

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

MISSOURI COALITION FOR THE)
ENVIRONMENT,)
)
Plaintiff,)
)
v.)
)
MICHAEL O. LEAVITT, Administrator)
of the United States Environmental)
Protection Agency, and THE UNITED)
STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Defendants,)
)
and)
)
ASSOCIATION OF METROPOLITAN)
SEWERAGE AGENCIES and URBAN)
AREAS COALITION,)
)
Intervenors.)

Case Number: 03-4217-CV-C-NKL

CONSENT DECREE

WHEREAS, on or about February 15, 1994, and October 1, 1996, the State of Missouri published in its *State Register* certain revisions to the State’s water quality standards and subsequently submitted these revisions to the United States Environmental Protection Agency (“EPA”) for review and approval as required by the Clean Water Act (“CWA”);

WHEREAS, in a letter dated September 8, 2000, from the EPA to the State of Missouri, the EPA identified certain provisions of the State’s revisions to the water quality standards that the EPA formally disapproved;

WHEREAS on or about July 2, 2003, the Missouri Coalition for the Environment sent a 60-day Notice of Intent to Sue the EPA alleging violations of Section 303(c) of the CWA, 33 U.S.C. § 1313(c);

WHEREAS on October 7, 2003, Missouri Coalition for the Environment (“Plaintiff”), filed a complaint in the United States District Court for the Western District of Missouri against Michael O.

Leavitt, in his official capacity as Administrator of the United States Environmental Protection Agency, and United States Environmental Protection Agency (collectively “EPA” or “Defendants”), invoking jurisdiction under the CWA, 33 U.S.C. § 1251 *et seq.*, for the EPA’s alleged failure to comply with Section 303(c) of the CWA, 33 U.S.C. §§ 1313(c), and under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-59, 701-706, for alleged acts and omissions in violation of the CWA;

WHEREAS on May 21, 2004, the EPA formally withdrew its September 8, 2000, disapproval of the State of Missouri’s specific criteria at 10 CSR 20-7.031(4) related to water quality standards for wetlands and approved the standard;

WHEREAS by entering into this Consent Decree, the Parties do not waive or limit any claim or defense, on any ground, related to any final agency action taken pursuant to this Consent Decree, including but not limited to the EPA’s approval or disapproval of any new or revised water quality standard submitted to the EPA by the State of Missouri and/or the EPA’s establishment of any water quality standard for the State of Missouri under sections 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), or to any agency inaction;

WHEREAS it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation;

WHEREAS by entering into this Consent Decree the Plaintiff does not waive any claims and the EPA does not waive any defenses, on any grounds, related to any claims that are not resolved by this Decree;

WHEREAS the Court finds and determines that it has jurisdiction to enter this Decree; and

WHEREAS the Court finds and determines that this Consent Decree represents a just, fair, adequate and equitable resolution of the claims raised in this action.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I. GENERAL TERMS

1. The Parties to this Consent Decree are Plaintiff and Defendants. The Parties understand that (a) Michael O. Leavitt was sued in his official capacity as Administrator of the United States Environmental Protection Agency; and (b) the obligations arising under the Consent Decree are to be performed by the EPA and not by Michael O. Leavitt in his individual capacity.

2. This Consent Decree applies to, is binding upon, and inures to the benefit of Plaintiff and Defendants and their respective successors, assigns, and designees.

3. For purposes of entry and enforcement of the Consent Decree only, the Parties to this Consent Decree agree that the Court has jurisdiction over the matter, the Parties to the Consent Decree, any disputes arising under the Consent Decree, as well as any alleged violations of this Consent Decree, and may issue such further orders or direction as may be necessary or appropriate to construe, implement, modify or enforce the terms of this Consent Decree.

