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No Looking Back: The Western District Court of Appeals Declares That Missouri's Creation of a 303(d) List Does Not Qualify as Rulemaking. Missouri Soybean Association v. Missouri Clean Water Commission

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CASENOTE

NO LOOKING BACK: THE WESTERN DISTRICT COURT OF APPEALS DECLARES THAT MISSOURI’S CREATION OF A 303 (d) LIST DOES NOT QUALIFY AS RULEMAKING

Missouri Soybean Association v. Missouri Clean Water Commission

I. INTRODUCTION

The Clean Water Act ("CWA") was enacted in 1972, over President Nixon’s veto, in an effort to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The federal government is ultimately responsible for insuring that the goals of the CWA are achieved. However, the framers of the CWA believed that the states had a vested interest in how these goals were to be pursued. Accordingly, the CWA establishes a cooperative effort between the federal and individual state governments, balancing the necessity for an active federal role in the CWA’s administration, while preserving the states’ rights to manage pollution control, and to plan and develop uses for their land and water resources.

Section 303 of the CWA requires each state to, among other things, determine which waterbodies within its borders are “impaired” due to pollution, and to devise a strategy for reducing that pollution. The impaired waterbodies must be listed, ranked, and submitted with the state’s pollution control strategy to the EPA in what is commonly referred to as a 303(d) list. In Missouri, 303(d) lists are created by the Missouri Department of Natural Resources (“MDNR”), in cooperation with Missouri’s Clean Water Commission (“Commission”).

Under Missouri’s Administrative Procedure Act (“MoAPA”), actions or determinations made by Missouri’s agencies can be subject to judicial review so long as those actions or determinations constitute “rulemaking.” However, in Missouri Soybean Association v. Missouri Clean Water Commission, the Missouri Court of Appeals for the Western District (“Court of Appeals”) held that creation of a 303(d) list does not constitute “rulemaking” under the MoAPA, and therefore a court cannot scrutinize the determinations or strategies the list contains. This note will discuss the Congressional intent underlying Missouri’s role in the CWA, rulemaking as defined under the MoAPA, and the potentially harmful effects that could result if Missourians are prohibited from challenging 303(d) lists created by their state.

II. FACTS AND HOLDING

Under § 303 of the CWA Missouri is required to determine which waterbodies within its borders should be considered “impaired.” According to federal law, a particular waterbody should be considered “impaired” if it is polluted to such a degree that it fails to meet the state’s water quality standards (“WQS”). To this end, the CWA requires Missouri to create a “list of impaired waters” (“303(d) list”) through a statutorily defined procedure. Once completed, this list is submitted to the EPA for its approval. Missouri is also required to determine a “total maximum daily load” (“TMDL”) for specific pollutants identified by the EPA. TMDLs represent the level of each pollutant that a particular

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3 33 U.S.C. § 1251(g) (1994). “Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.” Id.
6 Id. at *14.
7 Id. at *1.
8 40 C.F.R. § 130.2(j) (2002).
10 Mo. Soybean, 2002 WL 45891 at *1.
11 Id. at *2.
12 Id. at *1, (citing 33 U.S.C. § 1313(d)(1)(A)).
“impaired” waterbody can readily assimilate without violating the state’s WQS.\textsuperscript{13} TMDLs may be, but are not required to be, determined concurrently with the creation of the 303(d) list.\textsuperscript{14}

The MDNR is Missouri’s general environmental agency.\textsuperscript{15} It has administrative authority over environmental control and the conservation and management of natural resources.\textsuperscript{16} The Commission is the state’s water contaminant control agency and is vested with “all incidental powers necessary to carry out the purposes of [the Missouri Clean Water Law].”\textsuperscript{17} Structurally the Commission is assigned to the MDNR.\textsuperscript{18} The Regional Administrator of the EPA (“Administrator”) is required to review, and approve or disapprove 303(d) lists submitted by Missouri, as well as any TMDLs developed by the state.\textsuperscript{19}

Prior to 1998, the MDNR sent Missouri’s 303(d) list biennially as an attachment with its water quality status report (the “305(b) Report”).\textsuperscript{20} However in 1998, the process changed in two respects.\textsuperscript{21} First, the MDNR, compelled by federal regulation,\textsuperscript{22} involved the public in the process of compiling its 1998-303(d) list.\textsuperscript{23} Second, the MDNR’s list was first submitted to the Clean Water Commission for approval, before being submitted to the Administrator.\textsuperscript{24}

In January of 1998 the MDNR issued a notice soliciting public comments on its proposed 303(d) list.\textsuperscript{25} At that time the proposed 303(d) list consisted of 72 waterbodies determined by the MDNR to need TMDLs in order to comply with state water quality standards.\textsuperscript{26} During this public comment period, the Sierra Club recommended that the Missouri River and the Mississippi River (the “Rivers”) be added to the 303(d) list.\textsuperscript{27} In March of 1998, the MDNR published a list containing proposed additions to its 303(d) list, which included the Rivers.\textsuperscript{28} Concurrent with this list, the MDNR provided public notice of its intention to solicit any additional data that would support or refute the inclusion of these additional waterbodies.\textsuperscript{29} In May of 1998, the MDNR noticed its second proposed 303(d) list, which was comprised of 85 waterbodies, but excluded the Rivers.\textsuperscript{30} This notice was made public in a document called the “Missouri 303(d) Strategy document,” which explained the rationale for including or excluding certain waterbodies from the proposed list.\textsuperscript{31} The MDNR issued a notice, in August of 1998, dividing the 85 listed waterbodies into three tiers: (1) recommended 303(d) waterbodies required to have TMDLs; (2) recommended 303(d) waterbodies required to have additional monitoring prior to TMDL development; and (3) recommended 303(d) waterbodies required to use attainability analyses for TMDL development.\textsuperscript{32} The August notice, entitled “NOTICE OF AVAILABILITY FOR COMMENT MISSOURI 303(d) STRATEGY DOCUMENT AND RECOMMENDED SECTION 303(d) WATERS,” explained that the Rivers were excluded because they contained no contaminant violations despite having diminished resource quality resulting from flow depletions and habitat alterations.\textsuperscript{33}

\textsuperscript{13} Mo. Soybean, 2002 WL 45891 at *1.
\textsuperscript{14} Whether TMDLs are submitted concurrently with the state’s 303(d) list or not, Missouri must include a strategy and schedule for determining TMDLs, which is also subject to the EPA’s for approval. See 40 C.F.R. § 130.28 (2002).
\textsuperscript{15} Id. at *3.
\textsuperscript{16} Id.
\textsuperscript{17} Id. (citing Mo. Rev. Stat. § 644.026.1(16) (2000) which states that the Commission shall, “[e]xercise all incidental powers necessary to carry out the purposes of sections 644.006 to 644.141, assure that the state of Missouri complies with any federal water pollution control act, retains maximum control thereunder and receives all desired federal grants. aid and benefits.”).
\textsuperscript{18} Mo. Soybean, 2002 WL 45891 at *3.
\textsuperscript{19} Id. at *2.
\textsuperscript{20} Mo. Soybean, 2002 WL 45891 at *3.
\textsuperscript{21} Id.
\textsuperscript{22} EPA. State. interstate. and substate agencies carrying out activities described in § 25.2(a) shall provide for, encourage, and assist the participation of the public…Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.” 40 C.F.R. § 25.3(a-b) (2002).
\textsuperscript{23} Mo. Soybean, 2002 WL 45891 at *3.
\textsuperscript{24} Id. See also Mo. Rev. Stat. § 644.026.1 (2000).
\textsuperscript{25} Mo. Soybean, 2002 WL 45891 at *3.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. See also 40 C.F.R. § 130.22 (2002).
\textsuperscript{32} Mo. Soybean, 2002 WL 45891 at *4.
\textsuperscript{33} Id.
The MDNR submitted its proposed August list to the Commission for approval in an open meeting held in September of 1998. At this meeting the Missouri Soybean Association ("Association") presented testimony opposing the inclusion of the Rivers on the final list, while the Sierra Club argued that the Rivers should be included. The MDNR did not recommend including the Rivers. However, when the vote was called, Commissioner Susan Lambert recommended adding the Rivers to the final list. The Commission approved the MDNR's proposed 303(d) list, but added the Rivers to the second tier of waterbodies.

The Commission published its approved, three-tiered list of waterbodies in a document called "SECTION 303(d) WATERS." This final list, which explained the three-tiered ranking of the included waterbodies, was submitted to the EPA in October of 1998. The EPA partially approved, and partially disapproved the list in January of 1999. While all of the listed waterbodies were approved, the EPA did not acknowledge Missouri's three-tiered system. Instead, it required Missouri to schedule and prepare TMDLs for all listed waterbodies. This means that Missouri is required to determine TMDLs for the Rivers by 2009. The Rivers are by far the largest waterbodies in the state and the largest waterbodies ever placed on any 303(d) list.

