

2004

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Recommended Citation

Clare N. Murphy, *Missouri's 303(d) List Now a "Rule": Is This Good for Missouri's Waters, Good for Agriculture, or No Good at All? Missouri Soybean Association v. The Missouri Clean Water Commission*, 11 Mo. Env'tl. L. & Pol'y Rev. 171 (2004)

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CASENOTE

**MISSOURI'S 303(d) LIST NOW A "RULE": IS THIS GOOD FOR MISSOURI'S WATERS,
GOOD FOR AGRICULTURE, OR NO GOOD AT ALL?**

*Missouri Soybean Association v. The Missouri Clean Water Commission*¹

I. INTRODUCTION

In 1998, the Missouri Clean Water Commission ("the Commission") included the Missouri and Mississippi Rivers ("the rivers") on Missouri's 303(d) list ("the list") of waters that do not meet the state's water quality standard.² Listing the rivers was the first step in a long, state-federal collaborative process required by the Clean Water Act, which aims at controlling water pollution from all its sources. The Missouri Soybean Association, along with other large agricultural interests, attacked the listing of the rivers in both federal and state court. These groups sought a judicial declaration that the creation of the state's 303(d) constitutes rulemaking, because as such, the 1998 list would be considered void for failure to abide by the rulemaking procedures required by the Missouri Administrative Procedural Act. Although the Association lost in both federal and state court, the Missouri Legislature enacted an amendment mandating that all future 303(d) lists are rules. This note will discuss the motivations driving the Association and other agricultural groups to seek mandates that agencies must follow rulemaking procedures when creating the 303(d) list. This note will also discuss whether ultimately attaining that ruling, albeit legislatively, is really to their advantage, as well as the potential effects the required administrative procedures could have on water pollution abatement.

II. FACTS AND HOLDING

Under the Clean Water Act ("CWA"),³ states are required to identify and list those waters within their boundaries for which current pollution control measures are not strict enough, such that the waterbody meets water quality standards set in accordance with the water's designated use.⁴ The 1998 list originated with Missouri Department of Natural Resources ("MDNR"), who had developed a proposed list of impaired waters for the 303(d) list, published that list for public comment, and revised the list.⁵ At a meeting in September of 1998, the Commission, the state entity with authority to approve the list for submission to the Environmental Protection Agency ("EPA"), accepted the MDNR's proposed list and added three waters, including the Missouri and Mississippi Rivers, in response to the input from the Sierra Club.⁶

Identification of impaired waters and preparation of a 303(d) list is but the "starting point for the Clean Water Act's pollution process."⁷ The CWA next requires that the EPA approve each state's list.⁸ After approval, the impaired waters undergo scientific study to establish the total maximum daily load ("TMDL") of

¹ 102 S.W.3d 10 (Mo. 2003) (en banc) [hereinafter *Mo. Soybean Assn.*].

² *Id.* at 20; see 33 U.S.C. § 1313 (d)(1)(A) (2000).

³ 33 U.S.C. §§ 1251-1376.

⁴ 33 U.S.C. § 1313 (d)(1)(A); 40 C.F.R. § 130.7(b)(1) (2002).

⁵ *Mo. Soybean Assn.*, 102 S.W.3d at 20; see also *Mo. Soybean Assn. v. Mo. Clean Water Commn.*, 2002 WL 45891 at *4 (Mo. App. W.D. 2002) [hereinafter *Mo. Soybean*].

⁶ *Id.*

⁷ *American Canoe Assn., Inc. v. EPA*, 30 F. Supp. 2d 908, 912 (E.D. Va. 1998) (citing 33 U.S.C. § 1313 (d)(1)(A)).

⁸ 33 U.S.C. § 1313(d)(2).

specifically identified pollutants that a body of water can absorb before its quality is affected.⁹ Before submission to the EPA, the Commission had organized the 1998 list into three categories of TMDL management for impaired waters: (1) those waters proposed for full TMDL development; (2) those waters reported as impaired, but which required further environmental monitoring to confirm the waters as impaired before prior to TMDL development; and (3) those recognized as impaired but for which there was no practical remedy.¹⁰ The Commission listed the Missouri and Mississippi Rivers as impaired due to “habitat loss” due to “channelization” and added them to the second category of listed waters.¹¹ The EPA granted approval of the Commission’s list after adding six more waters.¹² Despite Missouri’s categorization of the list, the EPA required TMDL development for all waterbodies on the 1998-303(d) list.¹³

In anticipation of TMDL development, the Missouri Soybean Association (“MSA”) brought an action in federal court challenging the EPA’s approval of the list.¹⁴ Judge Scott Wright of the United States District Court for the Western District of Missouri dismissed the case with prejudice, on ripeness grounds.¹⁵ The court found that the controversy was not ready for review because the complaint alleges harms that may occur only after implementation of the presumably more stringent regulations mandated by the TMDLs.¹⁶ The court ruled that such harms were too remote and speculative to adjudicate.¹⁷ The MSA appealed.¹⁸ The Federal Court of Appeals also found that the action was not ripe, stating that “[m]ore stringent controls on water use . . . will not occur until after TMDLs are developed and implemented. Even then it remains uncertain whether TMDL development or regulatory implementation will adversely impact MSA’s members.”¹⁹ Because the court did not have jurisdiction over the unripe case, there was no adjudication on the merits; thus, dismissal was without prejudice.²⁰ The court ordered the case vacated and remanded.²¹

