



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 12 2008

OFFICE OF
WATER

Doyle Childers, Director
Missouri Department of Natural Resources
P.O. Box 176
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Dear Mr. Childers:

This letter constitutes EPA's determination under Clean Water Act (CWA) section 303(c)(4)(B) as to whether new or revised water quality standards are needed to satisfy the requirements of the CWA for two of three portions of an existing 195.5-mile segment of the Mississippi River that flows from Dam 27, upstream from St. Louis, down to the confluence with the Ohio River. This determination addresses whether the northern (upstream) and southern (downstream) portions of this water body segment should be designated for whole body contact recreation. Today's determination does not address the third, approximately 30-mile portion of this segment in the St. Louis area, which begins at North Riverfront Park and continues downstream to the confluence with the Meramec River.

EPA hereby determines that new or revised standards are necessary to meet the requirements of the CWA for two portions of the 195.5-mile segment of the Mississippi River. The portions of the River that are subject to today's determination include a 1.3-mile segment upstream from St. Louis that flows from Dam 27 to North Riverfront Park, and a 164.7-mile segment downstream from St. Louis that flows from the confluence with the Meramec River to the confluence with the Ohio River. EPA is basing its determination for these portions of the 195.5-mile segment on the fact that the State of Missouri has neither adopted whole body contact recreation designated uses for these waters nor provided a use attainability analysis (UAA) demonstrating why such a use designation is not attainable. The original UAA submitted by the Missouri Department of Natural Resources (MDNR) in 2006 focused on an approximately 30-mile portion of the 195.5-mile segment of the Mississippi River in the St. Louis area, and data collected by the State since then has also only focused on the 30-mile portion. The original UAA did not attempt to demonstrate that whole body contact recreation was not attainable for the 1.3 miles upstream from St. Louis and did not address the 164.7-mile segment downstream from St. Louis. Although EPA is making this determination today, the State of Missouri may subsequently provide EPA with a demonstration, including any relevant additional data and information, that whole body contact recreation is not attainable on the portions of the 195.5-mile segment addressed in today's determination. If the State of Missouri makes such a demonstration, EPA will review any information provided in accordance with the CWA and federal regulations in concluding whether future action is needed by either EPA or the State of Missouri.

Statutory and Regulatory Background

Section 303 of the CWA requires States and authorized Tribes (hereafter, collectively referred to as “States”) to adopt water quality standards for waters of the United States within their respective jurisdictions. Section 303(c) and EPA’s implementing regulations at 40 CFR part 131 require, among other provisions, that State water quality standards include the designated use or uses to be made of the waters and the criteria necessary to protect those uses. States are required to submit new or revised water quality standards to EPA for review and approval or disapproval (CWA section 303(c)(2)(A)). CWA section 303(c)(4)(B) authorizes the Administrator to determine, even in the absence of a State submission, that a new or revised standard is needed to meet the requirements of the CWA. The authority to make a determination under CWA section 303(c)(4)(B) is discretionary and resides exclusively with the Administrator, unless the authority is explicitly delegated by the Administrator.

Section 101(a)(2) of the CWA states the national interim goal of achieving by July 1, 1983 “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and ... recreation in and on the water” (hereafter collectively referred to as “fishable/swimmable”) wherever attainable. CWA section 303(c)(2)(A) requires water quality standards to “protect the public health and welfare, enhance the quality of water, and serve the purposes of this Chapter.” EPA’s regulations at 40 CFR part 131 interpret and implement these provisions through a requirement that water quality standards protect section 101(a)(2) uses unless those uses have been shown to be unattainable. Unless the State demonstrates that a fishable/swimmable use is not attainable on a certain water body, the water body must be designated as fishable/swimmable. This approach was upheld in Idaho Mining Association v. Browner, 90 F.Supp. 2d 1078, 1092 (D. Id. 2000). Thus, where a State believes that a use specified in section 101(a)(2) is not attainable and designates uses that do not included uses specified in section 101(a)(2), that State must conduct a use attainability analysis. See 40 CFR § 131.10(j).

The “use” of a water body is the most fundamental articulation of its role in the aquatic and human environments, and the water quality protections established by the CWA follow from the water body’s designated use. If a use lower than a CWA section 101(a) goal use is designated based on inadequate information or incomplete analysis, water quality-based protections that might have made it possible for the water to achieve the goals articulated by Congress in CWA section 101(a) may not be put in place. EPA seeks, through the implementation of section 303(c) of the Act, to ensure that any State’s decision to forgo protection of a water body’s potential to support CWA section 101(a) goal uses results from an appropriately structured scientific analysis of which uses are attainable.

Uses are considered by EPA to be attainable, at a minimum, if the uses can be achieved (1) when effluent limitations under CWA sections 301(b) and 306 are imposed on point source dischargers, and (2) when cost-effective and reasonable best management practices are imposed on nonpoint sources (40 CFR § 131.10(d)). EPA’s regulations at 40 CFR § 131.10(g) list the grounds upon which a State may demonstrate that a use is not attainable.