II. DEFINITIONS

4. The following definitions shall apply to the terms referred to in this Consent Decree;

- a. "APA" shall mean the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706;
- b. "Consent Decree" shall mean this document;
- c. "CWA" shall mean the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*;
- d. "EPA" shall mean Michael O. Leavitt, the Administrator of the EPA, or the Administrator's duly authorized representative, and the United States Environmental Protection Agency.
- e. "Plaintiff" shall mean the Missouri Coalition for the Environment;
- f. "Plaintiff's Complaint" shall mean the Complaint filed in this case by Plaintiff on October 7, 2003.
- g. "September 8, 2000, letter" shall mean the letter dated September 8, 2000 from U. Gale Hutton, Director of Water, Wetlands, and Pesticides Division,

EPA Region VII, to Stephen Mahfood, Director of Missouri Department of Natural Resources in Jefferson City, Missouri, that was attached as Exhibit A to Plaintiff's Complaint.

- h. "Water Quality Standard" ("WQS") shall have the meaning provided at 40 C.F.R. § 131.3(i) and consist of the elements identified in 40 C.F.R. § 131.6, as of the date of entry of this Consent Decree, or as subsequently amended.

III. WATER QUALITY STANDARDS FOR CLAIMS TWO THROUGH EIGHT

5. The Parties understand that the State of Missouri ("State") has primary responsibility for the establishment of water quality standards pursuant to Section 303(c) of the CWA and that the State has represented that it will submit to the EPA new or revised water quality standards for review and approval or disapproval in a manner consistent with the CWA and other applicable law. Expected to be included in this submission will be new or revised water quality standards for the following, which correspond to Claims Two through Eight of Plaintiff's Complaint:

- a. Exceptions to the Application of Specific Criteria to streams with natural concentrations of dissolved oxygen below criteria: EPA anticipates that Missouri's revisions will address EPA's September 8, 2000, disapproval of 10 CSR 20-7.031 (4)(A)(3) to meet 40 C.F.R. §§ 131.6(b), (c) and 131.11.
- b. Use of Dissolved Metals Criteria for the Drinking Water Supply. EPA anticipates that Missouri's revisions will address EPA's September 8, 2000, disapproval of 10 CSR 20-7.031(4)(B)2.B to meet 40 C.F.R. §§ 131.6(b), (c) and 131.11.
- c. Water Quality Criteria—Protection of Aquatic life. EPA anticipates that Missouri's revisions will address EPA's September 8, 2000, disapproval of criteria listed in the Table 3 of the attachment to the EPA's September 8, 2000 letter to meet 40 C.F.R. §§ 131.6(b), (c) and 131.11.
- d. Water Quality Criteria—Human Health Protection—Fish Consumption. EPA anticipates that Missouri's revisions will address the EPA's September 8, 2000, disapproval of criteria listed in Table 3 of the attachment to the EPA's September 8, 2000 letter to meet 40 C.F.R. §§ 131.6(b), (c) and 131.11.
- e. Water Quality Criteria—Drinking Water Supply. EPA anticipates that Missouri's revisions will address EPA's September 8, 2000, disapproval of criteria listed in Table 3 of the attachment to the EPA's September 8, 2000

letter to meet 40 C.F.R. §§ 131.6(b), (c), and 131.11.

- f. Designated Cold-Water Sport Fisheries. EPA anticipates that Missouri's revisions will address EPA's September 8, 2000, disapproval of the modifications to stream classification listed in Table C of the attachment to the EPA's September 8, 2000 letter to meet 40 C.F.R. §§ 131.6(a), (b), (f), and 131.10.
- g. Designated Beneficial Uses. EPA anticipates that Missouri's revisions will address EPA's September 8, 2000, disapproval of the list of designated uses in Tables G and H of the attachment to the EPA's September 8, 2000 letter to meet 40 C.F.R. §§ 131.6(a), (b), (f), and 131.10.

6. Except as provided in Paragraphs 7 and 10 below, EPA shall, by April 30, 2006, sign a notice(s) of proposed rulemaking that proposes water quality standards for each of the items identified in Paragraph 5 above. EPA agrees to forward such notice(s) of proposed rulemaking to the Federal Register for publication within five (5) days of signature.

7. The requirements of Paragraph 6 shall not apply to any item in Paragraph 5 for which on or before April 30, 2006, the State has submitted new or revised water quality standards for such item and EPA has approved such standards. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approvals.

