

**Clean Water Act Implications for Agriculture**  
**Agricultural Law Tract**  
**June 20, 2002**

Presented by:  
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The federal Clean Water Act<sup>1</sup> (CWA) was adopted in 1972 and has principally applied to point source dischargers throughout the past three decades. The application of the CWA to nonpoint sources has been limited.<sup>2</sup> The common notion of a point source is something that comes out of a pipe that is controllable whereas nonpoint sources are diffuse and not easily controllable.<sup>3</sup> However, recent trends, including out of court settlements by EPA with environmental groups, are toward increasing regulation of agricultural production nonpoint sources. In Iowa, the Department of Natural Resources (DNR) has delegated authority to implement the CWA but it is subject to the EPA's oversight and review of its programs.

## **Water Quality Standards**

Generally, water quality standards are the rules that determine whether a water body is "polluted." The standards are also used to determine the effluent limitations of impaired or discharges from point sources to water body.

### **DNR Policy**

The DNR's general policy toward water quality standards is stated in its regulations:

"It is the general policy of the [environmental protection] commission to protect and enhance the quality of all waters of this state. In furtherance of this policy it will attempt to prevent and abate the pollution of all waters of the state to the fullest extent possible consistent with statutory and technological limitations. This policy shall apply to all point *and nonpoint sources of pollution.*"<sup>4</sup>

### **Water body use designations**

Water bodies are designated as a general use or a designated use. General use segments are those that do not support aquatic communities principally because they do not support

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<sup>1</sup> 33 U.S.C. §§ 1250-1387

<sup>2</sup> *But see* 33 U.S.C. § 1288, 1314(f), 1329 for nonpoint source management programs

<sup>3</sup> *See* 33 U.S.C. § 1362(14) for definition of point source

<sup>4</sup> Iowa Admin. Code r. 567-61.2(1)

water flow year round.<sup>5</sup> Iowa has eight designated use categories under which waters can be classified. They include: primary contact recreation, cold water aquatic life, high quality water, high quality resource water, significant source warm water, limited resource warm water, lakes and wetlands and drinking water supply.<sup>6</sup> The DNR evaluates each stream to determine its use designation. All changes in a stream's use designation goes through the chapter 17A rulemaking process.

### **Water Quality Standards**

Class A waters are primary contact recreation waters and class B waters are designated for wildlife, fish, aquatic and secondary body contact. For example, the Raccoon River to the Des Moines Center Street Dam is designated as a Class B significant resource warm water, but at the Des Moines Water Works intake at Prospect Park is designated as a drinking water supply.

Iowa's water quality standards include narrative standards and numeric standards.<sup>7</sup> An example of a narrative standard also called a "free from" standard is: "Such waters shall be free from substances attributable to wastewater discharges or agricultural practices in concentrations or combinations which are acutely toxic to human, animal, or plant life."<sup>8</sup>

Numeric standards are set for each classification of a water body. For example for class B waters the pH needs to remain between 6.5 and 9 and for drinking water supplies the level of atrazine is limited to 3 mg/L. The regulations contain a list of numeric and narrative standards for each water classification.<sup>9</sup>

### **Triennial Review**

Section 303(c) of the CWA requires states "at least once each three year period" to review water quality standards and to modify or adopt standards as appropriate. DNR has been conducting its triennial review of Iowa's standards for the past eighteen months and is continuing this process. A diverse technical advisory committee meets irregularly to provide feedback to the DNR staff. Then, the proposed rules goes through a chapter 17A public notice and comment period before eventual adoption by the Environmental Protection Commission.

### **Regional Nutrient Standards**

Region 7 EPA is currently developing regional numeric standards for nitrogen and phosphorus in order to protect aquatic life. The current direction from national EPA headquarters is to set the standard of allowed nitrogen and phosphorus at a level where 75% of the water bodies by definition and 25% of the pristine water bodies would violate the standard. If Region 7 EPA adopts this approach, more Iowa waters will be classified as impaired waters on the TMDL list. The state is allowed to do an alternate plan, but it must be approved by Region 7 EPA.

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<sup>5</sup> Iowa Admin. Code r. 567-61.3(1)(a)

<sup>6</sup> Iowa Admin. Code r. 567-61.3(1)(b)

<sup>7</sup> Iowa Admin. Code r. 567-61

<sup>8</sup> Iowa Admin. Code r. 567-61.3(2)

<sup>9</sup> Iowa Admin. Code 567-61.3(3)

## **Total Maximum Daily Loads**

Under § 303(d) of the CWA states are to identify waters for which effluent limitations are not stringent enough to implement water quality standards. The DNR is to establish TMDLs for the streams listed on the 303(d) list. The EPA is also promulgating new federal regulations. The EPA is evaluating the proposed TMDL rule after the change in administrations.<sup>10</sup> The new rule is projected to take effect in October 2002.

Water quality standards and water use designations are also the basis for determining whether a water body is impaired or polluted. If the DNR determines that the water body is not meeting the standard for its designated use, the DNR may list the water body on the § 303(d) list of impaired waters.

### **Authority to include nonpoint sources**

A dispute continues to remain whether the EPA or DNR can list a water body on the § 303(d) list that is impaired solely by nonpoint sources. In *Pronsolino v. Marcus*,<sup>11</sup> where the Plaintiffs challenged the establishment of a TMDL for the Garcia River in Northern California because the river was listed primarily because of sediment run-off from logging and agricultural activities. The district court held that the EPA could set a TMDL for the Garcia River but that the state could refuse to regulate based on the TMDL. California would likely lose substantial federal funding if it did not regulate based on the TMDL.

### **Iowa TMDL list**

The DNR currently has 59 water bodies on its TMDL list. While the list did not go through a chapter 17A rule promulgation, the DNR did accept public comment and the EPC added to the list through its own rule promulgation. The DNR is in the process of developing TMDLs on those 59 water bodies.

The DNR is now working on its 2002 TMDL list.<sup>12</sup> The DNR took public comment on the methodology for listing a water body on its October 2002 list until May 15, 2002. A new TMDL list is due to the EPA for review in October 2002. The list is then subject to EPA review and approval.

