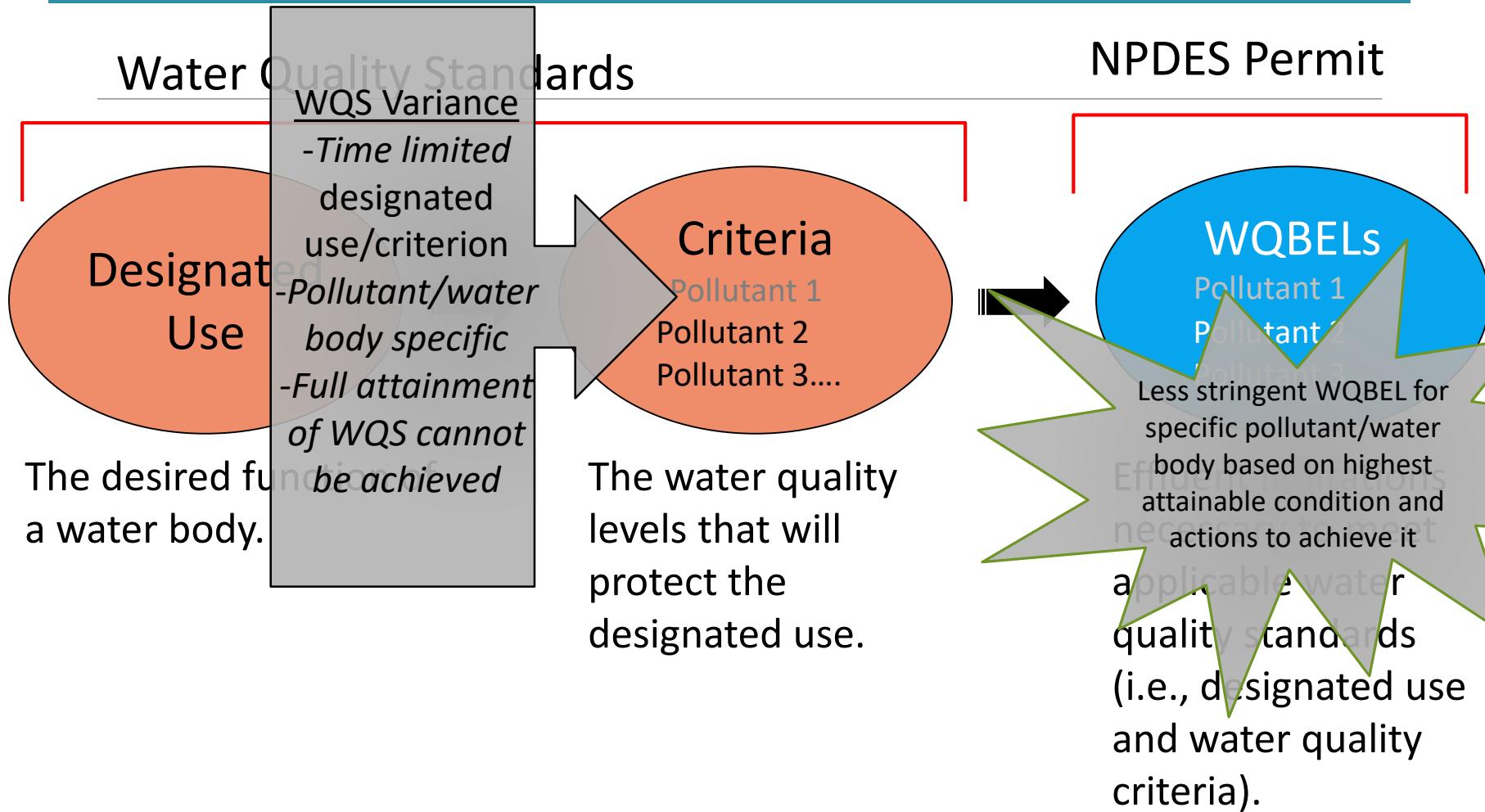
**A data driven alternative to pursuing a use change** that focuses on:

- achievable environmental outcomes and accountability,
- consistency in decision making,
- public engagement, and
- accountability.

**Provides a legal bridge between WQS and NPDES permit limits** that allows permitting authorities to:

- establish less stringent Water Quality Based Effluent Limits (WQBELs) for specific pollutant or water body
- for a specified period of time (only as long as necessary to achieve HAC),
- that still derive from and comply with all applicable WQS consistent with 40 CFR 122.44(d)(1)(vii)(A).

