

Federal Court Delivers Major Victory Upholding State Primacy and Flexibility in Nutrient Criteria Development

The United States District Court Judge Laughrey of the Western District of Missouri [upheld](#) EPA's approval of Missouri's nutrient water quality criteria for lakes and reservoirs. EPA's approval was challenged by the Missouri Coalition for the Environment (MCE). The decision is a landmark, nationwide precedent that bolsters the flexibility afforded to states in nutrient criteria development. The court's decision reaffirms the Clean Water Act's (CWA's) Cooperative Federalism framework, EPA's appropriate role in the standard setting process ("mere oversight"), the court's limited review of EPA action (determination of rational basis) while also rejecting unpromulgated EPA guidance as a legal requirement that must be complied with in water quality standards development.

The Association of Missouri Clean Water Agencies (AMCA), NACWA and five other municipal wastewater associations to support EPA's approval of Missouri's nutrient approach because of the far-reaching impacts of this litigation.

Summary of Ruling

MCE alleged that EPA's approval of Missouri's use of "Screening Thresholds" and site-specific aquatic life assessments – as opposed to a single, stringent statewide numeric nutrient criterion – violated the CWA and the Administrative Procedure Act. The decision addresses and rejects MCE's three main claims:

1. *Did Missouri (and EPA through its approval) protect the most sensitive use of the State's lakes when adopting criteria based on aquatic life?*

MCE argued that the Missouri criteria fail to protect the most sensitive use – drinking water. The court held that EPA had a rational basis supporting approval because the Agency made a "scientific" determination that the proposed "numeric criteria propounded by the State adequately protected the aquatic life use and that the existing narrative criteria adequately protected the drinking water and recreational uses. As such, no matter which use is the 'most sensitive' in any particular ecoregion, the State's standards were adequately protective." This is a significant holding that allows States (and EPA) to adopt criteria for specific uses rather than having to address all uses at once.

2. *Does Missouri's "combined criteria" approach fail to protect the designated use?*

Missouri's approach involves a three-tiered numeric TN, TP, and Chlorophyll-a criterion approach. It sets a ceiling concentration (Response Impairment Threshold) above which a lake is impaired. It also sets a lower criterion (Nutrient Screening Threshold), below which a lake is unimpaired. Lakes with concentrations between the upper and lower values (which we expect will be the vast majority of lakes in Missouri) will then be subjected to a bioconfirmation procedure. This procedure features a lake-specific determination of water quality status (impaired or unimpaired). While more work for the Missouri Department of Natural Resources (DNR), this approach will surely lead to more accurate impairment determinations.

As noted above, MCE - like many environmental advocacy groups across the country - is fighting for a single, statewide numeric nutrient approach. We suspect they believe such an approach will be more expeditiously implemented and will be set arbitrarily low as opposed to the site-specific analysis approach adopted by Missouri DNR. Significantly, the court held that MCE failed to establish why the screening

factors must be numeric reiterating the State's authority to supplement its numeric criteria with narrative criteria: "the narrative screening factors may be considered supplemental to the numeric chlorophyll criteria, an approach expressly permitted under 40 C.F.R. § 131.11."

The court also dispensed with MCE's arguments that EPA's approval is arbitrary and capricious because Missouri relied on a 2013 EPA Guiding Principles document that conflicts with its own proposed standards. MCE argued that under the 2013 Guiding Principles, Missouri must promulgate regulations that protect a lake's intended use before it requires restoration. MCE views Missouri's approach as only kicking in once a waterbody is impaired. The court rejected MCE's attempt to make EPA's unpromulgated 2013 Guiding Principles a legally binding requirement.

3. Does Missouri's apex predator calculations and criteria protecting sport fish protect other lower trophic level aquatic life?

Missouri's standards were designed to protect the health of the apex predators or sport fish which represent the top of the aquatic life food chain because, according to the State, their health "can be interpreted as an indicator of overall ecosystem health and the presence of a 'wide variety' of aquatic biota." MCE argued that Missouri's "apex predator" approach was unsupported by scientific literature and would only protect a sliver of aquatic life; the CWA defines the aquatic life use to include fish, shellfish and other wildlife.

The court held that EPA did not rely on the "apex predator" theory in its approval but instead made a "technical determination that the State's proposed chlorophyll criteria in the Plains ecoregion would, in combination with the rest of the combined criteria framework, protect the aquatic life use by ensuring the health of a wide range of biota and thus complied with the CWA and Missouri law."

Impact of Decision

This decision upholds Missouri's flexible combined-criteria nutrient approach (featuring waterbody-specific evaluations in most cases) as a model for other states seeking to tailor nutrient criteria to a wide range of waters. Such an approach is critical given the significance in terms of community development, land use, and stormwater/wastewater response costs from waterbody nutrient impairment determinations.