Prior to modifying Missouri's submission, the EPA solicited public comment on the changes. The Association and the Associated Industries of Missouri ("Industries") requested a public hearing regarding Missouri's list, which was denied by the EPA. The Association, Industries, and the Missouri Water Quality Coalition "commented that the state failed to follow proper rulemaking procedures and proper fiscal note procedures," when promulgating its 1998-303(d)

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34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
40 Id.

The Commission included a "Strategy Document" with the final version of its 1998-303(d) list that provided in pertinent part:

"About 1200 stream segments encompassing 40% of the stream miles in the state are believed to suffer some impairment in aquatic habitat quality. While the [MDNR] believes it may be counter productive [sic] to list and attempt TMDL's on all these streams, all the streams listed above as having potential nutrient concerns and the Mississippi and Missouri Rivers will be targeted as high priority for monitoring to better define the status of aquatic habitat quality and to determine the future 303(d) status of these waters... From September through November of every odd numbered year, all available water quality data with acceptable quality assurance is reviewed for compliance with applicable water quality standards by the Water Pollution Control Program of the [MDNR]. Waters found not to be in compliance with these standards are listed in the biennial state water quality report. This report, called the 305(b) Report after the section of the federal Clean Water Act which requires it, represents the most complete list that the [MDNR] has been able to document of the state's waters not meeting water quality standards. The § 303(d) list is in general a subset of the waters listed in the 305(b) Report. The 1998 Missouri § 303(d) list contained certain 305(b) waters for which there was little hard data documentation of a problem, but for which staff felt a significant water quality problem had been identified making them worthy of a § 303(d) listing. Waterbodies listed as not meeting water quality standards in the 305(b) Report also appeared on the § 303(d) list for the purpose of TMDL development unless a waterbody falls into one or more of the following categories [not relevant here]... The proposed 1998-303(d) list ... is composed of three lists of waterbodies. The first is a list of those waters where there is sufficient evidence through hard data of water quality impairment, including some that may still need the application of all conventional water pollution control practices. The waters on this list will require the development and implementation of total maximum daily loads (TMDLs). Those that lack conventional treatment will be required to attain that level, and proceed to TMDL development if the problem persists. The second list shows waters whose impairment status is less adequately documented and for which more environmental monitoring is needed to determine the 303(d) status of these waters. The third list is a list of impaired waters for which there is no practical solution to these water quality problems, and includes waters with chlordane contaminated sediments, and with naturally occurring contaminants. TMDLs or use attainability analysis for these waters would address these difficult situations."

Id. at *5.
list. "While proposing that such comments should be addressed to the state, [the] EPA submitted that the public had adequate opportunity to participate in the establishment of Missouri’s 1998-303(d) list." In April of 1999 the EPA responded to public comments and made its final decisions regarding Missouri’s list, leaving the decision to include the Rivers unchanged.  

The Association, the Industries, the Missouri AG Industries Council, and the Missouri Chamber of Commerce filed a four count complaint in the Circuit Court of Cole County seeking declaratory judgment, challenging the promulgation of Missouri’s 303(d) list, as well as injunctive relief pursuant to § 536.050.1. In Count I, the Association claimed that “the creation of the list constituted a rulemaking under the MoAPA,” that the Commission’s submitted list fit within the definition of a rule under § 536.010.4, and that the list was adopted without meeting the notice requirements of Missouri statute § 536.021. Specifically, the association asserted that the Commission adopted Missouri’s 303(d) list without (1) filing a notice of proposed rulemaking or an order of final rulemaking concerning the list; (2) publishing a notice of proposed rulemaking or final rulemaking in the Missouri Register; (3) including the required information in a notice of proposed rulemaking or order of final rulemaking as required by §§ 536.021.2 & 536.021.6; and (4) including notice that the Rivers would be included in Missouri’s proposed list at the meeting in September of 1998. In Count II, the Association claimed that the Commission failed to comply with the MoAPA because no fiscal notes were filed with either the proposed or final 303(d) lists. Count III asserted that the MDNR and Commission acted arbitrarily and capriciously by adding the Rivers to Missouri’s 1998-303(d) list in that the agencies lacked sufficient evidence to conclude that the present effluent limitations were insufficient to meet water quality standards. Finally, in Count IV the Association contended that Missouri’s Sunshine Law was violated by the Commission’s failure to properly notice the September 1998 meeting.

“The trial court dismissed the action for lack of subject matter jurisdiction, finding that neither the Commission nor MDNR rendered a final decision subject to judicial review.” On appeal, the Court of Appeals held that Missouri’s 1998-303(d) list was not a rule, and the development of the list was not rulemaking under § 536.010.4(c) of the MoAPA because the creation of the list did not substantially affect the public’s legal rights or the procedures available to the public. Accordingly, the Court of Appeals affirmed the decision of the trial court, ruling, “the circuit court did not have subject matter jurisdiction pursuant to § 536.050.1, which empowers the courts of this state to render declaratory judgments respecting the validity of rules or of threatened applications thereof, because there was no rule for [the Association] to challenge.”

III. LEGAL BACKGROUND

A. The Federal Clean Water Act

Since the late 1800’s, the Federal Government has attempted to legislate pollution control efforts for this country’s navigable rivers, lakes, and streams. In the early 1900’s, the Public Health Service was authorized to

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49 Id.
50 Id.
51 Id.
52 Id.
53 All plaintiffs in the instant decision will be referred to collectively as the “Association,” for the remainder of the casenote.
58 Id.
59 Id.
60 Id. at *7.
61 Id. at *14.
62 Id.
63 "The Rivers and Harbors Act of 1890...was the first federal statute that governed water pollution,” which “prohibited the dumping of waste into the New York Harbor and was intended only to safeguard navigability.” Jason R. Jones, The Clean Water Act: Groundwater Regulation and the National Pollutant Discharge Elimination System, 8 Dickinson Journ. Of Envtl. Law and Policy 93, 96 (1999). See also 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
investigate the health effects of pollution in navigable lakes and streams, but was not given power to institute measures to abate dangerous conditions." 64 By the 1930s, Congress recognized that water pollution was a significant problem and several bills were proposed to address the issue on a national level. 65

Individual states, on the other hand, initially regulated the problem of water pollution within their borders exclusively through citizen suits based on common law trespass or nuisance doctrines. 66 Neither cause of action had much of a deterrent affect on the growing problem of water pollution. In fact, some states actually disregarded pollution control altogether in order to compete economically with other states; prompting a "race to the bottom...encouraging sources to move where pollution would be tolerated, if not encouraged." 67 Congress recognized that the problem of water pollution was national in character, 68 and that some states were ignoring environmental protection in order to increase their economic prosperity. 69 In response, Congress enacted the Federal Water Pollution Control Act of 1948 ("FWPCA"), which consisted primarily of subsidies to the states to aid local pollution abatement programs. 70 Over twenty years later, water pollution had increased to such an alarming degree that one river, the Cuyahoga in Ohio, actually burst into flames due to the oil and other industrial wastes it carried. 71

Congress passed the CWA, 72 a comprehensive revision of the FWCPA, on October 4, 1972, by an overwhelming majority in both houses. 73 Senator Edmund Muskie expressed the need for an FWCPA overhaul by stating:

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. 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.

We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food. 74

Despite its vast Congressional support, the bill was vetoed by President Nixon and returned to Congress less than two weeks later. Expressed in a note to Congress, the President stated that while he was interested in cleaning up America's waterbodies, he wanted to "attack pollution in a way that [did] not ignore other real threats to the quality of life, such as spiraling prices and increasingly onerous taxes." 75 Congress was quick to respond, overriding President Nixon's veto the very next day. 76

Sources of water pollution are divided into two categories by the CWA: point sources and non-point sources. 77

Point sources are defined by statute as:

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64 Jones, 8 Dickinson Journ. of Envtl. Law and Policy at 96.
65 Id. (citing N. William Hines, Nor Any Drop to Drink: Public Regulation of Water Quality, 52 Iowa L. Rev. 799, 805-08 (1967)).
66 Christopher, 40 Washburn L.J. at 496.
68 Christopher, 40 Washburn L.J. at 497.
69 Weinberg, 30 Envtl. L. Rptr. at 10895.
73 Caputo, 27 Envtl. L. Rep. at 10574. It passed unanimously in the Senate, and received only eleven votes opposing passage in the House. Id.
74 Id.
75 Id.
76 Id.
77 Christopher, 40 Washburn L.J. at 498.
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...[not including] agricultural stormwater discharges and return flows from irrigated agriculture.  