# Link Between WQS Variances and NPDES Permits



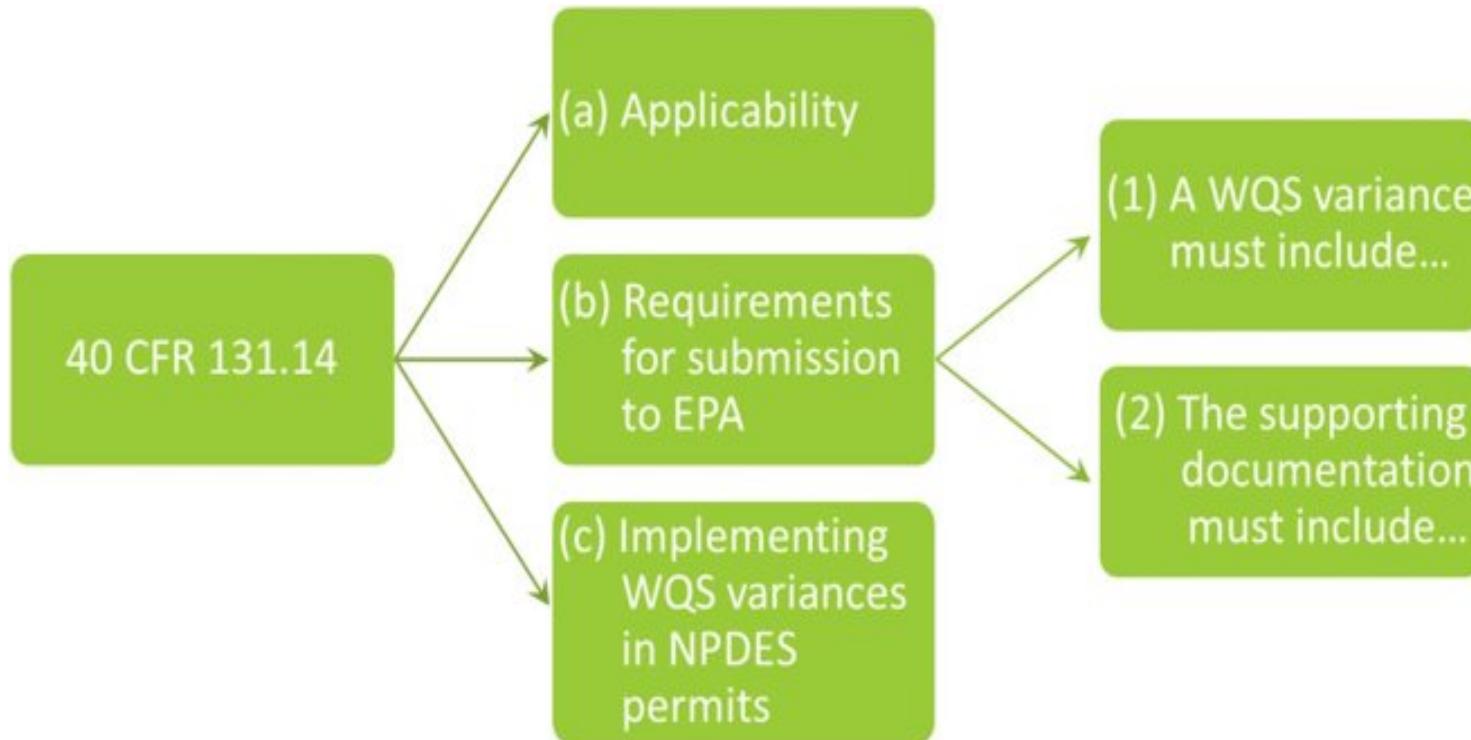
# Intent of 40 CFR 131.14

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- **Explicitly authorizes WQS variances** - states and authorized tribes are not required to adopt their own authorizing provisions or procedures.
- **Reduces uncertainty by facilitating appropriate, consistent, and effective implementation over a defined period of time.**
- **Ensures transparency and accountability** to both the regulated community and the public.