A UAA is defined at 40 CFR § 131.3(g) as a “structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors.” In a UAA, the physical, chemical and biological factors affecting the attainment of a use are evaluated through a water body survey and assessment. Guidance on water body surveys and assessment techniques is contained in EPA’s Technical Support Manual, Volumes I-III: Water Body Surveys and Assessments for Conducting Use Attainability Analyses (Volumes I-II, November 1983; Volume III, November 1984). Additional guidance is provided in EPA’s Water Quality Standards Handbook: Second Edition (EPA-823-B-94-005, August 1994). Guidance on economic factors affecting the attainment of a use is contained in EPA’s Interim Economic Guidance for Water Quality Standards: Workbook (EPA-823-B-95-002, March 1995).

In today’s determination, EPA concludes that the State of Missouri has not adequately supported its decision not to designate a use consistent with CWA section 101(a) goals for portions of the 195.5-miles of the Mississippi River upstream and downstream from St. Louis and determines that new or revised water quality standards, i.e., whole body contact recreation, are necessary for those portions. Unless the State demonstrates that whole body contact recreation is not attainable through a UAA, these portions of the River must be designated for whole body contact recreation. At this time, the State has not made such a demonstration.

History of Missouri’s Water Quality Standards Subject to this Determination

On September 8, 2000, EPA acted on Missouri’s revised water quality standards adopted in 1994 and 1996. In that action EPA approved the majority of the new or revised water quality standards submitted by MDNR and disapproved certain new or revised water quality standards. At that time EPA Region 7 also identified concerns with some of the State’s existing water quality standards, and identified items for attention in the State’s next triennial review of its existing water quality standards. EPA Region 7 raised certain issues, including Missouri’s failure to address the “swimmable” aspect of the “fishable/swimmable” goal of the CWA for certain waterbodies. EPA Region 7 wrote the following in its September 8, 2000 letter:

Since 1984, EPA has expressed its concern with MDNR’s approach to classifying surface waters for whole body contact. As captured in a document titled, “A Whole Body Contact Recreation Use Attainability Analysis” (1984), MDNR’s philosophy since 1967 has been to withhold the designation of surface waters for whole body contact unless “requested by the public.” Although focusing on smaller streams, this philosophy apparently extends to all waters, including large rivers. The lower portion of the Mississippi River in Missouri and the entire Missouri River are not designated for whole body contact. Without the necessary use attainability analysis, the State’s failure to meet the requirements of section 101(a)(2) of the CWA and its implementing federal regulations has and continues to be a significant deficiency within Missouri’s water quality standards program.

EPA indicated that if the State did not either revise its water quality standards in accordance with the statutory and regulatory requirements or demonstrate by a thorough analysis of use attainability that whole body contact recreation is not attainable, EPA Region 7 intended to request that the Administrator make a determination that new or revised standards are needed pursuant to the Administrator's authority contained in CWA section 303(c)(4)(B).

Following EPA's September 2000 letter, Missouri did not revise its water quality standards to address the items that EPA disapproved nor did Missouri address the other items noted in EPA's letter. However, EPA Region 7 did not request that the Administrator use the authority contained in CWA section 303(c)(4)(B) to make a determination for waters lacking whole body contact recreation or for any of the other issues where the Region intended to make such a recommendation. Following this inaction by the State and EPA, Plaintiff Missouri Coalition for the Environment (MCE) filed a complaint on October 7, 2003 against EPA under the CWA's citizen-suit provision, CWA section 505(a)(2). The complaint referred to the September 8, 2000 letter, and alleged that EPA's "disapproval" had triggered a "nondiscretionary duty," a duty with a firm deadline that EPA had failed to meet, under CWA section 303(c)(4) for EPA to "promptly prepare and publish proposed regulations" for the State of Missouri.

In December 2004, EPA and MCE entered into a joint consent decree and settlement agreement to resolve the litigation. The terms of the consent decree have been satisfied and the consent decree is not at issue in this determination. This determination addresses one of the items included in the settlement agreement. Under the terms of the settlement agreement, EPA was to determine, pursuant to CWA section 303(c)(4)(B), whether new or revised water quality standards are necessary to meet the requirements of the CWA unless MDNR submitted to EPA new or revised water quality standards for those items by the dates specified in the settlement agreement. The settlement agreement specifies that any such determination will address the issue identified in the settlement agreement, as well as the concerns raised in EPA's September 8, 2000 letter, and that it "will be made by the Administrator or the Administrator's duly authorized delegate with fully and lawfully delegated authority to make such determinations." Moreover, the settlement agreement provides that any determination must: (1) be in writing and set forth the factual and legal basis for the determination, and (2) the writing must also state that the signatory has the authority to make the determination(s) therein.

