

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

MISSOURI COALITION FOR)	
THE ENVIRONMENT, a non-profit)	Civil No:
corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	COMPLAINT
MARIANNE HORINKO, in her)	
capacity as Acting Administrator)	
of the United States Environmental)	
Protection Agency, and the)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Defendants.)	
)	
)	

INTRODUCTION

1. This is an action for declaratory and injunctive relief under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and for judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Defendants Marianne Horinko, Acting Administrator of the U.S. Environmental Protection Agency, and the U.S. Environmental Protection Agency ("EPA"), have violated, and continue to violate, the CWA by failing to uphold their responsibility of ensuring that the State of Missouri's water quality standards provide the state's residents with clean and safe water for drinking, swimming, fishing and other purposes.
2. For years – in some cases nearly 20 years – EPA has looked the other way while the State of Missouri failed to adopt water quality standards sufficient to protect public health and the environment. The CWA requires that EPA propose and promulgate

water quality standards for recalcitrant states such as Missouri in order that the purposes of the Act are upheld. 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 of Missouri's standards was set forth by EPA in correspondence dated September 8, 2000, to the Missouri Department of Natural Resources. *See* Exhibit A.

3. Plaintiff seeks an order requiring EPA to fulfill its duty under the law to establish compliant water quality standards for the State of Missouri.

JURISDICTION AND VENUE

4. This court has jurisdiction over this action pursuant to 33 U.S.C. § 1365(a) (CWA citizen suit provision); 5 U.S.C. §§ 701 – 706 (APA); 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief) and 2202 (injunctive relief). Plaintiff is challenging final agency actions as defined by the APA, 5 U.S.C. § 551(13). As required by 33 U.S.C. § 1365(b), Plaintiff furnished Defendant EPA with written notice of its violations of the CWA more than 60 days prior to filing this complaint. That notice is attached hereto as Exhibit B and incorporated by reference.

5. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in the District.

PARTIES

6. The Plaintiff in this action is the Missouri Coalition for the Environment ("MCE"), a non-profit corporation with its principal office at 6267 Delmar Boulevard, Suite 2-E, University City, Missouri 63130. MCE is a membership organization, composed of more than 1,000 individual members.

7. The purposes of MCE include preserving and enhancing the scenic, scientific, educational, historical, wilderness, wildlife, open space, outdoor recreation and public health values of the physical environment, and coordinating, encouraging, and

assisting efforts of others to maintain and enhance environmental quality. From its incorporation in 1969, MCE has been actively engaged in efforts to preserve the natural values of Missouri's waterways. MCE continuously undertakes efforts of citizen education, lobbying and legal action to advance these purposes.

8. These above mentioned interests of MCE, as well as the interests of its members, have been and will continue to be adversely affected by EPA's failure to establish water quality standards for Missouri in compliance with the CWA. MCE's members, and all Missourians, are subjected to unhealthy levels of pathogens and other pollutants in the state's waters because of EPA's violation of the CWA. MCE files this action on its own behalf and on behalf of its members.

9. The above above-described aesthetic, conservation, and scientific interests of MCE and its members have been, are being, and, unless the relief requested is granted, will continue to be adversely affected and irreparably injured by EPA's failure to comply with the CWA. For these same reasons, MCE is also adversely affected and aggrieved by the actions and omissions of EPA within the meaning of the APA. MCE's injury in fact is fairly traceable to the EPA's conduct and would be redressed by the relief sought in this case. Plaintiff has no adequate remedy at law.

10. Defendant Marianne Horinko is the Acting Administrator of the U.S. Environmental Protection Agency.

11. Defendant U.S. Environmental Protection Agency is a federal agency charged with the administration of the CWA (as more specifically described herein), among other environmental statutes.

STATUTORY BACKGROUND

12. In 1972, Congress passed the CWA 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 CWA set 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." 33 U.S.C. § 1251(a)(2).