### **Differences from Past TMDL lists for the 2002 TMDL list**

#### Credible Data Law

The main difference with this year's list, other than improved water monitoring data, compared to previous lists is two-fold. First, the list is to be developed under the state's new credible data law.<sup>13</sup> This law was enacted to require the DNR to only list those streams for which it has documentation of the impairment.

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<sup>10</sup> 65 Fed. Reg. 43586-43670 (2000). See also <http://www.epa.gov/owow/tmdl/index.html>

<sup>11</sup> *Pronsolino v. Marcus*, 91 F.Supp.2d 1337 (N.D. Cal. 2000), Appeal pending Nos. 00-16026, 00-16027 (9<sup>th</sup> Cir. 2001).

<sup>12</sup> See <http://www.state.ia.us/epd/wtresrce/303dnote.htm> or [http://www.state.ia.us/dnr/organiza/epd/wtresrce/files/tmdl\\_2002.htm](http://www.state.ia.us/dnr/organiza/epd/wtresrce/files/tmdl_2002.htm)

<sup>13</sup> Iowa Code §§ 455B.193-195

"Credible data" means scientifically valid chemical, physical, or biological monitoring data collected under a scientifically accepted sampling and analysis plan, including quality control and quality assurance procedures. Data dated more than five years before the department's date of listing or other determination under section 455B.194, subsection 1, shall be presumed not to be credible data unless the department identifies compelling reasons as to why the data is credible.<sup>14</sup>

All "credible data" must be collected by the department, the department's designee or a qualified volunteer. The DNR has proposed rules to define who qualifies as a "qualified volunteer," and as of the date of this outline, had not finalized the new rules.<sup>15</sup> Credible data is required for:

- a. Developing and reviewing any water quality standard.
- b. Developing any statewide water quality inventory or other water assessment report.
- c. Determining whether any water of the state is to be placed on or removed from any section 303(d) list.
- d. Determining whether any water of the state is supporting its designated use or other classification.
- e. Determining any degradation of a water of the state under 40 C.F.R. § 131.12.
- f. Establishing a total maximum daily load for any water of the state.<sup>16</sup>

The credible data law also includes several parameters for evaluation of data and using the data to place water bodies on the 303(d) list. For example, many of the impairments of the last 303(d) were listed as unknown. The new credible data law allows these streams to continue to be listed, but a TMDL cannot be developed to remedy the impairment until more data is collected on the water body.

"e. If a pollutant causing an impairment is unknown, the water of the state may be placed on a section 303(d) list. However, the department shall continue to monitor the water of the state to determine the cause of impairment *before* a total maximum daily load is established for the water of the state and a water of the state listed with an unknown status shall retain a low priority for a total maximum daily load development until the cause of the impairment is determined unless the department, after taking into consideration the use of the water of the state and the severity of the pollutant, identifies compelling reasons as to why the water of the state should not have a low priority."<sup>17</sup>

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<sup>14</sup> Iowa Code § 455B.171(11)

<sup>15</sup> Iowa Admin. Bulletin vol. 24, No. 16, 1204-6 (February 6, 2002).

<sup>16</sup> Iowa Code § 455B.194(1)

<sup>17</sup> Iowa Code 455B.195(1)(e)

## Iowa litigation

Second, the EPA is supervising the DNR's actions in this area under the auspices of a court order. The EPA has been sued in 39 states over the state's failure to establish TMDL's.<sup>18</sup> The Sierra Club and SAILORS Inc. brought suit against the EPA in Iowa based on the DNR's failure to establish TMDLs.<sup>19</sup> The DNR was not a party to the lawsuit. Like in many other states, the EPA agreed to a consent decree with the Sierra Club which requires the DNR to establish TMDLs on a specific schedule.<sup>20</sup> The Sierra Club is to be notified of any changes to the 303(d) list and is to receive a detailed explanation of any changes to the list. The EPA is also to provide justification for the Mississippi River Basin not being included in the October 2002 list if it not included in the final listing.

It is not clear how TMDLs will be implemented in Iowa in the future. Many of the TMDLs were established because of nonpoint source impairments. The current TMDL plans hed call for monitoring of the stream to verify an impairment and voluntary changes in land use or management. Many of the TMDLs are to be reevaluated to determine whether they are being met. Challenges remain to determine what happens if the TMDLs aren't met upon reevaluation.

## CAFO Regulations

Concentrated Animal Feeding Operations are considered to be point sources under the Clean Water Act.<sup>21</sup> Generally, a CAFO is currently defined in rule as those operations larger than 1000 animal units that discharge to a water body or to a man-made conveyance to a water body.<sup>22</sup> The EPA proposed rules in January 2001 just prior to the present administration taking office.<sup>23</sup> The new administration took public comments and is obligated to promulgate the new regulations by December 2002 pursuant to an out of court settlement. Once the new regulations are finalized, the DNR may need to make adjustments to its current livestock regulatory program so that it is substantially equivalent to the new federal requirements.

### NPDES permits

The current federal law requires CAFOs to obtain National Pollutant Discharge Elimination System (NPDES) permit. Many states do not require an NPDES permit in name, including Iowa. There are two main reasons given for not issuing NPDES permits. First, Iowa may be considered to have a permit by rule. Current confinement regulations contain similar requirements to an NPDES permit. Second, Iowa standards require no discharges to water bodies of the state. If a discharge occurs, a violation of the law occurs and the livestock operation is subject to an enforcement action including natural resource restitution and monetary penalties.

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<sup>18</sup> See <http://www.epa.gov/owow/tmdl/lawsuit1.html>

<sup>19</sup> *SAILORS INC. v. U.S. EP.A. & Sierra Club v. EPA*, U.S. Dist. Ct. N.D. Iowa, CR Division, Consolidated Case No. C98-134-MJM (2001).

<sup>20</sup> See attached consent decree.

<sup>21</sup> 33 U.S.C. 1362 (14)

<sup>22</sup> 40 C.F.R. pts. 122, 412

<sup>23</sup> 66 Fed. Reg. 2960-3145 (2001).

