



Group Sues EPA to Force Promulgation of Nutrient Criteria for Lakes and Reservoirs; AMCA Files Motion to Join Suit, May 2016

The stakes have been raised for DNR's ongoing effort to finalize revised TN, TP, and chlorophyll-a criteria for lakes and reservoirs. On February 24, the Missouri Coalition for the Environment (MCE) filed a Clean Water Act citizen suit against EPA in a Jefferson City federal district court. MCE is seeking an order to compel EPA to promulgate nutrient criteria for Missouri lakes and reservoirs within 90 days. On the authorization of the Board, AMCA filed a motion to intervene in the suit on April 12 to defend the ongoing state criteria-development process. The outcome of this case is likely to influence the timing and reasonableness of the nutrient criteria.

By way of background, Missouri adopted revised TN, TP, and chlorophyll-a criteria for lakes and reservoirs in 2011. Those TN and TP criteria were linked with the chlorophyll-a criteria. On August 16, 2011, EPA notified DNR that it was rejecting those criteria for all lakes and reservoirs except for a handful of waters listed in Table M of 10 CSR 20-7.031 (3)(N) Nutrients and Chlorophyll. EPA provided two reasons for its decision:

1. The approach used to establish the criteria did not include enough information for EPA to independently reproduce the criteria – that is, EPA could not replicate DNR's math;
2. DNR did not clearly demonstrate that the criteria will protect the designated aquatic life and/or recreational uses.

Since the disapproval, DNR has been working with stakeholders to develop revised criteria that will meet EPA's approval. EPA apparently has been satisfied with DNR's progress to date, because it has refrained from exercising its authority under the CWA to issue its own substitute criteria. Nonetheless, AMCA has been pushing DNR to expeditiously conclude its lake nutrient criteria revision process because of the threat of a citizen group suing EPA to act – as MCE has now done.

MCE's complaint alleges that EPA violated a mandatory duty under CWA 303(c)(4) to "promptly" develop and issue nutrient criteria after it disapproved the state's nutrient criteria for lakes. MCE is asking the court to order EPA to issue its own revised criteria within 90 days. That would be a highly undesirable situation. Due to the administrative procedures EPA must follow to issue new regulations – including a public notice and comment period and publication in the *Federal Register* – a 90-day timeline would leave EPA with no more than a few weeks in which to actually develop the criteria. With so little time to evaluate the protectiveness of a range of criteria, it is all but certain that EPA would feel compelled to err on the side of caution with overly broad and overly stringent criteria.



MCE's complaint is likely to be resolved in one of three ways. First, the court could find that EPA was within its discretion to refrain from issuing substitute nutrient criteria while the state process was underway, and dismiss the suit. Second, the court could find that EPA has violated a duty by not issuing the criteria by this date. In that event, the court would either set its own deadline for EPA (possibly 90 days) or it would give EPA and MCE an opportunity to attempt to reach an agreement on a deadline. Third, as it has done in a number of other similar cases, EPA may seek to settle the case by agreeing to a timeline to take action. EPA has not yet filed a response to MCE's complaint, so it is unknown at this time whether the Agency intends to dispute MCE's claims.

AMCA filed its motion to intervene in the suit on the side of EPA on April 12. AMCA was joined in the motion by the Missouri Municipal League and Missouri Public Utility Alliance. AMCA's primary objective is to ensure that the DNR is afforded sufficient time to finalize its criteria. Participating in the case as an intervenor can further this objective in two ways. First, AMCA intends to provide support for EPA if it disputes MCE's legal arguments and seeks to dismiss the case. Second, as a party to the case, AMCA would have a seat at the table if EPA and MCE engage in discussions to set an agreed-upon deadline for EPA to issue nutrient criteria – either upon the order of the court or as part of settlement negotiations. AMCA will not agree to any timeframe that does not, at a minimum, give EPA enough time to develop reasonable criteria (which, in turn, would give Missouri additional time to conclude its criteria development process). The court is not expected to rule on AMCA's motion until May at the earliest.