“Non-point source pollutants are substances of widespread origin that run off, wash off, or seep through the ground, eventually entering surface waters or ground waters.”

The CWA reformed both state and federal approaches to water pollution control by creating a mandatory partnership between the federal government and individual state governments. In doing so, Congress attempted to balance the necessity for an active federal role in restoring and maintaining the “chemical, physical and biological integrity of [the] Nation's waters,” while preserving the states' rights and responsibilities to reduce and eliminate pollution, as well as to plan and develop uses for their land and water resources.

To achieve this goal, Congress devised two distinct regulatory schemes for enforcement of the CWA. One program was designed specifically to target point source pollution. The CWA's other regulatory mechanism is a combination of programs designed to reduce nonpoint source pollution.

Focusing on intentional discharges of pollution by individuals or entities, the CWA created the National Pollution Discharge Elimination System (“NPDES”). Under this system, anyone wishing to discharge pollutants into a waterbody can receive a permit to do so from the EPA, or an approved state agency, so long as certain “effluent limitations” and other restrictions are met. The NPDES is national in scope, is premised on the incorporation of the best available technology for reducing pollutant discharges, and has been the “basis of the [CWA’s] success.”

The other method established by the CWA utilizes cooperative efforts by both federal and state governments to achieve ambient water quality standards. The CWA includes three programs designed to manage ambient water quality throughout the nation's waters. Under § 208, the states are instructed to draft area-wide waste treatment management plans, including procedures for identifying nonpoint source pollution from agriculture and other activities.

Specifically, Section 208 of the act calls for area-wide water pollution planning in areas designed by the governor of each state that would include both point and nonpoint sources and pollution abatement programs. The plans should include: (a) identification of the treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area with associated construction priorities, time schedules, and the establishment of regulatory programs for such treatment works, including urban runoff and storm water; (b) identification of the sources of nonpoint pollution--agriculture (including runoff from irrigated fields), silviculture, runoff from land used for livestock and

79 Mo. Soybean, 2002 WL 45891 at *3. See also U.S. v. Earth Sciences, Inc., 599 F.2d. 358, 373 (1979). “The legislative history indicates to us Congress was classifying nonpoint source pollution as disparate runoff caused primarily by rainfall around activities that employ or cause pollutants.”
82 33 U.S.C. § 1251(g). “Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”
85 “[T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any contaminant, or combination of contaminants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.” 33 U.S.C. § 1342(a)(1) (1994). “At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact... The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist.” 33 U.S.C. § 1342 (b) (1994).
crop production or land that has had manure applied to it, mining, saltwater intrusion, waste disposal on lands, disposition of all residual waste generated in the designated area, and land and subsurface excavations; (c) setting forth of a procedure and methods (including land-use requirements) that feasibly will control such sources.90

The second program, § 319,91 requires the states to prepare and submit a report for the EPA’s approval that (1) identifies waterbodies within the state that will not meet the state’s water quality standards without additional nonpoint source control; (2) identifies categories and/or particular nonpoint sources that add significant pollution; (3) describes the process for identifying the best management practices and measures to control each category of nonpoint sources, and to reasonably reduce the level of pollution resulting from each, and (4) identifies and describes the State and local programs for controlling nonpoint source pollution.92 The state is also required to prepare and submit, for the EPA’s approval, a management program that the state intends to implement for controlling pollution added from nonpoint sources.93 Finally, § 303 of the CWA establishes both the process by which states adopt their WQS, and the process followed by the states to implement those standards.94 Under § 303(a), states that have not already adopted water quality standards are required to do so.95 Subsection (b) requires the EPA to adopt water quality standards for any state that fails to comply with subsection (a),96 and subsection (c) provides for periodic review of those standards.97 “The goal was to set standards for all navigable waterways in America, balanced and tailored to accommodate the various needs of each, including, explicitly, the need for the protection of fish and wildlife.”98 However, subsection (d) of 303 established the TMDL system.99 As the instant decision illustrates, the TMDL system has been controversial in practice, and is therefore discussed in greater detail below.

Missouri’s Responsibilities Under Section 303(d)

Section 303(d) of the CWA requires Missouri to create a list of “impaired” waterbodies, which consists of all waterbodies in the state that fail to meet Missouri’s WQS100 due to the presence of pollution.101 In creating its 303(d) list, Missouri must follow a strict, federally regimented process. First, Missouri must “assemble all existing and readily available” water-quality information.102 This includes: (1) Missouri’s most recent EPA approved 303(d) list, (2) Missouri’s most recent 305(b) report, (3) § 319 nonpoint source assessments, (4) drinking water source water assessments under § 1453 of the Safe Drinking Water Act, (5) dilution calculations, trend analyses, or predictive models for determining the physical, chemical or biological integrity of streams, rivers, lakes, and estuaries, and (6) data, information, and water quality problems reported at all levels of government, including territorial and tribal governments, as well as members of the public and academic institutions.103

Next, Missouri must document, for both the public and the EPA, the methodology it plans to use in order to consider and evaluate this information, and determine which waterbodies should be considered impaired.104 This

93 33 U.S.C. § 1329(b).
98 Christopher, 40 Washburn L.J. at 506.
100 33 USC § 1313(d)(1)(A). 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...[WQS] 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 (2002).
101 40 C.F.R. § 130.2(2) (2002). An impaired waterbody is “[a]ny waterbody of the United States that does not attain and maintain water quality standards (as defined in 40 CFR Part 131) throughout the waterbody due to an individual pollutant, multiple pollutants, or other causes of pollution, including any waterbody for which biological information indicates that it does not attain and maintain water quality standards.” Id.
103 40 C.F.R. § 130.22(b)(1-6) (2002).
methodology “should explain how [Missouri] will consider and evaluate the following types of data and information” when making its listing decision: (1) physical, chemical, and biological data and information, (2) aquatic and riparian habitat information, and (3) any other data or information about waterbody impairments, including drinking water susceptibility analyses. The methodology must also explain how Missouri plans to use and collect ambient water information, and what factors and methods will be used to establish TMDLs. The initial methodology that Missouri plans to use must first be made available to the public. After providing the public with 60 days in which to comment, and after replying to all significant comments, a final methodology must be drafted and submitted to the EPA (and made available to the public), along with a summary of both the comments received during the notice period and Missouri’s responses. Although the EPA will not approve or disapprove Missouri’s methodology, it will consider it when deciding whether or not to approve Missouri’s next 303(d) list.

Following its methodology, Missouri must then determine which waterbodies within its borders are “impaired,” and which must have TMDLs established. The actual 303(d) list must be divided into four parts. Part 1 must list “waterbodies impaired by one or more pollutant(s)” unless certain exceptions apply. Waterbodies impaired by pollution, but not by one or more pollutants as defined by 40 C.F.R. § 130.2(c) (2002), must be listed in Part 2. Part 3 must list any waterbodies presently below Missouri’s WQS, but for which the EPA has already approved or created a TMDL. Finally, Part 4 must include waterbodies that are presently impaired, but will attain WQS by submission of the next 303(d) list. TMDLs need only be created for waterbodies on Part 1 of a 303(d) list. Missouri is also required to provide the pollutant(s) causing the impairment of any waterbodies listed in Part 1, the type of pollution causing the impairment for each waterbody on Part 2, and the geographic location of each waterbody on the list. The list can be submitted by Missouri either as a separate four-part list, or as an attachment to its biennial 305(b) report.