# Basic structure of 40 CFR 131.14

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# WQS Variance Requirements - Scope

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Define the **scope of the variance**:

- Pollutant specific
- Discharger specific
  - Individual discharger
  - Multiple dischargers
- Waterbody/waterbody segment specific

A multiple-discharger variance (MDV):

- Can reduce the administrative burden associated with adopting many otherwise similarly justifiable individual discharger-specific WQS variances
- Must fulfill all requirements at 131.14 (e.g. dischargers included in an MDV must be eligible to receive a WQS variance)

# WQS Variance Requirements - HAC

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Reflect the **highest attainable condition (HAC)** during the **specified time period** in the variance.

## Similarities between HAU and HAC

- HAU is defined as a “modified...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 factors in 131.10(g) that precludes attainment of the use and any other information or analyses used to evaluate attainability.”
- HAC is a similar requirement- a quantifiable expression of the best condition that can be achieved during the term of the variance. Cannot lower currently attained water quality.

## Differences Between HAU and HAC

Highest Attainable Use (HAU)	Highest Attainable Condition (HAC)
<ul style="list-style-type: none"><li>-Only expressed as a use</li><li>-Applies only to CWA 101(a)(2) uses and subcategories of such uses</li></ul>	<ul style="list-style-type: none"><li>-does not have to be expressed as a use</li><li>-Applies to WQS variance for either 101(a)(2) or non-101(a)(2) uses</li></ul>

# WQS Variance Requirements – Term & Public Input

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- ❑ **Term of the variance must be a specified time after EPA approval of variance, or a specific date.** Must document that the term is only as long as necessary to achieve the highest attainable condition.
- ❑ Timeframe is justified by describing the pollutant control activities that need to occur during that term.
- ❑ **Establish after a public hearing** consistent with 40 CFR 131.20.

# WQS Variance Requirements – Reevaluation

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## **A variance with a term of longer than 5 years must reevaluate the highest attainable condition**

- The variance must include a provision specifying how the state/tribe intends to obtain public input on the reevaluation.
- Variance must specify a frequency to reevaluate, but at least every 5 years
- The reevaluations must be submitted to EPA within 30 days of completion
  - Variance will no longer be the applicable WQS for purposes of the Act, if the reevaluation is not conducted consistent with the frequency specified in the WQS variance or the results are not submitted to EPA, until the reevaluation is complete or the results are submitted
- Must include a provision that if the reevaluation identifies a more stringent highest attainable condition, it becomes the applicable highest attainable condition.

# Is a WQS Variance the Right Tool for Your Situation?

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SUBMISSION REQUIREMENTS

# Strong Supporting Documentation: Ensures Consistency with 40 CFR 131.14

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## 1. The need for the WQS variance

- 40 CFR 131.14(b)(2): “The supporting documentation must include (i) Documentation demonstrating the need for a WQS variance.”

## 2. The term of the WQS variance is only as long as necessary to achieve the highest attainable condition.

- 40 CFR 131.14(b)(2): “The supporting documentation must include (ii) “Documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition.”

## 3. The interim WQS represents the highest attainable condition

- 40 CFR 131.14(b)(1)(ii): “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.

# Is a WQS Variance the Right Tool?

## 1. Can you identify the geographic scope of your problem?

- Single Discharger
- Multiple Discharger

- Waterbody segment
- Entire Waterbody



- Nonpoint sources can have a significant bearing on whether a designated use and criteria can be attained.
- It is essential to consider nonpoint sources and potential controls when adopting a waterbody/ waterbody segment variance and identifying highest attainable condition.

# Is a WQS Variance the Right Tool?

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2. Can you demonstrate that a use related to aquatic life or recreation is unattainable for a limited period of time (at this geographic scope and for a specific pollutant(s)) based on one of the 7 regulatory factors?

Or

3. Can you demonstrate that you considered the use and value of a non-101(a)(2) use and find that a variance is needed to make incremental progress toward attaining that use (at this geographic scope and for a specific pollutant(s))?

# Is a WQS Variance the Right Tool?

40 CFR  
131.10(g)

- 1. Naturally occurring pollutant concentrations.
- 2. Natural, ephemeral, intermittent or low flow conditions.
- 3. Human caused conditions cannot be remedied or would cause more environmental damage to correct than leave in place.
- 4. Dams, diversions or other hydrologic modifications.
- 5. Physical conditions related to natural features preclude aquatic life uses.
- 6. Controls more stringent than needed to meet technology based limits cause substantial and widespread economic and social impact.

