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***Variances Under the Clean  
Water Act – New  
Developments in the Use of an  
Old Tool***

Arkansas Environmental Federation's 50<sup>th</sup> Annual  
Convention and Trade Show

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## Objectives

1. Define “variance” as it concerns the Clean Water Act’s water quality standards – i.e., the WQS Variance.
2. Provide a very brief history of the WQS Variance.
3. Describe the process and parameters of WQS Variances under the current regulatory regime.
4. Review recent use of the WQS Variance and discuss what, if any, potential use may exist in Arkansas.
5. Brief review of the legal challenges and uncertainties facing the *redeployment* of the WQS Variance under the Clean Water Act.

# Variations Under the Clean Water Act

## Definition

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

40 C.F.R. § 131.3(o) – *Water Quality Standards Variance*

## Water Quality Standard (WQS) 101

Water Quality Standards – provisions of State or Federal Law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.

Designated uses – those uses specified in water quality standards for each water body or segment whether or not they are being obtained (*e.g.*, public drinking water, recreation, agricultural, industrial, etc.)

Criteria – elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.

## WQS Variances: *The Abridged History*

Legal Authority – The Environmental Protection Agency's (EPA) authority to establish WQS Variances comes from Clean Water Act sections 101(a) and 303(c)(2).

Prior History – EPA has long recognized and supported WQS Variances as an available tool that provides time for progress towards an underlying designated use and criteria.

*In re Bethlehem Steel Corp.* No. 58 (Mar. 1977) – decision setting forth EPA's position that where a state satisfies all of the requirements in 40 CFR Part 131 for removing designated uses, EPA could also approve a state decision to limit the applicability of the use removal to only a single discharger and/or single criterion via a variance for a limited time period, while continuing to apply the underlying use designation and criteria to the water body as a whole (*i.e.*, the underlying use designation and criteria would apply to all other dischargers other than the one for which a variance has been granted).

## History cont'd ...

The “Great Lakes System” – Between 2004 and 2015, 75% of state submitted WQS Variances were submitted from those states covered by the “Water Quality Guidance for the Great Lakes System.” See 40 CFR Part 132 – Appendix F. EPA attributes the successful utilization of WQS Variances to the fact that Part 132 – App. F details more specifics regarding the WQS Variance than did other WQS rulemakings.

2015 Rulemaking – In 2015 EPA finalized WQS rulemaking that seeks to provide States and authorized tribes with at least the same level of authority/specificity found in the Great Lakes System. EPA also clarifies that it could approve a variance for a specific discharger or group of dischargers where applicable.

80 Fed. Reg. 51020 (Aug. 21, 2015)

# WQS Variances Generally

Generally, the EPA can approve a variance (individual or general) where the State satisfies the requirements in 40 CFR Part 131 for removing a designated use.

Therefore...

The State must demonstrate it is not feasible for the discharger or group of dischargers to attain water quality based effluent limitations (WQBELs) derived from the applicable designated use and criteria during the term of the variance due to at least one of the factors listed in 40 C.F.R. 131.10(g).

# WQS Variances Specifically (1 of 5)

## Applicability and Limitations

1. WQS Variances may be adopted for a permittee(s) or water body/waterbody segment(s).
2. Must retain underlying designated use and criterion addressed by the WQS Variance and all other applicable standards not addressed by the variance remain applicable.
3. An adopted WQS Variance shall be the applicable standard for the following purposes: (i) Developing NPDES permit limits and requirements and (ii) Issuing WQS certification under section 401.
4. No variance if designated use and criterion can be achieved with TBELs.



# WQS Variances Specifically (2 of 5)

## Requirements

1. Identification of the pollutant or water quality parameter, the water body/waterbody segment, and, if discharger specific, the permittee.
2. Identify all requirements that apply throughout the term of the WQS Variance, which shall represent the “highest attainable condition” of the segment.
3. Statement that the requirements of the WQS Variance are the “highest attainable condition” at the time of adoption or during a later reevaluation, whichever is more stringent.
4. The term of the WQS Variance (either interval of time or specific date), which must be only as long as necessary to achieve the highest attainable condition.
5. Specified frequency to reevaluate the highest attainable condition where the variance term is greater than 5 years.
6. Provision that the WQS Variance will no longer be the WQS if the States does not conduct reevaluation.