This issue is currently under litigation in at least one case in Iowa.<sup>24</sup> In *Sierra Club v. Murphy Family Farms, Inc.*, the Allamakee County District Court granted summary judgment ruling that the operation was not required to have an NPDES permit under the CWA unless there was an actual discharge. The court also made note of the opinion of DNR legal counsel that their program is equivalent to the federal NPDES permit. This case goes to trial July 2002 on nuisance claims.

### **Lawsuits against CAFOs under other federal laws**

Other avenues other than the Clean Water Act of also being pursued by a variety of groups against CAFOs. The NPDES permit issue is under litigation in North Carolina.<sup>25</sup> Actions have also been brought under the Federal Racketeering Influenced and Corrupt Organizations Act (RICO),<sup>26</sup> Comprehensive Environmental Response Compensation and Liability Act (CERCLA),<sup>27</sup> and Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).<sup>28</sup>

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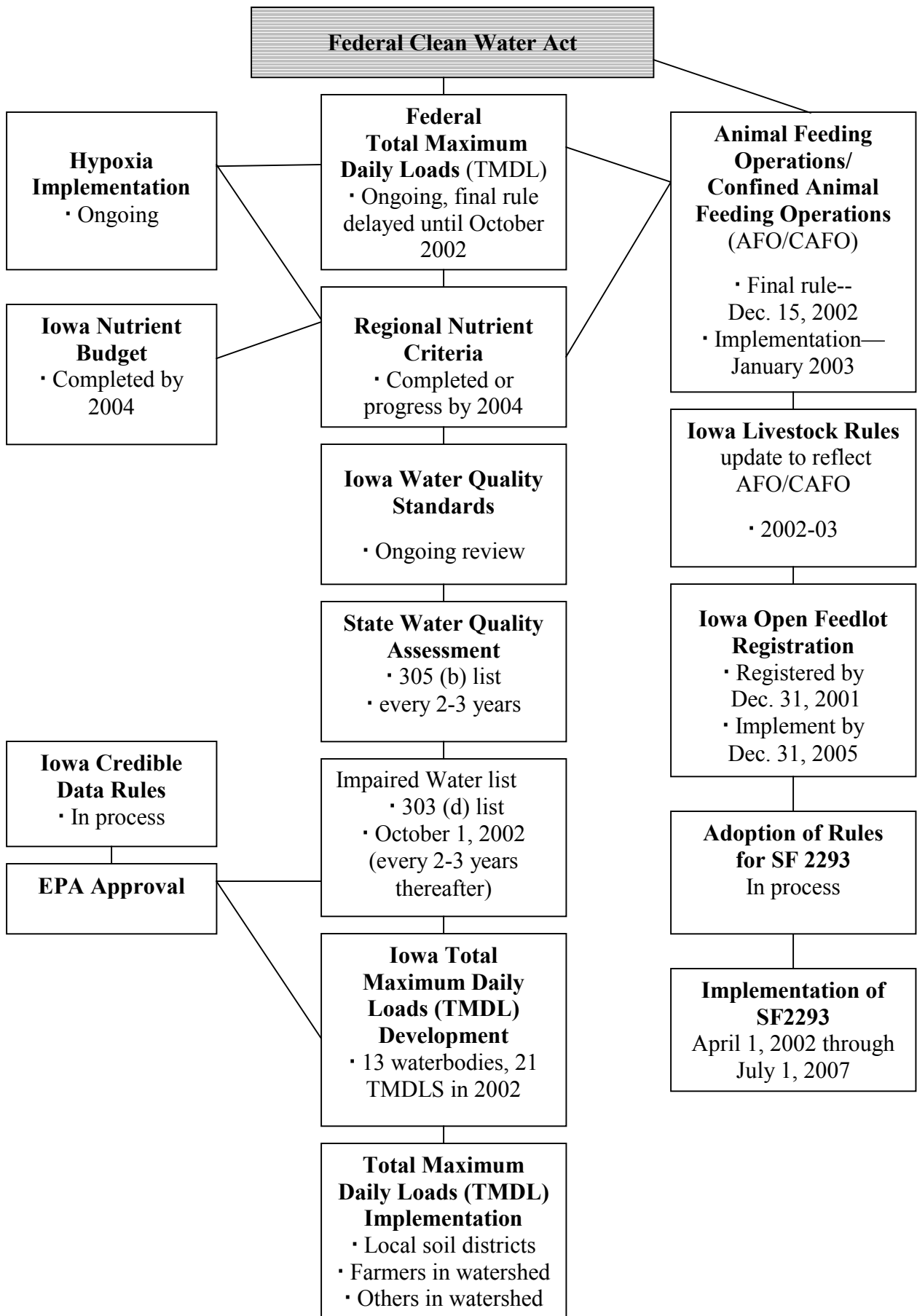
<sup>24</sup> *Sierra Club v. Murphy Family Farms, Inc., & Wayne Weber*, Iowa District Court in Allamakee County, Case No. LACV023308.

<sup>25</sup> *American Canoe Assoc., Inc. v. Murphy Farms, Inc.*, unpublished Opinion, 4<sup>th</sup> Circuit Ct. App. (March 29, 2000); ruling that the NPDES issue was moot since the operation discharged to a water body.

<sup>26</sup> *Anderson v. Smithfield Foods, Inc.*, Case No. 8:01-CV-441-T-17TBM, U.S. Dist. Ct for the Middle District of Florida, Tampa Division (Motion to Dismiss granted February 13, 2002).

<sup>27</sup> *Sierra Club v. Tyson Foods, Inc.*, Civil Action No. 4:02CV73-M, U.S. Dist. Ct. for the Western District of Kentucky; complaint filed April 25, 2002.

<sup>28</sup> *Id.*



UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION

SAILORS, INC. and MISSISSIPPI RIVER  
REVIVAL,

Plaintiffs,

v.

Consolidated  
Case No. C98-134-MJM

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,<sup>1/</sup>

Defendants.

SIERRA CLUB,

Plaintiff,

v.