The MSA, along with other trade and business associations,²² also filed a petition for declaratory judgment and injunctive relief pursuant to the CWA and the Missouri Administrative Procedure Act (“MAPA”) in the Circuit Court of Cole County.²³ MSA challenged the Commission’s decision to include the rivers on the list submitted to EPA under MAPA, which gives courts the power to render declaratory judgments on administrative actions constituting a rule.²⁴ The plaintiffs argued that the promulgation of the list meets the guidelines of a “rule” as defined by MAPA, and that the Commission’s inclusion of the rivers therefore

⁹ 33 U.S.C. § 1313(d)(1)(c); 40 C.F.R. § 130.7(c)(1); see also *Sierra Club, North Star Chapter v. Browner*, 843 F. Supp. 1304, 1306-07 (D. Minn.1993) (describing TMDL process).

¹⁰ *Mo. Soybean Assn.*, 102 S.W.3d at 20.

¹¹ *Id.*

¹² *Id.* The final list contained a total of 165 waters.

¹³ *Id.*

¹⁴ See *Mo. Soybean Assn. v. EPA*, 289 F.3d 509 (8th Cir. 2002).

¹⁵ See *id.*

¹⁶ *Mo. Soybean Assn.*, 102 S.W.3d at 28.; Harms alleged included decreases in property values, required changes in land management practices, limitations on crop growth and rotation, and limitations on use of fertilizers and pesticides. *Mo. Soybean Assoc. v. EPA*, 289 F.3d at 511.

¹⁷ *Mo. Soybean Assn.*, 102 S.W.3d at 29.

¹⁸ See *Mo. Soybean Assn. v. EPA*, 289 F.3d 509.

¹⁹ *Id.* at 512.

²⁰ See *id.* at 513.

²¹ *Id.*

²² The other appellants in the case are the Missouri Ag. Industries Council, Inc., Associated Industries of Missouri, and the Missouri Chamber of Commerce. *Mo. Soybean Assn.*, 102 S.W.3d at 14, n. 1.

²³ *Mo. Soybean*, 2002 WL 45891 at *6.

²⁴ *Mo. Soybean Assn.*, 102 S.W.3d at 21-22.

constituted rulemaking.²⁵ The plaintiffs also argued that they would incur a variety of injuries due to the inclusion and the resulting TMDL requirements, including:

changes in land-management practices, limits on the sales and use of fertilizers and pesticides, limits on crop growth and rotation, decreased crop yields, increased farming cost, limitations on production and/or manufacturing quality and quality, changes in NPDES point source effluent limitations, increased cost of water treatment, restrictions on locations for production and manufacturing, and limitations on raw materials that could be used in production or manufacturing.²⁶

The court found that in creating the 1998-303(d) list, neither the Commission nor the MDNR had rendered a final decision subject to judicial review.²⁷ Judge Thomas Brown dismissed the petition with prejudice for lack of subject matter jurisdiction.²⁸

The MSA appealed the decision.²⁹ The Court of Appeals affirmed the decision of the trial court and held that Missouri's 1998-303(d) list was not a rule, and the development of the list was not rulemaking due to the exception in § 536.010.4(c) of MAPA, which excludes "[a]n intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication."³⁰ The appellate court reasoned that the creation of the 303(d) list, like the creation of these other forms of governmental communication, also does not "substantially" affect the public's legal rights or the procedures available to the public.³¹

The appellate court granted transfer to the Missouri Supreme Court in April of 2002, resulting in the instant case.³² The Supreme Court did not base its ruling on the intergovernmental communications exception to rulemaking, as the appellate court had. Special Judge Lawrence Mooney held that the 1998-303(d) list of impaired waters did not constitute a "rule" under MAPA because its creation did not have a substantial effect on appellants' legal rights, and that the circuit court therefore lacked subject-matter jurisdiction over a declaratory judgment action challenging the decision to add the rivers to that list.³³ Due to the hypothetical nature of the appellants claims, the court found, as the federal court had, that the case was not ripe for review so the court could not reach the merits; the judgment was modified to dismissal without prejudice.³⁴

III. LEGAL BACKGROUND

A. Federal Law

Before 1972, Congress attempted to control water pollution through the Federal Water Pollution Control Act.³⁵ The Act focused regulatory efforts on water quality standards, which were to serve both to guide

²⁵ *Id.*

²⁶ *Id.* at 21.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See Mo. Soybean*, 2002 WL 45891 at *7.

³⁰ *Id.* at *11 (citing Mo. Rev. Stat. § 536.010(4)(c) (2000)).

³¹ *Mo. Soybean*, 2002 WL 45891 at *14.

³² *See Mo. Soybean Assn.*, 102 S.W.3d at 10.

³³ *Id.* at 29.