40 CFR  
131.14(b)  
(2)(i)(A)(2)

- 7. 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.

# Is a WQS Variance the Right Tool?

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4. Can you identify the best condition achievable (i.e., highest attainable condition) and how much time is needed to attain it?
  
5. Can you identify the pollutant control activities that will be implemented during this time to make incremental progress towards that highest attainable condition?

***If you answered “yes” to these questions, then a WQS variance may be useful to address your situation.***

# Requirements for submission

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## Discharger(s) specific HAC and Pollutant Control Activities

1. Highest attainable interim criterion; or
2. Interim effluent condition reflecting greatest pollutant reduction achievable; or
3. *If no additional feasible pollutant controls*, the interim criterion or interim effluent condition reflecting greatest pollutant reduction with optimization of installed treatment **AND** adoption and implementation of a pollutant minimization program (PMP).

❖ *Pollutant Minimization Program (131.3(p))* – “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.”

# Requirements for submission

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## Waterbody or Waterbody Segment HAC and Pollution Control Activities

1. Highest attainable interim use and interim criterion; or
2. *If no additional feasible pollutant controls*, the interim use and interim criterion reflecting greatest pollutant reduction with optimization of installed treatment **AND** adoption and implementation of a pollutant minimization program (PMP).

- ❖ *Pollutant Minimization Program (131.3(p))* – “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.”

# Subsequent Variances

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- The regulations do not prohibit adoption of a subsequent variance once the initial variance expires.
- A subsequent variance may be obtained if the requirements of 131.14 are fully met again.
- In addition, a subsequent waterbody or waterbody segment variance would require additional documentation on implementation of Best Management Practices (BMPs) and progress for nonpoint sources.

# How Do WQS Variances Relate to Other CWA Tools?

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# WQS Variances and Other CWA Tools

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- Site-specific criteria
- Permit compliance schedules
- Impaired waters listings
- Total Maximum Daily Load allocations
- 401 certifications

# Site Specific Criteria

Site Specific Criteria	WQS Variance
Where the same designated use will be protected but with different (e.g. more or less stringent) water quality criteria.	Where the designated use cannot be attained for a period of time, even with the appropriate criteria in place, and the state adopts a less stringent designated use and criteria for a specified period of time.

# Permit Compliance Schedule

Permit Compliance Schedule	WQS Variance
The permit requires compliance with final WQBELs (based on WQS) “as soon as possible.”	The WQS variance is a temporary designated use and criterion and WQBELs are adjusted to make incremental progress toward attaining the standard.
Actions and time needed to comply with the WQBEL are known.	Actions and time needed to comply with the WQBEL are uncertain.
A condition included in a permit.	WQS basis for a less stringent permit limit.

# Using Permit Compliance Schedule to Meet HAC

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Permit Compliance Schedule provides permittees time to implement an enforceable sequence of actions that leads to achievement of the WQBELs.

