

# The fallacy of “Narrative Protections”

One perspective of gap analysis

# Rules vs. Policy

- MDNR interprets rule language where no clear definition is included in the rule.
- 1996 Memorandum to MDNR permit writers provided for discharge of substances at the chronic toxicity value to unclassified waters.
- Previously this policy was attempted to be included in the rule. EPA objected.
- Presently MDNR does permit discharge of ammonia at the acutely toxic value to unclassified waters.

*Toxic is as toxic does, does it not?*

# Mixed Messages

- EPA has never formally objected to any permit conditions based on the aforementioned policy. The effect of the policy, and lack of an EPA objection to permits issued pursuant thereto, is the same as if the policy had been included in the rule. The public received no notice and had no say in the matter.

# Lost for words

MDNR, e-mail, 12/22/08

- **Currently the definitions in 10 CSR 20-7.010 do not include a definition of toxic. Perhaps that might be helpful...** The LMD allows listing unclassified waters a couple of different ways (1) if acute criteria are exceeded more than once in a three year period, (2) if other demonstrations of acute toxicity of waters or sediments are made such as more than one failed acute toxicity test of the water in a three year period or mean sediment levels exceed 150% of PEL value, or (3) **biological monitoring indicates alteration from reference stream/control stream in same EDU**, (4) significant deviation from amount of color or percent fine sediment deposition in reference/control stream.

# Policy vs. Practice

- None of the factors for listing ‘unclassified’ waters as ‘impaired’ is required to be monitored for by POTWs not receiving an industrial discharge.
- Despite significant documentation of conditions in unclassified streams unsuitable for aquatic life, or narrative criteria in their entirety, little to no corrective action is taken, including listing on the 303(d).

“It’s what you oughtn’t to do but you do anyway”  
--*Mel Brooks, 1981*

Q: Does the department issue permits that can allow the chronic threshold for toxic substances to be exceeded in unclassified waters?

A: “...For ammonia however, yes [in gaining situations]. And presumably any other parameter for which degradation while traveling in the unclassified stream can be reasonably predicted.”- *MDNR, e-mail, 01/08/09*

Q: Does the department consider toxic substances that would produce toxicity at the chronic value to be "non-toxic" in unclassified waters?

A: “I have never seen that assertion made in that way by MO.”- *MDNR, e-mail, 01/08/09*

Q: How does that understanding conform with the narrative criterion and the CWA mandate [for toxicity or toxic discharge]?

A: “It does not. But until the regulations are changed or I receive an actual objection from the EPA, I am compelled to write permits in accordance with our [interpretation of the] regs.”- *MDNR, e-mail, 01/08/09*

*Is MDNR the proper entity for addressing the problem, since it seems to rely entirely upon the opinion of EPA?*

# Semantics, Vernacular, and 'Legalese'

- MDNR has a legal opinion of “what is Waters of the State” supported by law and case law.
- MDNR is aware that the Standards Document is written as such that the current interpretation concerning toxicity is likely inconsistent with the rule.-*MDNR staff memorandum, February 2006*
- What is “objectionable”? Good question...

# Conundrum

- What *can* be done vs. what *should* be done
- All downstream landowners have a stake, whether it is utility rates or property value. A toxic or pathogen-bearing discharge, such as would result under the current policy, would diminish downstream property value and compromise intrinsic uses.
- “The primary role of government should be the protection of private property.”--*Thomas Paine, Founding Father, The United States of America*
- Regulatory flexibility vs. compassionate consistency

# We all live downstream

- State should assure a minimum of water quality from discharges that do not significantly impact intrinsic uses protected by narrative criteria, or create a health hazard. For discharges to unclassified waters, this is demonstrably not the present case under current policy and practice.
- Landowner recourse through MDNR is limited as the Department's hands are tied by its own interpretation owing to an *admitted* lack of clear definitions. This practice is not landowner friendly; a landowner could petition MDNR for redress of bonafide grievances only to be rebuffed with the mantra “we can't do anything, the practice is allowed by [our interpretation of] the rules”.

# Points made so far

- There is a clear disconnect between the rule and its implementation by MDNR.
- If this is bridged, the effect may include more stringent limits for ammonia, chlorine, and other ‘degradable’ toxic substances and could require some permittees to begin disinfection -or- limits could remain the same but the rule will be clarified.
- The disconnect should be bridged through a rule change, such as by developing an Implementation Method approved through the order of rulemaking & adding the method to the Standards Document, or by adding requisite definitions to ensure consistent protection for narrative criteria in all waters of the state.

# Things that will NOT change

Except in the instance of legislative action and executive approval, the following will not be affected:

- The requirement for a “water contaminant source” to be permitted.
- What constitutes “Waters of the state”.
- The definitions of “pollution” and “pollutant”.

# Questions to resolve:

- how to apply the 101(a)(2) uses & 101(a)(3) prohibition on toxic discharges to presently “unclassified” waters,
- how to assess conditions under which those uses are not unattainable,
- how to address the situation of ‘effluent dependent’ (created) uses and criteria that should apply,
- how to manage the classification process,
- how to dovetail the classification process to other administrative tasks (i.e rulemaking, assessments, permitting, etc.)

# Work already completed

- The existing methodology document for reclassifying waters of the state can serve as a UAA framework for removing aquatic life use.
- UAA protocol for recreational contact can serve as a framework for removing secondary use or incidental contact.
- Historic intent of “aquatic life” from CWC exists and could serve as a starting point for refining the implementation of the narrative criteria.
- Draft of proposed Water Quality Standards document revision to address perceived CWA 101(a)(2) & 101(a)(3) gaps.

# Simple solutions, complicated effects:

- Petition for Declaratory Judgment concerning toxicity and intrinsic uses as they exist in the WQS to settle debate and identify where correction is/isn't required in order for policy to conform to existing mandates.

-or-

- Treat all waters as 'classified' & supporting (at the minimum) the uses of livestock/wildlife watering, incidental contact, and protection from toxicity to aquatic life in the absence of a UAA ascertaining the inability to support such uses.

-or-

- Remove requirement for permit to 'unclassified' waters rendering the operating authority civilly liable in perpetuity for downstream impacts/effects to private parties.

# Part II

Stay tuned...