

Schaben, Darlene

From: Kevin Perry <kperry@regform.org>
Sent: Tuesday, September 17, 2013 12:10 PM
To: Hoke, John
Cc: DNRContact, rwalker@regform.org
Subject: REGFORM's comment letter on Proposed WQS Rule
Attachments: REGFORM comment letter on proposed WQS rule v2 9.14.13.pdf

Dear Mr. Hoke:

Attached please find our comment letter on the proposed WQS rule.

Thank you for considering our comments on this important rule.

Will you please reply to this email so I know you received it?

Thank you,

Kevin

Kevin Perry

Assistant Director

REGFORM

238 East High Street

Jefferson City, MO 65101

573 680-5069 cell phone

kperry@regform.org



September 14, 2013

Mr. John Hoke
Water Protection Program
Division of Environmental Quality
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102

Subject: Comments on “10 CSR 20-7.031 Water Quality Standards” Proposed Amendment, Published in the *Missouri Register* June 17, 2013”

Dear Mr. Hoke:

Thank you for the opportunity to comment on the proposed rule amendment for 10 CSR 20-7.031.

We strongly support this rule. We urge the Clean Water Commission (“Commission” or “CWC”) to adopt it. This regulation is needed to avoid U.S. EPA acting to set standards for Missouri.

By establishing the 1:100,000 NHD as a starting point, this proposed regulation sets forth a reasonable approach to designating uses that is acceptable to U.S. EPA and meets requirements of the Clean Water Act.

We offer the following comments in an effort to improve the proposed rule. These comments should not be construed as opposition to adoption of the proposed rule.

1. Variance Procedure. The proposed rulemaking includes a new variance procedure in 10 CSR 20-7.031(12) and defines the term “variance” at 10 CSR 20-7.031(1)(X). The proposed procedure includes a provision that a variance may be granted only if it satisfies “an analysis based on the factors provided in 40 CFR 131.10(g).”

The Federal Regulation cited is in the designated use section of the Federal water quality standards regulations and reads in part “States may remove a designated use which is *not* an existing use, as defined in §131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible...” (emphasis in the original). The regulation identifies six acceptable reasons for removing a designated use. The rule specifically prohibits the removal of an “existing use.”

This variance procedure is too restrictive. It does not allow variances to water quality standards if the affected waterbody has an existing use.

Also, the proposed variance procedure subjects entities seeking a variance to the same test required for performing a Use Attainability Analysis (UAA). In contrast, the Federal regulations that allow states to have variance policies, codified at 40 CFR 131.13, simply state that “States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances.” Linking variances to Federal UAA requirements is not required by the Clean Water Act. It is burdensome, expensive to undertake, and time-consuming. It should not be adopted as proposed.

Request. REGFORM requests that the Commission strike subsection (12)(B) and adopt a more reasonable and balanced variance procedure that is flexible and takes full advantage of the freedom and discretion granted in 40 CFR 131.13.

2. Sulfate and Chloride Criteria Equations. The specific criteria for Sulfate and Chloride that are intended to be protective of aquatic life proposed in 10 CSR 20-7.031(5)(L) are required to be based on the upper quartile values for the water body in question. Alternately, the values can be based on any similar water body in the same watershed or a nearby watershed in the same ecosystem.

The proposed amendment is vague. It is not clear what “based on” means. If the upper quartile were applied to hardness, the resulting limits would be less stringent. If the upper quartile is applied to the sulfate and chloride limits directly, each water body would, according to direct mathematical calculation, fail 75% of the time. Neither result appears to be acceptable.

REGFORM believes that the best path forward is not to attempt anticipate or speculate on the concerns U.S. EPA might have with the sulfate and chloride limits that were previously adopted by the Commission but are not yet approved (nor disapproved) by U.S. EPA.

Request. REGFORM requests that the CWC strike the proposed amendment language in subsection (5)(L). Leave (5)(L) as it is, unchanged. If U.S. EPA provides a basis for disapproval, should it disapprove, then Missouri will have a rationale for devising new limits for sulfate and chloride.