13. To meet this and other goals, the law requires the adoption of water quality standards. Water quality standards are intended to be promulgated by the states and to establish the desired condition of each waterway within the state's regulatory jurisdiction. While states are given the initial responsibility of adopting adequate standards, EPA is assigned the authority and mandatory duty of ensuring that states' standards comply with the CWA. 33 U.S.C. § 1313(a) - (c).

14. 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 in those waters and still protect the designated uses, expressed in numerical limits or narrative form; and (3) an antidegradation policy with implementation procedures to protect the current quality of waters and all of their existing uses. 33 U.S.C. § 1313(c)(2) and (d)(4)(B); 40 C.F.R. Part 131, Subpart B.

15. States are required to review and revise their water quality standards at least every three years (the "triennial review"), and to submit all existing and revised water quality standards to EPA for review. 33 U.S.C. § 1313(c)(1). New or revised standards are to be established by "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A).

16. EPA retains approval authority over new or revised water quality standards. EPA must notify the state within 60 days of submission of a new or revised standard if it approves the standard as complying with the CWA. If EPA disapproves the standard, it must within 90 days notify the state and specify the required changes. If the state fails to adopt the specified changes within an additional 90-day period, EPA is required to "promptly" propose and promulgate a revised standard for the state. 33 U.S.C. § 1313(c)(3) and (4)(A). EPA is also required to establish a new or revised

standard whenever the agency determines that a revised or new standard is necessary to meet the requirements of the CWA. 33 U.S.C. § 1313(c)(4)(B).

STATEMENT OF FACTS

17. The Missouri Clean Water Commission ("MCWC"), a seven-member citizen commission, has the authority and responsibility under state law of approving revisions to Missouri's water quality standards. The Missouri Department of Natural Resources ("MDNR"), under the supervision of the MCWC, has the responsibility of implementing and enforcing the water quality standards.

18. Missouri's water quality standards, as further specified below, do not comply with the requirements of the CWA, its implementing regulations and agency guidance. In many important areas, the standards have not complied with the CWA for many years.

19. On or about February 15, 1994, the State of Missouri published in its *State Register* revisions to the water quality standards. These revisions were subsequently submitted to EPA for review and approval as required by the CWA.

20. On or about October 1, 1996, the State of Missouri published in its *State Register* additional revisions to the water quality standards. These revisions were also submitted to EPA for review and approval as required by the CWA.

21. On or about March 31, 1998, the EPA's Office of the Inspector General issued an Audit Report entitled "Missouri's Water Quality Standards and Monitoring." The report concluded, in part, that "several of Missouri's standards were less restrictive than those required by the Clean Water Act." Significant deficiencies highlighted in the report included the state's failure to ensure that its waters are safe for swimming and other aquatic recreation uses, the state's adoption of standards for certain pollutants that were less protective than EPA guidance, and the state's failure to adopt an implementation procedure for its antidegradation policy.

22. On or about September 8, 2000, EPA transmitted a 30 page letter to the Director of MDNR that identified numerous provisions of the state's water quality standards that are inconsistent with the CWA.

23. The September 8, 2000, EPA letter formally disapproved eight categories of the revisions that had been adopted by the MCWC in 1994 and 1996. With regard to these eight categories of disapproved revisions, EPA gave the state 90 days from the date of the letter to bring the standards into compliance with the CWA. EPA further indicated that it would propose compliant standards for the state if this deadline was not adhered to.

24. The eight categories of revisions to the water quality standards that EPA disapproved include the following:

- 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 this standard;
- c. The water quality standards 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 6 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;
- h. The removal of designated uses from 21 lakes and 6 streams without following the required procedures.

25. 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 CWA and implementing regulations. 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;
- b. The long-standing failure of Missouri's standards to protect the vast majority of the state's waters for whole body contact recreation, which failure allows for essentially unregulated discharges of bacteria and other pathogens.

