

March 29, 2021

Kim Caviness
Mississippi Dept. of Environmental Quality
PO Box 2261
Jackson, MS 39225
Via email: kcaviness@mdeq.ms.gov

Dear Ms. Caviness:

RE: Comments of the Mississippi River Collaborative (MRC) on the Proposed Mississippi Triennial Review of Water Quality Standards

Dear Ms. Caviness:

The Mississippi River Collaborative (MRC) consists of ten state organizations – as well as other regional and national partners – working to protect water quality in the Mississippi River Basin and the Gulf of Mexico.

We appreciate that some improvements are proposed to Mississippi standards in the February 1, 2021 Triennial Review proposals but write to urge you to consider certain matters that should be clarified in the standards as well as standards that should be established regarding nutrient pollution and arsenic that are not contained in the draft.

- 1. It must be made clear that no waters may receive classifications or criteria that are less than that necessary to protect all fishable/swimmable uses without following the UAA or variance procedures of 40 C.F.R. 131.10(g) or 40 C.F. R. 131.14 and obtaining U.S. EPA approval of the change.**

The draft would establish new classification categories in Section 2.3 for “Modified Fish and Wildlife” and “Drainage Waters.” It should be made clearer, however, just how limited use of these new classifications can be given the Clean Water Act (CWA), federal regulations, and the presumption that standards should be protective of fishable/swimmable uses. See *Kansas Natural Resources Council Inc. v. Whitman*, 255 F. Supp. 2d, 1208, 1213 (D. Kan. 2003).

Under the CWA, a water body that may be considered by some to be a “drainage ditch” must still be protected for all existing uses and every use that is attainable. Broad categories of water bodies cannot normally be employed that would presume that waters cannot support a use just because they cannot support a different use. Further, a water body cannot be placed in the “modified” or “drainage” category without going through a use attainability analysis process as dictated by 40 C.F.R. 131.10(g) that is approved by U.S. EPA under Section 303(c) of the CWA.

For example, a water body that cannot be expected to support a particular species that requires a certain type of habitat might receive a use classification that would remove criteria needed to protect that particular species, but this would not allow those waters to be put in a water body category that would allow pollution that would harm other species that potentially could live in the water body. Further, those waters should be protected from new pollution by antidegradation requirements and the need to protect downstream waters under 40 C.F.R. §131.10(b).

2. Specific to antidegradation, a Tier 3 category should be created, and it should be clear that existing uses must always be protected.

The draft is not clear regarding antidegradation and apparently fails to create even a Tier 2.5 category of protection. Mississippi should create a Tier 3 protection category.

In the proposed Section 2.3 (G), with its description of waters that clearly should receive the highest level of protection, one would expect to see antidegradation requirements that allow essentially no new pollution. Compare with 40 C.F. R. 131.12(a)(3). However, the draft at G(2) does not set forth requirements for new or increased pollution to these waters that are even as strict as Tier 2 requirements. On its face, draft 2.3 G does not even require that the degradation be necessary to accommodate important social or economic development. (We presume that showing would be required under Section 2.1 A.)

For the outstanding Mississippi waters of the type identified in 2.3 G, Mississippi should adopt standards that make clear that these waters are off limits for new pollution.

Further, proposed Section 2.1 C states, “in no case shall it be permissible to deposit or introduce materials into the Waters of the State that will cause impairment of the designated use(s) of said waters.” Read in isolation, this language could imply that it was not necessary to protect all existing uses despite 40 C.F.R. 131.12(a)(1). The language should be amended to state “in no case shall it be permissible to deposit or introduce materials into the Waters of the State that will cause impairment of the designated or existing use(s) of said waters.”

3. Mississippi Should establish numeric nutrient standards.

MRC petitioned U.S. EPA in 2008 to take significant steps in the development of numeric nutrient criteria and to develop a TMDL for the Mississippi River. We recognized then that these were not easy steps to take, but they would help set the necessary framework to achieve the Mississippi River/Gulf of Mexico Hypoxia Task Force’s (HTF) goals. Our petition was denied, and our subsequent action under the Administrative Procedure Act to require further consideration of the petition ultimately failed. However, the District Court in *Gulf Restoration Network v. Jackson* (E.D. La 2016) made clear that U.S. EPA did not have unlimited discretion to do little or nothing itself while encouraging states to act. The District Court wrote the following:

“EPA’s assessment that the best approach at this time is to continue in its comprehensive strategy of bringing the States along without the use of federal rule making is subject to the highly deferential and limited review that that the Fifth Circuit described in its opinion. Presumably, there is a point in time at which the agency will have abused its great discretion by refusing to concede that the current approach — albeit the one of first choice under the CWA — is simply not going to work. But for now, Plaintiffs have

not demonstrated that EPA's assessment was arbitrary, capricious, or contrary to law. 224 F. Supp. 3d 470, 477." (emphasis added)

Much of the basis for U.S. EPA's denial of MRC's petition and the court's decision to uphold U.S. EPA's denial was set forth in a memo by Acting Assistant Administrator Nancy Stoner in 2011, entitled "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions." This memo outlines eight elements for a "state framework for managing nitrogen and phosphorus pollution." While *some* of the elements discussed in the Stoner Framework memo were incorporated into *some* state Nutrient Reduction Strategies, other elements are glaringly absent from most, such as numeric nutrient criteria development. (EPA said that numeric N and P criteria for at least one class of waters by 2014-16 would be a reasonable start.)

Accordingly, MRC is distressed to see that Mississippi does not propose any nitrogen or phosphorus standards as part of this triennial review. Writing NPDES permits and calculating TMDLs that protect Mississippi and downstream waters would certainly be facilitated by creation of protective numeric criteria for nitrogen and phosphorus.

4. Mississippi Should reconsider its Human Health Standard for arsenic.

U.S. EPA criteria for inorganic arsenic listed at 40 C.F.R. §131.36 to protect persons who eat fish is 0.14 ug/L, but it appears that the corresponding Mississippi criteria is 24 ug/L. (See Section 2.2, Table 2.) While there may be reasons why the Mississippi standard would be over 171 times higher than U.S. EPA criteria, it is clear that the Mississippi standard is unlikely to be protective and should be reconsidered.

MRC looks forward to continuing to work with Mississippi DEQ to protect the waters of Mississippi and downstream waters including the Gulf of Mexico.

Sincerely,



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