On March 28, 2006, MDNR submitted new or revised water quality standards, satisfying EPA's obligations under the terms of the settlement agreement for all but one item that had an April 30, 2006 deadline. For the one remaining item, identified as "Whole Body Contact Use," MDNR submitted new or revised water quality standards partially addressing this item on March 28, 2006; that is, MDNR adopted water quality standards resulting in a whole body contact recreation use for approximately 3,600 classified water body segments and 400 classified lakes, but did not adopt whole body contact recreation uses for the remaining 142 classified water body segments covered by the settlement agreement. EPA approved the State's designation of 4,000 waters for whole body contact recreation by letter dated April 28, 2006 from Betty Berry, Region 7's Acting Director of the Water, Wetlands, and Pesticides Division, to Doyle Childers, Director of MDNR.

With regard to the 142 waters for which MDNR did not adopt whole body contact recreation uses, EPA made a determination on October 31, 2006 for 141 of the 142 waters. At that time, EPA determined that new or revised standards were needed for 99 of the 141 waters, but that new or revised standards were not needed for the other 42 of the 141 waters.

The remaining water body that was not part of EPA's October 31, 2006 determination is the 195.5-mile segment of the Mississippi River, beginning just upstream of the metropolitan St. Louis area and flowing to the confluence with the Ohio River. MDNR had previously designated this 195.5-mile segment of the Mississippi River (described in the Missouri water quality standards, 10 CSR § 20-7, Table H, as: "Mississippi R., Class P, Miles 195.5, From Ohio River to Dam #27, Counties Mississippi, St. Louis City") for "Boating and Canoeing." In their March 28, 2006 submission, MDNR revised the "Boating and Canoeing" designated use to "Secondary Contact Recreation" and included an expanded definition for this recreational use sub-category. While EPA approved the new definition for the designated use, EPA has not yet approved or made a determination as to whether or not secondary contact recreation is the highest attainable use for this 195.5-mile segment of the Mississippi River. The current settlement agreement deadline for EPA to make a determination for this segment is February 27, 2009.

Determination

EPA hereby determines that, based on the fact that Missouri has neither adopted whole body contact recreation designated uses nor provided sufficient information demonstrating why such a use designation is not attainable, new or revised water quality standards (i.e., whole body contact recreation) are necessary to meet the requirements of the CWA for (1) the 1.3-mile segment north of St. Louis that flows from Dam 27 to North Riverfront Park, and (2) the 164.7-mile segment south of St. Louis that flows from the confluence with the Meramec River to the confluence with the Ohio River. In making this determination, EPA also considered public comments submitted in 2006 and other information available to EPA regarding recreation in and on these portions of the Mississippi River. This information indicates that these portions of the River are currently used for recreational activities, including swimming, canoeing, kayaking and jet-skiing.

EPA makes this determination pursuant to its authority contained in CWA section 303(c)(4)(B). EPA's authority to make such a determination is discretionary. In this case, EPA chose at the time of entering into the settlement agreement to exercise this discretion in committing to make such a determination if MDNR did not submit new or revised water quality standards by April 30, 2006 (deadline for the determination has been extended to February 27, 2009 through subsequent negotiations with MCE). For the purposes of today's determination, the Administrator has delegated this authority to me, Benjamin H. Grumbles, EPA's Assistant Administrator for Water. Thus, pursuant to the settlement agreement, I am a duly authorized delegate with fully and lawfully delegated authority to make this determination.

Where EPA concludes that new or revised water quality standards are needed, CWA section 303(c)(4) requires EPA to “promptly prepare and publish proposed regulations setting forth a revised or new water quality standard.” EPA’s strong preference is for States to adopt their own water quality standards regulations. To that end, EPA strongly encourages the State of Missouri to expeditiously revise its own water quality standards, taking into account any available data. If, in the course of preparing its own regulation, the State identifies or collects additional data or information that supports a decision that whole body contact recreation is not appropriate for all or part of the 1.3-mile portion and/or the 164.7-mile portion subject to today’s determination, the State may present that information and conclusion in a UAA in lieu of adopting whole body contact recreation for those portions of the water body. In that circumstance, EPA will review that UAA for consistency with the requirements of 40 CFR § 131.10 and notify the State of the results of the Agency’s review. If such a UAA supports only secondary contact recreation for the segments addressed in today’s determination, then, consistent with the federal requirements, the obligation for EPA to prepare proposed replacement federal regulations will no longer exist. Similarly, if the State adopts whole body contact recreation for the water body segments addressed in today’s determination, and submits such new or revised water quality standards to EPA for review and approval, Missouri will have revised its regulations to be consistent with the federal requirements, and the obligation for EPA to prepare proposed replacement federal regulations will no longer exist.

EPA recognizes and applauds the substantial effort that MDNR underwent over the last several years to adopt water quality standards resulting in recreation uses that are consistent with the CWA and EPA’s implementing regulations for approximately 3,600 classified stream segments and 400 classified lakes. EPA also applauds the State’s ongoing efforts to resegment and redesignate the Mississippi River and encourages the State to continue on this path. EPA looks forward to collaborating on this and other efforts to adopt appropriate use designations for the waters of the State of Missouri in the future.

Sincerely,



Benjamin H. Grumbles
Assistant Administrator

cc: Elizabeth Hubertz, Clinic Attorney, Washington University School of Law
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