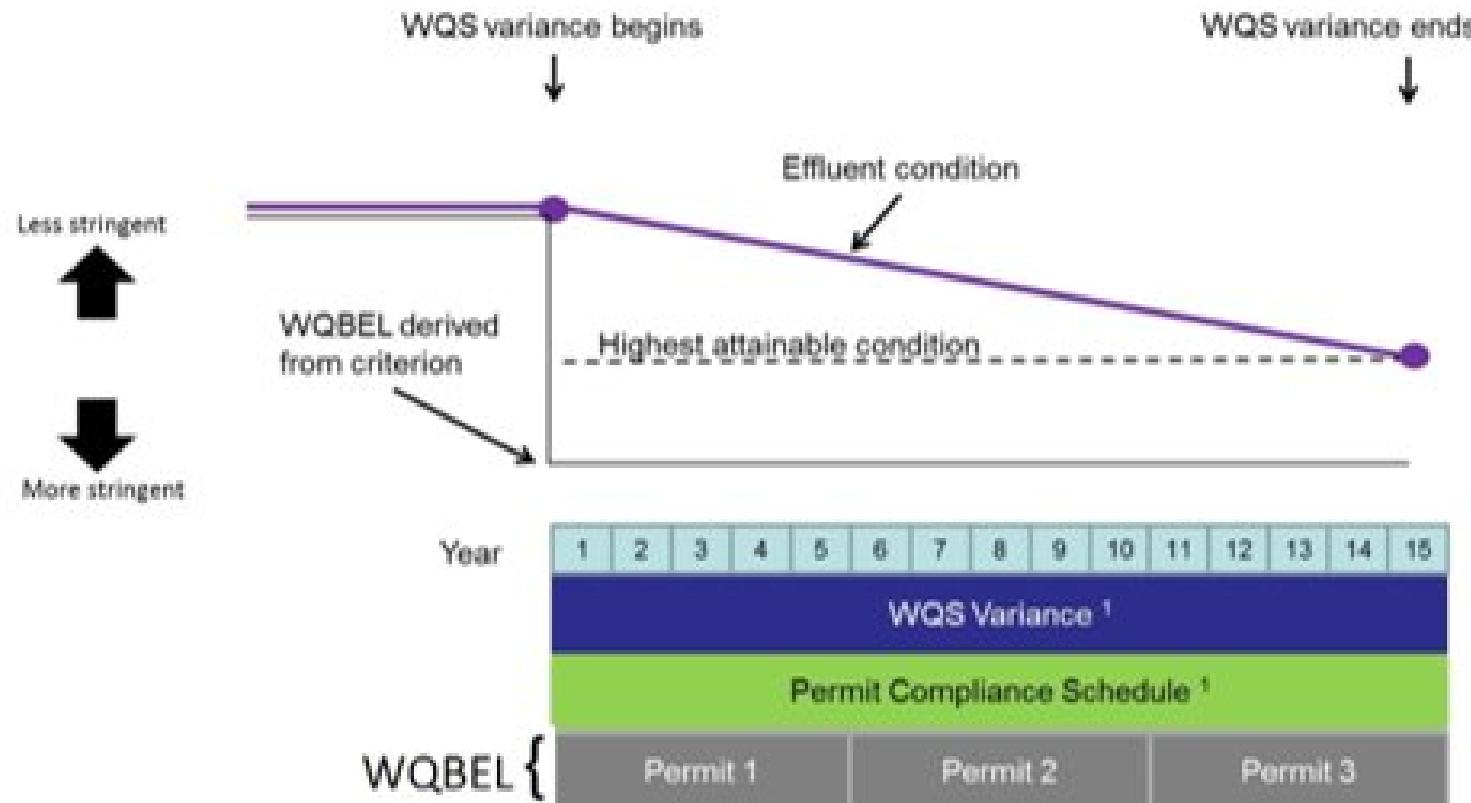
Highest attainable condition applies throughout the variance term and must be achieved by the end of the term.

WQBELs are written to the HAC immediately.

Although less stringent than WQBELs based on the underlying designated use and criteria, a WQBEL based on the HAC may not be immediately met on day 1 of NPDES permit.

A permit compliance schedule can provide permittees time to implement necessary measures to meet the WQBEL based on the HAC.

# Example: Using a Permit Compliance Schedule with a WQS Variance



<sup>1</sup> Meets all statutory and regulatory requirements.

# Impaired Waters Listing (303(d))

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Assessment for 303(d) listing is based on the underlying designated use and criteria, not the interim requirements of a variance.

Variances are time-limited and intended to restore the underlying designated use, not change the long-term goal of the waterbody.



# Total Maximum Daily Loads

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Interim requirements of a WQS variance do not replace the underlying designated use and criteria.

- Load allocations must be based on the underlying designated use because a WQS variance is time-limited and intended to restore the waterbody.

However, a permit may include limits based on the WQS variance even where there is a TMDL for that parameter because the allocations in the TMDL are not “available” while the variance is in effect.

# CWA Section 401 Certifications

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- If a WQS variance is the applicable WQS, a state or authorized tribe can use the WQS variance as a basis for 401 certification.

# WQS Variances Summary

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A WQS variance provides less stringent requirements for a specific pollutant(s) and discharger(s) or waterbody for a limited time.

Provides the WQS basis for an alternative WQBEL.

Must justify the need for the WQS variance as well as the term of the variance.

The underlying designated use and criteria remain the applicable WQS for all other pollutants, waterbodies, waterbody segments, and discharger(s) not specified in the WQS variance for all other CWA purposes.

A WQS variance is a WQS action subject to EPA review and approval and as such, EPA must complete ESA and Tribal consultation as appropriate.