26. Finally, EPA's September 8, 2000, letter identified other provisions of the state's standards that EPA acknowledges are not in compliance with the CWA or its implementing regulations. These provisions include the six listed below:

- a. The state's failure to adopt appropriate bacteriological indicators to protect aquatic recreation uses;
- 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;

- c. The state's failure to adopt an implementation procedure for its antidegradation policy;
- d. The state's failure to establish a default use classification consistent with the purposes of the CWA for waters that the state has failed to include on its so-called "classified" waters list;
- e. The state's allowance of a "mixing zone" on intermittent and ephemeral streams that threatens aquatic life;
- 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.

27. On or about March 8, 2001, MDNR sent a response to EPA in which it promised to rectify the deficiencies in the water quality standards by the fall of 2001. MDNR thereafter convened six "stakeholder meetings" from April to June of 2001 to discuss how best to bring the standards into compliance with the CWA. MCE participated in all but one of these meetings.

28. One year after its initial response to EPA, MDNR sent another letter to EPA, on or about March 8, 2002, in which it promised to publish a proposed rule with the necessary revisions by July 1, 2002.

29. MCE and other interested members of the public, on numerous occasions in the period from 2001 to 2003, informally requested that MDNR take action to fix the deficiencies in the water quality standards. For example, prior to filing its notice of intent to sue, MCE sent a letter in March 2003 to MDNR's director pointing out the significant delay in adopting compliant standards and requesting an update on the status of MDNR's efforts to rectify the deficiencies. MCE received no response to this letter until nearly three weeks after it filed the notice of intent to sue.

30. As of the date this Complaint was filed, the State of Missouri has not revised its water quality standards to make them compliant with the CWA.

31. Despite the prolonged failure of the State of Missouri to bring its water quality standards into compliance, and despite its promise to propose and promulgate standards for Missouri within 90 days of its September 2000 letter, EPA has failed to take action to ensure that Missouri's lakes and streams are safe for human use and protective of aquatic life. EPA has the ultimate responsibility for ensuring that water quality standards comply with the CWA.

32. On July 2, 2003, MCE sent EPA a 60-day notice of intent to sue for failure to perform mandatory duties under the CWA as required by section 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2). Subsequent to sending its notice of intent to sue, MCE has continued to urge MDNR and EPA to adopt compliant standards. However, the agencies have failed to take the necessary actions to comply with the law.

CLAIMS FOR RELIEF

First Claim for Relief **(CWA and APA)**

33. Plaintiff realleges all preceding paragraphs.

34. In 1994, the MCWC submitted to EPA a revised water quality standard applicable to wetlands.

35. EPA disapproved that standard on September 8, 2000, finding the revision to be inconsistent with the CWA because it "represents a significant reduction in the level of protection afforded the State's wetlands." EPA gave the state 90 days to remedy the inconsistency.

36. The MCWC has failed to make any changes to the disapproved standard.

37. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate a revised standard for the State of Missouri, yet EPA has failed to carry out this duty.

38. EPA has violated 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard for Missouri's wetlands, and by failing to thereafter promulgate the standard.

39. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. EPA's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Second Claim for Relief
(CWA and APA)

40. Plaintiff realleges all preceding paragraphs.

41. In 1994, the MCWC submitted to EPA a revised water quality standard relating to the required dissolved oxygen content in the state's waters.

42. EPA disapproved that standard on September 8, 2000, finding the revision to be inconsistent with the CWA because it does not provide for a clear method of implementation, and therefore allows conditions that jeopardize aquatic life in Missouri's waters. EPA gave the state 90 days to remedy the inconsistency.

43. The MCWC has failed to make any changes to the disapproved standard.

44. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate a revised standard for the State of Missouri, yet EPA has failed to carry out this duty.

45. EPA has violated 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard for dissolved oxygen, and by failing to thereafter promulgate the standard.

46. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Third Claim for Relief
(CWA and APA)

47. Plaintiff realleges all preceding paragraphs.

48. In 1994, the MCWC submitted to EPA a revised water quality standard specifying that pollution by metals in drinking water supplies are to be measured using dissolved metals as opposed to total recoverable metals.

49. EPA disapproved that standard on September 8, 2000, finding the revision to be inconsistent with the CWA because it is less protective of human health than the standard set forth in current EPA guidance. EPA gave the state 90 days to remedy the inconsistency.

50. The MCWC has failed to make any changes to the disapproved standard.

51. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate a revised standard for the State of Missouri, yet EPA has failed to carry out this duty.

52. EPA has violated 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard for metals in drinking water supplies, and by failing to thereafter promulgate the standard.

53. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Fourth Claim for Relief
(CWA and APA)

54. Plaintiff realleges all preceding paragraphs.

55. In 1996, the MCWC submitted to EPA revised water quality standards for the protection of aquatic life from the pollutants cadmium, copper, lead and zinc.

56. EPA disapproved those standards on September 8, 2000, finding the revisions to be inconsistent with the CWA because they were less protective than the standards set forth in current EPA guidance. Specifically, MDNR had failed to account for the existence of some aquatic species in calculating its revised standards, and had

allowed for an imprecise consideration of water hardness when setting such standards.

EPA gave the state 90 days to remedy the inconsistency.

57. The MCWC has failed to make any changes to the disapproved standards.

58. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate revised standards for the State of Missouri, yet EPA has failed to carry out this duty.

59. EPA has violated 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard protecting aquatic life from pollution by these metals, and by failing to thereafter promulgate the standard.

60. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Fifth Claim for Relief
(CWA and APA)

61. Plaintiff realleges all preceding paragraphs.

62. In 1994 and 1996, the MCWC submitted to EPA revised water quality standards for the protection of the health of those consuming fish from waters designated for "Human Health Protection – Fish Consumption." The standards related to the following six pollutants: trihalomethanes, 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene.

63. EPA disapproved those standards on September 8, 2000, finding the revisions to be inconsistent with the CWA because they were either less protective than the standards set forth in current EPA guidance or had removed an existing standard entirely. EPA gave the state 90 days to remedy the inconsistency.

64. The MCWC has failed to make any changes to the disapproved standards.

65. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate revised standards for the State of Missouri, yet EPA has failed to carry out this duty.

66. EPA has violated 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard protecting the health of those consuming fish from the state's waters, and by failing to thereafter promulgate the standard.

67. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Sixth Claim for Relief
(CWA and APA)

68. Plaintiff realleges all preceding paragraphs.

69. In 1994 and 1996, the MCWC submitted to EPA revised water quality standards for the protection of the health of those directly exposed to, or consuming fish from, water bodies designated for "Drinking Water Supply." The standards related 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.

70. EPA disapproved those standards on September 8, 2000, finding the revisions to be inconsistent with the CWA because they were less protective than the standards set forth in current EPA guidance. EPA gave the state 90 days to remedy the inconsistency.

71. The MCWC has failed to make any changes to the disapproved standards.

72. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate revised standards for the State of Missouri, yet EPA has failed to carry out this duty.

73. EPA has violated the 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard protecting the health of those coming in contact with, or consuming fish from, waters designated for "Drinking Water Supply," and by failing to thereafter promulgate the standard.

74. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Seventh Claim for Relief
(CWA and APA)

75. Plaintiff realleges all preceding paragraphs.

76. In 1994 and 1996, the MCWC submitted to EPA revised water quality standards concerning the designation of water bodies for the use of "Cold-Water Sport Fisheries." The revised standard reduced or removed this use from six water bodies: the North Fork of the White River (Ozark County); South Indian Creek (Newton and McDonald Counties); Spring Creek (Douglas and Ozark Counties); Turnback Creek (Taney County); Indian Creek (Franklin and Washington Counties); and Bull Shoals Lake (Ozark County).

