Variances Under the Clean Water Act/New Developments in the Use of an Old Tool: Jordan Wimpy (Mitchell Williams) Arkansas Environmental Federation Convention Presentation

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Jordan P. Wimpy undertook a presentation at the Arkansas Environmental Federation's annual Convention and Trade Show titled:

Variances Under the Clean Water Act – New Developments in the Use of an Old Tool ("Presentation")

Jordan is Counsel with the Mitchell Williams Law Firm.

The *Presentation's* objectives included:

1. Define "variance" as it concerns the Clean Water Act's water quality standards ("WQS") referencing WQS Variances
2. Provide a 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

Jordan first defined a WQS Clean Water Act variance. 40 C.F.R. § 131.3(o) is stated to mean:

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 Water Quality Standard variance.

An overview of the Clean Water Act WQS was subsequently provided:

- WQS – 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 WQS, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.

An "abridged" history of WQS Variances was provided, noting:

- Legal Authority – Sections 101(a) and 303(c)(2) provide EPA the authority to establish WQS Variances
- Prior History – Noting that EPA has historically both 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) (EPA position document)
- The "Great Lakes System" (Noting 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.")
- 2015 Rulemaking (EPA finalization of WQS rulemaking seeking to provide States with at least the same level of authority/specificity found in the Great Lakes System.) Citing 80 Fed. Reg. 51020 (Aug. 21, 2015)

EPA is stated to be able to generally approve a variance if the State satisfies the requirements in 40 CFR Part 131 for removing a designated use. As a result, 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).

The *Presentation* listed key elements of WQS Variances:

- Applicability and Limitations
- WQS Variances may be adopted for a permittee(s) or water body/waterbody segments(s).
- Must retain underlying designated use and criterion addressed by the WQS Variance and all other applicable standards not addressed by the variance remain applicable.
- 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.
- No variance if designated use and criterion can be achieved with TBELs.
- Requirements
- Identification of the pollutant or water quality parameter, the water body/waterbody segment, and, if discharger specific, the permittee.
- Identify all requirements that apply throughout the term of the WQS Variance, which shall represent the "highest attainable condition" of the segment.
- 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.
- 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.
- Specified frequency to reevaluate the highest attainable condition where the variance term is greater than 5 years.
- Provision that the WQS Variance will no longer be the WQS if the State does not conduct reevaluation.
- Documentation and Demonstration of Need
- Naturally occurring pollutant concentrations prevent attainment;
- Natural, ephemeral, or intermittent flow prevent attainment;
- Human caused conditions or sources of pollution prevent attainment and cannot be remedied without more environmental damage;
- Dams, diversions or other hydrologic modifications preclude attainment;
- Physical conditions related to natural features of the water body preclude attainment of aquatic life protection uses; or

- 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.
- 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.

The *Presentation* included an example of a variance developed by Montana in 2011. The Montana variance focuses on nutrients. It applies to various classes of wastewater treatment facilities. See M.C.A. § 75-5-313.

The Montana Board of Environmental Quality adopted in 2014 numeric criteria for nutrients in surface water necessary to protect designated uses. Subsequently, 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 25-110µg/l and at TN range of 350-1300µg/l

12B – Adopted "Nutrient Standards Variances" reflecting the limits specified in state statute

Elements of the Montana variance were noted, including:

- Applicability
- Highest Attainable Condition
- Term
- Short-term Milestones
- Documentation of Need

A copy of Jordan's slides can be downloaded here.