Federal regulation also lays out the requirements for the creation of TMDLs for any waterbodies listed on Part 1 of Missouri’s list. A TMDL “is a written, qualitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant,” and must include the following elements: (1) the name and geographic location of the impaired waterbody, (2) identification of the pollutant and the applicable WQS, (3) the amount of the pollutant load that can be present in the waterbody and still allow attainment of the WQS, (4) the amount or degree by which the current pollutant load presently exceeds the pollutant load acceptable to attain and maintain WQS, (5) identification of source categories and subcategories, as well as individual sources of the pollutant, (6) wasteload

References:

105 40 C.F.R. § 130.23(b)(1-5) (2002).
106 40 C.F.R. § 130.23(d) & (e)(3) (2002).
107 40 C.F.R. § 130.23(a) (2002).
108 40 C.F.R. § 130.21(a) (2002).
109 40 C.F.R. § 130.24(c) (2002).
110 40 C.F.R. § 130.27(a)(1) (2002).
111 40 C.F.R. § 130.27(a) (2002).
112 40 C.F.R. § 130.27(a)(1) (2002). “Waterbodies impaired by one or more pollutant(s) as defined by § 130.2(d), unless listed in Part 3 or 4. Waterbodies identified as impaired through biological information must be listed on Part 1 unless you know that the impairment is not caused by one or more pollutants, in which case you may place the waterbody on Part 2 of the list. Where the waterbody is listed due to biological information, the first step in establishing the TMDL is identifying the pollutant(s) causing the impairment. Waterbodies must also be included on Part 1 where you or the EPA have determined, in accordance with §§ 130.32(c)(1)(v), (2)(vii), and (3)(i), that a TMDL needs to be revised. Waterbodies that you chose to list pursuant to § 130.25(b), because you anticipate that they will become impaired by one or more pollutant(s), must be included on Part 1 of your list. A TMDL is required for waterbodies on Part 1 of the list.”
113 40 C.F.R. § 130.27(a)(2) (2002).
115 40 C.F.R. § 130.27(a)(4) (2002).
116 40 C.F.R. § 130.31(a) (2002).
117 40 C.F.R. § 130.31(b) (1)(3) (2002).
118 40 C.F.R. § 130.27(c) (2002).
The effects of nonpoint 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.\(^{119}\)

TMDLs can be, but are not required to be, submitted with the 303(d) list. However, Missouri must include a strategy and schedule for determining TMDLs when submitting its list to the EPA for approval.\(^{122}\) Accordingly, Missouri must (1) include a prioritized schedule for establishing TMDLs for all waterbodies and pollutant combinations on Part 1 of its list, (2) schedule establishment of TMDLs as soon as practicable, evenly paced over the duration of the schedule,\(^{123}\) (3) identify each specific TMDL it intends to establish and the one year period during which it is scheduled to be established, (4) explain how it considered the severity of the impairment and the designated use of the waterbody in prioritizing waterbodies for TMDL establishment on the schedule, (5) identify waterbodies that are either designated as a public drinking water supply or are used as public drinking water, but are impaired by one or more pollutants, or have species listed as endangered under the Endangered Species Act present in the water, and (6) include and explain any other factors used in the prioritization of the schedule.\(^{124}\)

Once Missouri has completed its 303(d) list, it must make it available to the public for a minimum of 30 days, before submitting it to the EPA for approval.\(^{125}\) After this 30-day notice period, a copy of Missouri’s final list, along with any TMDLs, a summary of the public’s comments during the notice period, and all of Missouri’s responses to significant comments, must be sent to the EPA, as well as the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”).\(^{126}\) The EPA consults with the FWS and the NMFS to facilitate the consideration of endangered species in the listing and TMDL scheduling process. Missouri is required to document its consideration of any comments made by the EPA, FWS, and NMFS in respect to Missouri’s 303(d) list.

Although every state is required to comply with the duties listed under § 303(d), the CWA provides that if any state fails to submit a 303(d) list, or if the EPA disapproves a state’s 303(d) list, then the EPA must create the list and TMDL schedule on behalf of the state.\(^{127}\) Regardless of who promulgates the 303(d) list, states can apply for federal funding for a wide array of water quality planning and management activities.\(^{128}\)

**Opposition to the TMDL Program**

Nonpoint source pollution is now the primary threat to our nation’s waters,\(^{129}\) and “agriculture represents the largest cause of nonpoint source pollution.”\(^{130}\) The EPA lists excess fertilizers, herbicides, insecticides, and bacteria and nutrients from livestock as contributors to this threat.\(^{131}\) Nonpoint source pollution can create serious economic, health.

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119 Defined under 40 C.F.R. § 130.2(g) (2002) as “[t]he portion of a TMDL’s pollutant load allocated to a point source of a pollutant for which an NPDES permit is required. For waterbodies impaired by both point and nonpoint sources, wasteload allocations may reflect anticipated or expected reductions of pollutants from other sources if those anticipated or expected reductions are supported by reasonable assurance that they will occur.”

120 Defined under 40 C.F.R. § 130.2(f) (2002) as “[t]he portion of a TMDL’s pollutant load allocated to a nonpoint source, storm water source for which a National Pollutant Discharge Elimination System (NPDES) permit is not required, atmospheric deposition, ground water, or background source of pollutants.”


122 See 40 C.F.R. § 130.28 (2002).

123 However, TMDLs must be scheduled no later than 10 years from July 10, 2000, if the waterbody and pollutant was listed on any part of the list before that date or 10 years from the due date of the first subsequent list after July 10, 2000, on which the waterbody and pollutant is initially included. Missouri may extend the schedule for one or more TMDLs by no more than five years if it explains to EPA as part of its 303(d) list submission that, despite expeditious actions, establishment of all TMDLs on Part 1 of the 303(d) list within 10 years is not practicable. 40 C.F.R. § 130.28(b)(2).

124 40 C.F.R. § 130.28(a-d) & (f) (2002).

125 40 C.F.R. § 130.36(a) (2002).

126 40 C.F.R. § 130.36(b) & (c)(1-3) (2002).


129 http://www.epa.gov/owow/nps/qa.html; “States report that nonpoint source pollution is the leading remaining cause of water quality problems. The effects of nonpoint 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.”


131 http://www.epa.gov/owow/nps/qa.html

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and environmental safety risks for both surface and groundwaters. For instance some nonpoint source pollution increases levels of carcinogens such as nitrates, which have been shown to directly correlate with increased cancer levels and other human disorders. In particular, a disorder called Methemoglobinemia (a.k.a. "blue baby syndrome") reduces the ability of the blood to carry oxygen and is thought to be particularly dangerous to infants. Other effects can include: (1) increased levels of nitrogen and phosphorous, which may ultimately lead to a reduction in the water's dissolved oxygen content, reduce aquatic animal populations, and give water an unpleasant smell and taste; (2) contaminated drinking water; and (3) impairment of rivers, lakes, and estuaries by sediment and silt from soil erosion. Additionally, "[a]pproximately thirty-seven percent...of the species listed in the Endangered Species Information Database are endangered in part due to effects of irrigation and the use of pesticides." The agriculture industry has attacked the TMDL program through both political channels and citizen suits such as the instant decision. Farmers currently face rising costs, increasing competition from the world market, and decreasing prices for their products. "While other businessmen may be able to pass on rising costs to the consumer, farmers cannot unilaterally raise their crop or livestock prices." One commentator succinctly described the uncertainty TMDLs create for farmers:

While definite changes in current farming and ranching practices such as the incorporation of buffer strips around streams will be necessary for compliance with runoff limits set by TMDLs, the true measure of economic loss to each individual farmer remains uncertain. For example, if a TMDL in a particular watershed mandates a decrease in herbicide use, the farmer will save the initial cost of the herbicide, but then may lose crop production per acre. Because crop prices are based on supply and demand, the ultimate amount of economic loss becomes difficult to determine, especially considering the global market factors that affect agricultural prices. Thus, farming interests, long exempt from the cost of pollution abatement and worried that any additional expense could force them out of business, oppose the new TMDL regulations.

There are many farming techniques available to farmers that would reduce soil erosion and sediment loss. For instance, farming techniques "such as conservation tillage, crop rotation, terracing, contour planting, and the timing of agricultural operations can control erosion and reduce sediment loss." "Because unwanted nutrients and pesticides often attach to soil particles, reducing erosion also reduces pesticide and nutrient pollution." Vegetation strips, sediment traps, and detention basins can also be useful. Additionally, the need for pesticides and chemical fertilizers can be reduced or eliminated through crop rotation, accurate calculation of fertilizer needs, adjustment of the planting and harvesting times, the planting of pest resistant crops, and the use of biological controls and integrated pest management. Further, better water management and water conservation in irrigated areas can also reduce pollution. While this list suggests many ways that farmers could voluntarily alter their behavior to reduce nonpoint source pollution, it is by no

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132 Zaring, 20 Harv. Envtl. L. Rev. at 520.
133 Id.
134 Id.
135 Id.
136 Id. at 521.
137 "Agricultural interest groups bear considerable influence in Congress, and have been treated favorably under past water pollution laws."
138 Christopher. 40 Washburn L.J. at 485. "Thus, agricultural interests who dislike the prospect of increased regulation of their discharges can subject those responsible for pollution controls to pressure and make nonpoint source pollution controls particularly lax." Zaring, 20 Harv. Envtl. L. Rev. at 515.
139 Id. at 491.
140 Id.
141 Id. at 493.
142 Id.
144 Id.
145 Id.
146 Id.
means comprehensive. However, it is unlikely that farmers would adopt these or other practices if the only benefit were the reduction of nonpoint source pollution.\textsuperscript{147}

It is ultimately the states that decide, under § 208 of the CWA, whether farmers must restrict the use of their land in order to mitigate runoff and comply with TMDLS.\textsuperscript{148} “To assist the states in gathering information, the statutory role of the TMDL is to identify the load necessary, as a matter of engineering, to implement the [WQS].”\textsuperscript{149} However, the EPA is not without influence over the states when it comes to encouraging land-use restriction. “A practical reality, of course, is that once federal environmental grant money begins to flow, state regulatory agencies become dependent on it. They become sensitive to threats to terminate it--terminations that would entail job and programmatic cuts. This influences behavior. A state may knuckle under to coercive threats by [the] EPA.”\textsuperscript{150} Missouri’s farmers are therefore concerned about the potential impacts of a state’s compliance under both §§ 208 and 303.