77. EPA disapproved those standards on September 8, 2000, finding the revisions to be inconsistent with the CWA because they removed a designated use from water bodies without providing justification as required by 40 C.F.R. § 131.10. EPA gave the state 90 days to remedy the inconsistency.

78. The MCWC has failed to make any changes to the disapproved standards.

79. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate revised standards for the State of Missouri, yet EPA has failed to carry out this duty.

80. EPA has violated the 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard restoring the designated use of

"Cold-Water Sport Fisheries" to these streams, and by failing to thereafter promulgate the standard.

81. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Eighth Claim for Relief
(CWA and APA)

82. Plaintiff realleges all preceding paragraphs.

83. In 1994 and 1996, the MCWC submitted to EPA revised water quality standards that reduced the protection afforded to many of the state's waters. The revisions to 10 C.S.R. § 20-7.031, Tables G and H resulted in the deletion of designated uses for a number of classified lakes and stream segments or the removal of waters from the state's so-called "classified waters" list altogether. These revisions affected 21 lakes and 6 streams and are described in detail in Tables 4.1 and 4.2 in the EPA's September 8, 2000, letter to MDNR.

84. EPA disapproved the revisions on September 8, 2000, finding the revisions to be inconsistent with the CWA because they removed a designated use from water bodies without providing justification as required by 40 C.F.R. § 131.10 or de-classified the waters entirely, which also resulted in a removal of designated uses. EPA gave the state 90 days to remedy the inconsistency.

85. The MCWC has failed to make any changes to the disapproved standards.

86. The MCWC's failure to act triggered EPA's nondiscretionary duty to propose and promulgate revised standards for the State of Missouri, yet EPA has failed to carry out this duty.

87. EPA has violated 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard restoring the designated uses to these lakes and streams, and by failing to thereafter promulgate the standard.

88. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Ninth Claim for Relief
(CWA and APA)

89. Plaintiff realleges all preceding paragraphs.

90. The State of Missouri's water quality standards allow for new discharges of pollutants from publicly-owned waste treatment facilities and mine dewatering operations into waters designated as "Outstanding National Resource Waters" ("ONRWs"). The ONRW classification applies to only three streams that represent the highest quality waters in the entire state, namely the Current, Jacks Fork and Eleven Point Rivers.

91. In its September 8, 2000, letter, EPA found the provision allowing additional discharges in ONRWs to be "inconsistent with both federal regulations at 40 C.F.R. § 131.12(a)(3) and the State's own antidegradation policy." Federal regulations prohibit new or increased discharges to ONRWs. EPA further found that the State's approach "does not provide an appropriate level of protection for high quality waters."

92. The MCWC has failed to correct this inconsistency of the State's water quality standards with the CWA.

93. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

94. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully

withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Tenth Claim for Relief
(CWA and APA)

95. Plaintiff realleges all preceding paragraphs.

96. The State of Missouri's water quality standards protect less than 10 percent of the State's identified water body segments for "whole body contact recreation." The designation of waters for whole body contact recreation primarily requires the application of bacteria limits on effluent to ensure the protection of the health of those who undertake recreational activities in such waters.

97. Section 101(a)(2) of the CWA, 33 U.S.C. § 1251(a)(2), established as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and ... recreation in and on the water," wherever attainable. This national goal is commonly referred to as the "fishable/swimmable" goal of the CWA. Section 303(c)(2)(A) of the CWA, 33 U.S.C. § 1313(c)(2)(A), requires water quality standards to "protect the public health and welfare, enhance the quality of water, and serve the purposes of this Act." EPA's regulations at 40 C.F.R. § 131 interpret and implement these provisions by requiring that water quality standards provide for fishable/swimmable uses unless those uses have been shown to be unattainable, thereby creating a rebuttable presumption that all waters shall be made safe for fishing and swimming.

