



## **Federal Court Upholds State Primacy and Flexibility in Nutrient Criteria Development June 2021**

On June 1, 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 and EPA's appropriate role in the standard setting process ("mere oversight"). The Court correctly found EPA had a rational basis for its action while also rejecting unpromulgated EPA guidance as a legal requirement that must be complied with in water quality standards development. The NCWQA joined NACWA and six other municipal wastewater associations to support EPA's approval of Missouri's nutrient approach because of the far-reaching impacts of this litigation.

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:

First, MCE argued that the Missouri criteria fail to protect the most sensitive use – drinking water. The Court held that EPA had a rational basis for 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.

Second, MCE has been fighting for a single, statewide numeric nutrient approach. Missouri's approach involves a three-tiered numeric total nitrogen (TN), total phosphorus (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 will be subjected to a bioconfirmation procedure, which involves a lake-specific determination of water quality status (impaired or unimpaired) leading to more accurate impairment determinations.

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..." 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.

Third, 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."

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.