

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

MISSOURI COALITION FOR THE)
ENVIRONMENT,)

Plaintiff,)

v.)

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

MICHAEL O. LEAVITT, Administrator)
of the United States Environmental)
Protection Agency, and THE UNITED)
STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendants.)

**MISSOURI COALITION FOR THE ENVIRONMENT'S SUGGESTIONS IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF UNCONTROVERTED FACTS 2

 A. Background Facts..... 2

 B. Missouri Revises its Water Quality Standards..... 3

 C. EPA Finds Problems with Missouri's Water Quality Standards..... 4

 D. The State Fails To Take Corrective Action 6

 E. Facts Relating to the State's Wetland Standard 7

 F. Facts Relating to the State's Dissolved Oxygen Standard 8

 G. Facts Relating to the State's Standard for Metals in Drinking Water 8

 H. Facts Relating to the State's Standards for the Protection of Aquatic Life..... 9

 I. Facts Relating to the State's Standards for Waters Designated for "Human Health Protection – Fish Consumption" 9

 J. Facts Relating to the State's Standards for Protecting Waters Designated for "Drinking Water Supply" 10

 K. Facts Relating to the State's Designated Use of Cold-Water Sport Fisheries..... 11

 L. Facts Relating to the State's Removal of Designated Uses from 21 Lakes and 6 Streams..... 11

 M. Facts Relating to the State Standard for Outstanding National Resource Waters..... 12

 N. Facts Relating to the Whole Body Contact Recreation Standard 13

 O. Facts Relating to the Pathogen Indicator Organism Standard 15

 P. Facts Relating to the Development of Site Specific Standards..... 16

 Q. Facts Relating to Anti-Degradation Implementation Procedures 17

 R. Facts Relating to the State's Failure to Implement Default Standards for Unclassified Waters 18

S.	Facts Relating to the State's Allowance of Mixing Zones on Small Streams.....	19
T.	Facts Relating to the State's "High-Flow Exemption"	19
III.	LEGAL BACKGROUND	20
A.	Standard for Summary Judgment.....	20
B.	The Clean Water Act and Water Quality Standards	21
C.	Citizen Suit Provision of the Clean Water Act	24
1.	Section 303(c)(4)(A).....	24
2.	Section 303(c)(4)(B).....	25
D.	Judicial Review Pursuant to the Administrative Procedure Act.....	25
IV.	ARGUMENT	27
A.	EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate an Adequate Water Quality Standard for the Protection of Wetlands in Missouri and its Subsequent Withdrawal of its Disapproval was Arbitrary and Capricious	27
B.	EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate an Adequate Water Quality Standard for Dissolved Oxygen in Missouri's Waters.....	29
C.	EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate an Adequate Water Quality Standard for Metal Contamination in Missouri's Waters Designated for Drinking Water Supply	30
D.	EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Protection of Aquatic Life from Cadmium, Copper, Lead and Zinc Pollution.....	31
E.	EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Protection of Human Health Through the Consumption of Fish.....	31
F.	EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Protection of Waters Designated for "Drinking Water Supply"	33
G.	EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Designated Use of Cold-Water Sport Fisheries....	34

H. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards Restoring Designated Uses for 21 Lakes and 6 Streams .	35
I. EPA Should Be Ordered to Propose and Promulgate a Rule Setting Forth an Adequate Standard for Outstanding National Resource Waters in Missouri.....	35
J. EPA Should Be Compelled To Propose and Promulgate a Rule Ensuring that All Waters in Missouri are Protected for Whole Body Contact Recreation	38
K. EPA Should Be Compelled to Propose and Promulgate a Water Quality Standard for Missouri that Specifies an Adequate Indicator Organism for Measuring Pathogen Pollution .	42
L. EPA Should be Compelled to Propose and Promulgate a Standard for Missouri That Contains a Lawful Procedure for Adopting Site Specific Standards.....	44
M. The EPA Should Be Compelled to Propose and Promulgate an Implementation Procedure for Missouri's Antidegradation Policy.....	45
N. EPA Should Be Compelled to Propose and Promulgate Adequate Water Quality Standards for "Unclassified" Waters in Missouri	48
O. EPA Should Be Compelled to Propose and Promulgate an Adequate Water Quality Standard for Mixing Zones	51
P. EPA Should Be Compelled to Propose and Promulgate a Water Quality Standard that Ends Missouri's Broad Exemption from Pathogen Limits During Periods of Stormwater Runoff.....	52
V. CONCLUSION.....	54

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	20
<i>Arkansas v. Oklahoma</i> , 503 U.S. 91 (1992)	23
<i>Audubon Soc. of Cent. Arkansas v. Dailey</i> , 977 F.2d 428 (8th Cir. 1992)	26
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	20
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971)	26
<i>Friends of Boundary Waters Wilderness v. Dombeck</i> , 164 F.3d 1115 (8th Cir. 1999).....	20
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985)	24
<i>Idaho Conservation League v. Browner</i> , 968 F. Supp. 546 (W.D. Wash. 1997)	24
<i>Idaho Conservation League v. Russell</i> , 946 F.2d 717 (9th Cir. 1991)	24
<i>Idaho Mining Assoc. v. Browner</i> , 90 F. Supp. 2d 1078 (D. Id. 2000)	22, 38
<i>Kansas Natural Resource Council, Inc. v. Whitman</i> , 255 F. Supp. 2d 1208 (D. Kan. 2003). 23, 38	
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....	20
<i>Motor Vehicle Mfr. Ass'n v. State Farm Mutual</i> , 463 U.S. 29 (1983)	26
<i>National Wildlife Federation v. Browner</i> , 127 F.3d 1126 (D.C. Cir. 1997).....	passim
<i>National Wildlife Federation v. Whistler</i> , 27 F.3d 1341 (8th Cir. 1994).....	26
<i>Northwest Environmental Advocates v. EPA</i> , 268 F. Supp. 2d 1255 (D. Or. 2003).....	passim
<i>PUD No. 1 of Jefferson County v. Washington Dep't of Ecology</i> , 511 U.S. 700 (1994).....	23, 45
<i>Raymond Proffitt Found. v. U.S. EPA</i> , 930 F. Supp. 1088 (E.D. Pa. 1996).....	22, 24, 45, 54

Statutes

5 U.S.C. § 702..... 23

5 U.S.C. § 706..... passim

28 U.S.C. § 2412..... 51

33 U.S.C. § 1251..... 20, 21, 35, 37

33 U.S.C. § 1313..... passim

33 U.S.C. § 1314..... 21

33 U.S.C. § 1365..... 22, 51

R.S.Mo. § 644.021 2

R.S.Mo. § 644.026 2

Rules

Fed. R. Civ. P. 56(e) 20

Regulations

40 C.F.R. § 122.2..... 45

40 C.F.R. § 131.2..... 22, 37

40 C.F.R. § 131.3..... 21

40 C.F.R. § 131.6..... 26, 37, 42

40 C.F.R. § 131.10..... 31, 32, 35, 36

40 C.F.R. § 131.11..... 21

40 C.F.R. § 131.12..... 12, 33, 34, 42

40 C.F.R. § 141.64..... 10, 30

40 C.F.R. Part 131, Subpart B 21

10 C.S.R. 20-7.031..... passim

I. INTRODUCTION

Congress passed the Federal Water Pollution Control Act (the "Clean Water Act" or "Act") in 1972 in order to ensure the public's safety when drinking from, swimming in, fishing in and recreating on the nation's waters. While establishing a federal mandate for clean water, Congress left the states a significant role by delegating them conditional authority to set water quality standards, to write permits to meet such standards, and to carry out enforcement actions. However, when states fail in their role of setting adequate water quality standards, the Act places the ultimate obligation for ensuring clean water on the U.S. Environmental Protection Agency ("EPA").

The citizens of Missouri have for years been without adequate protection of their surface waters as a result of inaction on the part of the Missouri Clean Water Commission and Department of Natural Resources. These two public entities, which share responsibility for safeguarding the state's streams and lakes, have remained idle year after year, while EPA and members of the public pointed out serious deficiencies in the state's water quality standards. And even though EPA had the authority – and even the mandatory duty – to do something about these deficiencies, it, too, decided not to take action.

Among the standards at issue in this litigation are those relating to the presence of pathogens in swimming waters, dissolved oxygen for fish survival, toxins in drinking water supplies and pollution discharges to the Current and Jacks Fork Rivers. The long list of inadequacies in Missouri's standards was set forth by EPA most comprehensively in correspondence dated September 8, 2000, to the Missouri Department of Natural Resources. *See* Exh A, Tab 1. It is time, at long last, that EPA carry out its mandatory duty and ensure that Missourians have clean water. Plaintiff Missouri Coalition for the Environment respectfully

seeks from this Court an order compelling EPA to propose and promulgate adequate water quality standards for the state of Missouri.

II. STATEMENT OF UNCONTROVERTED FACTS

A. Background Facts

1. Members of the Missouri Coalition for the Environment use the surface waters in Missouri in various ways, including for swimming, fishing, drinking and aesthetic enjoyment. Exhs. A (Tab 8), B & C.

2. Missouri law charges the Missouri Department of Natural Resources ("MDNR") and Missouri Clean Water Commission with implementation of the state's Clean Water Law. R.S.Mo. §§ 644.021 and 644.026. The Clean Water Commission ultimately must approve rules designed to implement this law, some of which are known as water quality standards. *Id.* § 644.026.1(8).

3. Missouri's water quality standards are codified in the *Code of State Regulations* at 10 C.S.R. 20-7.031.

4. EPA has the authority to approve or disapprove amendments to Missouri's water quality standards, as well as to promulgate new standards for Missouri when the state fails to adopt standards consistent with federal laws, regulations and guidance. 33 U.S.C. § 1313(c)(3) & (4).

5. The Coalition sent EPA a notice of intent to sue pursuant to section 505(a)(2) of the Clean Water Act on July 2, 2003, which notice recited each of the claims in the Coalition's Complaint. Exh. D, Tab 3 (authenticated at Exh. D, ¶¶2-3).

B. Missouri Revises its Water Quality Standards

6. The state of Missouri published a "Proposed Rulemaking" relating to the state's water quality standards in the *Missouri Register* on October 1, 1993. Exh. A, Tab 2 (authenticated at Exh. A, ¶3).

7. The state of Missouri published an "Order of Rulemaking" relating to the state's water quality standards in the *Missouri Register* on February 15, 1994. Exh. A, Tab 3 (authenticated at Exh. A, ¶4).

8. The state of Missouri, through MDNR, submitted its water quality standards, including those revised in the February 15, 1994, *Missouri Register*, to EPA on April 14, 1994. Exh. A, Tab 4 (DEF00077-78)¹ (authenticated at Exh. A, ¶5).

9. The state of Missouri published a "Proposed Rulemaking" relating to the state's water quality standards in the *Missouri Register* on April 1, 1996. Exh. A, Tab 5 (authenticated at Exh. A, ¶6).

10. The state of Missouri published an "Order of Rulemaking" relating to the state's water quality standards in the *Missouri Register* on October 1, 1996. Exh. A, Tab 6 (authenticated at Exh. A, ¶7).

11. The state of Missouri, through MDNR, submitted its water quality standards, including those revised in the October 1, 1996, *Missouri Register*, to EPA on December 9, 1996. Exh. A, Tab 7 (authenticated at Exh. A, ¶8).

¹ For documents produced by EPA in response to the Coalition's discovery requests, page number designations will use the Bates number with the prefix "DEF" assigned by EPA.