B. Missouri’s Administrative Procedure Act

State agencies, such as the MDNR, are part of the executive branch of Missouri’s government. 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.”\textsuperscript{151} “Promulgation of rules and regulations is an executive function.”\textsuperscript{152} The process Missouri’s agencies must use in order to promulgate rules is codified under the MoAPA.\textsuperscript{153}

The term “Rule” is defined under the MoAPA to include any “agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency,” including the amendment or repeal of an existing rule.\textsuperscript{154} However, thirteen separate exclusions restrict the scope of this general definition.\textsuperscript{155} The exclusion most pertinent to the instant decisions states that an

\begin{footnotesize}
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\item Id. at 487. “[O]nly the most saintly of farmers will voluntarily internalize these costs.”
\item Pronislo v. Marcus, 91 F. Supp. 2d 1337, 1342 (N.D. Cal. 2000).
\item Id. at 1335.
\item Id. at 1337.
\item Mo. Const. art. IV, § 47
\item Mo. Coalition for Environment v. Joint Comm. on Admin. Rules, 948 S.W. 2d 125, 133 (Mo. 1997) (en banc); State ex rel. Royal Ins v. Director of Mo. Dept. of Ins., 894 S.W. 2d 159, 161 (Mo. 1995) (en banc).
\item Mo. Rev. Stat. § 536.010.4(a-m) (2000). The thirteen exclusions are:
\begin{enumerate}
\item (a) A statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;
\item (b) A declaratory ruling issued pursuant to section 536.050, or an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts;
\item (c) An 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;
\item (d) A determination, decision, or order in a contested case;
\item (e) An opinion of the attorney general;
\item (f) Those portions of staff manuals, instructions or other statements issued by an agency which set forth criteria or guidelines to be used by its staff in auditing, in making inspections, in settling commercial disputes or negotiating commercial arrangements, or in the selection or handling of cases, such as operational tactics or allowable tolerances or criteria for the defense, prosecution, or settlement of cases, when the disclosure of such statements would enable law violators to avoid detection, facilitate disregard of requirements imposed by law, or give a clearly improper advantage to persons who are in an adverse position to the state;
\item (g) A specification of the prices to be charged for goods or services sold by an agency as distinguished from a license fee, or other fees;
\item (h) A statement concerning only the physical servicing, maintenance or care of publicly owned or operated facilities or property;
\item (i) A statement relating to the use of a particular publicly owned or operated facility or property, the substance of which is indicated to the public by means of signs or signals;
\item (j) A decision by an agency not to exercise a discretionary power;
\item (k) A statement concerning only inmates of an institution under the control of the department of corrections and human resources or the division of youth services, students enrolled in an educational institution, or clients of a health care facility, when issued by such an agency;
\item (l) Statements or requirements establishing the conditions under which persons may participate in exhibitions, fairs or similar activities, managed by the state or an agency of the state;
\end{enumerate}
\end{enumerate}
\end{footnotesize}
“intergovernmental, interagency, or intraagency memorandum, directive, or 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.

In order to be valid under the MoAPA, any rule promulgated by a Missouri agency must have a grant of statutory authority, cannot conflict with state law, and cannot be so arbitrary and capricious as to be inequitable or unreasonable.156 The agency must also determine that the rule is necessary to carry out the purposes of the statute in order to have rulemaking authority under the MoAPA.157 This is accomplished through individual agency procedures designed to determine whether a rule is necessary to carry out the purposes of the statute, based on reasonably available empirical data.158 This data includes an assessment of the effectiveness and the cost of rules, both to the state and to any private or public person or entity that may be affected.159 “In addition to seeking information by other methods, an agency may solicit comments from the public on the subject matter of a rule that the agency is considering proposing.”150 For instance, the agency may file a notice of the rule under consideration as a proposed rulemaking with the secretary of state for publication in the Missouri Register, or appoint committees to comment on the subject matter of a proposed rule.161

Final agency rules cannot take effect until after 30 days following a congressional session after the order of the rulemaking has been filed with the general assembly and the secretary of state.162 Once promulgated, all agency rules filed with the secretary of state pursuant to §§ 536.015 to 536.043 must be retained permanently and made available for public inspection at all reasonable times.163 Missouri’s courts are authorized to render declaratory judgments respecting the validity of rules, or of threatened applications thereof.164 An individual may challenge a rule so long as she is, or may be, aggrieved by the rule, and is not obligated to exhaust any administrative remedies prior to filing suit.165 Accordingly, Missouri’s judiciary has had an abundant opportunity to determine what constitutes rulemaking activity under the under the MoAPA. Missouri’s case law has determined that an “agency rule” is an agency statement of policy or interpretation of law of future affect which acts on unnamed and unspecified persons.166 “Implicit in the concept of the word ‘rule’ is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract.”167 Missouri’s courts have determined whether agency actions were “rulemaking activity” in a variety of factual settings. For instance: when a municipal board of police commissioners decided to increase a license fee for private investigators, the court held that a license fee is a rule under the MoAPA because it meets the MoAPA’s general definition of a rule, and is not expressly excluded by the MoAPA’s list of exclusions,168 a purported change in a statewide Medicaid reimbursement policy for in-patient psychiatric services, which limited reimbursement to only expenses for electroshock therapy, was a rule because the reimbursement policy applied generally to all participants in the Medicaid program;169 and the contents of a “right-of-way” manual were rules because the information declared the policy of the Highway and Transportation Commission and set practices and procedures governing rights of the public.170 These cases represent only a sample of the factual settings in which Missouri’s Courts have construed the MoAPA’s definition of rulemaking.171 Prior to Mo. Soybean, the question

(m) Income tax or sales forms, returns and instruction booklets prepared by the state department of revenue for distribution to taxpayers for use in preparing tax returns. Id.

159 Id.
161 Id.
167 Baugus v. Director of Revenue, 878 S.W.2d 39, 42 (Mo. 1994) (en banc).
169 NME Hospitals, Inc. v. Dept. of Social Serv., Div. Of Medical Serv., 850 S.W.2d 71 (Mo. 1993) (en banc).
of whether rulemaking activity takes place in the promulgation of a state’s 303(d) list had never been addressed in Missouri. However, another jurisdiction has addressed this issue, from the EPA’s standpoint, and now stands squarely at odds with the instant decision.

In Sierra Club v. U.S. EPA the plaintiffs challenged the EPA’s approval of Maryland’s 1996-303(d) list, stating that the EPA failed to adhere to the formal requirements of rulemaking under the Federal Administrative Procedure Act. It was undisputed that the EPA did not provide any type of public notice or comment period, prior to approving Maryland’s 1996-303(d) list. However, the defendant contended that it was under no obligation to provide for public notice and comment because the EPA’s approval of a state’s 303(d) list was not rulemaking under the Federal Administrative Procedure Act. The court agreed with the defendant, holding that approval or disapproval of state submissions under the CWA is not rule making; it is only the actual development of the list or load that is rule making. In dictum the court explained its rationale:

It is only when the EPA disapproves a list or load and must "identify such [impaired] waters ... and establish such loads" that the EPA becomes subject to the public notice and comment requirements because, in such a situation, the EPA is the party engaged in rule making.

Additionally, the Maryland District Court believed that the public policy considerations favored this result; specifically the policy favoring public awareness and an open process of government decision making. As a result of this approach, “the public is provided notice and the opportunity to comment by the party devising the list or load limit. In the case of the state as rule maker, all comments are forwarded to the EPA as part of the administrative record,” giving the “EPA the opportunity to review all comments and request additional information or clarification from the state prior to making a decision to approve or disapprove.”

IV. INSTANT DECISION

The Court of Appeals began its analysis by addressing the standard of review for dismissals based on a lack of subject matter jurisdiction. “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” The word “appear” was construed by the Court of Appeals to mean that the trial court correctly dismissed the case so long as it was more likely than not that court lacked subject matter jurisdiction. Because both parties stipulated to the facts, the question of subject matter jurisdiction on appeal was “purely a question of law” requiring de novo review.

