From: Mark Barath
To: John Backus
Subject: Re: WQS amendments
Date: 11/22/2011 12:51 PM

John:

The subject of variance is covered briefly in 40 CFR 131.13. And yes from that brief wording it could be argues that there is very little to go on. Under 40 CFR 131.13. a., with variances being WQS, they need to be reviewed and if need be, modified. While the nationally applicable regulation does not provide specifics on variances, the EPA has articulated its longstanding position that variances, as time-limited and narrow use revisions, are appropriate WQS tools that must go through public notice and comment review and EPA's review and approval. This position is supported by the EPA's longstanding practice regarding variances. Over the years though, EPA discussed variance in state specific promulgation and legal decisions which has expanded EPA's expectation. See below for reference.

The EPA's WQS Handbook, 1994:
http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/chapter05.cfm#section3

The specific regulations were for Kansas, Puerto Rico and Great Lakes. See below for reference.

Kansas: 40 CFR 131.34
Puerto Rico: 49 CFR 131.40
Great Lakes: 40 CFR 132 Great Lakes Water Quality Guidance regulations (Published March 23, 1995,)

In addition, EPA has developed legal decisions on variances. See below for reference.

Variances in Water Quality Standards, March 15, 1985, Memo from Edwin L. Johnson, Director of the Office of Water Regulations and Standards, to the Regional Water Division Directors and the Advanced Notice of Proposed Rulemaking at 63 FR 36759

Yes , you could argue that none of this applies to MD. But as mentioned yesterday, these expectations, etc., are being codified in the proposed reg revisions. They will not apply for the 2012 round of Maryland's submittals but in the future...

Mark A. Barath
Environmental Scientist
Office of Standards, Assessment and TMDLs (3WP30)
Water Protection Division
U.S. EPA Region III
1650 Arch Street
Philadelphia, Pa 19103-2029
(215) 814-2759 Telephone
(215) 814-2318 Fax

▼ "John Backus" ---11/22/2011 10:47:30 AM---Mark: Will you please point me to the Federal Regulations regarding the variances/TR you mention?

From: "John Backus" <JBackus@mde.state.md.us>
To: Mark Barath/R3/USEPA/US
Date: 11/22/2011 10:47 AM
Subject: Re: WQS amendments

Mark: Will you please point me to the Federal Regulations regarding the variances/TR you mention?

Thanks, John

>>> <Barath.Mark@epamail.epa.gov> 11/22/2011 10:23 AM >>>
John:

Glad to help you out:

FWS: Fish and Wildlife Service
NMFS: National Marine Fisheries Services They look upon themselves as the gate keeper keeping the extinction horde at bay and can be the source of major headache. As an example, the draft BO for CB TMDL was 170 pages long.
BE: biological evaluation - done by EPA with every standards submittal as part with FWS and/or (NMFS
BO: biological opinion - done by mainly NMFS and/or FWS as response to EPA BE as part of Endangered Species Act Section 7 consultation.

In the 2005 TR EPA approval letter/package, there was almost no mention of the restoration variance, just an afterthought comment. None of us here were involved in that TR so were all that came from and what type of RIII deliberation occurred outside of CBPO draws a blank.

As you know, the regs state that in TR all variances must be re-evaluated with justification on why they should be renewed , etc. MD was given a pass with the last TR on this review requirement. The proposed draft EPA regs. coming out in new year will set a time limit for variance among other things.

And yes I understand where MD is coming from but we also have to deal with what the regulation say. The push and pull of all this has given some aches to deal with but that is life in WQS land. And yes we at all levels of government curse and complain about he fact that CBPO did not ever come out with actual TP/TN criteria recommendations.

Have a good holiday.

Mark A. Barath
Environmental Scientist
Office of Standards, Assessment and TMDLs (3WP30)
Water Protection Division
U.S. EPA Region III
1650 Arch Street
Philadelphia, Pa 19103-2029
(215) 814-2759 Telephone
(215) 814-2318 Fax

From: "John Backus" <JBackus@mde.state.md.us>

To: Mark Barath/R3/USEPA/US

Date: 11/22/2011 09:01 AM

Subject: Re: WQS amendments

Hey Mark,
Will you please translate the acronym extravaganza that you just provided? That is impressive!

I should mention that last year, we added the Chester River Restoration Variance and was not a big deal after speaking with the Riverkeeper folks. I don't foresee any other issues...but you never know.

As we discussed yesterday, I understand your issues with the restoration variance "tool" from a WQS perspective. However, with the current data and tools that we have, along with, and within the context of the Bay TMDL, the Bay Model (with all its warts and wrinkles) this still makes the most sense...in the near term. As I see it, the only way we'll really know, is to implement the Bay TMDL per the WIPs, then see what the WQ outcomes are.

Thanks, John

>>> <Barath.Mark@epamail.epa.gov> 11/22/2011 8:29 AM >>>
John:
Thanks for the bit on revision. As I see it, the Chester River change is just that, a modification of existing variance. The Eastern Bay, on the other hand, is a new variance with all the warts and wrinkles associated with it. My only headache will be with the BE to NMFS. How that plays out is another story. We are still working out the final version of the NMFS BO on the CB TMDL for which all these WQS drive. And thank you for holding off until after the holiday season even though that wasn't your original intent.
Mark A. Barath
Environmental Scientist
Office of Standards, Assessment and TMDLs (3WP30)
Water Protection Division
U.S. EPA Region III
1650 Arch Street
Philadelphia, Pa 19103-2029
(215) 814-2759 Telephone
(215) 814-2318 Fax

From: "John Backus" <JBackus@mde.state.md.us>

To: Cheryl Atkinson/R3/USEPA/US@EPA, Larry Merrill/R3/USEPA/US@EPA, Mark Barath/R3/USEPA/US

Cc: "Bruce Michael" <BMICHAEL@dnr.state.md.us>, Richard Batiuk/CBP/USEPA/US@EPA, "Rich Eskin" <reskin@mde.state.md.us>

Date: 11/21/2011 03:36 PM

Subject: WQS amendments

Here's the formatted regulatory amendments.
Text in **[Bold Brackets]** is deleted
Text in *italics* is new.

Notice that I had to move the section for the Chester River. It was inadvertently placed in wrong subparagraph when we initially added it.

If you have any questions, let me know.

-John

John Backus
Science Services Administration
Maryland Department of the Environment

1800 Washington Blvd.
Baltimore, MD 21230-1718
Phone: 410-537-3965
Fax: 410-537-3998

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