³⁴ *Id.*

³⁵ *See* Ann K. Wooster, *Actions Brought Under Federal Water Pollution Control Act Amendments Of 1972 (Clean Water Act)* (33 U.S.C.A. §§ 1251 et seq.)—*Supreme Court Cases*, 163 A.L.R. Fed. 531 (2000).

performance by polluters and to trigger legal action to abate pollution.³⁶ But the Act proved ineffective, as evidenced by the Senate Committee on Public Works' statement that "the Federal water pollution control program . . . has been inadequate in every vital aspect."³⁷ The problems arose from the nature of the standards themselves, which focused only on the "tolerable effects rather than the preventable causes of water pollution, from the awkwardly shared federal and state responsibility for promulgating such standards, and from the cumbersome enforcement procedures."³⁸ These factors combined to make it very difficult to develop and enforce standards to govern individual polluters' conduct.³⁹

In response to the shortcomings of the Federal Water Pollution Control Act, Congress made important amendments to the laws in 1972, which became known as "the Clean Water Act" ("CWA").⁴⁰ Congress enacted the CWA in an effort to restore and maintain "the chemical, physical, and biological integrity of the Nation's waters."⁴¹ Congress designed the CWA as comprehensive protection of unpolluted waters and as a means of repairing damaged waters; the Supreme Court has consistently referred to the 1972 Act as intending "to establish an all-compassing program of water pollution regulation" and "to establish a comprehensive long-range policy for the elimination of water pollution."⁴² In order to meet these goals, the CWA posited "a major shift in enforcement policy—away from primary reliance on water-quality standards^[43] and toward primary reliance on specific effluent limits^[44] on all point sources."⁴⁵ Thus the amendments restrict the discharge of pollution, regardless of whether the stream into which the waste was dumped was over-polluted at the time.⁴⁶

This new CWA enforcement policy is based on a partnership between the States and the Federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴⁷ Effluent limitations are promulgated by the Environmental Protection Agency ("EPA") and water quality standards are promulgated by the States.⁴⁸ With this partnership in mind, Congress devised two distinct regulatory schemes for enforcement of the CWA.⁴⁹ One program specifically targeted point source (pollutants discharged from a pipe, conduit, or channel) pollution.⁵⁰ The CWA's other

³⁶ *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-03 (1976).

³⁷ Sen. Rpt. 92-414, at 5 (October 28, 1971).

³⁸ *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202-03 (1976).

³⁹ *Id.*

⁴⁰ See *Natural Resources Defense Council v. U.S. E.P.A.*, 915 F.2d 1314, 1316 (9th Cir. 1990).

⁴¹ 33 U.S.C. § 1251.

⁴² See e.g., *Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 318 (1981).

⁴³ The term "water quality standards" is defined as "provisions of State or Federal Law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are designed to protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." 40 C.F.R. § 131.3(i).

⁴⁴ An "effluent limitation" in turn is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . including schedules of compliance." 33 U.S.C. § 1362(11).

⁴⁵ *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000); 33 U.S.C. § 1362(14). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

⁴⁶ See *Arkansas v. Oklahoma*, 503 U.S. 91, 92 (1992).

⁴⁷ *Id.* at 101 (citation omitted).

⁴⁸ See *id.*

⁴⁹ Steven J. Blair, Student Author, *No Looking Back: The Western District Court of Appeals Declares that Missouri's Creation of a 303(d) list Does Not Qualify as Rulemaking*, 9 Mo. Env'tl. L. & Policy Rev. 154, 159 (2002).

⁵⁰ *Id.*

regulatory mechanism amounted to a combination of programs designed to reduce non-point source pollution (those discharging pollutants as a result of surface water runoff from farming, ranching, or logging operations).⁵¹

In order to control the discharge of a pollutant from a point source into the waters of the United States, the CWA created the National Pollutant Discharge Elimination System ("NPDES") permit.⁵² Under this program, anyone wishing to discharge pollutants must receive a permit in order to do so.⁵³ These permits mandate compliance with technology-based effluent limitations and state water quality standards.⁵⁴ They also impose conditions on data and information collection, reporting, and such other requirements the administrator deems appropriate.⁵⁵ The Administrator of the EPA has the authority to issue such permits.⁵⁶ The NPDES is national in scope, is premised on the incorporation of the best available technology for reducing effluent discharges,⁵⁷ and is the "basis of the [CWA's] success."⁵⁸

Although the technology-based strategy of effluent limitations on all point sources (the NPDES permit program) was its capstone, the 1972 Act nonetheless carried forward the pre-existing regime of water-quality standards.⁵⁹ To do so, Congress developed the comprehensive, standards-setting section 303 of the CWA, entitled the "Water Quality Standards and Implementation Plans."⁶⁰ No rivers or waters are exempted and all are covered to the full extent of federal authority over navigable waters.⁶¹ No distinction is drawn between point sources and non-point sources.⁶² Section 303 of the CWA "establishes both the process by which states adopt their [water quality standards], and the process followed by the states to implement those standards."⁶³ The section ultimately aims at utilizing cooperative efforts by both Federal and State governments to achieve ambient water quality standards.⁶⁴ This section has proved controversial, as the instant case illustrates.

Section 303(d) mandates three means of state action.⁶⁵ First, 303(d) provides that each state compile a list identifying those waters within its boundaries which fall below water quality standards, despite the imposition of enumerated controls and treatments.⁶⁶ This submission is known as a section 303(d) list.⁶⁷ It then requires the State to establish a priority ranking for these waters, taking into account the severity of the pollution and the water's general uses.⁶⁸ Finally, 303(d) requires the State to establish "Total Maximum Daily

⁵¹ *Id.*

⁵² See generally 33 U.S.C. §§ 1251-1311.

⁵³ 33 U.S.C. § 1342(a)(1).

⁵⁴ *Id.*

⁵⁵ 33 U.S.C. §§ 1318, 1342. Under the Clean Water Act, the primary permitting and enforcement responsibility shifts to the state if the state establishes a permit and enforcement program compatible with the federal program, and the state program is approved by the administrator. *Id.*

⁵⁶ 33 U.S.C. § 1342(a).