JOINT NOTICE OF FILING OF  
SETTLEMENT AGREEMENT

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,

Defendants.

The United States Environmental Protection Agency and plaintiffs in the above-captioned matters the United States Environmental Protection Agency ("EPA") have filed a Consent Decree and a motion requesting the Court to enter that Decree as an order of the Court. The parties are also filing a Settlement Agreement. This Settlement Agreement, which is attached hereto, is filed only for informational purposes as set forth in the Consent Decree. No action by the Court with respect to this Settlement Agreement is requested.

<sup>1/</sup> Christine T. Whitman and William W. Rice are hereby substituted for as defendants in this matter pursuant to Fed. R. Civ. P. 25(d)(1).

JOHN C. CRUDEN  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

Dated: 22 October 2001

By: Robert M. Butler  
FOR EILEEN MCDONOUGH  
Environmental Defense Section  
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United States Attorney  
Northern District of Iowa

Dated: 22 October 2001

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**SETTLEMENT AGREEMENT**

WHEREAS, on November 19, 1998, Plaintiffs Sailors, Inc. and Mississippi River Revival and on February 25, 1999, Plaintiff Sierra Club filed complaints in this action (Case No. C98-134-MJM and Case No. C99-30-MJM) against the United States Environmental Protection Agency, Christine T. Whitman, Administrator, and William W. Rice, Acting Regional Administrator, EPA Region VII, (collectively ("EPA") pursuant to Section 505(a)(2) of the Federal Water Pollution Control Act, as amended (hereinafter referred to as the ("Clean Water Act" or ("CWA")), 33 U.S.C. § 1365(a)(2), and under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (hereinafter the "APA"). On April 8, 1999, the above referenced cases were consolidated under Case No. 98-134-MJM.

WHEREAS, for purposes of this Settlement Agreement, Sailors, Inc., Mississippi River Revival, and Sierra Club will be referred to jointly as "Plaintiffs."

WHEREAS, the parties have entered into a Consent Decree in the consolidated cases referenced above that sets forth certain EPA commitments regarding the Clean Water Act Section 303(d) Total Maximum Daily Loads ("TMDLs") program in the State of Iowa ("Consent Decree").

WHEREAS, the parties intend for this Settlement Agreement to set forth terms for certain matters related to monitoring, the continuing planning process ("CPP"), and the review of NPDES permits in Iowa that are not addressed in the Consent Decree.

WHEREAS, Plaintiffs and EPA have agreed to a settlement of this action without any admission of fact or law, which they consider to be a just, fair and equitable resolution of the claims raised in this action. The parties agree that it is in the interest of the public, the parties and judicial economy to resolve the issues in this action.

**FOR PLAINTIFFS:**

Dated: 10/18/2001

By: [Signature]  
Lawrence P. McLellan, Esq.  
Sullivan & Ward, P. C.  
801 Grand Avenue, Suite 3500  
Des Moines, IA 50309-2719

Dated: 10/19/01

By: [Signature]  
Jerry Anderson, Esq.  
Associate Dean and Professor  
Drake University Law School  
Cartwright Hall  
Des Moines, IA 50311-4505

Dated: 10-19-01

By: [Signature]  
Wallace L. Taylor, Esq.  
118 Third Avenue, S.E., Suite 326  
Cedar Rapids, IA 52401

NOW, THEREFORE, the parties agree to this settlement in the manner, terms and conditions as follows:

GENERAL TERMS

1. The parties to the Settlement Agreement are Plaintiffs and the EPA. The parties understand that the defendants named in the complaints were sued in their official capacities, and any obligations or duties arising under this Settlement Agreement are to be performed by EPA. This settlement applies to, is binding upon, and inures to the benefit of the parties, their officers, employees, members, successors, and assigns.

2. For purposes of this Settlement Agreement, the following terms shall have the meaning provided below. All references in this Settlement Agreement to sections of the United States Code ("U.S.C."), the Code of Federal Regulations ("C.F.R.") or "implementing regulations" are to those sections in effect as of the date of entry of this Settlement Agreement or to any amendments to these sections when those amendments become effective.

a. "EPA" means the United States Environmental Protection Agency and its successors, Christine T. Whitman, the Administrator of EPA, or the Administrator's duly authorized representative; William W. Rice, the Acting Regional Administrator of the United States Environmental Protection Agency, Region VII and their successors;

b. The "United States" means the United States of America, including its officers, agencies, departments and instrumentalities;

c. "Water Quality Limited Segment" or ("WQLS") has the meaning provided at 40 C.F.R. § 130.2(j);

d. "Total Maximum Daily Loads" ("TMDL") has the meaning provided at 40 C.F.R. §130.2(i);

e. "State" or "Iowa" means the 29th state of the union, admitted as a sovereign state of the United States, forming a Constitution and a state government, including its officers, agencies, departments and instrumentalities.

THE CONTINUING PLANNING PROCESS

3. Not later than ninety (90) days from the Effective Date of this Settlement Agreement, EPA will provide Plaintiffs and any other interested person upon request with a copy of the State's most recent CPP.

4. EPA will review the State's CPP for consistency with CWA Section 303(e), 33 U.S.C. § 1313 (e), and EPA's implementing regulations at 40 C.F.R. § 130.5. Not later than one (1) year from the Effective Date, EPA shall provide a written summary of its review, including any recommendations for revisions to the CPP, to Plaintiffs, Iowa, and to any other interested person upon request.

5. EPA will keep a current copy of the State's CPP at EPA, Region VII, for public review during the pendency of this Settlement Agreement.

6. If EPA finds that Iowa's CPP is not consistent with the CWA and its implementing regulations, and if the State does not modify its CPP in response to EPA's review to be consistent with the CWA and its implementing regulations, EPA shall take appropriate action as provided under the CWA and accompanying regulations.

NPDES REVIEW

7. EPA shall request notice from the State of Iowa by November 15th of each year of all NPDES permits that Iowa intends to issue within the next 12 months for waters for which a TMDL has been established. If EPA receives such notice from the State, EPA shall provide Plaintiffs with a copy of the notice.

