


Use Attainability Analyses (UAAs)

Fred Andes
Barnes & Thornburg LLP
NACWA Law Conference
November 17, 2011



Key UAA Issues

- Uses, Criteria and UAAs
- UAA Tests
- Existing Uses
- Integration of UAA and LTCP
- Use of Short-Term Variances
- Permit Compliance Schedules
- Decrees and Orders

Uses, Criteria and UAAs

- Water Quality Standard = designated use and criterion to protect that use
- EPA requires States, in setting WQS, to presume that every waterbody can meet “fishable, swimmable” uses, and then set WQS based on those uses
- One way to get relief from those WQS is through doing a Use Attainability Analysis (UAA)
- UAA results in change to WQS, which must be approved by EPA

UAA Tests

- 40 CFR 131.10(g): Designated use can be removed if not feasible because:
 1. Natural (background) concentrations, or
 2. Natural, ephemeral, intermittent, or low flow conditions, or
 3. Human caused conditions that cannot be remedied or would cause more harm to fix, or
 4. Dams, diversions, hydromodifications where not feasible to remedy, or
 5. Physical conditions (poor habitat), or
 6. Controls would cause substantial and widespread economic and social impact

UAA Tests

- REMEMBER: You only have to meet one of six tests in 40 CFR 131.10(g)
- UAA pathway can apply to any designated uses – aquatic, recreational, human health, or wildlife IF state water quality standards allow its use
- Precedents set for one type of use can apply to another – so watch progress in dealing, for example, with recreational issues for CSOs

Existing Uses

- Change in designated uses cannot remove an “existing use,” so EU is a complete barrier to doing UAA
- Two parts of EU question: (1) is there an existing use; and (2) would designated use change remove that EU
- Only if both answers are YES is there an EU problem with doing a UAA

Existing Use Analysis

- Precedent set in Indiana on CSOs
- Define existing uses carefully – can have different uses in wet and dry weather
- Existing use in wet weather could be low extent of swimming, in waters that have high bacteria levels
- CSO LTCP would reduce bacteria levels during wet weather events, and frequency of high-bacteria episodes, so would make conditions better than before
- Therefore, no EU problem

CSO Long-Term Control Plans

- EPA CSO policy requires that LTCPs must attain water quality standards
- WQS issue can be dealt with up front or later, in post-construction monitoring
- EPA guidance recommends that WQS reviews happen within LTCP process
- Indiana legislation sets up structure for UAAs to be done during LTCPs

Short-Term Variances

- Variances have to meet same basic tests as UAAs in 40 CFR 131.10(g), but lower burden of proof since temporary
- Variances useful when WQS needs to be changed or attainment is in doubt
- Usually issued for up to 5 years, but most states allow them to be renewed
- Ability to use mechanism depends on variance provision in state WQS regulations

Compliance Schedules

- Compliance schedules are included in permits, to recognize that cannot comply immediately with new/revised limits
- Can only get schedule if expect to comply with limits eventually – if not, then variance instead
- EVERYTHING depends on how state compliance schedule rule is written
- Schedule can go beyond 5 years
- Schedule can go beyond permit term
- Schedule can cover time period after UAA done but before all of UAA-based measures are implemented

Decrees and Orders

- Can provide some protection from liability during UAA when regulatory or permitting mechanisms not available
- Can be judicial or administrative – judicial provides more protection, although even that not clear as to risk of citizen suits
- Increased use of variance and compliance schedules may make it less necessary to use enforcement mechanisms

Questions?

Contact:

Fred Andes

Barnes & Thornburg LLP

312/214-8310

fandes@btlaw.com