

Schaben, Darlene

From: Lish D. Alderson <aldersonl@ncrpc.com>
Sent: Wednesday, September 18, 2013 4:50 PM
To: Hoke, John
Cc: DNRContact, staylor@mo-ag.com; DNRContact, rbrundage@ncrpc.com
Subject: Letter re Comments on Proposed Amendments to 10 CSR 20-7.031
Attachments: 2013.09.18 Ltr to J Hoke re Comments water quality standards.pdf

Gentlemen,

On behalf of Mr. Brundage, please find the attached letter in regards to comments on proposed amendments to 10 CSR 20-7.031.

Thank you,



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September 18, 2013

Via Email Only

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Re: Comments on proposed amendments to 10 CSR 20-7.031
Missouri Register Vol. 38, No. 12 (June 17, 2013)

Dear John:

The purpose of this letter is to provide comment on proposed amendments to 10 CSR 20-7.031 Water Quality Standards published in the June 17, 2013 *Missouri Register*. I am offering these comments on behalf of the Missouri Agribusiness Association.

Comment No. 1: On page 939, section (1)(C) references uses for each water body “whether or not they are being attained.” “Attained” by what date? 1975?

Comment No. 2: On page 939, section (1)(C)1 provides for a process to assign designated uses to streams according to tiers of aquatic habitat protections based on watershed size, scale and information in the MoRAP Aquatic Gap project. We support the tiers of aquatic habitat (e.g. small river, creek, headwater stream). We support using watershed size, scale and other hydrological and physical data. However, at this time we do not support using the MoRAP Aquatic Gap project data to supplement biological data. The MoRAP dataset was not intended to be a regulatory tool or to be incorporated into a regulation. Although the MoRAP dataset contains useful information, it should be used as a tool to help assign aquatic tiers. Therefore, we recommend that the MoRAP Aquatic Gap project not be incorporated by reference into the rule.

Comment No. 3: On page 939, section (1)(C)1 refers to assigning uses to different categories of “aquatic habitat protections” such as “Warm water habitat (Small River)” and “Warm water habitat (Headwater).” But the end of this paragraph, it discusses assigning beneficial uses to “lakes and reservoirs” by designating aquatic habitat uses based on limnological characteristics. In the following list, I did not see any description of lakes and reservoirs in subparagraphs A – E. Maybe I missed it.

Comment No. 4: On page 939, section (1)(C)1.A. is the definition of Warm Water Habitat. This definition describes habitat that allows the maintenance on a “wide variety” of warm-water biota. Small headwater streams do not sustain a “wide variety” of warm water biota. “Wide variety” is a subjective term. We suggest deleting the words “wide variety” from this definition. The same comment applies to the words “wide variety” in the definition of Cool Water Habitat.

Comment No. 5: On page 939, section(1)(C)1.D describes a habitat category for “Exceptional Aquatic Habitat” which includes waters with “high diversity of aquatic species.” What constitutes “high diversity” is not defined. Furthermore, there must be a “satisfactory demonstration” that a “high diversity” of species exists. What could be considered a “satisfactory demonstration” is not defined or explained in the rule. Moreover, this category of habitat is not addressed in other parts of this regulation. There are no water quality standards defined for this category. Most importantly, there is no need for this category. Missouri already has an antidegradation rule that prevents degradation of high quality habitats and waterbodies. For example, Tier 3 waters such as outstanding national resource waters receive the highest degree of protection. Furthermore, what beneficial uses that are different from any other habitat would apply? Due to these uncertainties, this definition should be removed from the rule pending further clarification.

Comment No. 6: On page 941, paragraph (F)7 defines “Class E” streams as streams with ephemeral flow less than 96 hours duration in response to precipitation events. There is no “class” for ephemeral streams that do not have permanent pools but have ephemeral surface flow for more than 96 hours? This second “class” of waterbody is not defined. No beneficial uses are assigned to these waterbodies unless a UAA is performed that documents permanent pools and the presence of aquatic life. Consequently, we recommend the definition of Class E streams be deleted from the regulation.

Comment No. 7: On page 941, paragraph (X) Variance. This paragraph requires approval by the EPA. That requirement should be deleted from the definition.

Comment No. 8: On page 941, section (2)(C) states that other designated uses may be applied to water bodies on a case by case basis “following approval by the commission and the U.S. Environmental Protection Agency.” At a recent Water Protection Forum meeting, the Department said that the process to add and remove beneficial uses was the same. In previous paragraph (2)(A)4., beneficial uses can be removed subject to a demonstration based on a UAA as described in subsection (2)(G). Subsection (2)(C) should reference the UAA process described in section (2)(G).