8. For those NPDES permits that EPA in its discretion reviews, when the permit is for a discharge to a water for which a TMDL has been established, EPA will include in its review consideration of whether the effluent limitations in such permits are consistent with such TMDLs.

9. For those NPDES permits that EPA in its discretion reviews, where EPA provides written comments to the State of Iowa related to whether effluent limitations consistent with established TMDLs have been incorporated into such NPDES permits, or where EPA objects to any NPDES permit proposed by the State of Iowa based on failure to incorporate effluent limitations consistent with established TMDLs into that permit, EPA shall provide a copy of those comments or objection to the Plaintiffs after such comments or objection are provided to the State.

MONITORING PROGRAM STUDY

10. Within thirty-six (36) months after the Effective Date of this Settlement Agreement, EPA agrees to conduct a study of Iowa's surface water quality monitoring program which is designed to assess the quality of surface waters in the State of Iowa. Within eighteen (18) months after the Effective Date of this Settlement Agreement, EPA agrees to prepare an

interim report on the progress of the study, which shall include results and conclusions obtained to date concerning Iowa's surface water quality monitoring program, and make such interim report available to Iowa, Plaintiffs and to any other interested person upon request. In conducting this study of Iowa's surface water quality monitoring program, EPA will pay particular attention to that portion of this program that results in identifying impaired waterbodies for the Section 303(d) List. Within six (6) months after completion of the study, EPA will make a written summary of its findings, including recommendations, available to Iowa, Plaintiffs, and to any other interested person upon request.

REPORTING

11. In order to assist Plaintiffs in assessing compliance with the Consent Decree, EPA shall either: provide Plaintiffs with copies of approved TMDLs and supporting decision documents; or place these documents on a Web site or Internet location or in a file at EPA's Region VII office accessible to Plaintiffs and the public within thirty (30) days of EPA approval.

EFFECTIVE DATE

12. This Settlement Agreement shall become effective upon the entry of the Consent Decree by the Court (the "Effective Date"). If for any reason the District Court does not enter the Consent Decree, the obligations set forth in this Settlement Agreement are null and void.

RELEASE BY PLAINTIFFS

13. This Settlement Agreement and, when entered, the Consent Decree, shall constitute a complete and final settlement of all claims which were asserted, or could have been asserted, by Plaintiffs against the United States in this consolidated action.

14. Plaintiffs hereby release, discharge, and covenant not to assert any and all claims, causes of action, suits or demands of any kind whatsoever in law or equity which they may have had, or may now or hereafter have, against the United States based on matters which were asserted or could have been asserted by Plaintiffs in this action, except as provided by Paragraphs 20 and 21 of the Consent Decree.

15. Plaintiffs reserve the right to challenge in a separate lawsuit the merits of any final action taken by EPA pursuant to this Settlement Agreement. EPA reserves all its defenses to such suits.

AGENCY DISCRETION

16. Except as expressly provided herein, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to EPA by law. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend, or review from time to time any actions EPA may perform pursuant to this Settlement Agreement, or to amend or promulgate regulations consistent with the CWA.

COSTS

17. EPA agrees that Plaintiffs are prevailing parties on certain issues and are entitled to reasonable attorneys' fees and costs accrued as of the Effective Date of this Settlement Agreement. The parties will attempt to reach agreement as to the appropriate amount of the recovery. Plaintiffs shall file any request for attorneys' fees within sixty (60) days of the Effective Date of this Settlement Agreement. EPA shall have sixty (60) days to respond to Plaintiffs' fee request.

NOTICE

18. Any notice required or made with respect to this Settlement Agreement shall be in writing and shall be effective upon receipt. For any matter relating to this Settlement Agreement, the contact persons are:

For the Plaintiffs:

Lawrence P. McLellan, Esq.  
Sullivan & Ward, P.C.  
801 Grand Avenue Suite 3500  
Des Moines, IA 50309-2719

Jerry Anderson, Esq.  
Associate Dean and Professor  
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and

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Sierra Club, Iowa Chapter  
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Des Moines, IA 50311

For the United States:

Associate General Counsel, Water Law Office  
Office of General Counsel (2355A)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Regional Counsel  
United States Environmental Protection Agency, Region VII  
901 N. 5th Street  
Kansas City, Kansas 66101

and

Chief  
Environmental Defense Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Settlement Agreement.

REPRESENTATIVE AUTHORITY

19. Each undersigned representative of the parties to this Settlement Agreement certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Settlement Agreement. By signature below, all parties consent to entry of this Settlement Agreement.

MUTUAL DRAFTING

20. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by the parties. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

COUNTERPARTS

21. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party has signed all other counterparts.

EFFECT OF SETTLEMENT AGREEMENT

22. The Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any party .

COMPLIANCE WITH OTHER LAWS

23. No provision of this Settlement Agreement shall be interpreted so as to constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the APA, 5 U.S.C. §§ 551-559, 701-706, the CWA, or any other law or regulation, either substantive or procedural.

APPLICABLE LAW

24. This Settlement Agreement shall be governed and construed under the laws of the United States.

THIRD-PARTY BENEFICIARIES

25. Nothing in this Settlement Agreement shall be construed to make any other person or entity not executing this Settlement Agreement a third-party beneficiary to this Settlement Agreement.

DISPUTE RESOLUTION AND REMEDY FOR NON-COMPLIANCE

26. In the event of a disagreement between the parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied party shall provide the

other parties with written notice of the dispute and a request for negotiations. The parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice, or such time thereafter as is mutually agreed. If the parties are unable to resolve the dispute within 60 days of such meeting, then the Plaintiffs' sole remedy is to reactivate the litigation in SAILORS v. EPA, Case No. C98-134-MJM (N.D. Iowa), to seek an order pursuant to the Clean Water Act to obtain the same action identified in this Settlement Agreement. EPA does not waive or limit any defense relating to such litigation. The parties agree that contempt of court is not an available remedy under the Settlement Agreement.