# WQS Variances Specifically (3 of 5)

## Documentation and Demonstration of Need

101(a)(2) Use (i.e., “fishable/swimmable”) - State must demonstrate that attaining the designated use and criterion is not feasible throughout the term of the variance because at least one of the factors identified in § 131.10(g) is met:

- (1) Naturally occurring pollutant concentrations prevent attainment;
- (2) Natural, ephemeral, or intermittent flow prevent attainment;
- (3) Human caused conditions or sources of pollution prevent attainment and cannot be remedied without more environmental damage;
- (4) Dams, diversions or other hydrologic modifications preclude attainment;
- (5) Physical conditions related to natural features of the water body preclude attainment of aquatic life protection uses; or
- (6) 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.

## WQS Variances Specifically (4 of 5)

### Documentation and Demonstration of Need Cont'd ...

Non-101(a)(2) Use - State must demonstrate and justify how its consideration of the use and the value of the water for those uses appropriately supports the variance and the variance term. A demonstration pursuant to the § 131.10(g) factors may be used to satisfy the requirement.

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## WQS Variances Specifically (5 of 5)

### Implementation

A WQS Variance serves as the applicable water quality standard for implementing NPDES permitting requirements for the term of the variance. Any limitations and requirements necessary to implement the WQS variance shall be included as enforceable conditions in the NPDES Permit.

## Case Study: Montana Variance for NNC

Step One: In 2011, the Montana legislature enacted a general nutrient variance provision for various classes of wastewater treatment facilities. M.C.A. § 75-5-313; see also, ARM 17.30.660(1).

Step Two: In 2014, the Montana Board of Environmental Quality adopted numeric criteria for nutrients in surface water necessary to protect designated uses.

Step Three: In 2014, the Montana Department of Environmental Quality issued MDEQ Circular DEQ-12A and 12B setting forth:

**12A** - NNC for “wadeable streams” established at TP range of 25-110 $\mu$ g/l and at TN range of 350-1300 $\mu$ g/l

**12B** - Adopted “Nutrient Standards Variances” reflecting the limits specified in state statute (included specific discharger and general discharger).

# Montana's Variance in a Nutshell

Applicability: (1) Pollutants – TP and TN NNC; (2) water body/waterbody segment(s) – “wadeable streams” and segments of the Yellowstone and Gallatin; (3) Permittees – Public and Private dischargers.

Highest Attainable Condition: Defined as the NNC (end-of-pipe) developed in 12A.

Term: Max of 20 years with triennial review.

Short-term Milestones: Adopted on triennial basis (first set includes end of pipe treatment requirements that are set forth in the statute) with public involvement.

Documentation of Need: (1) NNC necessary to protect aquatic life; (2) reverse osmosis (RO) only technology to achieve NNC; and (3) RO is not feasible because of substantial and widespread social impact.

# WQS VARIANCE = WQS TOOL

*WQS Variances are an important WQS tool that provide time to make progress towards attaining the underlying designated use and criteria.*

# References

## Background:

<http://water.epa.gov/scitech/swguidance/standards/handbook/chapter05.cfm>

<http://water.epa.gov/scitech/swguidance/standards/library/index.cfm>

[http://water.epa.gov/scitech/swguidance/standards/upload/2008\\_08\\_04\\_standards\\_wqsvariance.pdf](http://water.epa.gov/scitech/swguidance/standards/upload/2008_08_04_standards_wqsvariance.pdf)

## Rules and Rulemaking:

40 C.F.R. Part 131

78 Fed. Reg. 54518 (Sept. 4, 2013) – Water Quality Standards Regulatory Clarifications, *Proposed Rule*

80 Fed. Reg. 51020 (Aug. 21, 2015) – Water Quality Standards Regulatory Revisions, *Final Rule*

## Case Law:

*Upper Missouri Waterkeeper v. EPA*, No. 4:16-cv-00052 (U.S. Dist. Ct. Mont. (May 31, 2016))

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# Parting Thoughts/Shots?

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