3. Exceptional Aquatic Habitat. Under the definition of Designated uses, the proposed regulation identifies a variety of aquatic habitat protection uses. Included is Exceptional Aquatic Habitat (EAH) in 10 CSR 20-7.031(1)(C)1.D. The description of EAH includes this parenthetical example, “(e.g., rare or endangered species)”. This example is unnecessary and potentially problematic. It highlights and draws attention to particular types of unusual or unique assemblages.

If the Department would like to propose a definition for “unusual or unique assemblages of aquatic life,” it should do so directly rather than use examples.

Since “Exceptional Aquatic Habitat” is defined but not used anywhere in the rule, striking the entire definition is also an acceptable alternative.

Request. REGFORM requests that the Commission remove “(e.g., rare or endangered species)” from the adopted rule, or delete the entire definition of Exceptional Aquatic Habitat.

4. Narrative Trumps Erroneous Database Contents. We believe that the enhanced 1:100,000 scale NHD referred to in 10 CSR 20-7.031(2)(D)1 is being created manually. We also believe it is changing over time. We have identified errors in this data set. In particular, we have identified in the data set multiple examples of “Man-made systems constructed solely to treat or convey wastewater or stormwater.” These are prohibited in the proposed rule from the assignment of designated uses (see 10 CSR 20-7.031(2)(D)4.A.).

Because this process is prone to error, we believe the final rule should establish that the narrative in paragraph (2)(D)4. has precedence over the erroneous presence of a structure in the enhanced 1:100,000 scale NHD.

Request. REGFORM requests that the Commission add the following text after 10 CSR 20-7.031(2)(D)4.B:

“C. Any structures described in paragraphs (2)(D)4.A. or (2)(D)4.B. of this rule that may be found within the enhanced 1:100,000 scale NHD or the Use Designation Dataset (subsection (2)(E)) are there in error. Designated uses shall not be assigned to these structures, even if they are present in the 1:100,000 scale NHD or the Use Designation Dataset.”

5. Effective Date Trigger, Contingent on UAA Protocol. The UAA protocol for Aquatic Life described in paragraph (2)(G)3. of this proposed rule is currently under development. At this time, it does not exist in a form that can be reviewed and evaluated by the public. Nor can it be reviewed and evaluated by the Commission.

Yet this protocol may be an essential element of the process that will take effect when this proposed rule is promulgated.

REGFORM is concerned that the protocol may not be developed in a satisfactory manner at the time the Commission considers adoption of the proposed rule. Some may view any failure to complete the UAA protocol as sufficient cause for the Commission to not adopt this proposed rule.

REGFORM believes this regulation must be adopted to prevent U.S. EPA from establishing a costly and legally unsupported approach to use designation that far exceeds the parameters established in subsection (2)(A) of this proposed rule.

Request. If needed, we request the Commission adopt this or similar language in subsection (2)(G) that puts the major provisions of this rule into effect but delays others until the Commission has adopted the UAA protocol for aquatic life:

“3. Use attainability analyses intended for aquatic habitat protection shall be performed in accordance with methods and procedures as found in *Missouri Aquatic Habitat Use Attainability Analyses: Water Body Survey and Assessment Protocol [dated November 6, 2013, as]* published by the Water Protection Program, Division of Environmental Quality, Missouri Department of

September 14, 2013

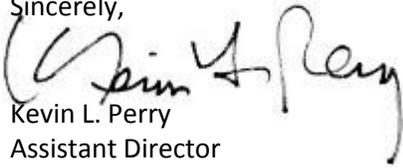
Page 4

Natural Resources, Jefferson City, MO 65102[, *which is hereby incorporated by reference and does not include any later amendments or additions*]. The department shall maintain a copy of the referenced document and shall make it available to the public for inspection and copying at no more than the actual cost of reproduction. **New effluent limitations for discharges affected by this rule shall not be implemented until such time as this document is adopted by the Commission and available for use;**"

We strongly encourage the Commission to adopt this important rule.