⁵⁷ See 33 U.S.C. § 1311.

⁵⁸ Sarah Birkeland, *EPA's TMDL Program*, 28 Ecology L. Q. 297, 302 (2001).

⁵⁹ *Pronsolino*, 91 F. Supp. 2d at 1341-42.

⁶⁰ *Id.* at 1343.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Blair, *supra* n. 49, at 160; see 33 U.S.C. § 1313.

⁶⁴ See *id.*

⁶⁵ See Mary E. Christopher, *Time To Bite The Bullet: A Look At State Implementation of Total Maximum Daily Loads (TMDLs) Under Section 303(D) of The Clean Water Act*, 40 Washburn L.J. 480, 505 (2001).

⁶⁶ 33 U.S.C. § 1313(d)(1)(A).

⁶⁷ *Sierra Club v. U.S. E.P.A.*, 162 F. Supp. 2d 406, 411 (D. Md. 2001).

⁶⁸ 33 U.S.C. § 1313(d)(1)(A).

Load” (“TMDL”) in accordance with the priority ranking.⁶⁹ Essentially, the TMDL program requires that the state establish the total maximum daily load of pollutant for that water such that standards are met and water quality is restored.⁷⁰ Section 303(d) thereby became an “intersection between the old and new strategies.”⁷¹ It calls for an assessment of the expected beneficial impact of the Act’s main innovation: imposition of the best effluent reduction technology could supply.⁷² If those reductions alone are enough to bring a waterway into compliance with standards, then no further action is required.⁷³ But if the reductions are not enough, then Section 303(d)(1) requires the waterway to join a list of “unfinished business.”⁷⁴

The final step, under Section 303(d)(2), is for the State to submit the prioritized list and TMDLs to the EPA for its approval or disapproval,⁷⁵ which the EPA is statutorily required to provide.⁷⁶ Every state is required to comply with the duties listed under Section 303(d), but if a state fails to do so or if the EPA disapproves the list, then the EPA must create the list and TMDL schedule for the state.⁷⁷

Missouri’s development of its 303(d) list of impaired waters for the year 1998 is the subject of the appeal in the instant case.

B. Missouri Law

The legislature delineated the State’s policies regarding the protection of Missouri’s waters in the Missouri Clean Water Law in Chapter 644.⁷⁸ The State’s responsibilities under the CWA are carried out by two administrative agencies: the Missouri Department of Natural Resources (“MDNR”) and the Missouri Clean Water Commission (“the Commission”).⁷⁹ Missouri’s Constitution vests the MDNR with the duty to “administer the programs of the state as provided by law relating to environmental control and the conservation and management of natural resources.”⁸⁰ The power to carry out the Clean Water Law’s goal of ensuring the continued purity of Missouri’s waters is vested in the Commission—the state’s water contaminant control agency.⁸¹ The Commission is responsible for submitting the state’s 303(d) list to the EPA.⁸²

Agencies like MDNR and the Commission must follow the administrative formalities set out in the Missouri Administrative Procedural Act (“MAPA”) when promulgating rules or regulations.⁸³ Section 536.010(4) of the Missouri Revised Statutes defines a “rule” as “each agency statement of general applicability

⁶⁹ *Id.*

⁷⁰ *See Mo. Soybean Assn.*, 102 S.W.3d at 16; *see also American Canoe*, 30 F. Supp. 2d at 913. EPA’s regulations break the TMDL into a “wasteload allocation” for point sources and a “load allocation” for non-point sources. 40 C.F.R. § 130.2.

⁷¹ *Pronsolino*, 91 F. Supp. 2d at 1343.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Under the CWA, the EPA has 30 days in which to approve or disapprove a state’s list of impaired waters. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.30(b)(1).

⁷⁶ *See* 40 C.F.R. § 131.21.

⁷⁷ 33 U.S.C. § 1313 (d)(2).

⁷⁸ *See* Mo. Rev. Stat. § 644.011 (2000).

⁷⁹ *Mo. Soybean Assn.*, 102 S.W.3d at 19.

⁸⁰ Mo. Const. art. IV, § 47.

⁸¹ Mo. Rev. Stat. §§ 640.010(3) & 644.021(1).

⁸² *Mo. Soybean Assn.*, 102 S.W.3d at 20.

⁸³ *Mo. Soybean*, 2002 WL 45891 at *7.

that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of an agency [subject to certain exceptions].”⁸⁴

Although defined broadly, the scope of a “rule” is limited by thirteen exclusions.⁸⁵ One such exclusion is that “[a]n intergovernmental, interagency, or intraagency memorandum, directive, manual, or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof” is not a rule.⁸⁶ As such, these memoranda need not meet the guidelines for rulemaking established by MAPA. This statutory definition has also been clarified by case law in *Baugus v. the Director of Revenue*.⁸⁷ *Baugus* provides that apart from exclusions, “not every generally applicable statement or ‘announcement’ of intent by a state agency is a rule.”⁸⁸ Implicit in the concept of a “rule” is that the agency declaration may potentially impact, however slightly, the substantive or procedural rights of some member of the public.⁸⁹ By its nature, rulemaking “involves an agency statement that affects the rights of individuals in the abstract.”⁹⁰