The core legal issue addressed by the Court of Appeals in this case was whether the creation of Missouri’s 1998-303(d) list amounted to rulemaking activity as defined by the MoAPA. Under § 536.010.4, “agency rulemaking occurs with the formulation of a ‘statement of general applicability that implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements of an agency.” The MoAPA requires agencies to abide by certain procedural formalities when promulgating rules or regulations, making [a] rule adopted in violation of the

173 Id.
174 Id. at 419-420. “Therefore, as to the initial submission to the EPA, it is the state, not EPA, which is required to meet the notice and comment requirements.” See also City of Albuquerque v. Browner, 97 F.3d 415, 425 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997) (citing 4th Cir. For proposition that, in this context, it is the states that engage in rule making, not the EPA, which is restricted to a reviewing capacity) Id. at 420.
175 Sierra Club v. U.S. EPA, 162 F.Supp.2d 406, 420 (D. Md. 2001). “See 33 U.S.C. § 1313(c)(4) (stating that if Administrator disapproves a state submission and must then promulgate a new or revised standard, the Administrator must adhere to the notice and comment requirements); 40 C.F.R. § 130.7(d)(2) (stating that if the Regional Administrator is required to devise a list or load limits then the ‘Regional Administrator shall promptly issue a public notice seeking comment on such listing and loadings’).” Id.
176 Id.
177 Id.
179 Id. at *7.
180 Id.
181 Id.
182 Id.
MoAPA’s requirements void.” After determining the statutory definition of rulemaking activity, the Court of Appeals turned to the Association’s arguments on appeal.

The Association believed that Missouri’s list should be categorized as an improperly promulgated rule under the MoAPA, asserting that Missouri’s 303(d) list had “general applicability” to Missouri’s citizens because it encompassed 165 bodies of water throughout the state that may potentially be subjected to TMDL restrictions. Further, the Association claimed that the Clean Water Commission’s preparation and ratification of the 303(d) list was an implementation of state public policy because Missouri’s Clean Water Law expressly provides:

[It is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses and for the propagation of wildlife, fish and aquatic life; to provide that no waste be discharged into any waters of the state without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters and meet the requirements of the Federal Water Pollution Control Act as amended; and to cooperate with other agencies of the state, agencies of other states, the federal government and any other persons in carrying out these objectives.]

The Association also claimed that the 303(d) list was a rule under the express provisions of Missouri’s Clean Water Law. Section 644.026(8) states that the Commission shall:

Adopt, amend, promulgate, or repeal after due notice and hearing, rules and regulations to enforce, implement, and effectuated the powers and duties of sections 644.006 to 644.141 and any required of this state by any federal water pollution control act, and as the [C]ommission may deem necessary to prevent, control and abate existing or potential pollution.

The Court of Appeals noted that under § 644.026.2 of Missouri’s Clean Water Law all rules promulgated by the Commission must also comply with the MoAPA in order to be effective. However, it rejected the argument that the Commission was involved in rulemaking activity in this case. Although the procedure used by the Commission to promulgate the list was similar to rulemaking activity under the MoAPA, the Court of Appeals declared that it would be incorrect to assume that all actions taken by a state agency, for which the public is given notice and an opportunity for comment, are necessarily rulemaking under the MoAPA. This was particularly true in this case, according to the Court of Appeals, because Missouri’s Clean Water Law requires notice, comment opportunities, and public hearings “whenever the Commission considers taking any action.” Additionally, federal regulation requires the Commission to give public notice and seek comment prior to submitting its final 303(d) list to the EPA. So even though the Commission complied with the notice and comment requirements for rulemaking under the MoAPA, they did not necessarily do so because they were engaged in rulemaking activity.

Section 536.010 defines a rule as an “agency statement of general applicability that implements...policy, or that describes the organization, procedure, or practice requirements of any agency.” In this case, the Association argued that the 303(d) list implemented the policy described under § 644.01, and therefore was a rule under the MoAPA. To
bolster this argument, the Association cited three cases in which the Court of Appeals had earlier held three rules invalid due to the particular agency’s failure to follow the proper method of promulgation under the MoAPA.196

First, in Tonnar v. Missouri State Highway and Transportation Commission197 ("MSHTC"), the MSHTC appropriated the Tonnar’s home and some of their property in order to improve Route 65 in Carroll County.198 The Tonnar’s sought compensation for the property and the purchase of a replacement home.199 The MSHTC reimbursed the Tonnar’s for relocation based on its “Right-of-Way Manual,” a publication created by the MSHTC that described its policy for compensation and relocation payments, as well as the practices and procedures governing the rights of the public with respect to this issue.200 The Court of Appeals held that provisions in the “Right-of-Way Manual” were not binding under the MoAPA because of improper promulgation.201

Second, the Association cited Missouri State Division of Family Services v. Barclay,202 in which the Court of appeals concluded that a method used by Family Services for computing income benefits of recipients was a rule under the MoAPA.203 Despite not actually being promulgated, the Court of Appeals held that the method was void.204

Finally, in Kansas Association of Private Investigators v. Mulvihill,205 the Court of Appeals determined that the decision of the Kansas City, Missouri Board of Police Commissioners ("MBPC") to increase its license fees for security officers seeking limited police powers was a rule.206 The MBPC posted the license fee increase at its agency’s office, but failed to follow the MoAPA’s notice requirements.207 Accordingly, the Court of Appeals determined that MBPC’s non-compliance with the MoAPA invalidated the rule.208

The Court of Appeals distinguished these cases from the instant decision.209 "The common thread in these cases is that the manual, policy, or the fee at issue had ‘a potential, however slight, of impacting the substantive or procedural rights of some member of the public.’"210 The Court of Appeals reasoned that in order for the 303(d) list to qualify, as a rule it must act on unnamed and unspecified persons of fact, because “[r]ulemaking, by its very nature, involves an agency statement that affects the rights of individuals in the abstract.”211

The Commission insisted that the 303(d) list could not be considered a rule.212 Rather, the 303(d) list merely represented “the Commission’s formal offer of advice and information” to the EPA as to which bodies of water in Missouri presently required regulation or further study.213 The EPA is not bound by the Commission’s suggestions, which is evidenced by the EPA’s changes to Missouri’s 303(d) list in 1998.214

The Association, citing Senn Park Nursing Center v. Miller215 countered that the EPA’s involvement was immaterial to the determination of whether the Commission enacted a rule under the MoAPA, citing.216 Emphasizing that this was a case of first impression, the Court of Appeals stated that it was appropriate to consider this Illinois case in order to determine whether the 303(d) list could qualify as a rule under Missouri law.217 In Senn Park, “three nursing home facilities sought a writ of mandamus against the Director of the Illinois Department of Public Aid [("IDPA") for..."
reimbursement of Medicaid Services." This dispute arose following an amendment to Illinois' state Medicaid plan. Under the Social Security Act, Illinois was required to implement a state plan, approved by the Department of Health and Human Services, before it could participate in the federal reimbursement program. The IDPA sent copies of Illinois' state medical plan, which included an amended procedure for calculating the inflation update factor, to nursing home facilities. The plaintiff nursing homes alleged that the amended inflation update procedure was invalid because the IDPA failed to publish the rule in accordance with the Illinois Administrative Procedure Act. The IDPA then made four specific exclusions to this rule: (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings, (c) intra-agency memoranda, or (d) the prescription of standardized forms. The definition of "rule" under the MoAPA, in pertinent part reads "each agency statement of general applicability that implements, interprets or prescribes law or policy, or that describes the procedure, or practice requirements of any agency." However, the MoAPA lists thirteen specific exclusions to its general definition of a rule. Under the MoAPA's definition of a "rule," including its exclusions, places greater emphasis on general applicability rather than on the agency's autonomy in adopting a rule. None of the exclusions even suggests that a federal approval requirement would have any effect on the characterization of an agency statement as a rule.

The Court of Appeals believed that this case was extremely similar to the instant decision in that the decision of a state agency is federally mandated, that decision-making process involves minimal federal control, and neither the IAPA nor MoAPA's definition of a "rule" specifically excludes an agency statement that is federally approved. However, the definitions are not identical, and that is what the Court of Appeals believes distinguishes these two cases. The IAPA defines a "rule" in pertinent part as "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." The MoAPA then makes four specific exclusions to this rule: (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings, (c) intra-agency memoranda, or (d) the prescription of standardized forms. The definition of "rule" under the MoAPA, in pertinent part reads "each agency statement of general applicability that implements, interprets or prescribes law or policy, or that describes the procedure, or practice requirements of any agency." However, the MoAPA lists thirteen specific exclusions to its general definition of a rule. Under the MoAPA's definition of a "rule," including its exclusions, places greater emphasis on general applicability rather than on the agency's autonomy in adopting a rule. None of the exclusions even suggests that a federal approval requirement would have any effect on the characterization of an agency statement as a rule.