Comment No. 9: On page 941, section (2)(D) is titled “Administration.” This title is confusing and misleading. A regulation should describe requirements which are then interpreted and implemented by the department. That is how a regulation is administered. If a different subsection of the rule is required to instruct MDNR staff how to “administer” the rule, the rule itself was not drafted with enough clarity. We suggest that this section be integrated into other sections of the rule.

Comment No. 10: On page 941, designated uses are assigned as described in section (2)(D). It refers to the enhanced 1:100,000 scale NHD dataset supplemented by the MoRAP Aquatic GAP project. As explained above, we recommend that this reference be deleted from the rule that it not be incorporated by reference. Nonetheless, the process to improve the 1:100,000 scale NHD map should continue.

Comment No. 11: On page 941, paragraph (E) refers to the “Use Designation Dataset.” As discussed above, we recommend that this dataset not be incorporated by reference into the rule since it is not yet complete.

Comment No. 12: On page 942, subsection (F) title *Use Attainability* is confusing. It says that UAA “must be performed when the commission – 1. Designates or has designated uses for a water body that do not include the protection of fish or recreation.” What does this mean? Why would the commission remove a use that was never assigned to a water body in the first place? Secondly, the commission would not add or remove a use unless a UAA was first performed. Subsection 3 refers to criteria that are less stringent than EPA’s section 304(a) criteria of the Clean Water Act. Missouri has not incorporated EPA’s 304(a) criteria into regulation. Therefore, this reference is incorrect. It should be less stringent than criteria adopted by the Clean Water Commission in the water quality standards in 10 CSR 20-7.031, not 304(a) criteria.

Comment No. 13: On page 942, subsection (G) Demonstration of Use Attainability. Subsection 1 says that UAA shall not cause segmentation of a water body. What does segmentation mean? By definition, a continuous stream up to its head waters will undergo a change in use designations from large river, small river, creek, head water and beyond. Therefore, there must be some level of segmentation that must occur. Furthermore, a UAA may only apply to a certain length of a water body that is dictated upon habitat and or funds available to perform the UAA. Segmentation in these instances should be allowed. We suggest deleting any references that prohibit or discourage segmentation.

Comment No. 14: On page 942, section (G)3. refers to a UAA protocol titled “*Missouri Aquatic Habitat Use Attainability Analysis: Water Body Survey in Assessment Protocol* dated November 6, 2013.” At a recent stakeholder meeting during which this UAA protocol was discussed, it was obvious the protocol is nowhere near completion. We hesitate to incorporate into rule a UAA protocol that is a work in progress. In its place, Bob Angelo from EPA suggested merely referring to the UAA process and six UAA categories set forth in 40 CFR 131.10.

Comment No. 15: On page 945, subsection (5)(L) proposes revisions to the sulfate and chloride criteria. I offered oral testimony at the September 11, 2013 Clean Water Commission meeting. I also provided the commission with a copy of a PowerPoint presentation. As I testified before the Commission, the proposed language does not include any default values for sulfate or hardness. EPA suggested that including default values in the rule would improve the chances that EPA could or would approve the rule. Thus, the primary purpose of this rulemaking was to provide default values as suggested by EPA. By including default values, our rule would be similar or equivalent to the Iowa rule which was approved by EPA. Consequently, the Missouri rule could be approved by EPA after this revision.

Instead of incorporating default values, the proposed rule suggests using the upper quartile values for sulfate and hardness to calculate chloride criteria. In personal conversations, you indicated the department may change the regulation to impose the lower quartile for hardness and the upper quartile for sulfate. It would be a mistake to reference the lower quartile for hardness and the upper quartile for sulfates. As set forth in the PowerPoint presentation, hardness and sulfate are positively correlated. In other words, when hardness is low, sulfate levels are low. The change you suggest would assume that hardness and sulfate are negatively correlated. To modify the rule to impose a lower quartile for hardness would not be scientifically defensible and result in overly protective chloride criteria.

We support Missouri's sulfate and chloride criteria in Table A. However, we are concerned with the proposed additions to subsection (5)(L). The Department should consider developing regional default values for the variables within the sulfate and chloride criteria equations that can be used in circumstances when contemporaneous sulfate, chloride, and hardness data are not available. The rule should be clarified to assert that default values should only be used when contemporaneous data are not available to determine attainment. Default values could be based upon representative waterbodies within the appropriate ecoregion and based upon the same statistical values for both sulfate and hardness (e.g., median for both variables). The MDNR should modify the proposed rule to account for these comments and to clarify the process to derive default values for criteria variables. Using this process, the rule should incorporate default values to satisfy EPA's concerns.

Thank you for the opportunity to submit these comments.

Sincerely,

By:



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RJB:la

c: Steve Taylor, Mo-Ag