

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

MISSOURI COALITION FOR THE ENVIRONMENT)	
)	
)	
Plaintiff,)	CASE NUMBER 2:03-CV-04217-NKL
)	
v.)	JUDGE: Nanette K. Laughrey
)	
MICHAEL LEAVITT, in his capacity as Acting Administrator of the United States Environmental Protection Agency, <i>et al.</i> ,)	
)	
Defendants.)	

**INTERVENORS' SUGGESTIONS IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Intervenors the Association of Metropolitan Sewerage Agencies (“AMSA”) and the Urban Areas Coalition (“UAC”) (collectively “Intervenors”) opposes the Plaintiff’s Motion for Summary Judgment, for the reasons set forth herein.

I. SUMMARY JUDGMENT SHOULD BE DENIED REGARDING PLAINTIFF’S CLEAN WATER ACT CLAIMS ON ALL COUNTS, AND ADMINISTRATIVE PROCEDURE ACT CLAIMS ON COUNTS ONE AND NINE THROUGH SIXTEEN, BECAUSE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR SUCH COUNTS.

Subject to certain exceptions, Intervenors agree with and adopt the arguments made by Defendants in their “Suggestions in Support of Partial Motion to Dismiss For Failure to State a Claim, Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Motion for Summary Judgment on Remedy” filed June 22, 2004 (hereafter, “Defendants’ Suggestions”).

Specifically, Intervenors agree with Defendants that:

- The Plaintiffs have failed to state a claim for relief under the Clean Water Act for all 16 counts in the Complaint (Defendants' Suggestions at 23-24);
- Count One is moot and should be dismissed because EPA has withdrawn its disapproval of, and has approved, that corresponding water quality standard (i.e., the wetlands standard)(Defendants' Suggestions at 28-29);
- Counts Nine through Sixteen should be dismissed for failure to state a claim under the Administrative Procedures Act because EPA did not have any mandatory duty with regard to the standards referenced in those Counts (Defendants' Suggestions at 25-28).

Intervenors adopt and incorporate Defendants' arguments with regard to these points, to support Intervenors' position that Plaintiff's summary judgment motion should be denied.

However, for the reasons set forth below, Intervenors further state that summary judgment to Plaintiff should be denied for Counts Two Through Eight under Plaintiff's Administrative Procedure Act Claims, because Defendants have not unreasonably delayed any action required under the Clean Water Act.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNTS TWO THROUGH EIGHT UNDER THE ADMINISTRATIVE PROCEDURE ACT SHOULD BE DENIED, BECAUSE DEFENDANTS HAVE NOT UNREASONABLY DELAYED ACTION TO PROMULGATE FEDERAL WATER QUALITY STANDARDS.

Plaintiff has alleged that Defendants violated the Administrative Procedures Act (APA) with respect to the water quality standards in these Counts because Defendants failed to promptly promulgate proposed federal water quality standards in lieu of the state standards that EPA rejected in September, 2000, as required by Section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c). Complaint at ¶¶ 46, 53, 60, 67, 74, 81, and 88. Specifically, Plaintiff alleges that

Defendant “unlawfully withheld or unreasonably delayed” agency action, and asks the Court to compel the Defendants to take immediate action under APA section 706(1), 5 U.S.C. § 706(1),¹ to promulgate federal replacement water quality standards. *Id.*

The Court may compel such relief only if it finds that EPA’s actions were “unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Defendants have not contested that they had a statutory duty to act within a certain time to promulgate new standards. Defendants’ Suggestions at 30. But notwithstanding Defendants’ apparent concession on this point, whether Defendants “unlawfully withheld or unreasonably delayed” their actions is an issue of law remaining before this Court.² Intervenors submit that the factual information in the record demonstrates that the Defendant’s have not acted with unreasonably delayed action with regard to the water quality standards at issue. To the contrary, Defendants have undertaken significant efforts with the Missouri Department of Natural Resources (MDNR) and potentially affected entities, such as the municipal wastewater treatment entities represented by Intervenors, to create standards to meet Clean Water Act requirements.

The question of “unreasonable delay” under APA § 706(1) is a legal question to be determined by examining a number of factual circumstances, including: the length of time that has lapsed since the agency has come under a duty to act, the reasonableness of the delay judged in the context of the statute authorizing the agency’s action, the consequences of agency delay, and the agency’s “need to prioritize in the face of limited resources.” *In re International*

¹ This statute states in part that “the reviewing court shall—(1) compel agency action unlawfully held or unreasonably delayed....” 5 U.S.C. § 706(1).