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Section 536.010.4(c) excludes from the general definition of a rule, "[a]n intergovernmental, interagency, or intra-agency 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." The Court of Appeals noted that the statutes defining the meaning of the term "rule" in Alabama, Iowa, and Michigan contained exceptions similar to § 536.010.4(c). Under the Michigan statute, "[a]n intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of or procedures and practices available to, the public," is not a rule.

Although the Court of Appeals could not find a case squarely on point in any of these jurisdictions, it believed that Kent County Aeronautics.

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218 Id.
219 Id.
220 Id.
21 Id.
222 Id.
224 Id.
226 Id.
228 Id.
230 Id.
232 Id.
234 Id.
236 Id.
238 Id.
240 Id.
242 Id.
244 Id.
246 Id.
248 Id.
250 Id.
254 Mo. Soybean, 2002 WL 45891 at *11.
256 Id.
258 Id. at **11-12.
260 Id. at *12.
Board v. Department of State Police was instructive on the issue of what should constitute an "intergovernmental communication" for purposes of § 536.010.4(c). In Kent, the Michigan Department of State Police ("State Police") identified problems with their police radio system. To address these problems, the Michigan legislature created the Michigan Public Safety Communications System ("MPSCS"), and awarded Motorola with the contract to design and build the system. The MPSCS required construction of nearly 200 new radio towers in the state. The State Police and Motorola planned to build one tower in Kent County. The affected township was notified of the intention of the State Police to construct a tower, and was advised to either issue a special use permit authorizing the tower's construction, or to select an alternative site. However, any alternative site chosen by the township was required to meet the "Equivalent Site Criteria" adopted by the State Police. The response from the township was to grant the special use permit, but substantially limit the height of the tower in accordance with the zoning regulations of the township, as well as the Kent County International Airport Zoning Ordinance. The State Police notified Kent County of its intention to construct the tower, and requested that either a special use permit be issued to the State Police, or an equivalent site be chosen by Kent County. Kent County did neither; choosing instead to advise the State Police to apply for a permit to construct the tower. The State Police and Motorola notified Kent County of its intention to proceed with construction, and began pre-construction activity. The township then reached an agreement with the State Police to consider building the tower at an alternative site chosen by the township, with a contingency that the State Police would return to the original site if third parties challenged construction at the new site. Construction at the new site was challenged the following month, and the State Police immediately resumed construction at the original site. The township filed a complaint against the State Police, alleging that the "Equivalent Site Criteria" were rules improperly promulgated under Michigan's Administrative Procedure Act, and were therefore invalid. The trial court granted summary judgment to the State Police, concluding that the "Equivalent Site Criteria" were not rules. The Michigan Court of Appeals affirmed the decision, holding that the "Equivalent Site Criteria" fell under the "intergovernmental communication" exclusion of the Michigan Administrative Procedure Act because it did not affect the rights of the public. The court explained its rationale for its decision as follows:

The "Equivalent Site Criteria" is analogous to a set of instruction intended to guide [the township] in proposing an equivalent, alternative site for construction. As the trial court correctly noted, the criteria do not create any legal obligation on behalf of the township to propose a site, nor do they enlarge, abridge, or in any way affect the rights of the public. The criteria simply advise a local governmental unit, by way of explanation, what will constitute an equivalent site for construction of a communications tower. The construction of the radio tower involved communications between two governmental agencies that did not affect the public's rights, or the procedures and practices available to the public.
The Court of Appeals in the instant decision believed that the 303(d) list was similar to the "Equivalent Site Criteria" in Kent, and that the list was simply a communication between the Commission and the EPA. 256 For all of these reasons, the Court of Appeals held that because the 303(d) "list simply advised the federal government, in the form of a list and supporting materials, what waterbodies the State has determined to potentially require TMDL's...[t]he 1998 Missouri 303(d) list involved communications between two governmental agencies that did not substantially affect the public's rights or the procedures available to the public," and therefore did not constitute rulemaking activity under the MoAPA. 257 Accordingly, the Court of Appeals affirmed the trial court's decision, ruling that the trial court properly dismissed the claim for lack of subject matter jurisdiction because the MoAPA only authorizes Missouri's courts "to render declaratory judgments respecting the validity of rules or of threatened applications thereof." 258

After ruling that the 303(d) list constituted only intergovernmental communication exempted from rulemaking under the MoAPA, the Court of Appeals admitted that courts in other jurisdictions have held that the development of a 303(d) list is rulemaking. 259 However, in the instant decision the Association claimed that a 303(d) list was a rule under the MoAPA, and the Court of Appeals concluded that such a decision would be contrary to the "clear language" of § 536.010.4(c). 260

As a final point, the Court of Appeals warned that the practical effect of their holding was to preclude parties from seeking judicial review of future 303(d) lists developed by Missouri. 261 The Court of Appeals also pointed to a potential conflict between its ruling, and Missouri's Clean Water Law. 262 Section 644.071 of Missouri's Clean Water Law provides in pertinent part that "[a]ll final orders or determinations of the commission or director made pursuant to the provisions of section 644.006 to 644.141 are subject to judicial review pursuant to the provisions" of the MoAPA. 263 Since the MoAPA prohibits judicial review of 303(d) lists, and it is presumed that the legislature was aware of this fact when enacting § 644.071, an inconsistency is apparent 264 However, the Court of Appeals declined the opportunity to settle this issue, stating that it was a dilemma that must be resolved by the legislature. 265

V. COMMENT

Missouri's Clean Water Law states that it is Missouri's public policy to conserve its waters, to limit water pollution, to fulfill its requirements under the CWA, and to cooperate with the federal government in carrying out these objectives. 266 Clearly, the creation of a 303(d) list falls within the MoAPA's general definition of rulemaking because it is a "statement of general applicability that implements...policy." 267

Creation of a 303(d) list, involves more than simply listing the waterbodies that are unable to meet Missouri's WQS. The state must also devise a written methodology to guide its consideration and evaluation of the information it uses to compile its list, 268 form conclusions as to whether each impaired waterbody will require a TMDL, 269 and prepare a strategy document that explains how Missouri plans to establish TMDLs for the waterbodies it has designated. 270 Although the 303(d) list is not effective unless the EPA chooses to approve it, the instant decision emphasized that a federal approval requirement is not dispositive of the existence of rulemaking by a state agency. Actions taken by

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256 Id. at *14.
257 Id.
258 Id.
259 Id.
260 Id.
261 Id. at *15.
262 Id.
263 Id.
264 Id.
265 Id.
268 40 C.F.R. § 130.23 (b)(1-5) (2002).
270 40 C.F.R. § 130.28 (2002).
Missouri's agencies can be rulemaking even if they must be approved by a federal agency before becoming effective.\textsuperscript{271} Further, if one of Missouri's agencies promulgates a rule and fails to fulfill the requirements of rulemaking under the MoAPA, federal approval will not cure the rule's ineffectiveness.\textsuperscript{272} So the Association would have had the right to challenge Missouri's decision to include the Rivers on its 1998-303(d) list under the MoAPA's general definition rulemaking.

The point of contention, however, is under § 536.010.4(c), which states that any intergovernmental or interagency communication that does not "substantially affect the legal rights...or procedures available to, the public, or any segment thereof," is not a rule under the MoAPA.\textsuperscript{273} The Court of Appeals believes that a 303(d) list falls precisely within this exclusion; consequently shielding the decisions, methods, and strategies the list contains from judicial scrutiny.\textsuperscript{274} Because no other Missouri Court had previously examined the "intergovernmental communications" exclusion,\textsuperscript{275} the Court of Appeals looked to other jurisdictions for guidance.\textsuperscript{276} Determining that \textit{Kent}\textsuperscript{277} paralleled the instant decision, the Court of Appeals held that creation of a 303(d) list was not rulemaking under the MoAPA because the legislature had intended to protect this type of agency action from judicial review.\textsuperscript{278} However, \textit{Kent} is arguably distinguishable from the instant decision.

In \textit{Kent}, the plaintiffs were government entities attempting to enforce a local zoning ordinance.\textsuperscript{279} The \textit{Kent} court concluded that the "Equivalent Site Criteria" was meant only to instruct the plaintiffs in choosing an alternative site for the construction of a communications tower if the plaintiffs found the chosen location undesirable.\textsuperscript{280} It did not compel the plaintiffs to find an alternative location; it merely clarified the type of alternative location the defendants would have considered an adequate substitute.\textsuperscript{281} Had the plaintiffs used the "Equivalent Site Criteria" to choose an alternative site, that choice would have likely been considered rulemaking under Michigan's law because it would have been an intergovernmental communication that could, for example, inconvenience landowners, create a nuisance, or violate a zoning ordinance. However, the "Equivalent Site Criteria" alone accomplished none of these and had no effect on the public. \textit{Kent} is truly exemplary of the intent behind the "intergovernmental communication" exclusion from rulemaking. However, the facts of the instant decision are dissimilar.