Rules promulgated by administrative agencies are valid only if the agency abides by MAPA’s detailed procedural mandates for rulemaking. No department, agency, commission or board rule is valid if: “(1) [t]here is an absence of statutory authority for the rule or any portion thereof; or (2) [t]he rule is in conflict with state law; or (3) [t]he rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.”⁹¹ An agency cannot propose a rule unless, “the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority” as determined by agency procedures which are “based upon reasonably available empirical data and . . . include an assessment of the effectiveness and the cost of rules both to the state and to any private or public person or entity affected by such rules.”⁹² Agencies must file a notice of proposed rulemaking with the Secretary of State.⁹³ The agency must also file a fiscal note with the proposed rulemaking when that agency intends to adopt, amend, or repeal a rule that “would require an expenditure of money by or a reduction in income for any person, firm, corporation, association, partnership, proprietorship or business entity of any kind or character which is estimated to cost more than five hundred dollars in the aggregate.”⁹⁴ Final agency rules cannot take effect until after 30 days following after the order of rulemaking has been filed with the general assembly and the secretary of state.⁹⁵ A rule is rendered void if the agency fails to follow these and other rulemaking procedures in adopting the rule.⁹⁶

During the 2002 legislative session, the Missouri legislature amended Section 644.036; all future 303(d) lists will be considered rules and therefore must abide by MAPA rulemaking guidelines.⁹⁷ The statute, as amended states, “[a]ny listing required by Section 303(d) of the federal Clean Water Act . . . to be sent to the

⁸⁴ Mo. Rev. Stat. § 536.010(4); *NME Hospitals, Inc. v. Dept. of Social Services*, 850 S.W.2d 71, 74 (Mo. 1993) (en banc). To be valid, rules must be promulgated according to the rulemaking procedures set out in Mo. Rev. Stat. §§ 536.021 & 536.025. *Id.*

⁸⁵ See Mo. Rev. Stat. §§ 536.010(4)(a)-(m).

⁸⁶ Mo. Rev. Stat. § 536.010(4)(c).

⁸⁷ 878 S.W.2d 39 (Mo. 1974) (en banc).

⁸⁸ *Baugus*, 878 S.W.2d at 42.

⁸⁹ *Baugus*, 878 S.W.2d at 42.

⁹⁰ *Id.* (citing Arthur E. Bonfield, *State Administrative Rule Making*, § 3.3.1 (Aspen Publishers, Inc. 1986)).

⁹¹ Mo. Rev. Stat. § 536.014 (2000).

⁹² Mo. Rev. Stat. § 536.016.

⁹³ Mo. Rev. Stat. § 536.021.

⁹⁴ Mo. Rev. Stat. § 536.205(1) (as cited in *Mo. Soybean*, 2002 WL 45891 at *7).

⁹⁵ Mo. Rev. Stat. § 536.019.

⁹⁶ See *Mo Soybean Assn.*, 102 S.W.3d at 33 (citing *NME Hospitals*, 850 S.W.2d at 74).

⁹⁷ Mo. Rev. Stat. § 644.036(5); *Mo. Soybean Assn.*, 102 S.W.3d at 32, n. 1 (Limbaugh, C.J., dissenting).

[EPA] for their approval that will result in any waters of this state being classified as impaired shall be adopted by rule pursuant to chapter 536, RSMo.”⁹⁸

IV. THE INSTANT DECISION

The court first analyzed whether the state’s 1998-303(d) list of impaired waters constitutes a rule under MAPA statutory guidelines, because unless it does, the state court does not have the power to render a declaratory judgment on the matter.⁹⁹ The majority cited several key sections of the Act, as well as passages from commentators distinguishing a rule from a simple statement of policy.¹⁰⁰ The court found that the list created no generally applicable legal rights or obligations as applied to some “yet unnamed, unspecified group of people.”¹⁰¹ Thus the court concluded it is only a compilation of waters that have substandard water quality and not a rule because the 303(d) list did not establish a “standard of conduct” that has the “force of law.”¹⁰²

The court then determined that the appellees’ formulation of the list does not meet the expanded standard of a rule as defined in the *Baugus* case.¹⁰³ In *Baugus*, the court clarified MAPA’s statutory definition of a rule, stating that it must “have the potential, *however slight*, of impacting the substantive or procedural rights of some member of the public.”¹⁰⁴ In applying the *Baugus* standard, the court elaborated the long process which must first occur before any regulation which might affect appellant is promulgated: EPA approval of the list, scheduling of the TMDL, performing studies and implementing a plan of action, EPA approval of the TMDL, and incorporation into the State’s CPP, which ultimately leads to future regulations.¹⁰⁵ Because the list is just the first step in this long process, the inclusion of the rivers on the list is not the cause of the impacts appellants prophesize; rather, the resulting regulations are.¹⁰⁶ The majority distinguished that the appellants “prophesy the impact of a potential rule” rather than “identify the potential impact of a rule” as required to meet the *Baugus* standard.¹⁰⁷ The court therefore concluded that the appellants’ stated harms are only “pure speculation”—they are conjectures of injuries that might result from future TMDL regulations.¹⁰⁸ These regulations may or may not be put into place as a result of the 303(d) list.¹⁰⁹ Therefore, the court reasoned that neither the Commission nor the MDNR engaged in rulemaking when formulating the 303(d) list.¹¹⁰

The court then enumerated the factors supporting dismissal of the appellants’ action.¹¹¹ The first such factor is that the state trial court did not have subject matter jurisdiction over the action.¹¹² MAPA provides that state courts have such power only regarding administrative actions constituting a rule.¹¹³ Because the majority determined that the 303(d) list is not a rule, they reasoned that state court did not have the power to provide the judgment appellants wanted.