C. EPA Finds Problems with Missouri's Water Quality Standards

12. As early as 1984, EPA expressed concern with the manner in which the state of Missouri was protecting its waters for recreational uses. Exh. A, Tab 1 (DEF0023)(authenticated at Exh. A, ¶2).

13. In 1998, the EPA Office of Inspector General conducted an audit of Missouri's water quality standards. The audit identified several deficiencies in the state's standards. Exh. D, Tab 1 (authenticated at Exh. D, ¶17).

14. In response to MDNR's submission of its standards in 1994 and 1996, EPA sent to MDNR a letter dated September 8, 2000, in which EPA disapproved eight provisions in Missouri's water quality standards and found many other provisions to be inadequate. Exh. A, Tab 1.

15. The water quality standards disapproved by EPA in its September 8, 2000, letter include the following (Exh. A, Tab 1 (DEF0015-0021)):

- a. the water quality standard applicable to wetlands;
- b. the water quality standard for the dissolved oxygen content of water, and the method of implementing the standard;
- c. the water quality standard for metal contaminants in drinking water supplies;
- d. the water quality standards intended to protect aquatic life from certain metal contaminants, including cadmium, copper, lead and zinc;
- e. the water quality standards intended to protect the health of people consuming fish caught in waters designated for "Human Health Protection – Fish Consumption" from pollution by the following six chemicals: trihalomethanes, 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene;

- f. the water quality standards intended to protect the health of people exposed through consumption of water or fish from waters designated for "Drinking Water Supply" to the following nine chemicals: 2,3,7,8-TCDD dioxin; 1,2-dichloropropane; trihalomethanes; 4,4'-DDT; 4,4'-DDE; 4,4'-DDD; bis chloromethyl ether; pentachlorobenzene; and 1,2,4,5-tetrachlorobenzene;
- g. the reduction or removal of the "Cold-Water Sport Fishery" designated use from six water bodies; and
- h. the removal of designated uses from 21 lakes and 6 streams without submitting any explanation for the removals.

16. EPA's September 8, 2000, letter also identified two pre-existing provisions of Missouri's water quality standards that it explicitly found to be "inconsistent" with the Clean Water Act and implementing regulations. Exh. A, Tab 1 (DEF0021-0024). The two inconsistent provisions include:

- a. the allowance by Missouri's standards of additional discharges by publicly-owned waste water treatment facilities and mine dewatering operations into "Outstanding National Resource Waters", which include the Current, Jacks Fork and Eleven Point Rivers; and
- b. the failure of Missouri's standards to protect the vast majority of the state's waters for recreational uses.

17. EPA's September 8, 2000, letter also identified other provisions of the state's standards that EPA acknowledges are not in compliance with the Clean Water Act or its implementing regulations. Exh. A, Tab 1 (DEF0024-0030). These provisions include the six listed below:

- a. the state's failure to adopt appropriate bacteriological indicators to protect recreational uses (DEF0024-0025);
- b. the state's failure to require that the establishment of site specific water quality standards be conducted through an EPA approved procedure, or through revisions to the standards that are subject to EPA approval (DEF0027);
- c. the state's failure to adopt an implementation procedure for its antidegradation policy (DEF0028);
- d. the state's failure to establish a default use classification consistent with the purposes of the Clean Water Act for waters that the state has failed to include on its so-called "classified" waters list (DEF0028-0029);
- e. the state's allowance of a "mixing zone" on intermittent and ephemeral streams that threatens aquatic life (DEF0029); and
- f. the state's allowance of a "high flow exemption" from its bacteria standards, which, in effect, suspends the application of such standards during periods of rainfall (DEF0029).

D. The State Fails To Take Corrective Action

18. MDNR responded to EPA's letter on March 8, 2001. Exh. E, Tab 1 (authenticated at Exh. E (Jenkins Aff., ¶34; Hogue Aff., ¶2)). MDNR indicated to EPA that it would rectify many of the problems with the standards by the fall of 2001. *Id.* (p.2).

19. A year later, on March 8, 2002, MDNR sent another letter to EPA in which it then promised EPA that it would "finalize the proposed rule by mid-April [2002]". Exh. E, Tab 2 (authenticated at Exh. E (Jenkins Aff., ¶30; Hogue Aff., ¶2)).

20. At approximately the same time MDNR personnel were promising EPA that it would take action to fix the water quality standards, MDNR personnel were still considering various options, including doing nothing at all on some of the deficient standards. MDNR staff internally noted that doing nothing would make EPA "much more susceptible to litigation" and would make MDNR "look pretty darned bad". Exh. E, Tab 3, pp. 2-3 (authenticated at Exh. E (Jenkins Aff., ¶31; Hogue Aff., ¶2)).

21. To this day, neither MDNR nor EPA has adopted regulations to rectify the deficiencies in Missouri's water quality standards.

E. Facts Relating to the State's Wetland Standard

22. EPA disapproved the revised water quality standard for wetlands submitted by Missouri in 1994, finding that the revised standard represented a "reduction in the protection afforded" to wetlands. Exh. A, Tab 1 (DEF0015).

23. EPA's guidance document entitled "Water Quality Standards for Wetlands", dated July 1990, specified that by the "end of FY 1993, the minimum requirements for States are to . . . establish beneficial uses for wetlands, [and] adopt existing narrative and numeric criteria for wetlands . . ." Exh. A, Tab 9 (authenticated at Exh. A, ¶10).

24. Missouri's water quality standard for wetlands does not identify any designated uses for wetlands, nor specify which numeric criteria are applicable to wetlands. 10 C.S.R. 20-7.031(4)(A)(6).

25. Missouri's water quality standard for wetlands has not been amended subsequent to its disapproval by EPA. 10 C.S.R. 20-7.031(4)(A)(6).

26. In a letter dated May 21, 2004, EPA notified the state of Missouri that it was withdrawing its earlier disapproval of the state's wetland standard. Exh. A, Tab 20 (authenticated at Exh. A, ¶21).²

F. Facts Relating to the State's Dissolved Oxygen Standard

27. EPA disapproved the revised water quality standard for dissolved oxygen submitted by Missouri in 1994, finding that the standard contained an ill-defined exemption for situations when the "natural" background level of dissolved oxygen was below the numeric standard. Exh. A, Tab 1 (DEF0016).

28. The current water quality standard for dissolved oxygen still contains the exemption that caused EPA's disapproval. 10 C.S.R. 20-7.031(4)(A)(3).

G. Facts Relating to the State's Standard for Metals in Drinking Water

29. EPA disapproved the revised water quality standard for metals in drinking water supplies submitted by Missouri in 1994, finding that the standard incorrectly specified that metals in drinking water supplies be measured as "dissolved metals" as opposed to "total recoverable metals." Exh. A, Tab 1 (DEF0017).

30. The current water quality standard for metals in drinking water supplies still contains the provision allowing their measurement as "dissolved metals". 10 C.S.R. 20-7.031(4)(B)(2)(B).

² On June 15, 2004, a week from the deadline for filing dispositive motions, EPA notified counsel for the Coalition that it had withdrawn its disapproval of Missouri's wetland standard. The Coalition intends to challenge EPA's reversal of course because it is "arbitrary and capricious" and lacks any rational basis. Missouri's wetland standard remains clearly deficient as wetlands have no designated uses assigned to them, nor do the standards specify which numeric criteria apply to wetlands. EPA's subsequent withdrawal of its disapproval completely ignores the fact that Missouri's standard remains inadequate, and focuses only on what EPA claims was its misreading of the standard when it rendered its disapproval in September 2000.

H. Facts Relating to the State's Standards for the Protection of Aquatic Life

31. EPA disapproved the revised water quality standards for the protection of aquatic life from cadmium, copper, lead and zinc pollution. EPA's disapproval was based on the fact that the standards were incorrectly calculated because MDNR failed to account for tolerances of certain aquatic species, and used improper data relating to water hardness. Exh. A, Tab 1 (DEF0018).

32. The specific provisions of the standards disapproved by EPA are set forth in Table 3 to EPA's September 8, 2000, letter. Exh. A, Tab 1 (DEF00067-00069).

33. The current water quality standard for the protection of aquatic life from cadmium, copper, lead and zinc pollution has not been revised since it was disapproved by EPA. 10 C.S.R. 20-7.031, Table A.

I. Facts Relating to the State's Standards for Waters Designated for "Human Health Protection – Fish Consumption"

34. EPA disapproved the revised water quality standards for the protection of human health through fish consumption for six pollutants: trihalomethanes, 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene. Exh. A, Tab 1 (DEF0019).

35. EPA disapproved the revised standard for trihalomethanes because the state had deleted a pre-existing standard without providing any rationale, and disapproved the revised standards for 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene because the standards are less stringent than EPA guidance. Exh. A, Tab 1 (DEF0019).

36. EPA guidance for protecting human health from contaminants in fish tissue consumed by humans is set forth in the "National Recommended Water Quality Criteria". The relevant pages for the pollutants 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene are provided in Exh. A, Tab 10 (authenticated at Exh. A, ¶11).

37. The current water quality standards for the protection of human health through fish consumption for the pollutants trihalomethanes, 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene have not been revised since they were disapproved by EPA. 10 C.S.R. 20-7.031, Table A.

J. Facts Relating to the State's Standards for Protecting Waters Designated for "Drinking Water Supply"

38. EPA disapproved the revised water quality standards for the protection of the health of people exposed through consumption of water or fish from waters designated for "Drinking Water Supply" for the following nine chemicals: 2,3,7,8-TCDD dioxin; 1,2-dichloropropane; trihalomethanes; 4,4'-DDT; 4,4'-DDE; 4,4'-DDD; bis chloromethyl ether; pentachlorobenzene; and 1,2,4,5-tetrachlorobenzene. Exh. A, Tab 1 (DEF0019).

39. EPA disapproved the revised water quality standards set forth in the above paragraph, with the exception of the standard for trihalomethanes, because they are less stringent than EPA guidance. Exh. A, Tab 1 (DEF0019).

40. EPA guidance criteria for the chemical pollutants set forth in paragraph 38 above, with the exception of trihalomethanes, are specified in the "National Recommended Water Quality Criteria". Exh. A, Tab 10.

41. EPA disapproved the revised water quality standard for trihalomethanes because it is less stringent than EPA's drinking water "maximum contaminant level." Exh. A, Tab 1 (DEF0019).

42. EPA's drinking water "maximum contaminant level" for trihalomethanes is found at 40 C.F.R. § 141.64.

43. The water quality standards identified in paragraph 38 above have not been revised since they were disapproved by EPA. *See* 10 C.S.R. 20-7.031, Table A.

K. Facts Relating to the State's Designated Use of Cold-Water Sport Fisheries

44. EPA disapproved in its September 8, 2000, letter the revised water quality standard that specifies which waters have the designated use of "Cold-Water Sport Fisheries." Exh. A, Tab 1 (DEF0019-0020).

45. EPA disapproved the revised standard because the state reduced or eliminated the Cold-Water Sport Fishery designated use without providing any justification for the following water bodies: the North Fork White River, South Indian Creek, Spring Creek, Turnback Creek, Indian Creek and Bull Shoals Lake. Exh. A, Tab 1 (DEF0019-0020).

46. The water quality standard relating to the designated use of Cold-Water Sport Fisheries has not been revised since its disapproval by EPA. 10 C.S.R. 20-7.031, Table C.

