

## **Upper Missouri Waterkeeper v. USEPA**—Deference given to EPA’s CWA regulations authorizing consideration of compliance costs when approving water quality standards and variance requests

The Clean Water Act authorizes States to adopt or revise water quality standards subject to approval by the Environmental Protection Agency. The standards “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter” and “shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.” 33 U.S.C. § 1313(c)(2)(A). The EPA has construed its approval authority to allow approval of state standards that otherwise do not protect such purposes “if the State conducts a use attainability analysis ... that demonstrates attaining the use is not feasible because [inter alia] ... [c]ontrols more stringent than those required by [33 U.S.C. §§ 1311(b), 1316] would result in substantial and widespread economic and social impact.” 40 C.F.R. § 131.10(g)(6). The EPA regulations also authorize States to obtain variances—i.e., “a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance from approved standards” (*id.* § 131.3(o))—from “base” water quality standards where a State demonstrates that “attaining the designated use and criterion is not feasible throughout the term of the WQS variance because ... [o]ne of the factors listed in § 131.10(g) is met.” *Id.* § 131.14(b)(2)(i)(A)(1). “The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition[.]” *Id.* § 131.14(b)(1)(iv).

Montana requested a variance in 2017 for a term up to 17 years with respect to discharge of nitrogen and phosphorus from 36 water municipal water treatment facilities. The State demonstrated that the cost of technology necessary to achieve compliance with base water quality standards would have a substantial, widespread economic and social impact on surrounding communities. The EPA approved the variance, relying “on economic guidance that it had previously issued, which provides that an average annual cost per household exceeding 2% of median household income in the affected community constitutes a substantial economic impact.” It further “determined that the interim limits imposed by the variance represented the highest attainable condition for all 36 facilities, and that the variance’s term of up to 17 years would last only ‘as long as necessary to achieve the highest attainable condition.’”

Upper Missouri Waterkeeper challenged the variance approval under the Administrative Procedure Act, arguing principally “that the Clean Water Act prohibits the EPA from considering compliance costs when granting variance requests.” The district court eventually entered summary judgment in favor of the EPA and allied intervenors on that issue but held the 17-year period to “achieve the highest attainable condition” arbitration and capricious. *Upper Missouri Waterkeeper v. USEPA*, 377 F. Supp. 3d 1156 (D. Mont. 2019). On the latter issue:

The seventeen-year timeline permissibly could be used to meet the criteria in Montana’s Base WQS. Defendants must begin with a program that complies with the relaxed criteria of the Current Variance Standard. Defendants must work toward ultimate attainment of Montana’s Base WQS in order to demonstrate progress toward attainment. Defendants must adopt a timeline for which attainment of Montana’s Base

WQS would be feasible. To hold otherwise would render meaningless Montana's Base WQS.

*Id.* at 1170. All parties appealed.

The Ninth Circuit affirmed the district court's grant of partial summary judgment to the EPA and the intervenors but reversed the partial grant to Waterkeeper. *Upper Missouri Waterkeeper v. USEPA*, Nos. 19-35892 et al., 2021 WL 4568069 (9th Cir. Oct. 6, 2021). Waterkeeper's challenge to the use of compliance costs in granting the waiver foundered on *Chevron* deference principles; its challenge to the propriety of using the "highest attainable condition" metric, as opposed to Montana's based water quality standard, foundered on the applicable regulations' text.

As to the first challenge, the panel began by observing that 33 U.S.C. § 1313(c)(2)(A) "addresses the establishment of water quality standards, not the granting of variances, and thus appears at first blush to be of limited relevance to Waterkeeper's argument." Nevertheless, "[w]ater quality standards and variances ... are closely linked in the regulatory framework created by the EPA after the Clean Water Act's passage." Citing 40 C.F.R. § 131.10(g)(6), the panel reasoned that "a State may adopt a water quality standard that does not designate the uses described in [40 U.S.C.] § 1251(a)(2) if it can show that implementing the pollution controls necessary to protect those uses 'would result in substantial and widespread economic and social impact'" and that "[t]he EPA adopted its variance regulation by building on this same framework." That said, the CWA itself was "silent or ambiguous as to the precise question raised," so the panel turned to whether the EPA's interpretation of "§ 1313(c)(2)(A)'s requirement that water quality standards 'serve the purposes of this chapter' as incorporating the purposes referred to in 33 U.S.C. § 1251(a)(2)" was permissible. It answered this question "yes" for two reasons:

First, the provision states that water quality standards shall protect the "public ... welfare," and that term can reasonably be understood to encompass consideration of whether compliance costs would cause substantial and widespread economic and social impact. And second, the EPA has reasonably construed § 1313(c)(2)(A)'s requirement that water quality standards "serve the purposes of this chapter" as incorporating the purposes referred to in 33 U.S.C. § 1251(a)(2). Congress declared in § 1251(a)(2) that water quality necessary to protect aquatic life and recreational use is to be achieved "wherever attainable." The statute does not define what factors may be taken into account when deciding whether a particular use is "attainable," so it fell to the EPA to flesh out the meaning of that term. The agency could perhaps have interpreted the term to focus solely on whether achieving water quality of a particular level is *technologically* feasible, even if the costs involved would prove financially ruinous to the communities benefitting from the improvements. But it seems far more plausible that Congress used the term in the sense reflected in the EPA's regulations—as including an assessment of whether achieving the necessary water quality is economically feasible, given the costs that would be imposed on the affected communities.

As to the second challenge, the panel read the district court as holding that the EPA, by "not requir[ing] compliance with the highest attainable condition at the outset of the term" and "not requir[ing] compliance with Montana's base water quality standards by the end of the term[,]” departed from its own regulations. Not so, it stated:

[T]he EPA's variance regulation unambiguously provides that compliance with the highest attainable condition is not required at the outset. A variance request may be approved only when a State can show that compliance with the base water quality standards cannot feasibly be attained. § 131.14(b)(2)(i)(A). If approved, the variance replaces the base water quality standard with the most rigorous standard that can feasibly be attained—the “highest attainable condition.” § 131.14(b)(1)(ii). The regulation then provides that a variance may remain in effect only “as long as necessary to achieve the highest attainable condition.”

In short, “the purpose of a variance is to make incremental progress toward compliance with the base water quality standards, but the ultimate goal by the end of the variance’s term is to achieve compliance with the highest attainable condition.” The panel added that the variance here contained various “safeguards,” including requiring each “individual facility [to] carefully track[] the steps the facility must take to achieve compliance with the highest attainable condition” and to “implement a ‘pollutant minimization program’—that is, ‘a structured set of activities to improve processes and pollutant controls’” in the event that the facility “reaches the highest attainable condition but still cannot attain compliance with the base water quality standards.”

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/10/06/19-35898.pdf>