⁹⁸ Mo. Rev. Stat. § 644.036(5).

⁹⁹ See *Mo. Soybean Assn.*, 102 S.W.3d at 22.

¹⁰⁰ See *id.* at 22-23.

¹⁰¹ *Id.* at 23.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ *Baugus*, 878 S.W.2d at 42 (citing *Bonfield*, supra n. 90, at § 3.3.1).

¹⁰⁵ *Mo. Soybean Assn.*, 102 S.W.3d at 24.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.* at 25.

¹¹³ *Id.* at 22.

The next factor supporting dismissal is the court's conclusion that due to the hypothetical nature of the claims, a declaratory judgment is not an appropriate remedy.¹¹⁴ A declaratory judgment is only available to adjudicate "real, substantial, presently existing"¹¹⁵ controversies, and not hypothetical situations that may or may not occur. Because appellants do not set forth a presently occurring injury which the declaratory judgment will ease, it will not "lay to rest the parties' controversy."¹¹⁶

The hypothetical nature of the allegations also led the court to establish that this issue is not yet ripe for review, another factor supporting dismissal.¹¹⁷ The ripeness doctrine is a constitutional guideline that prevents the courts from making premature determinations on intangible controversies.¹¹⁸ The court first explained the doctrine and then detailed both the seminal ripeness case, *Abbot Laboratories v. Gardner*¹¹⁹ and *Ohio Forestry Association, Inc. v. Sierra Club*,¹²⁰ another case which explored the doctrine. Missouri follows a two-part test based on *Abbot* in determining whether a controversy is ripe for adjudication: (1) whether adjudication is appropriate for the issues at hand; and (2) whether the parties will suffer hardship if judicial relief is denied.¹²¹ The court found that MSA's claims do not meet either requirement.¹²²

In its application of these standards to the facts of the case, the court looked to the result of MSA's earlier action against the EPA in federal court, stating that "[n]either the law nor our rivers would be clarified by an inconsistent holding."¹²³ The court reasoned that if the challenge to the federal government's approval of the list is not ripe for adjudication, then the challenge to the State's earlier inclusion of the rivers also is not ripe.¹²⁴ The State's impaired waters list demands no action from the appellants, and denies them no legal rights, and there are no penalties for noncompliance.¹²⁵ Stricter controls will only result after a long and complex process, and the effects of these controls are unpredictable.¹²⁶ The majority commented that "review now would require a crystal ball or, at least, a lively imagination."¹²⁷ The court ultimately urged the appellants to "sheath their swords until . . . regulations impacting them are proposed."¹²⁸

Chief Justice Stephen Limbaugh dissented, and Justice Benton joined his opinion.¹²⁹ The Chief Justice found that the 1998-303(d) list meets the two statutory requirements of a rule delineated in Section 536.010(4) of MAPA: (1) it must be a statement of general applicability; and (2) it must "implement" or "prescribe" law or policy.¹³⁰ Because the TMDL development is certain to occur in response to the list, and TMDLs have the potential to affect millions of Missourians living near listed waterways, the list meets the "general applicability" requirement.¹³¹ Because the list was developed as the first step in meeting the state and federal Clean Water

¹¹⁴ *Id.* at 26.

¹¹⁵ *Id.* at 25 (citing *Northgate Apartments, L.P. v. City of N. Kansas City*, 45 S.W.3d 474, 479 (Mo. App. W.D. 2001)).

¹¹⁶ *Mo. Soybean Assn.*, 102 S.W.3d at 25 (citing *Jones v. Carnahan*, 965 S.W.2d 209, 214 (Mo. App. W.D. 1998)).

¹¹⁷ *See Mo. Soybean Assn.*, 102 S.W.3d at 26-29.

¹¹⁸ *Mo. Soybean Assn.*, 102 S.W.3d at 26.

¹¹⁹ 387 U.S. 136 (1967) (overruled on other grounds).

¹²⁰ 523 U.S. 726 (1998).

¹²¹ *Mo. Soybean Assn.*, 102 S.W.3d at 27; *see Abbot*, 387 U.S. at 148-49.

¹²² *Mo. Soybean Assn.*, 102 S.W.3d at 28.

¹²³ *See Mo. Soybean Assn. v. EPA*, *supra* n. 14.

¹²⁴ *Mo. Soybean Assn.*, 102 S.W.3d at 29.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See id.* at 29.

¹³⁰ *Id.* at 30. (Limbaugh, C.J., dissenting).

¹³¹ *Id.* General applicability is satisfied where the agency statement of policy or interpretation of law "acts on unnamed and unspecified [persons and] facts." *NME Hospitals*, 850 S.W.2d at 74.

Law's objective of protecting, maintaining and improving the state's waters, the list was compiled to "prescribe" and "implement" environmental policy.¹³² Therefore the dissent reasoned that the 303(d) list is a rule.