L. Facts Relating to the State's Removal of Designated Uses from 21 Lakes and 6 Streams

47. EPA disapproved in its September 8, 2000, letter the revised water quality standards that removed designated uses from 21 Lakes and 6 streams, finding that the state had failed to provide any justification for the removal of the designated uses as required by EPA regulations. Exh. A, Tab 1 (DEF0020-0021; DEF0070-0071).

48. The water quality standards relating to the removal of designated uses from 21 Lakes and 6 streams as set forth in Tables 4.1 and 4.2 to EPA's September 8, 2000, letter have not been revised since the disapproval. *See* 10 C.S.R. 20-7.031, Tables G and H.

M. Facts Relating to the State Standard for Outstanding National Resource Waters

49. The state of Missouri has designated the Current, Jacks Fork and Eleven Point rivers as "outstanding national resource waters". 10 C.S.R. 20-7.031, Table D.

50. Missouri's water quality standards applicable to outstanding national resource waters generally prohibit new discharges of pollution to such streams, but contain exceptions for

discharges from "publicly-owned waste treatment facilities and mine dewatering water." 10 C.S.R. 20-7.031(7).

51. In 1980, the state of Missouri published a regulation for outstanding national resource waters that first contained the exemption for "publicly owned waste treatment facilities." Exh. A, Tab 18 (authenticated at Exh. A, ¶19).

52. In 1984, the state of Missouri published an amendment to its regulation for outstanding national resource waters that expanded the exemption to include "mine dewatering water." Exh. A, Tab 19 (authenticated at Exh. A, ¶20).

53. EPA regulations require that water quality in outstanding national resource waters "shall be maintained and protected." 40 C.F.R. § 131.12(a)(3). This requirement has existed since at least 1983. *See* 48 Fed. Reg. 51400, 51407 (Nov. 8, 1983).

54. EPA has interpreted its regulations applicable to outstanding national resource waters "to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs." Exh. A, Tab 11 (pp.4-10)(authenticated at Exh. A, ¶12).

55. In its September 8, 2000, letter to MDNR, EPA found that Missouri's water quality standard for outstanding national resource waters is "inconsistent" with federal regulations because of the exceptions for "publicly-owned waste treatment facilities and mine dewatering water." Exh. A, Tab 1 (DEF0021-0022).

56. The state has failed to amend the water quality standard for outstanding national resource waters subsequent to EPA's finding that it is "inconsistent" with federal regulations. 10 C.S.R. 20-7.031(7).

N. Facts Relating to the Whole Body Contact Recreation Standard

57. The EPA Office of Inspector General's audit of Missouri's water quality program in 1998 made the following finding: "Missouri did not classify 75 percent of its significant streams and 11 percent of its lakes as 'swimmable' and did not conduct the required studies to justify that the 'swimmable' use classification was not achievable. The Clean Water Act required every waterbody to be 'swimmable,' where attainable. As a result, Missouri did not protect the lakes and streams from bacteria that can be harmful for human health." Exh. D, Tab 1 (p.7).

58. MDNR has acknowledged that 3,879 of the 4,312 water bodies it has identified in the state are not protected for whole body contact recreation. Exh. E, Tab 4 (authenticated at Exh. E (Jenkins Aff., ¶13; Hogue Aff., ¶2)).

59. Since 1984, EPA has expressed its concern with MDNR's approach to designating surface waters for whole body contact recreation. Exh. A, Tab 1 (DEF0023).

60. EPA informed Missouri that its standards were deficient for not adequately protecting recreational uses in a letter dated November 29, 1993. Exh. D, Tab 1 (p.7).

61. A report on water quality in three southwestern Missouri streams prepared by an MDNR staff member in 2001 (revised in 2002) found that two of the streams contained bacteria levels that were "threats to those wanting to utilize these streams for recreation." Exh. E, Tab 10 (p.18)(authenticated at Exh. E (Jenkins Aff., ¶9; Hogue Aff., ¶2)). One of the two streams is not designated for whole body contact recreation. *See* 10 C.S.R. 20-7.031, Table H (Wilson Creek).

62. An EPA staff member conducted a survey in May 2002 on the degree to which states in the EPA regions had adopted protections for "primary contact recreation." The survey concluded that the vast majority of states have designated the vast majority of their waters for

primary contact recreation, meaning that limits on pathogens apply. Exh. A, Tab 12 (DEF00527-00532)(authenticated at Exh. A, ¶13).

63. In a document dated March 27, 2003, MDNR made the following statement relating to its water quality standard for recreational uses: "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." Exh. E, Tab 5 (p.1)(authenticated at Exh. C (Jenkins Aff., ¶5; Shannon Aff., ¶3)). The document also indicates that the state may have failed to adopt protective standards because of a reluctance to be viewed as the "bad guy" by the "regulated community." *Id.* (p.3).

64. An MDNR staff person in the Water Pollution Control Program acknowledged in a 2003 email that the vast majority of Missouri's waters receive, or are suitable for, human recreational use. He wrote, "Clearly, there is a small percentage of Missouri's streams, rivers etc. that are not used for recreation now and will not be used in the foreseeable future." Exh. E, Tab 6 (p.2)(authenticated at Exh. E (Jenkins Aff., ¶11; Hogue Aff., ¶2)).

65. In its September 8, 2000, letter to MDNR, EPA concluded that the state's failure to designate its waters for the use of whole body contact recreation was "inconsistent" with the Clean Water Act and "has and continues to be a significant deficiency with Missouri's water quality standards program." Exh. A, Tab 1 (DEF0021, 0024).

66. The state has failed to amend its water quality standards to designate its waters for whole body contact recreation subsequent to EPA's finding that its failure to do so is inconsistent with the Clean Water Act. 10 C.S.R. 20-7.031, Tables G & H.

O. Facts Relating to the Pathogen Indicator Organism Standard

67. In January 1986, EPA published a document entitled "Ambient Water Quality Criteria for Bacteria – 1986." The document stated: "EPA strongly recommends that states begin the transition process to the new indicators. While either E. coli or enterococci may be used for fresh waters, only enterococci is recommended for marine waters." Exh. A, Tab 13 (authenticated at Exh. A, ¶14).

68. In March 1993, EPA sent a letter to MDNR relating to the state's water quality standards that stated: "EPA has recommended the use of E. coli or Enterococcus as the preferred bacterial indicators since the 1986 development document was published. Please explain why MDNR intends to retain fecal coliform as the indicator." Exh. D, Tab 4 (p.9)(authenticated at Exh. D, ¶10).

69. In January 1997, EPA sent a letter to all states relating to water quality near beaches. In this letter, EPA reiterated that it had changed the preferred indicator organism for pathogen pollution in 1986 based on epidemiological studies. EPA also stated in the letter that it "strongly encourages" all states to change their indicator organism for measuring compliance with pathogen standards from fecal coliform to *E. coli*. Exh. A, Tab 14 (DEF00416)(authenticated at Exh. A, ¶15).

70. In March of 1999, EPA issued an "Action Plan for Beaches and Recreational Waters". The Action Plan stated that a priority for EPA would be ensuring that states adopt water quality criteria for bacteria originally developed by EPA in 1986. A component of the 1986 criteria recommended that states change the indicator organism for pathogen pollution from fecal coliform to *E. coli*. The 1999 Action Plan also stated: "Where a state does not amend its water quality standards to include the 1986 criteria, EPA will act under Section 303(c) of the

Clean Water Act to promulgate the criteria with the goal of assuring that the 1986 criteria apply in all states not later than 2003." Exh. A, Tab 15 (pp.1, 4)(authenticated at Exh. A, ¶16).

71. In its September 2000 letter to MDNR, EPA reiterated the statement from the "Action Plan for Beaches and Recreational Waters" that EPA would promulgate criteria for states that failed to adopt the 1986 criteria by the year 2003. Exh. A, Tab 1 (DEF0024-0025).

72. Missouri has failed to amend its water quality standards to change the indicator organism from fecal coliform to *E. coli*. 10 C.S.R. 20-7.031(4)(C).

P. Facts Relating to the Development of Site Specific Standards

73. Missouri's water quality standards allow for the setting of site specific standards without requiring their formal adoption into state regulations or their approval by EPA. See 10 C.S.R. § 20-7.031(4)(A)(3), (B)(1), (B)(5) and (L)(3).

74. In its September 8, 2000, letter to MDNR, EPA indicated that Missouri's approach to setting site specific standards did not comply with the Clean Water Act. EPA recommended that Missouri rectify this shortcoming in its standards by either developing an EPA approved methodology for setting site specific standards or submit each site specific standard to EPA for approval. Exh. A, Tab 1 (DEF0027).

75. The provisions of Missouri's water quality standards identified in paragraph 73 remain unchanged subsequent to EPA's finding in the year 2000 that they were deficient. See 10 C.S.R. 20-7.031(4)(A)(3), (B)(1), (B)(5) and (L)(3).

Q. Facts Relating to Anti-Degradation Implementation Procedures

76. As early as 1975, EPA regulations required states to include in their water quality standards an antidegradation policy and "implementation procedures" for that policy. See 63 Fed. Reg. 36742, 36779 (July 7, 1998).

77. EPA indicated to MDNR in 1991 that Missouri needed to develop an implementation procedure for its antidegradation policy. Exh. D, Tab 2 (authenticated at Exh. D, ¶7). EPA stated that "[t]he requirements for the WQS program for the FY 1991-1993 triennium are for states and qualified Indian tribes to: . . . adopt antidegradation implementation methods in WQS." *Id.* (attachment A).

78. A May 11, 1994, memo prepared by an MDNR staff person states that the antidegradation policy had been "essentially ignored" up to that date because of the lack of an implementation procedure. Exh. E, Tab 7 (authenticated at Exh. E (Jenkins Aff., ¶23; Hogue Aff., ¶2)).

79. MDNR wrote to EPA in 1994 that it was developing "guidance on implementing the antidegradation requirement." Exh. A, Tab 4 (p.1).

80. MDNR stated to EPA again in 1996 that it intended to revise its water quality standards to address implementation of its antidegradation policy. Exh. A, Tab 7 (p.1).

81. As part of its 1998 audit of Missouri's water quality program, EPA's Office of Inspector General found that Missouri lacked the required implementation procedure for its antidegradation policy. The audit also stated: "Missouri did not conduct antidegradation reviews to identify and protect the second level of high quality waters as provided in the procedures. Without these procedures, Missouri cannot ensure that it consistently identifies and protects its higher quality waters." Exh. D, Tab 1 (p.10).

82. In its September 8, 2000, letter, EPA found that Missouri's failure to have an antidegradation implementation procedure meant that it was "not in full compliance" with EPA regulations implementing the Clean Water Act. Exh. A, Tab 1 (DEF0028).

83. As of April 2004, EPA admitted that it has never approved an implementation procedure for the State of Missouri's antidegradation policy. Exh. D, ¶24.

84. To date, the state of Missouri has not adopted an implementation procedure for its antidegradation policy. *See* 10 C.S.R. 20-7.031.

R. Facts Relating to the State's Failure to Implement Default Standards for Unclassified Waters

85. The state of Missouri has developed a system for classifying surface waters. This system of "classified waters" consists of Class "L" for lakes, Class "P" for perennial streams, and Class "C" for intermittent streams (streams that may cease flowing during dry periods). 10 C.S.R. 20-7.031(1)(F).

86. There are 25,590 miles of classified streams in the state of Missouri. Exh. A, Tab 16 (p.1 of attachment)(authenticated at Exh. A, ¶17).

87. There are 84,450 miles of unclassified streams in Missouri. Exh. A, Tab 16 (p.1 of attachment).

88. Approximately 82.5% of the water pollution discharge permits issued by MDNR are on unclassified streams. Exh. A, Tab 16 (p.1 of attachment).