² The Defendants’ concession on the question of “unreasonable delay” is not binding on this Court as a judicial admission. Only purely factual admissions are binding on the Court. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d cir. 1972) (“The scope of judicial admissions is restricted to matters of fact which otherwise would require evidentiary proof”); *New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24, (4th Cir. 1963) (“A judicial admission is usually treated as absolutely binding, but such admissions go to matters of fact which, otherwise, would require evidentiary proof.”), *cert. denied*, 376 U.S. 963 (1964).

Chemical Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992). For example, if during the period of delay, the agency is acting to develop the necessary underpinnings for its required action, the delay is not actionable under the APA. *See e.g. In re California Power Exchange Corp.*, 245 F.3d 1110 (9th Cir. 2001)(delayed action not unreasonable where agency was developing appropriate framework and factual information to address claims and formulate prospective remedies); *cf. Raymond Proffitt Foundation v. Environmental Protection Agency*, 930 F. Supp. 1088, 1094 (E.D. Pa. 1996)(EPA’s delayed action in promulgating federal water quality standards after rejecting state standards was unreasonable, where EPA was merely “watching to see what [the state] is doing”).

Thus the Court has the duty to examine whether Defendant’s actions constitute “unreasonable delay.” As the Defendants’ Suggestions makes abundantly clear, EPA has not acted unreasonably in delaying the setting of federal water quality standards. In the time since the Defendant EPA’s September 2000 letter, EPA and the State have had “at least 15 meetings” to discuss the deficiencies in the State’s water quality standards. Defendants’ Suggestions, at 31 and Exhibits 1 and 2. As a result, the technical meetings and ongoing stakeholder discussions have “served to provide the State with necessary information for revising its water quality standards.” Defendants’ Suggestions, at 32.

As EPA’s significant involvement with the State since September 2000 suggests, EPA determined that it would be a better use of its resources and the State’s more limited resources to provide the State with the necessary assistance to develop water quality standards at the State level, rather than at the federal level. Ultimately, it is the State who must enforce the standards on its regulated entities, both public and private, and it clearly appears that EPA decided that it was therefore in all parties’ best interests to develop standards at the state level after

consideration of technical input from all affected parties. EPA did not simply ignore or passively observe MDNR's efforts during this period; to the contrary, EPA has been directly involved in assisting the State and affected entities toward developing standards that will comply with the Clean Water Act and, it is hoped, be less susceptible to legal challenge. *See* Defendants' Suggestions at 31-33. Accordingly, any delay by the Defendants should not be determined "unreasonable" under APA § 706(1) under the facts presented in the Defendants' briefing.

Should the Court disagree and rule that the Defendants' actions have been unreasonably delayed, Intervenors support the Defendants' suggestion that the Court should allow the MDNR and EPA to continue along their current progress toward crafting replacement water quality standards, without a more stringent court order. As Defendants' note, and Intervenors agree, allowing such progress to continue to its conclusion, promotes Congress' goal in the Clean Water Act to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...." 33 U.S.C. § 1251(b). This process has allowed regulated entities to provide input on the technical and practical details of the standards' development—an important aspect that would be lost if such entities are shut out of the process and required to wait for federal action.

Ordering federal promulgation of replacement standards at this time would essentially ignore, to all parties' detriment, the significant progress made by the parties and stakeholders toward protective and achievable standards that will comply with the mandates of the Clean Water Act. This process has allowed interested parties, including Intervenors (who are participating fully in the process) and Plaintiffs (who have elected not to participate in the process) to provide meaningful input to assist and streamline the promulgation of regulations that will meet Clean Water Act requirements. To essentially undo the collaborative process EPA is

currently undertaking with MDNR, and to begin the rulemaking process anew at the federal level, would only further delay the ultimate implementation of Missouri's water quality standards.

CONCLUSION

Intervenors submit that Plaintiff's Motion for Summary Judgment should be denied, and Defendants' Motions to Dismiss be granted, for the reasons set forth in Defendants' Suggestions. In addition, with regard to Counts Two through Eight of the Complaint, Intervenors submit that Defendants have not "unreasonably delayed" action to promulgate water quality standards to replace standards rejected in September 2000. Therefore, Intervenors respectfully request this court to deny Plaintiff's motion for summary judgment with respect to Counts Two through Eight.

Dated: July 26, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 26, 2004, the foregoing *Intervenors'*
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served via the Court's ECF:

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