The dissent then argued that the 303(d) list not only meets the statutory definition of a rule, but also the *Baugus* expanded definition of a rule: an agency declaration with a potential, however slight, of impacting the rights of some member of the public.¹³³ The dissent found that this standard was easily satisfied because the mere listing of the rivers triggers TMDL development, which is certain to necessitate changes that will invariably affect appellant association members.¹³⁴ Because the 303(d) list is a rule promulgated in violation of MAPA guidelines, it is void.¹³⁵ Therefore, the dissent believed that the case should have been reversed and remanded for reentry in favor of the appellants.¹³⁶

V. COMMENT

When Congress passed the Clean Water Act on October 4, 1972 by overwhelming margins, they recognized the serious health consequences of water pollution.¹³⁷ The chairman of the Senate's Subcommittee on Air and Water Pollution stated, "The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us."¹³⁸ Despite the passage of the CWA, the U.S. still struggles with pollutants in the nation's waters. Data shows that as a direct result of the NPDES permit program, point source pollution, like discharge from a pipe or similar conveyance, has decreased substantially over the last quarter century.¹³⁹ But little or no progress has been made in addressing non-point solution, generally caused by polluted run-off from fields and city streets.¹⁴⁰ Evidence shows that polluted runoff is the largest reason that approximately 40 percent of America's surveyed waters are too polluted for basic uses like fishing and swimming.¹⁴¹ According to the EPA's 1994 Water Quality Inventory, agriculture is by far the leading source of non-point pollution for the nation's impaired rivers and lakes.¹⁴²

The question then becomes why non-point source pollution, as opposed to point source pollution, remains such a problem.¹⁴³ One explanation is that in general, point source pollution is much easier to regulate than non-point source pollution. The CWA's NPDES program has been successful in imposing a set of

¹³² See *Mo. Soybean Assn.*, 102 S.W.3d at 30. (Limbaugh, C.J., dissenting).

¹³³ *Id.* at 31 (citing *Baugus*, 878 S.W.2d 39).

¹³⁴ *Id.* The dissent lists likely injuries as: changes in land management practices, limitation on sales and use of fertilizers, pesticides, and herbicides, increased costs in satisfying new pollution standards, increased costs in water treatment, and limitations on raw materials that can be used in production or manufacturing.

¹³⁵ *Id.* at 33.

¹³⁶ *Id.*

¹³⁷ Drew Caputo, *A Job Half Finished: The Clean Water Act After 25 Years*, 27 *Envtl. L. Rep.* 10574, 1 (1997).

¹³⁸ *Id.* at 1 (quoting *U.S. Gov't Printing Office, 1A Legislative History of the Water Pollution Control Act Amendments of 1972*, 222-23 (1973)).

¹³⁹ *Id.* at 3.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 5.

¹⁴³ U.S. EPA, *What is Nonpoint Source (NPS) Pollution? Questions and Answers* <<http://www.epa.gov/owow/nps/qa.html>> (last updated Aug. 18, 2003). "States report that non-point source pollution is the leading remaining cause of water quality problems. The effects of non-point source pollutants on specific waters vary and may not always be fully assessed. However we know that these pollutants have harmful effects on drinking water supplies, recreation, fisheries, and wildlife." *Id.*

technology-based discharge limits on all point source dischargers and requiring that permit holders report on the actual levels of pollutants being discharged.¹⁴⁴ Apart from the basic fact that regulating runoff is generally more difficult than regulating pollution from a pipe or sewer, another important factor is that the CWA does not even attempt meaningful regulation of non-point source pollution.¹⁴⁵ It simply requires that states manage polluted runoff "to maximum extent practicable."¹⁴⁶ This means that "agricultural interests who dislike the prospect of increased regulation of their discharges can subject those responsible for pollution controls to pressure and make non-point source pollution controls lax."¹⁴⁷ In a state like Missouri, where large agricultural interests have a lot of political clout, this factor may play a part in minimizing the regulations of non-point source pollution, mainly agricultural runoff.

This factor plays a clear role in the drama that unfolded surrounding the instant decision. The Missouri Soybean Association, along with other large agricultural associations, attacked the 303(d) list in the courts out of fear of increased regulations on their land management practices. Essentially, they did not want TMDL development that would force them to use fewer or different pesticides or herbicides. If they could attain a judgment that the 1998-303(d) list was a rule, then it would be void for failure to follow the MAPA rulemaking procedures. Also, the presence of the mandate for a hearing in the rulemaking context means that the agency must meet interested members of the public face to face with an opportunity for oral presentation and comment.¹⁴⁸ For this reason, appellants want a determination that the list is rule to obtain more power to influence future decisions during the extensive public notice and hearing process. Along with increased influence due to the more public procedures, they also want to be able to attack the creation of the list in state courts as early in the process as possible, and can only do so if the list is a rule. The earlier they can attack the list, the longer they can stave off implementation of new TMDL regulations.

But the Association was unable to convince the federal court that the EPA's approval of the list constituted rulemaking. The Association was also unsuccessful in their attempt to do the same in state courts. The Missouri Supreme Court ultimately refused to recognize the Commission's addition of the rivers to the MDNR's original list as rulemaking, and instead deferred to the federal decision, reasoning that an inconsistent judgment in state court would clarify neither law nor the waters. The courts never reached the merits of the case because of the lack of subject matter jurisdiction if the list is not a rule.