Thank you for considering our comments. We trust that the Commission will view these as we intend them: ideas for improving a much-needed rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin L. Perry". The signature is written in a cursive style with a large initial "K".

Kevin L. Perry
Assistant Director

c: R. Walker, REGFORM
REGFORM members

REGFORM
REGULATORY ENVIRONMENTAL
GROUP FOR MISSOURI

RECEIVED

SEP 20 2013

WATER PROTECTION PROGRAM

September 14, 2013

Mr. John Hoke
Water Protection Program
Division of Environmental Quality
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102

Subject: Comments on "10 CSR 20-7.031 Water Quality Standards" Proposed Amendment, Published in the *Missouri Register* June 17, 2013"

Dear Mr. Hoke:

Thank you for the opportunity to comment on the proposed rule amendment for 10 CSR 20-7.031.

We strongly support this rule. We urge the Clean Water Commission ("Commission" or "CWC") to adopt it. This regulation is needed to avoid U.S. EPA acting to set standards for Missouri.

By establishing the 1:100,000 NHD as a starting point, this proposed regulation sets forth a reasonable approach to designating uses that is acceptable to U.S. EPA and meets requirements of the Clean Water Act.

We offer the following comments in an effort to improve the proposed rule. These comments should not be construed as opposition to adoption of the proposed rule.

1. Variance Procedure. The proposed rulemaking includes a new variance procedure in 10 CSR 20-7.031(12) and defines the term "variance" at 10 CSR 20-7.031(1)(X). The proposed procedure includes a provision that a variance may be granted only if it satisfies "an analysis based on the factors provided in 40 CFR 131.10(g)."

The Federal Regulation cited is in the designated use section of the Federal water quality standards regulations and reads in part “States may remove a designated use which is *not* an existing use, as defined in §131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible...” (emphasis in the original). The regulation identifies six acceptable reasons for removing a designated use. The rule specifically prohibits the removal of an “existing use.”

This variance procedure is too restrictive. It does not allow variances to water quality standards if the affected water body has an existing use.

Also, the proposed variance procedure subjects entities seeking a variance to the same test required for performing a Use Attainability Analysis (UAA). In contrast, the Federal regulations that allow states to have variance policies, codified at 40 CFR 131.13, simply state that “States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances.” Linking variances to Federal UAA requirements is not required by the Clean Water Act. It is burdensome, expensive to undertake, and time-consuming. It should not be adopted as proposed.

Request. REGFORM requests that the Commission strike subsection (12)(B) and adopt a more reasonable and balanced variance procedure that is flexible and takes full advantage of the freedom and discretion granted in 40 CFR 131.13.

2. Sulfate and Chloride Criteria Equations. The specific criteria for Sulfate and Chloride that are intended to be protective of aquatic life proposed in 10 CSR 20-7.031(5)(L) are required to be based on the upper quartile values for the water body in question. Alternately, the values can be based on any similar water body in the same watershed or a nearby watershed in the same ecosystem.

The proposed amendment is vague. It is not clear what “based on” means. If the upper quartile were applied to hardness, the resulting limits would be less stringent. If the upper quartile is applied to the sulfate and chloride limits directly, each water body would, according to direct mathematical calculation, fail 75% of the time. Neither result appears to be acceptable.

REGFORM believes that the best path forward is not to anticipate or speculate on the concerns U.S. EPA might have with the sulfate and chloride limits that were previously adopted by the Commission but are not yet approved (nor disapproved) by U.S. EPA.

Request. REGFORM requests that the CWC strike the proposed amendment language in subsection (5)(L). Leave (5)(L) as it is, unchanged. If U.S. EPA provides a basis for disapproval, should it disapprove, then Missouri will have a rationale for devising new limits for sulfate and chloride.