89. Missouri's numeric criteria for chemical pollutants and pathogens do not apply to unclassified streams. 10 C.S.R. 20-7.031(4).

90. Unclassified streams in Missouri do not have any beneficial uses assigned to them. Exh. A, Tab 17 (p.13)(authenticated at Exh. A, ¶18). *See also* 10 C.S.R. 20-7.031 (containing no provision assigning designated uses to unclassified waters).

91. The Missouri Department of Conservation has communicated to MDNR its view that unclassified waters need to have standards for dissolved oxygen to protect aquatic life. Exh. E, Tab 8 (p.3)(authenticated at Exh. E, ¶33).

92. EPA, in its September 2000 letter to MDNR, stated that the Clean Water Act and federal regulations require that all waters – not just the state's so-called classified waters – be protected to meet the "fishable/swimmable" standard. Exh. A, Tab 1 (DEF0029).

S. Facts Relating to the State's Allowance of Mixing Zones on Small Streams

93. Missouri's water quality standards allow for a "mixing zone" in which only the "acute" toxicity requirements have to be met. 10 C.S.R. 20-7.031(1)(N) and (3)(I) and (4)(A)(5).

94. Missouri's water quality standards allow mixing zones on small streams with flows of less than 0.1 cubic feet per second. 10 C.S.R. 20-7.031(4)(A)(5)(B)(I).

95. EPA, in its September 2000 letter, found that mixing zones on these small streams would provide "inadequate" dilution, and "might not protect aquatic life communities." Exh. A, Tab 1 (DEF0029).

T. Facts Relating to the State's "High-Flow Exemption"

96. Missouri's water quality standards create an exemption from compliance with pathogen standards that is applicable any time there is "stormwater runoff". 10 C.S.R. 20-7.031(4)(C).

97. MDNR has acknowledged that it is "necessary" to revise the current "high-flow exemption" found in the water quality standards. Exh. E, Tab 9 (p.1 of attachment) (authenticated at Exh. E (Jenkins Aff., ¶19; Hogue Aff., ¶2)).

98. Of all the 50 states, only the state of Kansas has a similar exemption in its state regulations. Exh. E, Tab 9 (p.1 of attachment).

99. EPA, in its September 2000 letter, stated that Missouri's high flow exemption might not ensure protection of recreational uses, and that it had disapproved "a more detailed and quantitative high flow exemption in Kansas." Exh. A, Tab 1 (DEF0029).

III. LEGAL BACKGROUND

A. Standard for Summary Judgment

"Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates the absence of any genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1121 (8th Cir. 1999). In a trilogy of cases decided in 1986, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court endorsed liberal use of the summary judgment procedure under Rule 56(c). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48.

The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. However, once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, or simply assert that it will be able to discredit the movant's evidence at trial. *Id.* The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts" and "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 586-87. There is no genuine issue of fact and summary judgment should be granted "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 587 (citation omitted).

This case is well-suited for resolution through summary judgment. The Coalition seeks an order against EPA that instructs the agency to do its job, and ensure that Missouri's waters are

protected by standards meeting minimum federal guidelines. The case can be resolved through the interpretation of federal statutes, regulations and agency guidance documents.

B. The Clean Water Act and Water Quality Standards

In 1972, Congress passed the Clean Water Act in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The introductory section of the Act sets forth a national goal that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." *Id.* § 1251(a)(2). Congress established in the Act a balance between traditional state responsibility over water pollution, on one hand, and the need to set minimum national safeguards in the face of serious, unresolved environmental problems on the other. In general, states are allowed to retain primacy over water pollution control as long as they meet minimum federal benchmarks. *See, e.g., Id.* §§ 1251 (goals and policies), 1313 (state and federal roles in the setting of water quality standards, and 1342 (state and federal roles in pollution permitting).

To meet the above "fishable/swimmable" goal and other of the Act's provisions, it requires the adoption of implementing regulations, some of which are referred to as "water quality standards." Water quality standards are intended to be promulgated by state agencies in states that have been delegated the authority to implement the Clean Water Act, and should establish the desired condition of each waterway within the state's regulatory jurisdiction. EPA is assigned the duty of ensuring that a state's standards comply with the Clean Water Act, and it must promulgate adequate standards for the state when the state has failed to do so. 33 U.S.C. § 1313(a)-(c).

Water quality standards must include three elements: (1) one or more designated "uses" for each waterbody; (2) water quality "criteria" specifying the amount of various pollutants that may be present and still protect the designated uses, expressed in numerical limits or narrative form; and (3) an antidegradation policy with an implementation procedure to protect the current quality of waters and their existing uses. 33 U.S.C. § 1313(c)(2) and (d)(4)(B); 40 C.F.R. Part 131, Subpart B; *Raymond Proffitt Found. v. U.S. EPA*, 930 F. Supp. 1088, 1090-91 (E.D. Pa. 1996). The designated uses assigned to individual water bodies by a state *must* include aquatic life protection and human recreation - the "fishable/swimmable" mandate of the Act – unless these uses are shown to be unattainable. *Idaho Mining Assoc. v. Browner*, 90 F. Supp. 2d 1078, 1080-81, 1088-92 (D. Id. 2000); 65 Fed. Reg. 41216, 41220-21 (July 3, 2000)(EPA's proposed water quality standards for the state of Kansas).

States are required to review their water quality standards at least every three years (the "triennial review"), and to thereafter submit all of the state's existing and revised water quality standards to EPA for review. 33 U.S.C. § 1313(c)(1); *National Wildlife Federation v. Browner*, 127 F.3d 1126, 1130 (D.C. Cir. 1997). EPA routinely develops guidance pursuant to its authority under the Clean Water Act for states to follow in their setting of water quality standards. *See, e.g.*, 33 U.S.C. § 1314(a)(granting EPA the authority to develop water quality criteria); 40 C.F.R. § 131.3(c). States must follow EPA's numeric criteria guidance in the setting of their water quality standards unless they develop an alternate standard based on "site-specific conditions" or other "scientifically defensible methods." 40 C.F.R. § 131.11(b).

EPA is required by the Clean Water Act to approve or disapprove all new or revised water quality standards promulgated by the states. If EPA disapproves a new or revised state standard, it must notify the state and specify the required changes. If the state fails to adopt the

specified changes within 90 days, EPA is required to "promptly" propose a new standard for the state, and within 90 days thereafter, to promulgate such standard. 33 U.S.C. § 1313(c)(3) and (4). EPA is also required to promulgate a new standard for a state whenever it has determined that a new standard is "necessary" to meet the requirements of the Act. *Id.* § 1313(c)(4)(B). *See generally Kansas Natural Resource Council, Inc. v. Whitman*, 255 F. Supp. 2d 1208, 1209-10 (D. Kan. 2003)(hereinafter "*KNRC*")(describing the roles of the states and EPA in the setting of water quality standards).

Water quality standards are the backbone of the Clean Water Act regulatory structure for ensuring the purity and safety of the nation's waters. They "serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies". 40 C.F.R. § 131.2. Individual permit limitations must be set in a manner that ensures compliance with water quality standards. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).

C. Citizen Suit Provision of the Clean Water Act

The Clean Water Act contains a citizen suit provision allowing suits against EPA when the agency has failed to exercise a nondiscretionary duty. 33 U.S.C. § 1365(a)(2). There are two subsections of the Clean Water Act that create nondiscretionary duties that EPA has failed to perform with regard to Missouri's water quality standards, subsections 303(c)(4)(A) and (c)(4)(B). *Id.* § 1313(c)(4)(A) and (c)(4)(B).

1. Section 303(c)(4)(A)

As set forth above, if EPA disapproves a new or revised standard submitted by a state, and the state then fails to adopt the specified changes within a 90-day period, EPA is required to

"promptly" propose a revised standard for the state, and 90 days thereafter to "promulgate" such standard. 33 U.S.C. § 1313(c)(3) and (c)(4). This section is applicable to Claims 1 through 8 of the Coalition's complaint, which address standards that were formally disapproved by EPA in its September 8, 2000 letter.

Courts have consistently held that a state's failure to promulgate new standards after an EPA disapproval places a mandatory duty on EPA to do so. In a case dealing with Oregon's water quality standards, the district court stated:

Based on the plain language of § 303(c)(4)(A) and the statutory scheme established by the CWA, EPA is under a nondiscretionary duty to promptly promulgate revised standards upon a state's failure to submit its own revisions within 90 days of the notice of disapproval.

Northwest Environmental Advocates v. EPA, 268 F. Supp. 2d 1255, 1260 (D. Or. 2003)(the "Oregon case" when hereinafter used in the text). *See also Raymond Proffitt Found.*, 930 F. Supp. at 1097; *Idaho Conservation League v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991); *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 548-49 (W.D. Wash. 1997).

Courts have found that delays of seven months, nineteen months and three years exceed the requirement of EPA to "promptly" propose and promulgate such standards. *See Idaho Conservation League*, 968 F. Supp. at 549 (seven months); *Raymond Proffitt Found.*, 930 F. Supp. at 1097 (nineteen months); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261 (three years).

2. Section 303(c)(4)(B)

EPA is also subject to a mandatory duty to promulgate water quality standards for a state whenever it determines that a new or revised standard is "necessary" to comply with the Clean Water Act. 33 U.S.C. § 1313(c)(4)(B). This section is applicable to claims 9 through 16 of the Coalition's complaint, involving water quality standards that EPA found to be legally deficient in its letter to MDNR dated September 8, 2000.

With regard to the duties created by section 303(c)(4)(B), the court in the Oregon case stated:

Thus, although the initial decision to review a state's existing standard is discretionary, the duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the existing standards are inadequate.

Northwest Env. Adv., 268 F. Supp. 2d at 1261.

D. Judicial Review Pursuant to the Administrative Procedure Act

The Administrative Procedure Act ("APA") provides for judicial review of an agency action by any person who is affected or aggrieved by such action. 5 U.S.C. §§ 702, 706. The standard of review applicable to agency actions is whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). If the agency action fails this standard, then the court "shall" hold it unlawful and set it aside. *Id.* § 706(2).

These provisions provide an alternate basis for judicial review of the EPA's decision not to exercise its Clean Water Act authority and promulgate adequate standards for the state of Missouri. Every three years, states are required to submit to EPA any new or revised water quality standards, as well as a copy of their pre-existing standards. States are required to submit their pre-existing standards to EPA "to enable it to make an informed decision about whether to exercise its discretion to supplant the state standards." *National Wildlife Federation*, 127 F.3d at 1130.

The D.C. Circuit has recognized that a state's recalcitrance in adopting adequate water quality standards, combined with inaction on the part of EPA, could effectively frustrate the purposes of the Clean Water Act unless citizens had a remedy to compel compliance. The court affirmed that EPA's decision not to exercise its authority under section 303(c)(4)(B) can be reviewed under the "arbitrary, capricious, [or] an abuse of discretion" standard pursuant to 5

U.S.C. § 706(2). *National Wildlife Federation*, 127 F.3d at 1131. "[I]n the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

The Oregon case reaffirmed the applicability of the APA to situations where EPA has decided, in the context of reviewing a state's standards, not to use its authority to fix legal shortcomings in such standards. An "agency's failure to exercise its discretionary duty under [Clean Water Act] § 303(c)(4)(B) is by itself a reviewable agency action under the APA." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1264. Among the issues in the Oregon case was EPA's decision not to exercise its discretion to promulgate a new antidegradation implementation procedure even though the state's version was woefully inadequate. The court reviewed EPA's decision not to exercise its authority using the APA's "arbitrary and capricious" standard, and then ordered EPA to promulgate the required procedure for the state. *Id.* at 1265.