FORCE MAJEURE

27. The parties recognize that the performance of this Settlement Agreement is subject to fiscal and procurement laws and regulations of the United States, which include but are not limited to the Anti-Deficiency Act, 31 U.S.C. §§ 1341, et. seq. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the timetables contained in this Settlement Agreement. Should a delay occur due to such circumstances, any resulting failure to meet the timetables set forth herein shall not constitute a failure to comply with the terms of this Settlement Agreement, and any deadlines occurring within one hundred twenty (120) days of the termination of the delay shall be extended one day for each day of the delay. EPA will provide Plaintiffs with notice as soon as is reasonably possible in the event EPA invokes this provision of the Settlement Agreement and will provide Plaintiffs with an explanation of EPA's basis for involving this provision.

MODIFICATION

28. This Agreement may be modified or amended only with the written consent of all parties.

TERMINATION

29. This Settlement Agreement shall terminate on the same date as the Consent Decree in Consolidated Case No. C98-134-MJM.

The parties consent to the form and substance of the foregoing Settlement Agreement

For the Defendant the United States of America:

Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, DC 20530

Dated 10/18/01

By: [Signature]  
EILEEN MCDONOUGH  
Environmental Defense Section  
Environment and Natural Resources Division  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530-0001

United States Attorney  
Northern District of Iowa

Dated 22 October 2001

By: [Signature]  
Robert M. Butler  
Assistant United States Attorney  
401 First Street, S.E. Suite 400  
Cedar Rapids, IA 52401

Of Counsel for the Defendants  
and the United States of America:

Michael Lee  
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1200 Pennsylvania Ave, N.W.  
Washington, DC 20460

Martha R. Steincamp  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

FOR PLAINTIFF SAILORS, INC. and MISSISSIPPI RIVER REVIVAL:

Dated 10/18/2001

By: [Signature]  
Lawrence P. McLellan, Esq.  
Sullivan & Ward, P. C.  
801 Grand Avenue Suite 3500  
Des Moines, IA 50309-2719

Dated 10/19/01

By: [Signature]  
Jerry Anderson, Esq.  
Associate Dean and Professor  
Drake University Law School  
Cartwright Hall  
27<sup>th</sup> and Carpenter  
Des Moines, IA 50309

FOR PLAINTIFF SIERRA CLUB:

Dated 10-19-01

By: [Signature]  
Wallace L. Taylor, Esq.  
118 Third Ave. S.E., Suite 326  
Cedar Rapids, IA 52401

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION

SAILORS, INC. and MISSISSIPPI RIVER  
REVIVAL,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,<sup>1/</sup>

Defendants.

SIERRA CLUB,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,

Defendants.

Consolidated  
Case No. C98-134-MJM

CONSENT DECREE

WHEREAS, this case involves claims by Sailors, Inc. and Mississippi River Revival, and Sierra Club ("Plaintiffs") under the Clean Water Act, 33 U.S.C. § 1251, et seq. ("Act or CWA"), and the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq. ("APA"), to compel the United States Environmental Protection Agency, Christine T. Whitman, Administrator, and William W. Rice, Acting Regional Administrator, EPA Region VII, (collectively "EPA") to identify waters

<sup>1/</sup> Christine T. Whitman and William W. Rice are hereby substituted for as defendants in this matter pursuant to Fed. R. Civ. P. 25(d)(1).

for listing pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), and to establish Total Maximum Daily Loads ("TMDLs") for those waters;

WHEREAS, Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and EPA's implementing regulations, 40 C.F.R. § 130.7(b), (c), (d), and (e), provide for (1) identification of waters for which applicable technology-based and other required controls are not stringent enough to implement water quality standards (the "Section 303(d) List"); (2) establishment of a priority ranking for such waters; and (3) establishment of TMDLs for pollutants for which those waters are not in attainment with water quality standards;

WHEREAS, in the complaints filed in this action, Plaintiffs allege inter alia, that EPA has violated the CWA and/or the APA in the following manner:

- a. Failure to adopt water quality standards for nonpoint source pollutants such as sediment, nutrients and pesticides, and EPA's failure to approve or disapprove Iowa's 1994 and 1996 water quality standards;
- b. Failure to establish appropriate monitoring methods and procedures for the State of Iowa and failure to withhold grants to the State;
- c. Failure to ensure that the State of Iowa has established and maintained a Continuing Planning Process ("CPP") consistent with the CWA;
- d. Failure to identify water quality limited segments still requiring TMDLs in Iowa;
- e. Failure to establish TMDLs in Iowa; and
- f. Failure to incorporate TMDLs in NPDES permits.





States Code (“U.S.C.”), the Code of Federal Regulations (“C.F.R.”) or “implementing regulations” are to those sections in effect as of the date of entry of this Consent Decree or to amendments to these sections when those amendments become effective.

- a. “Consent Decree” means this decree.
- b. “Clean Water Act” or “CWA” or “Act” means the Water Pollution Control Act codified at 33 U.S.C. section 1251 et seq and its amendments.
- c. “Day” means a calendar day unless expressly stated to be a working day.

In determining any period of time under this Consent Decree, where the last day or a specific date in the Consent Decree would fall on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the next working day.

- d. “Effective Date” means the date upon which this Consent Decree is entered by the Court.
- e. “EPA” means the United States Environmental Protection Agency, and successor; Christine T. Whitman, Administrator, and William W. Rice, Acting Regional Administrator, EPA Region VII, in their official capacities and their successors.
- f. “Establish” for purposes of this Consent Decree means (1) final agency action taken by EPA on a TMDL after the proposed TMDL has been submitted for public comment by EPA or (2) final agency action taken by the State of Iowa on a TMDL after the proposed TMDL has been submitted for public comment by the State.
- g. “Execute” or “Execution” means that all parties have fully signed original counterparts to this Consent Decree and have caused such documents to be delivered to each party.

h. “Plaintiffs” means the SAILORS, Inc., Mississippi River Revival, and the Sierra Club.

i. “Section 303(d) List” means the list required to be submitted by Section 303(d)(2) of the CWA, 33 U.S.C. § 1313(d)(2), and 40 C.F.R. § 130.7(b).

j. “Settlement Agreement” means the agreement between the parties executed concurrently with this Consent Decree.

k. “Total Maximum Daily Load” or “TMDL” has the meaning provided at 40 C.F.R. § 130.2(i).

l. The “United States” means the United States of America including its officers, agencies, departments and instrumentalities.

m. “Water Quality Limited Segment” or “WQLS” has the meaning provided at 40 C.F.R. § 130.2(j).

n. “State” or “Iowa” means the 29th State of the Union, admitted as a sovereign State of the United States forming a Constitution and a state government, including its officers, agencies, departments and instrumentalities.

