

EPA Recommendations for 2021 Revision – *Temporary Water Quality Standards*

§307.2. Description of Standards

1. §307.2(g). Temporary standards. In August 2015, the Environmental Protection Agency (EPA) published revisions to the federal WQS regulation which includes a section at 40 Code of Federal Regulation (CFR) 131.14 for WQS variances. The provision for temporary standards in §307.2(g) of the *Texas Surface Water Quality Standards* (TSWQS) is generally consistent with EPA’s definition of WQS variances, as used in the federal regulation and national guidance. Per the regulation at 40 CFR 131.14(b)(2)(i)(A), a temporary standard under §307.2(g) of the TSWQS may be justified when the current criterion cannot be attained for a specified period of time for one or more of the reasons under 40 CFR 131.10(g) of the federal standards regulation, or to facilitate restoration or reconfiguration activities (40 CFR 131.14(b)(2)(i)(A)(2)).

While not required under federal regulation prior to adopting a variance/temporary standard, an authorizing provision can provide clarity to dischargers about both federal and any additional state requirements for a temporary standard submission and the adoption process. We offer the following recommendations which may provide additional clarity and flexibility in implementing temporary standards (through the provision in the TSWQS), and for consistency with the federal regulation:

- EPA recommends that the Texas Commission on Environmental Quality (TCEQ) add a statement that all temporary standards must comply with the requirements of 40 CFR 131.14, to avoid confusion about the applicable requirements, which currently differ between the TSWQS and federal regulation. Including such a statement obviates the need for Texas’ authorizing provision to mimic the exact language of 40 CFR 131.14 and ensures there is no appearance of language that could contradict the federal regulation.
- Under §307.2(g)(1), EPA recommends that if TCEQ wants to provide the full range of options for expressing the highest attainable condition, as outlined in the federal WQS regulation, the state revise its temporary standard authorizing provision to allow the highest attainable condition under a temporary standard to be expressed using any of the options as described in 40 CFR 131.14(b)(1)(ii)(A), applicable to a specific discharger(s):

“(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.”

Similar language for variances applicable to a water body (or segment), as found in 40 CFR 131.14(b)(1)(ii)(B), could also be incorporated in the TSWQS. EPA interprets Texas’ temporary standard authorizing provision, as currently written, to limit temporary standards to expressing the highest attainable condition as an interim criterion only (i.e., option 1 of the three options above, as provided in the federal regulation for discharger-specific variances).

- Under §307.2(g)(2), EPA recommends that TCEQ clarify that, like all other water quality standards, temporary standards are not effective until approved by the EPA. The second sentence could be modified to read “Once adopted by the commission and approved by the EPA, a temporary standard....”
- Under §307.2(g)(4), EPA recommends adding language clarifying that, per 40 CFR 131.14(b)(1)(vi), for temporary standards with a term greater than five years, the Clean Water Act (CWA)-applicable standard reverts to the underlying designated use and criterion if a reevaluation is not conducted at least every five years and results submitted to EPA within 30 days of completion of the reevaluation. While it would add transparency, this same intent could be covered by the addition of language stating that any temporary standard must meet the federal requirements at 40 CFR 131.14.
- §307.2(g)(6) of the 2018 TSWQS states that temporary standards cannot be established which would impair an existing use. The federal regulation at 40 CFR 131.14 does not include this restriction related to existing uses, as this was seen to hamper incremental water quality improvements intended under a WQS variance. Instead, the federal regulation prohibits a variance from resulting in “any lowering of the currently attained ambient water quality, unless a WQS variance is necessary for restoration activities, consistent with 40 CFR 131.14(b)(2)(i)(A)(2).” The link to existing uses could be removed to provide additional flexibility in implementing temporary standards.

Although no temporary standards under §307.2(g) have been adopted to date, EPA believes that temporary standards can be a useful tool. Specific situations in which temporary standards may be useful in Texas is where a discharger cannot currently meet effluent limitations based on a numeric temperature site-specific criterion in Appendix A of the TSWQS or chlorophyll *a* site-specific criterion in Appendix F. Since both TCEQ and EPA have already determined that the numeric temperature criteria in Appendix A and the chlorophyll *a* criteria in Appendix F are the levels necessary to protect designated uses, it is unlikely that discharges in this situation could successfully get relief through revised, less stringent site-specific criteria. Among seven factors in the federal regulation that may be used to justify a WQS variance, factor 6 of 40 CFR 131.10(g) is applicable to economic considerations of costs needed to meet WQS, which stakeholders have previously raised as a concern in TCEQ’s workgroup meetings to address thermal discharges. Also, economic considerations are often discussed regarding implementation of nutrient criteria in wastewater permits in many states. Temporary standards can provide a legal basis to issue less stringent water quality-based effluent limitations in the relevant permit.

EPA has developed a checklist to assist in the development of discharger-specific variances/ temporary standards, which may be useful as TCEQ evaluates potential revisions to this provision or adopts a temporary standard under §307.2(g).¹ EPA has also developed a variance building tool to assist states in determining whether a WQS variance (temporary standard) is an appropriate tool for a

¹ USEPA. 2016. *Checklist For Evaluating State Submission Of Discharger-Specific Water Quality Standards Variances*. Available at: <https://www.epa.gov/sites/production/files/2016-03/documents/checklist-evaluating-discharger-specific.pdf>.

particular situation and, if so, help the entity navigate the requirements at 40 CFR Part 131.14 to determine what a legally binding WQS variance would look like and what additional information must be documented and submitted to EPA to support the WQS variance.²

Finally, EPA recommends that TCEQ update the *Procedures to Implement the Texas Surface Water Quality Standards* (referred to below as Implementation Procedures) to correspond with revisions adopted in §307.2(g) of the 2018 TSWQS, and any revisions based on the recommendations above, to ensure that the implementation document is consistent with TCEQ's WQS regulation.

² USEPA. 2017. *Water Quality Standards Variance Building Tool*. Variance Building Tool Version 1.0 (2017.08.23). Available at: <https://www.epa.gov/wqs-tech/water-quality-standards-variance-building-tool>.