98. EPA has since 1984 communicated its concern to MDNR about the State's failure to meet the goal in the CWA of ensuring that all waters are "swimmable." In its September 8, 2000, letter, EPA found the State's failure to designate all streams for whole body contact recreational use is a "significant deficiency" and "inconsistent" with the CWA.

99. The MCWC has failed to correct this inconsistency of the State's water quality standards with the CWA.

100. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

101. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Eleventh Claim for Relief
(CWA and APA)

102. Plaintiff realleges all preceding paragraphs.

103. The State of Missouri's water quality standards use fecal coliform bacteria as the indicator organism for pollution by pathogens.

104. Since 1986, EPA has recommended, based on scientific evidence, the use of either *E. coli* or *enterococci* bacteria as indicators of pollution by pathogens. In March 1999, EPA stated that it would use its authority under the CWA to promulgate new standards for states that did not voluntarily adopt the change to either *E. coli* or *enterococci* by the year 2003.

105. The MCWC has failed to correct this inconsistency of the State's water quality standards with the CWA. The inaction by the MCWC up to the date of the filing of this Complaint ensures that the appropriate bacteriological indicators will not apply to Missouri's waters by the year 2003 as required by EPA.

106. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

107. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Twelfth Claim for Relief
(CWA and APA)

108. Plaintiff realleges all preceding paragraphs.

109. Federal regulations provide specific requirements for the establishment of site specific water quality standards, meaning standards that apply to only one or a small subset of a state's waters. States are allowed to develop site specific standards in compliance with these requirements, including that such standards be submitted to EPA for review and approval. *See* 40 C.F.R. §§ 131.5, 131.6 and 131.11.

110. The Missouri 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).

111. EPA commented on this inconsistency with the CWA in its September 2000 letter. It indicated that the deficiency could be rectified by requiring that all site specific standards be subject to EPA review and approval, or through the adoption of an EPA approved procedure for the establishment of site specific standards.

112. The MCWC has failed to correct this inconsistency of the State's water quality standards with the CWA.

113. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

114. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to

act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Thirteenth Claim for Relief
(CWA and APA)

115. Plaintiff realleges all preceding paragraphs.

116. Federal regulations require that a state's water quality standards contain an anti-degradation policy and a method of implementing that policy. *See* 40 C.F.R. § 131.12(a).

117. The State of Missouri's water quality standards contain an anti-degradation policy, but do not contain a method for implementing that policy.

118. In September 2000, EPA notified the MDNR that "the State is not in full compliance with 40 C.F.R. § 131.12(a)." It also noted that MDNR had attempted to develop anti-degradation implementation methods over the past decade, but had never put them into effect.

119. The MDNR and MCWC have failed to correct this inconsistency of the State's water quality standards with the CWA.

120. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

121. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Fourteenth Claim for Relief
(CWA and APA)

122. Plaintiff realleges all preceding paragraphs.

123. Section 303(c) of the CWA requires that states have water quality standards applicable to all "navigable waters." 33 U.S.C. §§ 1313(c)(2)(A) and 1362(7). The goals of the CWA, including the "fishable/swimmable" goal, therefore apply to all navigable waters within a state, as that term is defined by the CWA.

124. The State of Missouri has created an artificial classification system for its water bodies. The so-called "classified" waters list found in the state's water quality standards does not include all "navigable waters" as defined by the CWA. Because many of Missouri's water quality standards only apply to classified waters, a significant number of navigable waters are left with only minimal protection.

125. EPA found in its September 2000 letter to MDNR that the state's water quality standards fail to adequately protect unclassified waters. For example, there is no default designated use for Missouri's unclassified waters, meaning that they are not required to meet the "fishable/swimmable" goals of the CWA.

126. The MCWC has failed to correct this inconsistency of the State's water quality standards with the CWA.

127. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

128. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Fifteenth Claim for Relief
(CWA and APA)

129. Plaintiff realleges all preceding paragraphs.

130. The Missouri water quality standards allow for "mixing zones" (areas near pollution discharges) where certain water quality standards do not have to be met.