There is no question that a 303(d) list is an intergovernmental communication. It is created by the MDNR, in cooperation with the Commission, and submitted to the EPA for approval. Form, however, is only half of the test. If an intergovernmental communication "substantially affect[s] the legal rights...or procedures available to, the public, or any segment thereof," it is a rule, and can be subjected to review by Missouri's courts despite its form. That is the key distinction between \textit{Kent} and the instant decision.

The CWA requires that Missouri create a 303(d) list.\textsuperscript{282} However, the CWA builds in safeguards to insure that if any state fails to properly fulfill its obligation, the CWA's goals will not suffer as a result. Should Missouri decide to forego its duty to create a 303(d) list, the EPA is obligated to do so on Missouri's behalf.\textsuperscript{283} There is no sanction for a state's failure to create a 303(d) list, other than its duty to eventually establish the TMDLs created by the EPA. Further, if the EPA does create Missouri's 303(d) list, the state is still free to apply for federal funding for implementation of any TMDLs the EPA has deemed necessary.\textsuperscript{284}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Mo. Soybean}, 2002 WL 45891 at *11. "[T]he definition of "rule" under § 536.010.4 of [MoAPA] does not exempt an agency statement that is federally approved."
\item See \textit{Senn Park Nursing Center v. Miller}, 455 N.E.2d 153 (III. App. 1983) The instant decision embraced the idea that if the MoAPA defined rulemaking similarly to the IAPA, the Court of Appeals would have reached a similar result despite federal approval. \textit{Mo. Soybean}, 2002 WL 45891 at *10-11.
\item \textit{Id.} at § 536.010.4(c) (2000).
\item \textit{Id.} at *14.
\item \textit{Id.} at *10.
\item \textit{Id.} at *10-13.
\item \textit{Mo. Soybean}, 2002 WL 45891 at *14.
\item \textit{Kent County Aeronautics Bd.}, 609 N.W.2d at 598.
\item \textit{Id.} at 583.
\item \textit{Id.}
\item 33 U.S.C. § 1313(d) (1994).
\item See 33 U.S.C. § 1313(d)(2) (1994). \textit{See also} 40 C.F.R. § 130.35.
\item See 40 C.F.R. § 130.62.
\end{enumerate}
\end{footnotesize}
In view of this, it seems that the federal regulations prescribing the methods for the creation of Missouri’s 303(d) list are Kent’s “Equivalent Site Criteria” counterparts, not Missouri’s 303(d) list. The regulations, among other things, inform Missouri as to how to create a 303(d) list, the proper methods and times for submission, the form of the submission, and what information needs to be included in order for the EPA to approve the list. Missouri’s 303(d) list, on the other hand, represents a collection of Missouri’s decisions and determinations, its methods for making those decisions, and its strategy for implementing the TMDLs it believes are necessary. Missouri’s 1998-303(d) list cited “1200 stream segments encompassing 40% of the stream miles in the state” as suffering impairment. As a result of this determination and the EPA’s subsequent approval of all of the waterbodies on the list, TMDLs must now be established and enforced for these waterbodies according to Missouri’s plan for implementation. Since the greatest source of water pollution today is nonpoint source pollution, commonly associated with agricultural land use, farmers who own land bordering these waterbodies may be affected by land use restrictions resulting from Missouri’s 303(d) list determinations, most notably the TMDLs they will require. Accordingly, Missouri’s 303(d) list is indicative of agency rulemaking because it is an intergovernmental communication that has the ability to affect the rights of Missourians. So, although Kent is a fine example of the proper application of the exclusion, the facts of the instant decision appear far less analogous.

The Court of Appeals establishes a bright line rule in the instant decision; Missouri’s creation of a 303(d) list is not rulemaking under the MoAPA and therefore cannot be challenged in court by those who may be aggrieved by its impact. Whether correctly decided or not, it is the law in Missouri at this point. While the Court of Appeals points out that there is a potential conflict between its ruling and Missouri’s Clean Water Law, the greater cause for concern for Missourians should be the practical effect of this holding. The reality is that the holding in the instant decision, coupled with the decision in Sierra Club, is likely to preclude Missourians from challenging future 303(d) lists at both the state and federal level, but only when Missouri creates the list. Missouri’s interpretation of its “intergovernmental communications” exclusion entitles the MDNR and Commission to make any decisions relevant for a 303(d) list without fear of scrutiny in Missouri’s courts. Alternatively, the current federal stance is that approval or disapproval of state submissions under the CWA is not rulemaking; it is only the actual development of the list or load that is rulemaking. Assuming other federal courts adopt this posture, 303(d) lists will be unchallengeable at both the state and federal level when created by Missouri. However, if Missouri fails to create a 303(d) list, or the EPA disapproves Missouri’s list, then any subsequent lists created by the EPA on Missouri’s behalf could be challenged because the federal position recognizes this type of action as rulemaking.

Ironically, the Court of Appeals could have followed Sierra Club and still reached the same result in this particular case. The MDNR did not propose that TMDLs needed to be established in order for the Rivers to comply with Missouri’s WQS. Rather, the strategy document that accompanied the final version of Missouri’s 1998-303(d) list stated that the Rivers’ impairment status was not “adequately documented,” and that environmental monitoring was necessary to determine whether TMDLs would need to be established for the Rivers at some point in the future. However, the EPA only partially approved Missouri’s list. After approving all of the listed waterbodies, the EPA disapproved Missouri’s three-tiered ranking system and required that TMDLs be established for every waterbody contained on the list. Following the rationale of Sierra Club, the EPA arguably became the rulemaker because it no longer confined itself to a reviewing capacity. Absent the EPA’s modification, the Association would have lacked standing to challenge Missouri’s inclusion of the Rivers because it is the decision to require TMDLs, rather than the decision to include the

286 Id. at *5.
287 A motion for a rehearing and/or transfer was denied by the Court of Appeals on March 5, 2002.
288 Id. at *15.
289 Supra n. 166.
290 Supra n. 168.
293 Mo. Soybean, 2002 WL 45891 at *5.
294 Id.
295 See 33 U.S.C. § 1313(c)(4) (stating that if Administrator disapproves a state submission and must then promulgate a new or revised standard, the Administrator must adhere to the notice and comment requirements); 40 C.F.R. § 130.7(d)(2) (stating that if the Regional Administrator is required to devise a list or load limits then the ‘Regional Administrator shall promptly issue a public notice seeking comment on such listing and loadings’), Sierra Club, 162 F.Supp.2d at 420.
Rivers, which ultimately threatens Missourians with potential land-use restrictions. Since the decision to require TMDLs was made by the EPA, rather than the MDNR, the Court of Appeals could have ruled that the EPA’s modifications to Missouri’s list mooted the Association’s claim against the MDNR. However, the Court of Appeals chose not to consider the effect of the EPA’s actions in the instant decision; concluding instead that the MoAPA flatly prohibits judicial review of 303(d) lists created by Missouri.  

VI. CONCLUSION

It appears that no other court has decided whether a state’s creation of a 303(d) list constitutes rulemaking under that particular state’s administrative procedure act. However, it is likely that it would be considered rulemaking in the majority of jurisdictions because it is an agency action falling within the definition of rulemaking in most states. Of course, the Court of Appeals’ decision is not controlling in every district in Missouri. However, it is highly persuasive for Missouri’s courts, and may also prove influential in states with similar “intergovernmental communications” exclusions as well.

The extent to which the Rivers inclusion on Missouri’s 303(d) list will actually impact farmers in the state is unclear. The Rivers are the largest waterbodies ever to require TMDLs. Under § 208 of the CWA, Missouri is free to decide whether, and to what extent, land-use restrictions are necessary for TMDL compliance. However, if Missouri wants federal funding to implement TMDLs for the Rivers, the EPA could require land-use restriction in exchange for its financial support. Whether land-use restriction stemming from Missouri’s 1998-303(d) list will become a reality for the state’s farmers, who already face rising costs, falling prices, and increased world competition, remains a threatening possibility.

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296 Mo. Soybean. 2002 WL 45891 at *16.
297 The Court of Appeals noted that only three other states’ administrative procedure acts contained “intergovernmental communications” exclusions similar to Missouri’s. Mo. Soybean. 2002 WL 45891 at **11-12.
298 The states with similar exclusions are Alabama, Iowa, and Michigan. Id.
300 Supra n. 148.
301 Supra n. 150.