



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

OCT 31 2006

OFFICE OF  
WATER

Doyle Childers, Director  
Missouri Department of Natural Resources  
P.O. Box 176  
Jefferson City, Missouri 65102

Dear Mr. <sup>Doyle</sup>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 141 water body segments in the State of Missouri. This determination addresses whether these 141 water body segments should be designated for Whole Body Contact Recreation (WBCR) or Secondary Contact Recreation (SCR) uses or whether available data adequately demonstrates that such use designations are not attainable.

EPA hereby determines, based on the use attainability analyses submitted by the State of Missouri and additional information where relevant, that new or revised standards are not needed for 42 of the 141 water bodies. EPA also determines that, for the remaining 99 of 141 water bodies, new or revised water quality standards are needed. For these waters, Missouri has not provided sufficient information to show recreational uses are not attainable and no additional information supports a conclusion that recreational uses are not attainable. The State of Missouri may subsequently provide EPA with a demonstration, including any relevant additional data and information, that such uses are not attainable. 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. EPA identifies which waters are included in each category in the Attachment to this letter.

### **Statutory and Regulatory Background**

Section 303(c) 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 applicable 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 also required to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards (CWA section 303(c)(1)). States are required to

submit these new or revised water quality standards to EPA for review and approval or disapproval (CWA section 303(c)(2)(A)). Under 40 CFR § 131.21, if EPA approves a new or revised water quality standard submitted by a State, that standard takes effect for CWA purposes. If EPA disapproves a new or revised water quality standard submitted by a State, EPA must promulgate its own water quality standard for the State when necessary to replace the disapproved water quality standard. Finally, 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 CWA's requirements. The authority to make a determination under CWA section 303(c)(4)(B) is discretionary and resides exclusively with the Administrator.

Section 101(a)(2) of the Clean Water Act 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. Clean Water Act 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, the use 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). Where a State believes that a use specified in section 101(a)(2) is not attainable and wishes to remove or subcategorize this use, that State must conduct a use attainability analysis. See 40 CFR § 131.10.

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 use attainment.

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

Under 40 CFR § 131.10(j), a State is required to conduct a use attainability analysis (UAA) whenever the State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the CWA, or when the State wishes to remove a designated use

that is specified in section 101(a)(2) of the Act or to adopt subcategories of CWA section 101(a)(2) uses that require less stringent criteria. 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 the 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 the 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 the Interim Economic Guidance for Water Quality Standards: Workbook (EPA-823-B-95-002, March 1995).

In today’s determination, where EPA has concluded that the State of Missouri has not adequately supported a decision to designate the use as lower than a CWA section 101(a) goal use for 99 water body segments, EPA is determining that new or revised water quality standards are necessary. In evaluating the information provided to EPA by the Missouri’s Department of Natural Resources (MDNR), EPA considered whether the data and information sufficiently demonstrate that primary contact recreation is not attainable consistent with the federal regulations at 40 CFR § 131.10(g). EPA used the Missouri Recreational Use Attainability Analysis Protocol (MDNR Water Protection Program, November 3, 2004) to the greatest extent practicable when evaluating this data and information.

### **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 also identified existing water quality standards for which EPA indicated that it would request that the Administrator make a finding of inconsistency under the CWA for certain existing water quality standards and identified items for attention in the State’s next triennial review of its existing water quality standards. In addition, EPA raised certain issues, including Missouri’s failure to address the “swimmable” aspect of the “fishable/swimmable” goal of the Clean Water Act. EPA explained 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.

As a result, EPA indicated that if the State did not either revise its water quality standards in accordance with the statutory and regulatory requirements or conduct a more thorough analysis of use attainability, EPA Region 7 intended to request that the Administrator make a determination 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 any of the other items noted in EPA's letter. EPA Region 7 did not formally request that the Administrator use his 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 which EPA had failed to meet, under CWA sections 303(c)(3) and (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. EPA has complied with the terms of the consent decree 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 with respect to Missouri's water quality standards 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, any determination must be in writing and set forth the factual and legal basis for the determination. Finally, if any such determination is made by a duly authorized delegate of the Administrator, 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 meeting the terms of the settlement agreement for all but one item that had an April 30, 2006 deadline. EPA's obligations under the settlement agreement have been satisfied regarding the other items 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 3600 classified water body segments and 400 classified lakes, but did not revise or adopt recreation uses for the remaining 142 classified water body segments covered by the settlement agreement. EPA approved the State's designation of 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 revise or adopt recreation uses, MDNR provided use attainability analyses (UAAs). Pursuant to Paragraph 3(b) of the settlement agreement, EPA must determine whether those 142 waters need new or revised recreational uses or whether adequate data and information support a conclusion that such uses are not attainable. Because MDNR did not adopt new or revised recreation use designations for these 142 waters, under 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 with respect to these 142 waters by April 30, 2006. Prior to that date, however, EPA and MCE agreed to a 6-month extension with respect to this item, extending EPA's deadline to October 31, 2006.