An agency action is arbitrary and capricious if an agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfr. Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983). *See also Audubon Soc. of Cent. Arkansas v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992); *National Wildlife Federation v. Whistler*, 27 F.3d 1341, 1344 (8th Cir. 1994). A reviewing court should undertake a "thorough, probing, in-depth review" of the agency's decision and then decide whether it was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

IV. ARGUMENT

A. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate an Adequate Water Quality Standard for the Protection of Wetlands in Missouri and its Subsequent Withdrawal of its Disapproval was Arbitrary and Capricious

Missouri amended its water quality standard for wetlands in 1994 and submitted the revised standard to EPA for review on April 14, 1994. Exh. A, Tab 4. In its September 2000 letter to MDNR, EPA disapproved the state's water quality standard for wetlands, finding that the revised standard represented a "reduction in the protection afforded" to wetlands. Exh. A, Tab 1 (DEF0015). The state of Missouri has not revised its water quality standard for wetlands subsequent to EPA's disapproval. Nevertheless, EPA has still not proposed or promulgated an adequate water quality standard for the protection of wetlands in Missouri. In a letter dated May 21, 2004, EPA withdrew its earlier disapproval of Missouri's wetland standard. Exh. A, Tab 20.

Missouri's water quality standard for wetlands is clearly deficient. It has long been understood that wetlands deserve protection under the Clean Water Act to the same extent as other "waters of the U.S." *See* 63 Fed. Reg. 36742, 36794 (July 7, 1998). "Necessary components of water quality standards for wetlands are designated uses and criteria, as defined in 40 CFR 131.6." *Id.* EPA's "National Guidance: Water Quality Standards for Wetlands", dated July 1990, specified that by the "end of FY 1993, the minimum requirements for States are to . . . establish beneficial uses for wetlands, [and] adopt existing narrative and numeric criteria for wetlands . . ." Exh. A, Tab 9 (p.v). Missouri's water quality standard for wetlands does not identify any designated uses for wetlands, nor specify which numeric criteria are applicable to wetlands. 10 C.S.R. 20-7.031(4)(A)(6). In sum, Missouri has relegated wetlands to a second class status, even though federal law requires that they be protected to the same extent as other "waters of the U.S."

EPA's disapproval of Missouri's standard for wetlands on September 8, 2000, combined with Missouri's subsequent inaction, created a mandatory duty for EPA to propose and promulgate an adequate standard for the state. 33 U.S.C. § 1313(c)(3) and (4); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order EPA to propose, and thereafter to promulgate, an adequate water quality standard for wetlands in Missouri.

Alternatively, the Coalition challenges EPA's last minute withdrawal of its disapproval as arbitrary and capricious under the APA. 5 U.S.C. § 706(2). The state of Missouri revised its wetland standard in 1994. The revised standard does not include any designated uses for wetlands, nor specify which numeric criteria apply to wetlands. As such, it does not comply with EPA regulations that require all "waters of the U.S." to have designated uses and specific criteria to protect those uses. 40 C.F.R. § 131.6. At a minimum, these uses must include recreation and aquatic life protection. EPA has not provided any specific information in its withdrawal that Missouri's standards meet these requirements, and its action therefore has no factual or legal basis, and is arbitrary and capricious within the meaning of the APA.

B. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate an Adequate Water Quality Standard for Dissolved Oxygen in Missouri's Waters

Missouri revised its water quality standard for dissolved oxygen in 1994 and submitted the revised standard to EPA for review on April 14, 1994. Exh. A, Tab 4. EPA disapproved the revised water quality standard for dissolved oxygen, finding that the standard contained an ill-defined exemption for situations when the "natural" background level of dissolved oxygen was below the numeric standard. Exh. A, Tab 1 (DEF0016). Without further regulatory definition of what is "natural", or at least a defined process for making this determination, the presence of this exemption makes the standard difficult if not impossible to enforce.

The state has not eliminated this exemption from its water quality standards subsequent to EPA's disapproval. *See* 10 C.S.R. 20-7.031(4)(A)(3). Neither has EPA proposed or promulgated a rule to rectify the deficiency in Missouri's standard for dissolved oxygen.

EPA's disapproval of Missouri's standard for dissolved oxygen on September 8, 2000, combined with the state's subsequent inaction, created a mandatory duty for EPA to propose and promulgate an adequate standard for the state. 33 U.S.C. § 1313(c)(3) and (4); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order EPA to propose, and thereafter to promulgate, an adequate water quality standard for dissolved oxygen in Missouri's waters.

C. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate an Adequate Water Quality Standard for Metal Contamination in Missouri's Waters Designated for Drinking Water Supply

Missouri revised its water quality standard for the measurement of metals in drinking water supplies in 1994 and submitted the revised standard to EPA on April 14, 1994. Exh. A, Tab 4. EPA disapproved the revised standard, finding that it incorrectly specified that metals in drinking water supplies be measured as "dissolved metals" as opposed to "total recoverable metals." Exh. A, Tab 1 (DEF0017). EPA concluded that the state's approach is "not consistent with EPA guidance and represents a less protective approach." *Id.*

The state's current water quality standard for metals in drinking water supplies still contains the provision allowing their measurement as "dissolved metals". 10 C.S.R. 20-7.031(4)(B)(2)(B). Nevertheless, EPA has not taken action to propose or promulgate a water quality standard for Missouri that sets forth an appropriate method for measuring metal contamination in waters designated for drinking water supplies.

EPA's disapproval of Missouri's standard for the measurement of metals in drinking water supplies on September 8, 2000, combined with the state's subsequent inaction, created a mandatory duty for EPA to propose and promulgate an adequate standard for the state. 33 U.S.C. § 1313(c)(3) and (4); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order EPA to propose, and thereafter to promulgate, an adequate water quality standard for the measurement of metal contamination in waters designated as drinking water supplies.

D. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Protection of Aquatic Life from Cadmium, Copper, Lead and Zinc Pollution

Missouri revised its water quality standards for the protection of aquatic life from cadmium, copper, lead and zinc pollution in 1994 and submitted the revised standard to EPA on April 14, 1994. Exh. A, Tab 4. EPA disapproved the revised standards. EPA's disapproval was based on the fact that the standards were incorrectly calculated because MDNR failed to account for tolerances of certain aquatic species, and used improper data relating to water hardness. Exh. A, Tab 1 (DEF0018). The specific provisions of the standards disapproved by EPA are set forth in Table 3 attached to EPA's September 8, 2000, letter. Exh. A, Tab 1 (DEF00067-00069). Missouri's standards for the protection of aquatic life from cadmium, copper, lead and zinc pollution have not been revised since they were disapproved. 10 C.S.R. 20-7.031, Table A.

EPA's disapproval of Missouri's standards for the protection of aquatic life from cadmium, copper, lead and zinc pollution on September 8, 2000, combined with the state's subsequent inaction, created a mandatory duty for EPA to propose and promulgate adequate standards for the state. 33 U.S.C. § 1313(c)(3) and (4); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order

EPA to propose, and thereafter to promulgate, adequate water quality standards for the protection of aquatic life from cadmium, copper, lead and zinc pollution.

E. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Protection of Human Health Through the Consumption of Fish

Missouri revised its water quality standards for the protection of human health through the consumption of fish from waters designated for "Human Health Protection – Fish Consumption" in both 1994 and 1996. Exh. A, Tabs 2, 3, 5 and 6. EPA disapproved the revised water quality standards for the protection of human health through fish consumption for six pollutants: trihalomethanes, 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene. Exh. A, Tab 1 (DEF0019). EPA disapproved the revised standard for trihalomethanes because the state deleted a pre-existing standard without providing any rationale, and disapproved the revised standards for 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene because the standards are less stringent than EPA guidance and no rationale was provided for this departure. Exh. A, Tab 1 (DEF0019). EPA guidance for protecting human health from contaminants in fish tissue consumed by humans is set forth in a publication entitled "National Recommended Water Quality Criteria." Exh. A, Tab 10.

Missouri's water quality standards for the protection of human health through fish consumption for the pollutants trihalomethanes, 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene have not been revised since they were disapproved by EPA. 10 C.S.R. 20-7.031, Table A. Neither has EPA proposed or promulgated an adequate standard for these pollutants.

EPA's disapproval of Missouri's standards for the protection of human health through the consumption of fish from waters designated for "Human Health Protection – Fish Consumption"

on September 8, 2000, combined with the state's subsequent inaction, created a mandatory duty for EPA to propose and promulgate adequate standards for the state. 33 U.S.C. § 1313(c)(3) and (4); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order EPA to propose, and thereafter to promulgate, adequate water quality standards for the protection of human health through the consumption of fish from waters designated for "Human Health Protection – Fish Consumption."

F. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Protection of Waters Designated for "Drinking Water Supply"

Missouri revised its water quality standards for the protection of human health through the consumption of water or fish from waters designated for "Drinking Water Supply" in 1994 and 1996. Exh. A, Tabs 2, 3, 5 and 6. EPA disapproved the revised water quality standards for the protection of the health of people exposed through consumption of water or fish from waters designated for "Drinking Water Supply" for the following nine chemicals: 2,3,7,8-TCDD dioxin; 1,2-dichloropropane; trihalomethanes; 4,4'-DDT; 4,4'-DDE; 4,4'-DDD; bis chloromethyl ether; pentachlorobenzene; and 1,2,4,5-tetrachlorobenzene. Exh. A, Tab 1 (DEF0019). EPA disapproved the water quality standards for eight of the nine chemicals because they are less stringent than EPA guidance. *Id.* The relevant EPA guidance criteria for these eight chemical pollutants are specified in EPA's publication entitled "National Recommended Water Quality Criteria." Exh. A, Tab 10. EPA disapproved the revised water quality standard for the ninth chemical – trihalomethanes – because it is less stringent than EPA's drinking water "maximum contaminant level." Exh. A, Tab 1 (DEF0019). EPA's drinking water "maximum contaminant level" for trihalomethanes is found at 40 C.F.R. § 141.64.

Missouri's water quality standards for these nine chemical pollutants have not been revised since they were disapproved by EPA. *See* 10 C.S.R. 20-7.031, Table A. EPA's disapproval of Missouri's standards for the protection of human health from the consumption of water or fish from these nine chemicals on September 8, 2000, combined with the state's subsequent inaction, created a mandatory duty for EPA to propose and promulgate adequate standards for the state. 33 U.S.C. § 1313(c)(3) and (4); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order EPA to propose, and thereafter to promulgate, adequate water quality standards for the protection of human health from the consumption of water or fish from waters designated for "Drinking Water Supply" for the following nine chemicals: 2,3,7,8-TCDD dioxin; 1,2-dichloropropane; trihalomethanes; 4,4'-DDT; 4,4'-DDE; 4,4'-DDD; bis chloromethyl ether; pentachlorobenzene; and 1,2,4,5-tetrachlorobenzene.

G. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards for the Designated Use of Cold-Water Sport Fisheries

Missouri revised its water quality standards for the designated use of "Cold-Water Sport Fisheries" in both 1994 and 1996. Exh. A, Tabs 2, 3 and 6. EPA disapproved the revised standards because the state reduced or eliminated the Cold-Water Sport Fishery designated use, without providing any justification, for the following six water bodies: the North Fork White River, South Indian Creek, Spring Creek, Turnback Creek, Indian Creek and Bull Shoals Lake. Exh. A, Tab 1 (DEF0019-0020). EPA regulations require that a state provide a rationale for the removal of a designated use, including, in this case, the preparation of a "use attainability analysis". 40 C.F.R. § 131.10(g), (h) and (j). Missouri's water quality standards relating to the

designated use of Cold-Water Sport Fisheries for the six waters listed above have not been revised since their disapproval by EPA. 10 C.S.R. 20-7.031, Table C.

EPA's disapproval of Missouri's removal of this designated use for these six waters, combined with the state's subsequent inaction, created a mandatory duty for EPA to propose and promulgate adequate standards for the state. 33 U.S.C. § 1313(c)(3) and (4); *Northwest Env. Adv.*, 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order EPA to propose, and thereafter to promulgate, water quality standards that restore the designated use of Cold-Water Sport Fishery to the following six water bodies: the North Fork White River, South Indian Creek, Spring Creek, Turnback Creek, Indian Creek and Bull Shoals Lake.

H. EPA Has Failed to Fulfill its Non-Discretionary Duty to Propose and Promulgate Adequate Water Quality Standards Restoring Designated Uses for 21 Lakes and 6 Streams

Missouri revised its water quality standards for 21 lakes and 6 streams in 1994 and 1996 by removing certain designated uses from these waters. Exh. A, Tabs 2, 3, 5 and 6. EPA disapproved the revised standards because the state reduced or eliminated designated uses without providing any justification as required by EPA regulations. Exh. A, Tab 1 (DEF00070-00071); 40 C.F.R. § 131.10(g), (h) and (j). The 21 lakes and 6 streams at issue, including the uses that were removed, are set forth in Tables 4.1 and 4.2 to EPA's letter of September 8, 2000. Exh. A, Tab 1 (DEF0070-0071). Missouri has not restored the designated uses that were removed. *See* 10 C.S.R. 20-7.031, Tables G and H.

EPA's disapproval of Missouri's removal of the designated uses for these 21 lakes and 6 streams, combined with the state's subsequent inaction, created a mandatory duty for EPA to propose and promulgate adequate standards for the state. 33 U.S.C. § 1313(c)(3) and (4);

Northwest Env. Adv., 268 F. Supp. 2d at 1260. EPA has not fulfilled this mandatory duty. The Coalition requests that the Court order EPA to propose, and thereafter to promulgate, water quality standards that restore the designated uses for the 21 lakes and 6 streams set forth in Tables 4.1 and 4.2 to EPA's September 8, 2000 letter. Exh. A, Tab 1 (DEF00070-00071).

I. EPA Should Be Ordered to Propose and Promulgate a Rule Setting Forth an Adequate Standard for Outstanding National Resource Waters in Missouri

The "outstanding national resource water" ("ONRW") designation is the highest form of protection that the Clean Water Act provides. *See* 63 Fed. Reg. 36742, 36786 (July 7, 1998)("ONRWs are intended to include the highest quality waters of the United States."). EPA regulations require that water quality in ONRWs "shall be maintained and protected." 40 C.F.R. § 131.12(a)(3). Such streams are subject to what is known as "Tier III" of the antidegradation policy, meaning that there can be no degradation of the quality of their waters. *See National Wildlife Federation*, 127 F.3d at 1127. EPA has interpreted its regulation "to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs." Exh. A, Tab 11 (pp.4-10). *See also* 65 Fed. Reg. 41216, 41217-18 (proposing water quality standards for the state of Kansas, including a discussion of the requirements for ONRWs).

States have discretion as to which waters they designate as ONRWs, but once such a designation is made, then the water body must be protected in a manner consistent with the federal regulations. The state of Missouri has designated three streams as ONRWs: the Current River, Jacks Fork River, and Eleven Point River. 10 C.S.R. 20-7.031, Table D. While Missouri's water quality standards applicable to ONRWs generally prohibit new discharges of pollution to these streams, they contain exceptions for discharges from "publicly-owned waste treatment facilities and mine dewatering water." 10 C.S.R. 20-7.031(7).

In its September 8, 2000, letter to MDNR, EPA found Missouri's water quality standard for ONRWs to be "inconsistent" with 40 C.F.R. § 131.12(a)(3) because of the above exceptions. Exh. A, Tab 1 (DEF0021-0022). EPA's finding that Missouri's water quality standard for ONRWs is inconsistent with its regulations triggered a mandatory duty for EPA to promulgate an adequate standard for the state. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). The agency's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261. Clearly, EPA's finding that Missouri's standard is "inconsistent" with the Act means that a new standard is "necessary" to meet its provisions.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to propose and promulgate new standards to protect Missouri's ONRWs. There are clear requirements that apply to ONRWs. 40 C.F.R. § 131.12(a)(3). EPA and the states must protect ONRWs from degradation, a requirement that both the state of Missouri and EPA have ignored for more than two decades. The offending provision in Missouri's standards for ONRWs has existed since the early 1980s. Exh. A, Tab 18 (showing that the exemption for waste treatment facilities was written into Missouri's standards in 1980), Tab 19 (showing that an additional exemption for mine wastes was added in 1984). Moreover, EPA's regulation stating that water quality in ONRWs "shall be maintained and protected" has existed since at least 1983. *See* 48 Fed. Reg. 51400, 51407 (Nov. 8, 1983). There has never been an exception in EPA's regulation for discharges from sewage treatment facilities or mines.

As the D.C. Circuit has recognized, a state's recalcitrance in adopting adequate standards, combined with inaction on the part of EPA, could effectively frustrate the purposes of the Clean Water Act unless citizens have a remedy to compel compliance. The court therefore found that EPA's decision not to exercise its authority under section 303(c)(4)(B) can be reviewed under the "arbitrary, capricious, [or] an abuse of discretion" standard pursuant to 5 U.S.C. § 706(2). *National Wildlife Federation*, 127 F.3d at 1131.

The state of Missouri submitted the entirety of its water quality standards for EPA's review on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. EPA acted arbitrarily, capriciously and abused its discretion when it decided not to exercise its authority under section 303(c)(4)(B) to fix the state's ONRW provision. The recognized and long-standing inadequacy of Missouri's ONRW provision, combined with the existence of clear standards set forth in EPA's regulations, make EPA's decision not to exercise its authority under 303(c)(4)(B) arbitrary, capricious and an abuse of discretion. *Northwest Env. Adv.*, 268 F. Supp. 2d at 1265.

The state of Missouri and EPA's failure to protect the state's most outstanding waters – the Current, Jacks Fork and Eleven Point Rivers – should not be allowed to continue. EPA found these deficient provisions to be "inconsistent" with the Clean Water Act in the year 2000, but has since failed to carry out its mandatory duty of proposing and promulgating new standards for Missouri that was triggered by this finding. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

J. EPA Should Be Compelled To Propose and Promulgate a Rule Ensuring that All Waters in Missouri are Protected for Whole Body Contact Recreation

The Clean Water Act establishes a national goal that all waters should be safe for fishing and swimming. This goal was to be met by 1983. 33 U.S.C. § 1251(a)(2). EPA has long

interpreted this provision of the Act to mean that a rebuttable presumption exists that all waters are to be designated for aquatic life protection and human recreation. Therefore, all waters must have, at a minimum, these "designated uses", unless they have been shown to be unattainable. *Idaho Mining Assoc.*, 90 F. Supp. 2d at 1087-98 (upholding EPA's use of the rebuttable presumption). If a state wishes to allow a water body to be degraded below swimming standards, then it must prove that recreation is not an attainable use. A structured scientific assessment is required to make this showing. 40 C.F.R. § 131.10(j). *See also KNRC*, 255 F. Supp. 2d at 1209 (discussing presumption that all waters shall be safe for swimming).

Designated uses are the backbone of the Clean Water Act because numeric criteria are set at an appropriate level to maintain such uses. *See KNRC*, 255 F. Supp. 2d at 1213 (discussing the importance of designated uses under the Clean Water Act's regulatory structure). EPA has stated that the use assigned to a water body is "the most fundamental articulation of its role in the aquatic and human environments, and all of the water quality protections established by the CWA follow from the water's designated use." 65 Fed. Reg. 41216, 41221.

The rationale for the rebuttable presumption that all waters are "fishable and swimmable" was explained by EPA in its promulgation of water quality standards for the state of Kansas after that state had failed to take appropriate action for many years:

EPA believes that using the "rebuttable presumption" approach is supported by sections 101(a) and 303(c) of the Clean Water Act. Further, EPA's longstanding interpretation, as reflected in its 1983 regulations, is that the purposes of the Act are better served by requiring a justification for designating uses less than fishable/swimmable rather than demanding an affirmative showing of attainability before requiring a fishable/swimmable use designation. *See* 40 C.F.R. § 131.10.

68 Fed. Reg. 40428, 40431 (July 7, 2003)(Kansas promulgation). *See also* 69 Fed. Reg. 3514, 3516-3518 (Jan. 26, 2004)(EPA promulgation of water quality standards after district court found that Puerto Rico had failed to apply the rebuttable presumption for recreational uses).

In its September 2000 letter to MDNR, EPA found that the state of Missouri's failure to designate its surface waters for recreational use (i.e., "whole body contact recreation" in the state's lexicon) was a "significant deficiency" and rendered the state's standards "inconsistent" with the Clean Water Act. Exh. A, Tab 1 (DEF0021, 0024). EPA has known since at least 1984 that Missouri's standards failed to protect recreational uses, and has communicated its concern over this deficiency to the state several times in the last 20 years. *See* Exh. A, Tab 1 (DEF0023); Exh. D, Tab 1 (EPA Audit, p.7). MDNR has acknowledged that 3,879 of the 4,312 water bodies it has identified in the state are not protected for whole body contact recreation (Exh. E, Tab 4), that its failure to protect its waters for recreational use "has and continues to be a significant deficiency" (Exh. E, Tab 5 (p.1)), and that most of Missouri's surface waters are, in fact, physically suitable for recreational use. Exh. E, Tab 6 (p.2). In failing to protect recreational uses, Missouri is among a small minority of states; an EPA survey has found that the overwhelming majority of states have taken action to protect this use. Exh. A, Tab 12.

EPA's finding that Missouri's failure to designate the majority of its surface waters for recreational use is "inconsistent" with the Clean Water Act triggered a mandatory duty for EPA to propose and promulgate an adequate standard for the state. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). The agency's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261. Clearly, EPA's finding that Missouri's standard is "inconsistent" with the Act means that a new standard is "necessary" to meet its provisions.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to promulgate appropriate designated uses for Missouri's waters. As the D.C. Circuit has recognized, a state's recalcitrance in adopting adequate water quality standards, combined with inaction on the part of EPA, could effectively frustrate the purposes of the Clean Water Act unless citizens have a remedy to compel compliance. The court therefore found that EPA's decision not to exercise its authority under section 303(c)(4)(B) can be reviewed under the "arbitrary, capricious, [or] an abuse of discretion" standard pursuant to 5 U.S.C. § 706(2). *National Wildlife Federation*, 127 F.3d at 1131.

There are clear requirements against which to judge the state and EPA's inaction. EPA and the states must protect surface waters such that they are "fishable and swimmable." This requirement emanates from section 101(a)(2) of the Act, and was to be met by 1983. 33 U.S.C. § 1251(a)(2). State standards submitted to EPA for review "must" include use designations consistent with the purposes of the Clean Water Act. 40 C.F.R. § 131.6(a). *See also* 40 C.F.R. § 131.2. In fact, any water that is not so designated must be reviewed every three years to determine whether human recreation has become an attainable use. *Id.* § 131.20(a). Thus, there has never been any doubt about what the Clean Water Act requires in this regard, nor has there been any doubt that Missouri has failed to meet this requirement. Both the EPA and the state have been aware of this deficiency since 1984. Exh. A, Tab 1 (DEF0023).