8. Except as provided in Paragraphs 9 and 10 below, EPA shall, by December 15, 2006, sign a notice(s) of final rulemaking promulgating water quality standards for each of the items identified in Paragraph 5 for which EPA signed a notice(s) of proposed rulemaking pursuant to Paragraph 6 of this Decree. EPA agrees to forward such notice(s) of final rulemaking to the Federal Register for publication within five (5) days of signing it.

9. The requirements of Paragraph 8 shall not apply to any item identified in Paragraph 5 for which on or before December 15, 2006, the State submits new or revised water quality standards for such item and EPA has approved such standards. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approvals.

10. Nothing in this Decree shall be construed to limit or modify the discretion accorded to EPA by the Clean Water Act, the Administrative Procedure Act, or by general principles of administrative law, to withdraw EPA's disapproval of any item identified in Paragraph 5. The requirements of Paragraph 6 shall not apply to any item identified in Paragraph 5 for which EPA withdraws its disapproval on or before April 30, 2006. The requirements of Paragraph 8 shall not apply to any item identified in Paragraph 8 for which EPA withdraws its disapproval on or before December 15, 2006. Any such withdrawal by EPA shall be in writing explaining the factual and legal basis for the withdrawal and shall be signed by the EPA official that has authority to approve or disapprove water quality standards.

11. Not later than five (5) business days after each of the actions identified in Paragraphs 6 through 10 above, except the actions of forwarding the notice(s) of proposed and final rulemakings to the Federal Register, EPA shall send signed notice via overnight mail as provided below in Paragraph 27.

IV. EFFECTIVE DATE

12. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Consent Decree are null and void.

V. REMEDY, SCOPE OF JUDICIAL REVIEW AND CONTINUING JURISDICTION

13. The Court shall retain jurisdiction to effectuate compliance with this Consent Decree and to consider any requests for costs of litigation, including attorney's fees, pursuant to Paragraphs 24 and 25 of this Consent Decree.

14. Nothing in this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by the EPA pursuant to this Consent Decree, except for the purpose of determining the EPA's compliance with the terms of this

Consent Decree.

15. Plaintiff's sole judicial remedy to address the merits of any final agency action taken by EPA: (a) under Paragraph 10 above to withdraw its September 8, 2000, disapproval for any item identified in Paragraph 5 above, (b) to approve new or revised water quality standards submitted by the State of Missouri for any item identified in Paragraph 5 above, or (c) under Paragraph 8 above to promulgate new or revised water quality standards for the State of Missouri for any item identified in Paragraph 5 above, is to file a new lawsuit to challenge such final agency action under the Clean Water Act and/or the Administrative Procedure Act, and Plaintiff reserves its rights to bring any such challenge. The EPA reserves all of its defenses to any such suits. Nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action.

VI. RELEASE BY PLAINTIFF AND RESERVATION OF RIGHTS

16. Upon approval and entry of this Consent Decree by the Court, this Decree shall constitute a final resolution between Plaintiff and EPA of Claims One through Eight and Claim Fourteen of the Complaint. Except for claims that may arise under the provisions of this Consent Decree, and as provided in Sections V and XII, Plaintiff hereby releases, discharges, and covenants not to assert (by way of the commencement of an action, the joinder of EPA in an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which it may knowingly or unknowingly have had, or may now have, against the United States based upon matters that have been asserted in Claims One through Eight and Fourteen of the Complaint.

VII. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

17. This Consent Decree shall terminate after fulfillment of all of the obligations of the EPA under Paragraphs 6 through 11 and 24 through 26 of this Consent Decree. EPA shall file the appropriate notice with the Court so that the Clerk of the Court may close this case. Plaintiff may oppose the filing by the EPA if Plaintiff objects to the termination of the Consent Decree.

VIII. FORCE MAJEURE

18. The Parties recognize that the performance of this Consent Decree is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C § 1341., *et seq.* The possibility exists that circumstances outside the reasonable control of the EPA could delay compliance with the obligations in Paragraphs 6 through 11 of this Consent Decree. Should a delay occur due to such circumstances, any resulting failure to fulfill any obligations set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, and any deadlines so affected shall be extended one (1) day for each day of the delay. As soon as possible under such circumstances, the EPA will provide Plaintiff with notice invoking the relief provided for under this Paragraph, with an explanation of the EPA's basis for invoking such relief. The EPA shall also provide Plaintiff with reasonable notice of the termination of the *force majeure* event upon which the EPA invoked such relief. Any dispute regarding invocation for such relief shall be resolved in accordance with the dispute resolution provision of Paragraph 19 below.