## **V. TERMS OF AGREEMENT**

### **5.A. ESTABLISHMENT OF TMDLs**

(1) The parties understand that the State of Iowa has primary responsibility for the establishment of TMDLs pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d). Iowa will establish TMDLs for the number of WQLSs specified in Attachment A. However, if Iowa fails to submit to EPA for approval/disapproval any TMDL in accordance with the deadlines in

Attachment A, then EPA shall establish such TMDL within eighteen (18) months of the missed deadline unless Iowa submits and EPA approves such TMDL prior to EPA establishing the TMDL.

(2).a. For purposes of measuring EPA's compliance with the milestones described in paragraph 5.A.(1) immediately above, EPA may count:

- (i) TMDL(s) established by Iowa and approved by EPA;
- (ii) TMDL(s) established by EPA; and
- (iii) WQLSs, and pollutants specified on the Section 303(d)

List for those WQLSs, that EPA determines do not need TMDL(s) pursuant to paragraph 5.A(2)b below.

b. In fulfilling its obligations under this Consent Decree, EPA is under no obligation to establish TMDLs for any WQLSs, or any pollutants specified on the Section 303(d) List for such WQLSs that EPA determines do not need TMDLs consistent with Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and its implementing regulations, including 40 C.F.R. § 130.7(b), or are removed from Iowa's 1998 Section 303(d) List by a future list consistent with the provisions of the Clean Water Act and EPA's implementing regulations.

(3) To the extent EPA establishes TMDLs in Iowa pursuant to this Consent Decree, and for purposes of EPA deciding which TMDLs to establish pursuant to this Consent Decree, EPA is not bound by any prior Iowa TMDL selection decision or by TMDL work started but not completed by Iowa.

Consent Decree. The report shall include identification of TMDLs proposed or established during the previous calendar year, including:

- a. WQLSs for which EPA has proposed TMDLs during the previous calendar year, if any;
- b. WQLSs for which during the previous calendar year EPA has approved TMDLs submitted by Iowa; and
- c. any other WQLSs included on Iowa's 1998 Section 303(d) List

that, during the previous calendar year, are determined not to need TMDLs pursuant to subparagraph 5.A(2)b, including a description of the basis for such determination.

(2) The report described in Section 5.C(1), above, shall include a review of EPA's compliance with any other terms of this Consent Decree during the previous calendar year.

(3) EPA and the Plaintiffs agree to meet yearly beginning nine (9) months after the Effective Date of the Consent Decree to discuss any WQLSs that, pursuant to paragraph 5.A(2)b of the Consent Decree, EPA determines do not need TMDLs or are removed from Iowa's 1998 Section 303(d) List by a future list.

#### 5.D. SECTION 303(d) LIST

(1) In order to address Plaintiffs' concerns regarding the 1998 Section 303(d) List, EPA agrees to take the following steps:

a. No later than thirty days after the Effective Date, EPA shall transmit the following to Iowa for consideration in developing the next Section 303(d) List: (i) the United States Geological Survey ("USGS") Technical Report 96-T005, "Rates of Sedimentation Along

01-NEM-0020-2 (Pool 12: Catfish Creek upstream to Lock and Dam #11 at Dubuque); IA 01-NEM-0020-1 (Pools 12 and 13: Lock and Dam #13 at Clinton upstream to Catfish Creek (near Dubuque)); IA 01-NEM-0010-4 (Pool 14: Wapsipinicon River upstream to Lock and Dam #13 at Clinton); IA 01-NEM-0010-3 (Pool 14: Lock and Dam #14 upstream to Wapsipinicon River); IA 01-NEM-0010-1 (Pools 16, 17 and 18: Iowa River upstream to Lock and Dam #15 at Davenport); IA 02-ICM-0010-2 (Pools 18 and 19: Burlington Water Supply intake upstream to Iowa River); IA 02-ICM-0010-1 (Pool 19: Skunk River upstream to Burlington Water Supply intake); IA 03-SKM-0010-2 (Pool 19: Ft. Madison Waste Water Treatment Plant (“WWTP”) upstream to Skunk River); and IA 03-SKM-0010-1 (Pools 19 and 20: Iowa/Missouri state line upstream to outfall of Ft. Madison WWTP) (collectively, the “Pools” or the “Mississippi River Pools”) for sediment and/or turbidity. If not, EPA shall either:

(i) determine, in accordance with 40 C.F.R. § 130.7(b), that any such Pool(s) need to be listed for sediment and/or turbidity, disapprove the omission of such Pool(s) for sediment and/or turbidity, and propose for public notice and comment an amendment that includes such Pool(s) for sediment and/or turbidity; or

(ii) determine, in accordance with 40 C.F.R. § 130.7(b), that such Pool(s) need not be listed for sediment and/or turbidity and approve the omission of such Pool(s) for sediment and/or turbidity.

c. EPA expects Iowa to make its next listing decision in accordance with 40 C.F.R. § 130.7(b)(6) and to provide a waterbody-specific rationale justifying the

130.7(b), that such Pool(s) need not be listed for sediment and/or turbidity.

(ii) With respect to a determination made under paragraph 5.D(1)(e)(i), EPA shall provide a waterbody-specific rationale justifying the omission of any Mississippi River Pool(s) for sediment and/or turbidity, and EPA shall provide a copy of the decision to the Plaintiffs.