In interpreting the list as a mere recommendation rather than a rule, the courts essentially gave the state agencies fewer procedural restrictions while still in the preliminary phases of determining which state waterbodies are polluted and from what sources. The courts recognized that the recommendations were subject to change as the state studied the waterways and developed appropriate TMDLs to address the pollution in each waterbody. The courts also understood that this decision would not deprive any party from addressing its concerns later in the process. The federal regulations include extensive public notice and hearing requirements before any regulations are actually imposed.¹⁴⁹ These requirements will give agencies like the Association the opportunity to challenge regulations that will impact their economic interests, once and if such regulations are actually proposed. To allow these groups to challenge the agency at every step of the process stifles the regulatory process and creates more litigation. Miring the state agencies in more administrative processes also contributes to the complications that states already face in attempting to regulate non-point source pollution,

¹⁴⁴ See Caputo, *supra* n. 137, at 8.

¹⁴⁵ See *id.* at 7.

¹⁴⁶ See *id.*

¹⁴⁷ David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515, 515 (1996).

¹⁴⁸ Alfred S. Neely, *Mo. Prac., Administrative Prac. & Proc.* vol. 20, § 6.39 (3d ed., West 2003).

¹⁴⁹ See 40 C.F.R. § 130.

making even harder the already difficult challenge of diminishing the severe environmental and health problems associated with the pollution.

But the Association and other agricultural interests interpreted these decisions as an attempt to take control away from the states and put it into the hands of the federal government. They argue that such a shift in power denigrates the initial compromise of federal and state power as brokered in the CWA. From its inception, the CWA has demanded a cooperative relationship between states and the federal government in the effort to ensure the purity of the nation's waters. But the proper balance of power in this relationship has proved difficult to find, especially regarding non-point source pollution. The Association and other agricultural interests typically resent federal involvement in regulation of their agricultural practices and therefore fight to retain as much state control as possible, where they have more influence.

The irony at the conclusion of this battle is that the judicial decision that the 1998 list is not a rule will have no influence in Missouri's ongoing debate due to the statutory amendment that the legislature passed in 2002, in response to the Western District Appellate Court's decision. All future 303(d) lists are now considered rules and must abide by rulemaking procedure. In enacting this legislation, the representatives presumably responded to demands from constituents who were unhappy with a court decision that they perceived as taking power out of the hands of Missourians and putting it into the hands of the federal government. In actuality, this legislation will have the exact opposite effect. The CWA delineates clear deadlines for state agencies to submit their 303(d) lists to the EPA for approval. If the agency does not meet the deadline, the EPA will create the list without state input. Therefore, because this legislation effectively ties the hands of the state agencies by mirroring them in the rulemaking process before they submit the list, it will be almost impossible for a state to meet the deadlines if their lists come under judicial or administrative attack. This time consuming litigation is almost certain to follow, especially when large waterbodies like the Missouri and Mississippi are included in the 303(d) list. Thus more often than not, the EPA will end up creating the list anyhow, which leaves the issue of which state waterbodies are impaired entirely up to federal discretion.

This phenomenon is already happening with the 303(d) list for 2004. The submission deadline is April 1, 2004, and the MDNR has already stated on three occasions that it will be impossible for it to meet that deadline.¹⁵⁰ On August 18, 2003 the Sierra Club issued a press release in which it asked the EPA to take over the 2004 list.¹⁵¹ In the press release, Sierra Club's Clean Water Campaign Director Ken Midkiff pointed out that federal law mandates that states meet the deadlines and with the new rulemaking procedures, Missouri will not be able to do so.¹⁵² He stated, "The Missouri General Assembly can pass all the laws it wants to tie the hands of the Missouri Department of Natural Resources and the Missouri Clean Water Commission, but this does not mean that federal laws can be ignored."¹⁵³ Therefore, despite the Association's apparent legislative victory in the ultimate decision that the 303(d) list is a rule, the ruling they were fighting for in the instant decision and lost, is really not to their advantage at all.

VI. CONCLUSION

The CWA was forged with the important goal of joining the federal government and the states together to protect the nation's waters from pollution. Big Agricultural interests argue that unless the 303(d) list is rule, the balance of power is inappropriately shifted in favor of the federal government. They argue that local interests need more influence over decisions and rules which impact local businesses.

¹⁵⁰ See Sierra Club, *Sierra Club ask EPA to take over 303d list in Missouri* <http://www.missouri.sierraclub.org/PressReleases/303d_list.htm> (accessed Feb. 7, 2004).

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ *Id.*

Although a balance of state and federal power was one of the CWA's goals, the main goal is still to protect all waterbodies from the pollution that threatens them. Currently, Missouri's waters are still endangered, largely from non-point source pollution caused by agricultural runoff. Missouri has been unable to regulate this pollution for many reasons, one being that the large agricultural interests often exert political pressure to fight environmental regulations they consider bad for business.¹⁵⁴ The legislature responded to such influence in amending Section 644.036 to ensure that future 303(d) lists are rules. The Association struggled to attain this ruling because if agencies must abide by the administrative procedures required in the rulemaking process, then groups like the Association would have more opportunities to influence the process and could attack the decisions in the most preliminary stages in order to stave off TMDL development as long as possible.

The fact that the Missouri and Mississippi Rivers, two of the largest rivers in the nation, were both listed as impaired waterbodies should set off alarm bells for all Missouri citizens. Polluted waters are the true danger that threatens the people of Missouri. If these major rivers are polluted now, then by the time the TMDLs actually take effect, which will probably take several years, they will likely be even more polluted. Therefore, the fight should not center on political interests or issues of federalism; rather, it should center on ensuring the purity of our waters, especially of these large and vital rivers.

CLARE MURPHY

¹⁵⁴ See Blair, *supra* n. 49, at 163.