IX. DISPUTE RESOLUTION

19. In the event of a disagreement between the Parties concerning the interpretation or performance of any aspect of this Consent Decree, the dissatisfied Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties shall confer in order to attempt to resolve the dispute within twenty (20) days of the written notice, or such time thereafter as is mutually agreed. If the Parties are unable to resolve the dispute within thirty (30) days of such notice, or such time thereafter as is mutually agreed, then either Party may petition the Court to resolve the dispute.

X. MODIFICATIONS AND EXTENSIONS

20. The Parties may extend the deadlines established in Paragraphs 6 through

11 and Paragraphs 24 through 25 by written stipulation executed by counsel for the Parties and filed with the Court. In addition, any provision of this Consent Decree may be modified by the Court upon motion by any Party to this Consent Decree demonstrating that such modification is consistent with law and in the public interest, after consideration of any response by the non-moving party.

21. Consistent with Paragraph 20, EPA may request modification of a date established in Paragraphs 6 through 10 of this Decree in accordance with the following procedures:

(a) If EPA seeks to modify a date established in Paragraphs 6 through 10 of this Decree for any item identified in Paragraph 5, and provides notice to Plaintiff at least sixty (60) days prior to the date sought to be modified and files the motion at least thirty (30) days prior to the date sought to be modified, then the filing of such motion shall, upon request by the EPA, stay the date for which modification is sought. Such stay shall remain in effect until the earlier of (i) a dispositive ruling by this court on such motion, or (ii) the date thirty (30) days after the date sought to be modified. Only one (1) such automatic stay shall be allowed per deadline in Paragraphs 6 through 10 for each item identified in Paragraph 5.

(b) If EPA seeks a modification of a date established in Paragraphs 6 through 10 of this Decree and does not provide notice to Plaintiff pursuant to Subparagraph (a) above, then any such request for modification shall demonstrate why EPA could not have utilized the notification procedures set forth in Subparagraph (a) above. The automatic stay described in Subparagraph (a) shall not be available for any requested modification for which EPA does not provide notice to Plaintiff pursuant to Subparagraph (a).

(c) Any motion to modify any date established in this Decree shall be accompanied by a motion for expedited consideration. Plaintiff shall not oppose the request for expedited consideration, but reserves all rights to oppose any requested modification.

XI. AGENCY DISCRETION

22. Except as expressly provided herein, nothing in this Consent Decree shall be construed to limit or modify the discretion accorded the EPA by the Clean Water Act, the Administrative Procedure Act, or by general principles of administrative law.

23. Nothing in this Consent Decree shall be construed to limit or modify the EPA's discretion after the EPA performs any action pursuant to this Consent Decree to alter, amend, or revise from time to time any such action, or to promulgate superceding regulations. Nothing in this Consent Decree relieves the EPA of the obligation to act in a manner consistent with the CWA and other applicable law.

XII. COSTS

24. EPA agrees that Plaintiff is entitled to reasonable attorneys' fees and costs accrued as of the effective date of this Consent Decree. Plaintiff has submitted to EPA all documentation regarding the attorney time expended in this case and the costs accrued. Plaintiff hereby states the time expended was reasonable and necessary and that the expenses accrued were also reasonable and necessary. In light of this representation, the EPA agrees to pay a total of \$ 88,198.79 to fully and finally resolve the issue of the Plaintiff's entitlement to attorney's fees and costs, and Plaintiff agrees to release any claim that has been or could be asserted against the United States relating to any such claim for attorneys' fees and costs accrued as of the date of this Consent Decree. This payment shall be made in accordance with Paragraph 26 below.