(iii) Within sixty (60) days of EPA's final determination, following public notice and comment, that any of the Mississippi River Pools should be included on the Section 303(d) List pursuant to paragraph 5.D(1)(e)(i), EPA shall: (a) compile a list of the Mississippi River Pools, if any, that should be included on the Section 303(d) List for sediment and/or turbidity; and (b) file a motion to amend this Consent Decree to include such Pool(s) in Attachment A as additional waters requiring TMDLs to be established pursuant to paragraph 5.A.

(2) For any sediment and/or turbidity TMDLs for the Pools included on the next Iowa Section 303(d) List pursuant to paragraph (1) above that Iowa has not established by December 15, 2009, EPA shall establish such TMDLs by June 15, 2011 subject to paragraph 5.A.

(3) EPA's decision with respect to whether the Pools of the Mississippi River should be included on the next section 303(d) List for sediment and/or turbidity shall be based on

Iowa's water quality standards as applicable to sediment and/or turbidity that are in effect for Clean Water Act purposes at the time EPA makes its decision. Currently, these standards are established under Iowa Code § 455B.171 and set forth at Iowa Administrative Code §§ 61.2 and 61.3.

(4) Any Pool listed for either sediment or turbidity need not necessarily be listed for the other pollutant.

#### **VI. SECURING COURT APPROVAL**

6. Plaintiffs are to join in and support such legal proceedings as necessary to secure the Court's approval and entry of this Consent Decree.

#### **VII. EFFECTIVE DATE**

7. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, this Consent Decree shall not become effective.

#### **VIII. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS**

8. This Consent Decree shall terminate after fulfillment of the obligations in sections 5.A, 5.B and 5.D of this Consent Decree. Upon termination of this Consent Decree, this case shall be dismissed with prejudice. The parties jointly shall file the appropriate notice with the Court so that the Clerk of the Court may close the file.











inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

**XIX. COUNTERPARTS**

19. This Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party had signed all other counterparts.

**XX. RELEASE BY PLAINTIFFS**

20. Upon approval and entry of this Consent Decree by the Court, this Consent Decree and the Settlement Agreement (filed separately) shall constitute a complete and final settlement of all claims which were asserted, or could have been asserted, by Plaintiffs against the United States in the complaints filed in this case (Consolidated Case No. C98-134-MJM). Plaintiffs hereby release, discharge, and covenant not to assert (by way of commencement of an action, the joinder of the Administrator and/or EPA in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which it may have had, or may now or hereafter have, against the United States based upon matters which were asserted, or could have been asserted, by Plaintiffs in the complaints filed in this case (consolidated Case No. C-98-134-MJM), except as provided in Section XXI .





Attachment A  
Schedule for Establishing TMDLs for the 157 Waterbodies on Iowa's 1998 303(d) list

December 15, 2000

Waterbody Name: Rock Creek  
Waterbody ID#: IA 01-MAQ-0010-0  
Waterbody Location:  
TMDL Priority: High  
Cause of Impairment: Ammonia & NO<sub>x</sub>

Waterbody Name: Corydon Reservoir  
Waterbody ID#: IA 05-CHA-00620-L  
Waterbody Location:  
TMDL Priority: Low  
Cause of Impairment: Atrazine

Waterbody Name: Nine Eagles Lake  
Waterbody ID#: IA 05-THO-00110-L  
Waterbody Location:  
TMDL Priority: High  
Cause of Impairment: Turbidity

December 15, 2001

Waterbody Name: Arrowhead Pond  
Waterbody ID#: IA 06-WED-00270-L\_O  
Waterbody Location: Pottawattamie County, S29, T77N, R41W, 1.5 mi SE of Neola  
TMDL Priority: Low  
Cause of Impairment: Siltation

Waterbody Name: Binder Lake  
Waterbody ID#: IA 05-NOD-00415-L\_O  
Waterbody Location: Adams County, S25, T72N, R34W, 1 mi NE of Corning  
TMDL Priority: High  
Cause of Impairment: Siltation

Waterbody Name: Bob White Lake  
Waterbody ID#: IA 05-CHA-00690-L\_O  
Waterbody Location: Wayne County, S4, T68N, R22W, 1 mi W of Allerton  
TMDL Priority: Medium  
Cause of Impairment: Siltation and Nutrients



Waterbody Name: West Lake Corning  
Waterbody ID#: IA 05-NOD-00410-L\_O  
Waterbody Location: Adams County, S36, T72N, R34W, at N edge of Corning  
TMDL Priority: High  
Cause of Impairment: Siltation

Waterbody Name: Yellow Smoke Park Lake  
Waterbody ID#: IA-06-BOY-00510-L\_O  
Waterbody Location: Crawford County, S6, T83N, R38W, 2 mi NE of Denison  
TMDL Priority: Low  
Cause of Impairment: Siltation

December 15, 2002

Waterbody Name: Lower Gar Lake  
Waterbody ID#: IA IA 06-LSR-02830-L  
Waterbody Location:  
TMDL Priority: High  
Cause of Impairment: Turbidity and Siltation

Waterbody Name: Lake Darling  
Waterbody ID#: IA 03-SKU-01450-L  
Waterbody Location:  
TMDL Priority: High  
Cause of Impairment: Siltation and Nutrients

Waterbody Name: Lake Keomah  
Waterbody ID#: IA 03-SSK-00120-L  
Waterbody Location:  
TMDL Priority: Low  
Cause of Impairment: Siltation and Aquatic Vegetation

Waterbody Name: Lake of Three Fires  
Waterbody ID#: IA 05-PLA-00335-L  
Waterbody Location:  
TMDL Priority: High  
Cause of Impairment: Nutrients and Siltation

Waterbody Name: West Lake (Osceola)  
Waterbody ID#: not designated  
Waterbody Location:  
TMDL Priority: High  
Cause of Impairment: Pesticides

Waterbody Name: Badger Creek lake  
Waterbody ID#: IA 04-LDM-03080-L  
Waterbody Location:  
TMDL Priority: Low  
Cause of Impairment: Siltation and Nutrients

Deadline	Number of Water Quality Limited Segments
12/15/03	16
12/15/04	22
12/15/05	19
12/15/06	17
12/15/07	17
12/15/08	18
12/15/09	20