131. In September 2000, EPA communicated to MDNR that the state's allowance of mixing zones on small streams (intermittent or ephemeral) was jeopardizing aquatic life communities. EPA noted that on small streams the intended dilution effect "would be inadequate" to protect aquatic life under some hydrological conditions. .

132. The MCWC has failed to correct this inconsistency of the State's water quality standards with the CWA.

133. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

134. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

Sixteenth Claim for Relief
(CWA and APA)

135. Plaintiff realleges all preceding paragraphs.

136. The Missouri water quality standards allow for an exemption from the fecal coliform standard that applies to streams designated for whole body contact recreation anytime the stream is affected by "stormwater runoff."

137. In September 2000, EPA communicated to MDNR that the state's allowance of this so-called "high flow exemption" is not protective of public health. It also found that the exemption is "broad and qualitative, providing for possible inappropriate and arbitrary implementation." EPA further found that it had "already disapproved a more detailed and quantitative high flow exemption in Kansas."

138. The MCWC has failed to correct this inconsistency of the State's water quality standards with the CWA.

139. EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA, triggering its mandatory duty to propose and promulgate a compliant standard for the State of Missouri. EPA's failure to propose and promulgate a new standard for Missouri violates the CWA. 33 U.S.C. § 1313(c)(4).

140. In the alternative, EPA's failure to propose and promulgate a compliant standard for the State of Missouri violates provisions of the APA. The agency's failure to act pursuant to its authority in 33 U.S.C. § 1313(c)(4)(B) constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

WHEREFORE, Plaintiff prays for the following relief:

- 1) A declaratory judgment that:
 - a) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard for Missouri's wetlands that is compliant with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate such a standard for wetlands constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
 - b) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard for dissolved oxygen that is compliant with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate such a standard for dissolved oxygen constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

- c) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard for the measurement of metal contamination in drinking water supplies that is compliant with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate such a standard for the measurement of metal contamination in drinking water supplies constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- d) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard protective of aquatic life from the pollutants cadmium, copper, lead and zinc that is compliant with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a compliant standard to protect aquatic life from these metals constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- e) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard for trihalomethanes, 4-4'-DDT, 4-4'-DDE, 4-4'-DDD, bis chloromethyl ether, and pentachlorobenzene in waters designated for "Human Health Protection – Fish Consumption" that is compliant with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a compliant standard for these six pollutants constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- f) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality

standard for 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 in waters designated for "Drinking Water Supply" that is compliant with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a compliant standard for these nine pollutants constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

- g) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard that restores the designated use of "Cold-Water Sport Fisheries" to the North Fork of the White River (Ozark County); South Indian Creek (Newton and McDonald Counties); Spring Creek (Douglas and Ozark Counties); Turnback Creek (Taney County); Indian Creek (Franklin and Washington Counties); and Bull Shoals Lake (Ozark County), and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a standard that restores this designated use constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- h) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(A) by failing to promptly publish a proposed water quality standard that restores designated uses for 21 lakes and 6 streams, and by failing to thereafter promulgate the standard. (The 21 lakes and 6 streams are specified in Tables 4.1 and 4.2 in the EPA's September 8, 2000, letter to MDNR.) In the alternative, that Defendant EPA's failure to act to propose and promulgate a standard that restores these designated uses constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

- i) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed water quality standard that prohibits new discharges of pollutants into waters designated as "Outstanding National Resource Waters", and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a standard that prohibits such discharges constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- j) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed water quality standard that designates the use of "whole body contact recreation" for all waters in Missouri for which such use has not been shown to be unattainable, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a standard that designates this use constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- k) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed water quality standard that specifies the use of either *E. coli* or *enterococci* bacteria as the indicator organism for contamination by pathogens, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a standard that uses a proper indicator organism that complies with EPA guidance constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- l) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed water quality standard that specifies a method of setting site specific standards that complies

with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a method of setting site specific standards constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