25. Plaintiff reserves the right to seek an award for reasonable attorneys' fees and costs incurred after entry of this Decree connection with any disagreement between the Parties concerning the interpretation or performance of any aspect of this Consent Decree. In the event that Plaintiff seeks such fees and costs, the Parties shall attempt to reach agreement as to the appropriate amount of recovery. If the Parties are unable to reach agreement, Plaintiff may file an application with the Court for such recovery, and EPA shall file a response within thirty (30) days from receipt of

Plaintiff's application.

26. Any payment made by EPA to Plaintiff for reasonable attorneys' fees and costs shall be made by electronic funds transfer to an account designated by Plaintiff's counsel. Within 10 days of the effective date of this Consent Decree, Plaintiff agrees to provide to the Defendants' counsel listed in Paragraph 27, written notification of the following information for purposes of EPA's electronic funds transfer: the name on Plaintiff's bank account, the bank name, and routing number for electronic transfer. This electronic transfer shall be made within 120 days after Defendants' counsel identified in Paragraph 27 below receives written notification from Plaintiff of the account information listed above. Within 20 days after EPA is notified that the electronic transfer has been made, EPA agrees to provide Plaintiff with written notice of such transfer as provided in Paragraph 27.

XIII. NOTICE AND CORRESPONDENCE

27. Any notice, including correspondence, required or made with respect to this Consent Decree, shall be in writing and shall be effective upon receipt. For any matter relating to this Consent Decree, the contact persons are:

For the Plaintiff

Edward J. Heisel
Attorney at Law
Missouri Coalition for the Environment
6267 Delmar Boulevard
Suite 2-E
St. Louis, MO 63130

For the Defendants

Michele L. Walter
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, DC 20026-3986

Associate General Counsel

Water Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2355A
Washington, DC 20004

Martha R. Steincamp
Office of Regional Counsel
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, KS 66101

For the State of Missouri

Aimee Davenport
Attorney, Missouri Department of Natural Resources
1731 E. Elm Street
P.O. Box 176
Jefferson City, MO 65102-0176

Association of Metropolitan Sewerage Agencies

Alexandra Dapolito Dunn (DC Bar #428526)
General Counsel
Association of Metropolitan Sewerage Agencies
1816 Jefferson Place, N.W.
Washington, D.C. 20036-2505

David W. Burchmore
Steven C. Bordenkircher
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304

Counsel for Urban Areas Coalition

Terry J. Satterlee
Thomas J. Grever
Lathrop & Gage, L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2684

Upon written notice to the other Parties, any Party may designate a successor contact person for any matter relating to this Consent Decree.

XIV. REPRESENTATIVE AUTHORITY

28. Each undersigned representative of the Parties to this Consent Decree certifies that he or she is fully authorized by such Party to enter into and execute the terms and conditions of this Consent Decree, and to legally bind such Party to this Consent Decree. By signature below, the Parties consent to entry of this Consent Decree.

XV. MUTUAL DRAFTING

29. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiff and the EPA. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting Party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

XVI. COUNTERPARTS

30. This Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

XVII. USE OF CONSENT DECREE

31. This Consent Decree shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person affiliated with it.

XVIII. COMPLIANCE WITH OTHER LAWS

32. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that the EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the Clean Water Act or any other law or regulation, either substantive or procedural.

XIX. APPLICABLE LAW

33. This Consent Decree shall be governed by and construed under the laws of the United States.

XX. SEVERABILITY

34. Subsequent to entry of this Consent Decree by the Court, if any term, condition or provision of this Consent Decree, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the United States invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Decree, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

XXI. THIRD-PARTY BENEFICIARIES

35. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree. The Parties consent to the form, substance and entry of the foregoing Consent Decree.

ORDER

UPON CONSIDERATION OF THE FOREGOING, THE Court hereby finds that this Consent Decree is fair and reasonable, both procedurally and substantively, consistent with applicable law, in good faith, and in the public interest. THE FOREGOING Consent Decree is hereby APPROVED AND ENTERED.

SIGNED and ENTERED this 27th day of December, 2004 .

s/ NANETTE K. LAUGHREY
NANETTE K. LAUGHREY
UNITED STATES DISTRICT JUDGE