3. Exceptional Aquatic Habitat. Under the definition of Designated Uses, the proposed regulation identifies a variety of aquatic habitat protection uses. Included is Exceptional Aquatic Habitat (EAH) in 10 CSR 20-7.031(1)(C)1.D. The description of EAH includes this parenthetical example, “(e.g., rare or endangered species)”. This example is unnecessary and potentially problematic. It highlights and draws attention to particular types of unusual or unique assemblages.

If the Department would like to propose a definition for “unusual or unique assemblages of aquatic life,” it should do so directly rather than use examples.

Since “Exceptional Aquatic Habitat” is defined but not used anywhere in the rule, striking the entire definition is also an acceptable alternative.

Request. REGFORM requests that the Commission remove “(e.g., rare or endangered species)” from the adopted rule, or delete the entire definition of Exceptional Aquatic Habitat.

4. Narrative Trumps Erroneous Database Contents. We believe that the enhanced 1:100,000 scale NHD referred to in 10 CSR 20-7.031(2)(D)1 is being created manually. We also believe it is changing over time. We have identified errors in this data set. In particular, we have identified in the data set multiple examples of “Man-made systems constructed solely to treat or convey wastewater or stormwater.” These are prohibited in the proposed rule from the assignment of designated uses (see 10 CSR 20-7.031(2)(D)4.A.).

Because this process is prone to error, we believe the final rule should establish that the narrative in paragraph (2)(D)4. has precedence over the erroneous presence of a structure in the enhanced 1:100,000 scale NHD.

Request. REGFORM requests that the Commission add the following text after 10 CSR 20-7.031(2)(D)4.B:

“C. Any structures described in paragraphs (2)(D)4.A. or (2)(D)4.B. of this rule that may be found within the enhanced 1:100,000 scale NHD or the Use Designation Dataset (subsection (2)(E)) are there in error. Designated uses shall not be assigned to these structures, even if they are present in the 1:100,000 scale NHD or the Use Designation Dataset.”

5. Effective Date Trigger, Contingent on UAA Protocol. The UAA protocol for Aquatic Life described in paragraph (2)(G)3. of this proposed rule is currently under development. At this time, it does not exist in a form that can be reviewed and evaluated by the public. Nor can it be reviewed and evaluated by the Commission.

Yet this protocol may be an essential element of the process that will take effect when this proposed rule is promulgated.

REGFORM is concerned that the protocol may not be developed in a satisfactory manner at the time the Commission considers adoption of the proposed rule. Some may view any failure to complete the UAA protocol as sufficient cause for the Commission to not adopt this proposed rule.

REGFORM believes this regulation must be adopted to prevent U.S. EPA from establishing a costly and legally unsupported approach to use designation that far exceeds the parameters established in subsection (2)(A) of this proposed rule.

Request. If needed, we request the Commission adopt this or similar language in subsection (2)(G) that puts the major provisions of this rule into effect but delays others until the Commission has adopted the UAA protocol for aquatic life:

“3. Use attainability analyses intended for aquatic habitat protection shall be performed in accordance with methods and procedures as found in *Missouri Aquatic Habitat Use Attainability Analyses: Water Body Survey and Assessment Protocol* [dated November 6, 2013, as] published by the Water Protection Program, Division of Environmental Quality, Missouri Department of

September 14, 2013

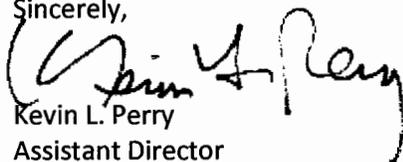
Page 4

Natural Resources, Jefferson City, MO 65102[, *which is hereby incorporated by reference and does not include any later amendments or additions*]. The department shall maintain a copy of the referenced document and shall make it available to the public for inspection and copying at no more than the actual cost of reproduction. **New effluent limitations for discharges affected by this rule shall not be implemented until such time as this document is adopted by the Commission and available for use;**"

We strongly encourage the Commission to adopt this important rule.

Thank you for considering our comments. We trust that the Commission will view these as we intend them: ideas for improving a much-needed rule.

Sincerely,



Kevin L. Perry
Assistant Director

c: R. Walker, REGFORM
REGFORM members