The state of Missouri submitted the entirety of its water quality standards on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. EPA acted arbitrarily, capriciously and abused its discretion when it decided not to exercise its authority under section 303(c)(4)(B) to designate recreational uses for Missouri's surface waters. The recognized inadequacy of Missouri's designated uses, combined

with the existence of a clear standard for what is required, make EPA's decision not to exercise its authority under 303(c)(4)(B) arbitrary, capricious and an abuse of discretion. *Northwest Env. Adv.*, 268 F. Supp. 2d at 1265.

The state of Missouri and EPA's long-standing failure to protect most of the state's surface waters for recreational uses should not be allowed to continue. EPA found these deficient provisions to be "inconsistent" with the Clean Water Act in the year 2000, but has since failed to carry out its mandatory duty of proposing and promulgating new standards for Missouri that was triggered by this finding. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

K. EPA Should Be Compelled to Propose and Promulgate a Water Quality Standard for Missouri that Specifies an Adequate Indicator Organism for Measuring Pathogen Pollution

EPA has long recommended that states switch the organism used to indicate whether waters are overly polluted with pathogens. In 1986, EPA developed guidance recommending that states switch from the widely used fecal coliform group of bacteria to *E. coli*. Exh. A, Tab 13. In March 1993, EPA asked MDNR to explain why it had not yet made the switch to *E. coli*. Exh. D, Tab 4 (p.9). In January 1997, EPA sent a letter to all states reiterating that it had changed the preferred indicator organism for pathogen pollution in 1986 based on epidemiological studies, and that it "strongly encourages" states to adopt this change. Exh. A, Tab 14 (DEF00416). In 1999, EPA published an "Action Plan" to better ensure the safety of the nation's beaches and recreational waters, in which it identified the adoption of appropriate indicator organisms as a priority. The Action Plan stated that "[w]here a state does not amend its water quality standards to include the 1986 criteria, EPA will act under Section 303(c) of the

Clean Water Act to promulgate the criteria with the goal of assuring that the 1986 criteria apply in all states not later than 2003." Exh. A, Tab 15 (pp.1, 4).

In its September 2000 letter to MDNR, EPA reiterated the statement from the "Action Plan for Beaches and Recreational Waters" that EPA would promulgate criteria for states that failed to adopt the 1986 criteria by the year 2003. Exh. A, Tab 1 (DEF0024-0025).

Nevertheless, Missouri has failed to amend its water quality standards to change the indicator organism from fecal coliform to *E. coli*, and EPA has similarly failed to promulgate an adequate standard for the state.

EPA's statement in the September 2000 letter that it would promulgate a new standard for states that failed to adopt an adequate indicator organism for pathogen pollution by the year 2003 – and the state of Missouri's continuing failure to do so – triggered a mandatory duty for EPA to promulgate an adequate standard. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). The agency's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261.

EPA's statement in its September 2000 letter that EPA would promulgate standards for states that failed to adopt an adequate indicator organism by the year 2003 clearly shows that EPA viewed a new standard as "necessary" to meet the provisions of the Clean Water Act.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to promulgate an appropriate pathogen indicator organism standard for Missouri's waters. *See National Wildlife Federation*, 127 F.3d at 1131. EPA's recommendation that states adopt *E. coli* as the indicator organism for pathogen pollution in fresh water has been

well known for nearly 20 years. It is an easily comprehended requirement, not subject to differing technical or legal interpretations.

The state of Missouri submitted the entirety of its water quality standards on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. The recognized inadequacy of Missouri's chosen indicator, combined with the existence of a clear standard for what is required, make EPA's decision not to exercise its authority under 303(c)(4)(B) arbitrary, capricious and an abuse of discretion. *Northwest Env. Adv.*, 268 F. Supp. 2d at 1265.

The state of Missouri and EPA's long-standing failure to ensure that the state is using an appropriate indicator of pathogen pollution should not be allowed to continue. EPA's findings in its September 2000 letter, combined with its previous policy statements, indicate that the agency has concluded that a new standard is necessary to comply with the Clean Water Act. Nevertheless, EPA has failed to carry out its mandatory duty of proposing and promulgating such a standard. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

L. EPA Should be Compelled to Propose and Promulgate a Standard for Missouri That Contains a Lawful Procedure for Adopting Site Specific Standards

Missouri's water quality standards allow for the setting of site specific standards without requiring their formal adoption into state regulations or their approval by EPA. *See* 10 C.S.R. § 20-7.031(4)(A)(3), (B)(1), (B)(5) and (L)(3). In its September 8, 2000, letter to MDNR, EPA indicated that Missouri's approach to setting site specific standards did not comply with the Clean Water Act. EPA recommended that Missouri rectify this shortcoming in its standards by either developing an EPA approved methodology for setting site specific standards or submit each site specific standard to EPA for approval. Exh. A, Tab 1 (DEF0027). There is no

exemption for site specific water quality standards from the requirement that state standards be submitted to EPA for review and approval. *See* 33 U.S.C. § 1313(c).

EPA's statement in its September 2000 letter that Missouri's approach to the setting of site specific standards is deficient, and the state's failure to rectify this deficiency, triggered a mandatory duty for EPA to promulgate a revised standard for Missouri. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). The agency's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261. EPA's finding in its September 2000 letter to the state of Missouri that the state's approach to site specific standards is deficient was an acknowledgement that a new standard is "necessary" to meet the provisions of the Clean Water Act. EPA is therefore under a mandatory duty to promulgate an adequate standard for the state.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to promulgate a new standard for Missouri that addresses its current unlawful approach to site specific standards. *See National Wildlife Federation*, 127 F.3d at 1131. The state of Missouri submitted the entirety of its water quality standards on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. The recognized inadequacy of Missouri's approach to setting site specific standards makes EPA's decision not to exercise its authority under 303(c)(4)(B) arbitrary, capricious and an abuse of discretion. *Northwest Env. Adv.*, 268 F. Supp. 2d at 1265.

The state of Missouri and EPA's failure to ensure that the state is using appropriate procedures for the setting of site specific standards should not be allowed to continue. EPA has

found that Missouri's approach does not meet the requirements of the Clean Water Act, but has failed to carry out its mandatory duty of proposing and promulgating new standards for Missouri that was triggered by this finding. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

M. The EPA Should Be Compelled to Propose and Promulgate an Implementation Procedure for Missouri's Antidegradation Policy

States must include an antidegradation policy as a component of their water quality standards. 40 C.F.R. §§ 131.6(d), 131.12(a). EPA regulations set forth a three tiered approach to antidegradation, with Tier I requiring protection of all existing uses of waters, Tier II requiring the maintenance of better-than-required water quality (unless there are overriding economic reasons to allow degradation), and Tier III consisting of those high quality waters for which no permanent degradation is allowed. *Raymond Proffitt Found.*, 930 F. Supp. at 1091; *PUD No. 1*, 511 U.S. at 705-06. Importantly, EPA's regulations also require that states "identify the *methods for implementing such policy . . .*" 40 C.F.R. § 131.12(a)(emphasis added).

As EPA has pointed out to the state of Missouri for more than a decade, the state's water quality standards completely lack any procedure for implementing the antidegradation policy. Exh. D, Tab 2; Exh. D, Tab 1 (p.10). Moreover, MDNR personnel have acknowledged that the absence of such an implementation procedure has caused the state's antidegradation policy to be "essentially ignored" by MDNR. Exh. E, Tab 7. EPA's 1998 audit of Missouri's water quality program found that this deficiency meant that "Missouri cannot ensure that it consistently identifies and protects its higher quality waters." Exh. D, Tab 1 (p.10). MDNR staff have repeatedly promised EPA that the state was working to address this problem, yet no action has ever been taken. Exh. A, Tab 4 (p.1); Exh. A, Tab 7 (p.1). EPA admits that it has never approved an implementation procedure for Missouri's antidegradation policy. Exh. D, ¶24.

In its September 8, 2000, letter, EPA found that Missouri's failure to have an antidegradation implementation procedure meant that it was "not in full compliance" with EPA regulations implementing the Clean Water Act. Exh. A, Tab 1 (DEF0028). Nevertheless, Missouri has failed to amend its water quality standards to include an implementation procedure, and EPA has similarly failed to promulgate an adequate standard for the state.

EPA's finding in its September 2000 letter that the state's failure to have an antidegradation implementation procedure meant it was "not in full compliance" with federal regulations triggered a mandatory duty for EPA to promulgate an adequate standard. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). The agency's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261. EPA's finding in its September 2000 letter to the state of Missouri that the state was not in full compliance with EPA's regulations clearly indicates that the federal agency viewed a new standard as "necessary" to meet the provisions of the Clean Water Act.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to promulgate an appropriate antidegradation implementation procedure for Missouri's waters. *See National Wildlife Federation*, 127 F.3d at 1131. EPA's regulations have required implementation procedures for antidegradation since 1975. *See* 63 Fed. Reg. 36742, 36779 (explaining the history of the antidegradation provision). Missouri's failure to adopt any semblance of such a procedure means that it is clearly failing to comply with these long-standing regulations.

The Oregon case is squarely on point. In that case, the state of Oregon had never adopted an implementation procedure for antidegradation, and EPA had never promulgated one for the state. The court noted that there were clear standards by which to evaluate the state and EPA's performance on this issue and reviewed EPA's decision not to promulgate a standard for the state under the APA. The court found that EPA had provided no rational basis for its decision not to promulgate an antidegradation implementation procedure for Oregon when it concluded its review of Oregon's standards, and ordered that the agency do so. *Northwest Env. Adv.*, 268 F. Supp. 2d at 1263-65.

The state of Missouri submitted the entirety of its water quality standards on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. The complete failure of Missouri to have the required procedure as part of its water quality standards, combined with the existence of a clear standard for what is required, make EPA's decision not to exercise its authority under 303(c)(4)(B) arbitrary, capricious and an abuse of discretion. *Northwest Env. Adv.*, 268 F. Supp. 2d at 1265.

The state of Missouri and EPA's long-standing failure to ensure that the state has an adequate implementation procedure for its antidegradation policy should not be allowed to continue. EPA has found that Missouri is not in compliance with the Clean Water Act, but has failed to carry out its mandatory duty of proposing and promulgating new standards for Missouri that was triggered by this finding. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

N. EPA Should Be Compelled to Propose and Promulgate Adequate Water Quality Standards for "Unclassified" Waters in Missouri

The state of Missouri has developed a system of classifying its surface waters that consists of three general classifications: Class "L" for lakes, Class "P" for perennial streams, and

Class "C" for intermittent streams (streams that may stop flowing during dry periods). 10 C.S.R. 20-7.031(1)(F). Waters not specifically identified in the regulations as fitting one of these classifications are considered "unclassified." There are 25,590 miles of classified streams in the state of Missouri, and 84,450 miles of unclassified streams. Exh. A, Tab 16 (p.1 of attachment). Approximately 82.5% of the water pollution discharge permits issued by MDNR are on unclassified streams. *Id.*

Thus, there are many more miles of streams in Missouri that are considered by the state to be "unclassified" than there are stream miles that have been identified and placed into one of the above categories. Streams may remain unclassified as a result of their failure to meet either of the two stream classification definitions, or because they were simply overlooked by MDNR and the Clean Water Commission when the table of classified streams was developed. In any event, Missouri's system of stream classification is a creature of the state's administrative process and has no counterpart in federal law.