- m) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed antidegradation standard that contains an implementation procedure, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate an anti-degradation standard that includes an implementation procedure constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- n) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed water quality standard that ensures all waters in Missouri, not just the state's "classified" waters, are subject to standards that comply with the CWA, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a standard that applies to all waters in Missouri constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).
- o) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed water quality standard that eliminates the application of "mixing zones" to intermittent and ephemeral streams, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to propose and promulgate a standard that eliminates the application of mixing zones on intermittent and ephemeral streams constitutes an action unlawfully withheld and unreasonably

delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

- p) Defendant EPA has violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and (c)(4)(B) by failing to promptly publish a proposed water quality standard that eliminates the high-flow exemption from the bacteria standard, and by failing to thereafter promulgate the standard. In the alternative, that Defendant EPA's failure to act to eliminate the high-flow exemption constitutes an action unlawfully withheld and unreasonably delayed, and is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(1) and (2).

2) An injunction requiring Defendant EPA to promptly propose and promulgate revised water quality standards for the State of Missouri as follows:

- a) A water quality standard for Missouri's wetlands that is compliant with the CWA;
- b) A water quality standard for dissolved oxygen that is compliant with the CWA;
- c) A water quality standard for the measurement of metal contamination in drinking water supplies that is compliant with the CWA;
- d) A water quality standard protective of aquatic life from the pollutants cadmium, copper, lead and zinc that is compliant with the CWA;
- e) A water quality standard for trihalomethanes, 4,4'-DDT, 4,4'-DDE, 4,4'-DDD, bis chloromethyl ether, and pentachlorobenzene in waters designated for "Human Health Protection – Fish Consumption" that is compliant with the CWA;
- f) A water quality standard for 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 in waters designated for "Drinking Water Supply" that is compliant with the CWA;
- g) A water quality standard that restores the designated use of "Cold-Water Sport Fisheries" to the North Fork of the White River (Ozark County); South Indian Creek (Newton and McDonald Counties); Spring Creek (Douglas and Ozark

Counties); Turnback Creek (Taney County); Indian Creek (Franklin and Washington Counties); and Bull Shoals Lake (Ozark County);

- h) A water quality standard that restores designated uses for 21 lakes and 6 streams as set forth in Tables 4.1 and 4.2 in the EPA's September 8, 2000, letter to MDNR;
- i) A water quality standard that prohibits new discharges of pollutants into waters designated as "Outstanding National Resource Waters";
- j) A water quality standard that designates the use of "whole body contact recreation" for all waters in Missouri for which such use has not been shown to be unattainable;
- k) A water quality standard that specifies the use of either *E. coli* or *enterococci* bacteria as the indicator organism for contamination by pathogens;
- l) A water quality standard that specifies a method of setting site specific standards that complies with the CWA;
- m) An antidegradation standard that contains an implementation procedure that complies with the CWA;
- n) A water quality standard that ensures all waters in Missouri, not just the state's "classified" waters, are subject to standards that comply with the CWA;
- o) A water quality standard that eliminates the application of "mixing zones" to intermittent and ephemeral streams;
- p) A water quality standard that eliminates the high-flow exemption from the bacteria contamination standard.

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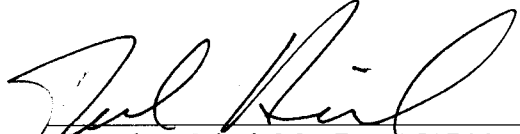
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- 3) An order awarding Plaintiff its costs of litigation, including reasonable attorneys' fees under 33 U.S.C. § 1365 or, in the alternative, under 28 U.S.C. § 2412; and
- 4) Such other and further relief as the Court deems just and proper.

Respectfully Submitted,

By:



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