

***Shifting Regulatory
Requirements: Not All
Change is Good***

**NACWA Developments in
Clean Water Law**

**Santa Fe, NM
November 18, 2010**

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Why WQS Matter

- **WQS are often called the bedrock or foundation of the CWA**
- **WQS are sometimes referred to as both aspirational (i.e., what we want our waters to be) and a basis for other regulatory decisions**
- **Whatever WQS are, they drive a number of important regulatory consequences, including:**
 - ❖ **303(d) listing decisions**
 - ❖ **TMDLs**
 - ❖ **WQBELs in NPDES permits**
 - ❖ **401 certifications of other federal actions**

A Brief History of the WQS Program

- The statutory basis for WQS pre-dates the Clean Water Act (see, e.g., the Water Quality Act of 1965)
- EPA promulgated the first WQS regulations in 1975 (40 Fed. Reg. 55,334, Nov. 28, 1975)
- EPA amended the WQS regulations in 1983 to address toxic criteria, UAAs, site-specific criteria and other program fundamentals (40 Fed. Reg. 51,400, Nov. 8, 1983)
- EPA promulgated the National Toxics Rule in 1992 (57 Fed. Reg. 60,848, Dec. 22, 1992)
- EPA published Water Quality Guidance for the Great Lakes System in 1995 (60 Fed. Reg. 15,366, March 23, 1995) (although limited in geographic applicability, the guidance resulted from an enormous agency effort based on extensive public comments and represents the “latest thinking” from EPA on a number of core WQS issues)

A Brief History of the 1998 ANPRM

- In 1998, EPA published advance notice of a proposed rulemaking on possible revisions to the WQS regulation (63 Fed. Reg. 36,742, July 7, 1998)
- The ANPRM was massive in scope, addressing over 70 core components of the WQS program, including:

Presumptive Applicability of Uses

Variances

Sediment Criteria

Biological Criteria

Wildlife Criteria

Physical Criteria

UAAS

Microbiological Criteria

**Antidegradation
(including Tier 2 ½)**

Mixing Zones

Design Flow Policies

**Independent
Application**

The ANPRM Process

- EPA received thousands of comments on the ANPRM
- Interested members of the public invested substantial time and resources assembling these comments
- EPA invested substantial time and resources engaging the public
- But nothing ever happened...

Fits and Starts Since the ANPRM

- **As an example, the use and variance provisions of the WQS regulations were the subject of:**
 - ❖ **A national symposium hosted by EPA in 2002**
 - ❖ **A national strategy published by EPA in 2003**
 - ❖ **A national plan published by EPA in 2004**
 - ❖ **A series of co-regulator and multi-stakeholder workshops funded by EPA in 2004-2006**
- **But all that emerged from this effort was a 2-page memo from the Director of OST on “improving the effectiveness of the UAA process”**

Not All Quiet on the Western Front

- In the absence of comprehensive regulatory revisions to keep up with current issues, the WQS program has evolved more through litigation (or the threat of litigation) than through administrative action.
- Recurring WQS issues in the courts include:
 - ❖ What/when/how do WQS apply?
 - ❖ What do narrative WQS mean?
 - ❖ When are mixing zones and variances permissible?
 - ❖ How should WQS be interpreted for listing decisions?
 - ❖ How should WQS be interpreted for NPDES permits?
 - ❖ What are the “applicable” WQS for other CWA purposes?

And Now, Something New (Or A Blast From the Past)

- In July 2010, EPA announced its plans “to initiate national rulemaking to make a limited set of targeted changes to EPA’s water quality standards regulation” (75 Fed. Reg. 44,930, July 30, 2010).
- EPA’s notice identifies 6 issues, but EPA claims to have started with over 100.
- EPA hosted two “listening sessions” on its anticipated rulemaking (Aug. 24 and 26, 2010).
- EPA does not expect to publish an actual rulemaking proposal until next summer.

Issue No. 1:

**Implementation methods for state
antidegradation policies: Should EPA's
regulations prescribe specific minimum
elements for these methods?**

Issue No. 2:

Administrator's determination: Who may/must sign an EPA determination that a new or revised WQS is necessary to meet the requirements of the CWA?

Issue No. 3:

Designated uses: Are they presumed attainable? And, if a UAA shows otherwise, what must be adopted in place of the use deemed to be unattainable?

Issue No. 4:

Variances: Should EPA, by regulation, define, describe and set minimum requirements for the “proper use of variances”?

Issue No. 5:

Triennial Reviews: Must states and tribes evaluate whether their existing criteria continue to be protective of designated uses as part of the triennial review process (i.e., taking into consideration any new information, including EPA's recommended 304(a) criteria, that has become available since the last review)?

Issue No. 6:

Updates to reflect court decisions: What is a WQS and when is a state's interpretation of its WQS subject to EPA review and approval (*Florida Public Interest Research Group* case); when are compliance schedules allowed and for how long (*Star-Kist Caribe* case); what record of public participation must a state submit to EPA (*City of Albuquerque* case)

Other Issues

- EPA went from over 100 issues, to 40, to 6, but the official rulemaking process has not even begun.
- What other issues might EPA add to the rulemaking?
- Once the door is opened...

Specific Concerns

- EPA has expressed concern that some states have inadequate procedures for ensuring that their antidegradation policies are implemented. But a national rulemaking is not needed to address this concern and may cause other problems (like constraining states that have robust programs already in place).
- Nothing in the CWA makes designated uses presumptively attainable. In fact, there is a growing awareness that many uses are not attainable, thus underscoring the need for and importance of the UAA process.
- Variances tend to be state- and situation-specific. A national rulemaking to address the “proper use of variances” is neither necessary nor appropriate.
- Compliance schedules are “purely matters of state law, which EPA has no authority to override.” (*Star-Kist Caribe* case). As a consequence, EPA has no authority to require states to submit their compliance schedule provisions to EPA for review and approval.

Overarching Concerns

- **6 issues are surely better than 100, but . . .**
 - ❖ Should EPA be allowed to start from scratch on issues that have been the subject of earlier notice-and-comment proceedings?
 - ❖ Should EPA be allowed to wipe the slate clean and start over without acknowledging and addressing earlier comments?
- **If EPA had such authority, then it could systematically ignore public comments by repeatedly initiating new rulemakings on the same or related issues...**