The federal Clean Water Act requires each state to have water quality standards for all navigable waters. 33 U.S.C. § 1313(c). The term "navigable waters" is defined in section 502(7) of the Act to mean the "waters of the United States, including the territorial seas". *Id.* § 1362(7). The term "waters of the United States" is in turn defined in regulations to include, *inter alia*, intrastate waters whose use, degradation, or destruction would or could affect interstate commerce, and the tributaries of such waters. 40 C.F.R. § 122.2. The scope of the Clean Water Act therefore extends beyond those waters the state of Missouri considers to be "classified."

The problem created by Missouri's classification system is that many of the state's water quality standards and effluent limitations only apply to classified waters. For example, Missouri's numeric criteria for chemical pollutants and pathogens do not apply on unclassified

streams. 10 C.S.R. 20-7.031(4). Similarly, unclassified streams do not have any beneficial uses assigned to them. Exh. A, Tab 17 (p.13). A sister agency in Missouri also charged with protecting the state's fish – the Missouri Department of Conservation – has communicated its concern over the lack of protection for unclassified waters, recommending to MDNR that unclassified waters at least be subject to standards for dissolved oxygen to protect aquatic life. Exh. E, Tab 8 (p.3)

EPA, in its September 2000 letter to MDNR, stated that federal regulations require that all waters – not just the state's "classified" waters – be protected to the "fishable/swimmable" standard. Exh. A, Tab 1 (DEF0029). This is consistent with the agency's prior legal interpretation of the Act. In 1997, EPA proposed water quality standards for Idaho after that state failed to ensure that "unclassified" waters had the minimal "fishable/swimmable" designated uses. These uses must apply to all waters as "default" standards. 62 Fed. Reg. 23004, 23006 (Apr. 28, 1997)(proposing water quality standards for Idaho).

EPA's finding that Missouri's standards fail to adequately protect unclassified waters triggered a mandatory duty for EPA to promulgate an adequate default standard for the state's unclassified waters. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). EPA's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261. Clearly, EPA's finding that Missouri's standards omit fundamental protections for unclassified waters – which are a majority of the state's waters – means that a new standard is "necessary" to meet its provisions.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to propose and promulgate adequate standards for Missouri's unclassified waters. As the D.C. Circuit has recognized, a state's recalcitrance in adopting adequate water quality standards, combined with inaction on the part of EPA, could effectively frustrate the purposes of the Clean Water Act unless citizens have a remedy to compel compliance. The court therefore found that EPA's decision not to exercise its authority under section 303(c)(4)(B) can be reviewed under the "arbitrary, capricious, [or] an abuse of discretion" standard pursuant to 5 U.S.C. § 706(2). *National Wildlife Federation*, 127 F.3d at 1131.

EPA acted arbitrarily, capriciously and abused its discretion when it decided not to exercise its authority under section 303(c)(4)(B) to promulgate adequate standards for Missouri's unclassified waters. The state of Missouri submitted the entirety of its water quality standards on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. The recognized inadequacy of Missouri's protections for unclassified waters, combined with the existence of a clear standard for what is required, make EPA's decision not to exercise its authority under 303(c)(4)(B) arbitrary, capricious and an abuse of discretion. *Northwest Env. Adv.*, 268 F. Supp. 2d at 1265.

The state of Missouri and EPA's long-standing failure to protect the state's unclassified waters should not be allowed to continue. EPA concluded in the year 2000 that this was a deficiency in Missouri's standards, but has since failed to carry out its mandatory duty of proposing and promulgating new standards for Missouri that was triggered by this finding. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

O. EPA Should Be Compelled to Propose and Promulgate an Adequate Water Quality Standard for Mixing Zones

The state of Missouri's water quality standards contain a provision allowing "mixing zones" on certain waters. In essence, a mixing zone is an area of a stream where the full array of water quality standards does not have to be met. *See* 10 C.S.R. 20-7.031(4)(A)(5)(exempting water within mixing zones from most "chronic" water quality criteria). Missouri's standards even allow mixing zones on very small streams with dry-season flows of 0.1 cubic feet per second or less. *Id.* 20-7.031(4)(A)(5)(B)(I).

EPA, in its September 2000 letter to MDNR, stated that Missouri's mixing zone policy "might not protect the aquatic life communities" and allows for "inadequate" mixing in small streams with flows of 0.1 cfs or less. "EPA interprets the CWA as allowing the use of mixing zones as long as the provisions addressing toxicity at section 101(a)(3) are met and the designated uses of the water body as a whole are protected." 63 Fed. Reg. 36742, 36788. EPA's finding that Missouri's mixing zone regulation fails to adequately protect aquatic life means that the "fishable" requirement of the Clean Water Act is not being met in some of the state's waters.

EPA's finding triggered a mandatory duty for EPA to promulgate an adequate standard for the state. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). The agency's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261. EPA's finding that Missouri's mixing zone regulation was not sufficiently protective means that a new standard is "necessary" to meet its provisions.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to propose and promulgate an adequate standard for mixing zones. As the D.C. Circuit has recognized, a state's recalcitrance in adopting adequate water quality standards, combined with inaction on the part of EPA, could effectively frustrate the purposes of the Clean Water Act unless citizens have a remedy to compel compliance. The court therefore found that EPA's decision not to exercise its authority under section 303(c)(4)(B) can be reviewed under the "arbitrary, capricious, [or] an abuse of discretion" standard pursuant to 5 U.S.C. § 706(2). *National Wildlife Federation*, 127 F.3d at 1131.

The state of Missouri submitted the entirety of its water quality standards on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. EPA acted arbitrarily, capriciously and abused its discretion when it decided not to exercise its authority under section 303(c)(4)(B) to promulgate adequate standards for mixing zones in Missouri.

The state of Missouri and EPA's failure to adequately protect the state's small streams by adopting an adequate mixing zone standard should not be allowed to continue. EPA concluded in the year 2000 that this was a deficiency in Missouri's standards, but has since failed to carry out its mandatory duty of proposing and promulgating new standards for Missouri that was triggered by this finding. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

P. EPA Should Be Compelled to Propose and Promulgate a Water Quality Standard that Ends Missouri's Broad Exemption from Pathogen Limits During Periods of Stormwater Runoff

The state of Missouri's water quality standards contain a provision allowing for a so-called "high-flow exemption" from its pathogen standards. This provision specifically exempts

waters from the pathogen standard anytime there is "stormwater runoff." 10 C.S.R. 20-7.031(4)(C). The extremely loose nature of this exemption makes Missouri's pathogen limit virtually impossible to enforce anytime there is the slightest bit of rainfall. Because of this, EPA, in its September 2000 letter to MDNR, stated that Missouri's high-flow exemption "might not ensure that the whole body contact use is adequately protected" and that it had disapproved similar, but even more specific, exemptions in other states. Taken together, these two statements clearly indicate that EPA viewed Missouri's high-flow exemption as legally inadequate.

EPA's finding that Missouri's high-flow exemption was legally deficient triggered a mandatory duty for EPA to promulgate an adequate standard for the state. Section 303(c)(4)(B) of the Clean Water Act requires that EPA promulgate a new standard for a state whenever it determines that such action is "necessary to meet the requirements" of the Act. 33 U.S.C. § 1313(c)(4)(B). The agency's "duty to promulgate new standards becomes nondiscretionary upon the agency's determination that the [state's] existing standards are inadequate." *Northwest Env. Adv.*, 268 F. Supp. 2d at 1261. EPA's finding that Missouri's high-flow exemption was not sufficiently protective means that a new standard is "necessary" to meet its provisions.

Alternatively, EPA has acted in a manner that is arbitrary, capricious and an abuse of discretion by deciding not to propose and promulgate an adequate standard. As the D.C. Circuit has recognized, a state's recalcitrance in adopting adequate water quality standards, combined with inaction on the part of EPA, could effectively frustrate the purposes of the Clean Water Act unless citizens have a remedy to compel compliance. The court therefore found that EPA's decision not to exercise its authority under section 303(c)(4)(B) can be reviewed under the "arbitrary, capricious, [or] an abuse of discretion" standard pursuant to 5 U.S.C. § 706(2). *National Wildlife Federation*, 127 F.3d at 1131.

The state of Missouri submitted the entirety of its water quality standards on two occasions during the 1990s, and EPA concluded its review of those submissions with its September 8, 2000, letter. EPA acted arbitrarily, capriciously and abused its discretion when it decided not to exercise its authority under section 303(c)(4)(B) to promulgate adequate standards relating to the high-flow exemption in Missouri.

The state of Missouri and EPA's failure to adequately protect the state's waters from pathogens during periods of rainfall should not be allowed to continue. EPA concluded in the year 2000 that this was a deficiency in Missouri's standards, but has since failed to carry out its mandatory duty of proposing and promulgating new standards for Missouri that was triggered by this finding. Alternatively, EPA's decision not to use its authority under section 303(c)(4)(B) was arbitrary, capricious and an abuse of discretion.

V. CONCLUSION

For the foregoing reasons, the Missouri Coalition for the Environment respectfully requests that the Court issue an order compelling the United States Environmental Protection Agency to propose, and thereafter to promulgate, adequate water quality standards in each of the areas addressed in the Coalition's Complaint and discussed above. The Coalition suggests that 90 days is an appropriate time period for each stage of this process (issuing a proposed rule, and thereafter promulgating the rule). The Coalition also requests that the Court issue such other relief as may be provided for by law, including attorneys fees pursuant to 33 U.S.C. § 1365(d) and 28 U.S.C. § 2412, and its costs of litigation.

Respectfully submitted,

/s/ Edward J. Heisel
EDWARD J. HEISEL, Mo. Bar # 51746
Missouri Coalition for the Environment
6267 Delmar Boulevard
St. Louis, Missouri 63130
Telephone: (314) 727-0600
Facsimile: (314) 727-1665

Bruce A. Morrison, Mo. Bar # 38359
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101-2208
Phone: (314) 231-4181
Fax: (314) 231-4184

Counsel for Plaintiff

DATED: June 22, 2004

Certificate of Service

I hereby certify that on June 22, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the email addresses below. Paper copies of exhibits that were not filed electronically were mailed via U.S. Mail.

Michele L. Walter United States Department of Justice P. O. Box 23986 Washington, DC 20026-3986 (202) 514-3376 Fax : (202)514-8865 Email: michele.walter@usdoj.gov	Alexandra Dapolito Dunn General Counsel Association of Metropolitan Sewerage Agencies 1816 Jefferson Place, N.W. Washington, D.C. 20036-2505 adunn@amsa-cleanwater.org
Charles M. Thomas Office of the United States Attorney 400 E. 9th St. 5th Floor Kansas City, MO 64106 (816) 426-3122 Fax : (816) 426-3165 Email: charles.thomas@usdoj.gov	David W. Burchmore Steven C. Bordenkircher Squire, Sanders & Dempsey, L.L.P. 4900 Key Tower 127 Public Square Cleveland, Ohio 44114-1304 dburchmore@ssd.com sbordenkircher@ssd.com
Terry J. Satterlee Thomas J. Grever Lathrop & Gage, L.C. 2345 Grand Boulevard, Suite 2800 Kansas City, Missouri 64108-2684 tsatterlee@lathropgage.com tgrever@lathropgage.com	

s/Edward J. Heisel

Edward J. Heisel, Mo. Bar # 51746