One of the 142 water body segments for which MDNR did not adopt Whole Body Contact Recreation is a 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"), which MDNR previously designated for "Boating and Canoeing" (MDNR's "Boating and Canoeing" category has since been revised to "Secondary Contact Recreation"). This 195.5-mile segment is not part of today's determination. EPA and MCE have agreed to extend the settlement agreement deadline regarding this water body until October 31, 2007.

EPA is addressing the remaining 141 waters in today's determination. With the exception of two of the 141 water body segments, these waters are not currently designated with any recreation use (i.e., Whole Body Contact Recreation or Secondary Contact Recreation). The two segments that are designated for a recreation use are designated for Secondary Contact Recreation (Blue Ditch (WBID 3147, Scott County) and East Yellow Creek (WBID 0597, Linn and Chariton Counties)). Based upon EPA's evaluation of the UAAs provided by MDNR and additional data collected by EPA, today's determination addresses whether new or revised water quality standards (i.e., whether either Whole Body Contact Recreation or Secondary Contact Recreation designated uses) are needed to meet the requirements of the CWA for any or all of the 141 classified stream segments.

### **Determination**

EPA hereby determines that adequate documentation exists to support a determination that new or revised recreation uses are not needed for 42 water bodies (and for one of these 42

water bodies, that the water body's current designation of SCR is supported). EPA further determines, based on currently available data and information, that new or revised water quality standards (i.e., Whole Body Contact Recreation or Secondary Contact Recreation designated uses) are necessary to meet the requirements of the CWA for 99 water bodies in Missouri. The Attachment to this determination identifies those waters that need new or revised standards, those that do not, and details the basis for this determination.

EPA makes this determination under 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 (extended deadline of October 31, 2006). 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.

For those waters where EPA concludes that new or revised water quality standards are needed, the statute 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 establish their own water quality standards regulations. To that end, EPA strongly encourages Missouri to expeditiously revise its own water quality standards taking into account any available data. If, in the course of preparing its own regulation, Missouri identifies or collects additional data or information for a particular water body segment that leads it to a different conclusion than contained in today's determination, Missouri may present that information and conclusion in a UAA in lieu of adopting new or revised water quality standards. In that circumstance, EPA will review that UAA for consistency with the requirements of 40 CFR § 131.10 and notify Missouri of the results of the Agency's review. If such a UAA supports a water body segment's lack of recreation uses consistent with the federal requirements, the obligation for EPA to prepare proposed replacement federal regulations will no longer be necessary. Similarly, if Missouri adopts a new or revised standard for a particular water body segment addressed in today's determination, MDNR must submit any new or revised water quality standards to EPA for review and approval. In the event that any of Missouri's new or revised water quality standards for any of these water body segments result in uses less than the fishable/swimmable uses and are based upon information not considered in today's determination, Missouri must submit a use attainability analysis, as appropriate. In the event that Missouri revises any of its regulations to be consistent with the federal requirements and EPA approves those revisions, the obligation for EPA to prepare proposed replacement federal regulations will no longer be applicable.

EPA recognizes and applauds the substantial effort that MDNR underwent to adopt water quality standards resulting in recreation uses that are consistent with the CWA and EPA's implementing regulations for approximately 3600 classified stream segments and 400 classified lakes. EPA has approved MDNR's use designations for these water body segments. Throughout the period of time EPA was evaluating the data for the 141 water body segments addressed in

today's determination, MDNR was continually responsive to EPA's requests for information and provided consultation throughout the entirety of the process. EPA is aware that this type of collaboration was not easy, especially when it became apparent that there was a difference of opinion on the appropriate use designations for a relatively small subset of the waters, and would like to thank MDNR for their continued effort. EPA looks forward to continuing to work with MDNR in adopting appropriate use designations for the waters of the State of Missouri.

Sincerely,



Benjamin H. Grumbles  
Assistant Administrator

Attachment

cc: Edward J. Heisel, Clinic Attorney, Washington University School of Law  
Interdisciplinary Environmental Clinic  
Edward Galbraith, MDNR  
Phil Schroeder, MDNR  
John B. Askew, Regional Administrator, EPA Region 7  
William A. Spratlin, EPA Region 7