

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MISSOURI COALITION FOR THE
ENVIRONMENT FOUNDATION,

Plaintiff,

v.

ANDREW R. WHEELER, in his
official capacity as the Administrator
of the United States Environmental
Protection Agency,

Defendant.

Civil Action No.
2:19-cv-4215-NKL

**AMICI WATER QUALITY ASSOCIATIONS' SUGGESTIONS IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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Amici curiae Association of Missouri Cleanwater Agencies, Association of Ohio Metropolitan Wastewater Agencies, California Association of Sanitation Agencies, National Association of Clean Water Agencies, North Carolina Water Quality Association, South Carolina Water Quality Association, Virginia Association of Municipal Wastewater Agencies, and the West Virginia Municipal Water Quality Association (the “Water Quality Associations”), pursuant to Fed. R. Civ. P. 56 and Local Rules 7.0 and 56.1, submit the following Suggestions In Opposition to the Motion for Summary Judgment of Plaintiff Missouri Coalition for the Environment Foundation (“MCE”) and in support of the motions for summary judgment of Defendant Andrew Wheeler, in his official capacity as Administrator of the U.S. Environmental Protection Agency (collectively “EPA”) (Dkt. No. 61), and Intervenor-Defendant State of Missouri (“Missouri”) (Dkt. No. 66).

In accordance with Local Court Rule 56.1(b), the Water Quality Associations submit the following response to MCE’s Statement of Facts, followed by their Statement of Uncontroverted Material Facts.

RESPONSE TO MCE’S STATEMENT OF FACTS¹

1. Objection. The paragraph contains an oversimplified summary of the Clean Water Act and applicable federal regulations, not material facts.
2. Disputed. The paragraph contains no material facts and fails to cite “to particular parts of materials in the record.” Fed. R. Civ. P. 56(c)(1)(A).

¹ In MCE’s Suggestion, MCE cites the Administrative Record as “AR #”, although the documents in MCE’s Appendix are not numbered sequentially as “AR #” but instead appear as “EPA00#”. The Water Quality Associations’ citations in this Suggestion will refer to the Exhibit number listed in MCE’s Appendix but will provide page cites as the EPA Bates Number “EPA00#” unless an exception is expressly stated.

3. Disputed. The first sentence cites to no “particular parts of materials in the record.” Fed. R. Civ. P. 56(c)(1)(A). The second sentence provides MCE’s opinion (e.g., “could provide some protection,” “when a water was so badly impaired”) without quoting Missouri’s narrative standard, which states that “[w]aters shall be free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor, or prevent full maintenance of beneficial uses.” 10 CSR 20-7.031(4)(C) (2020). Additionally, Missouri’s narrative criteria that existed in 2009 was 10 CSR 20-7.031(3), not 10 CSR 20-7.031(4). Moreover, Missouri’s narrative criteria in 2009 and today contain provisions requiring that state “[w]aters shall be free from substances or conditions in sufficient amounts to result in toxicity to human, animal, or aquatic life” and prohibiting “significant human health hazard from incidental contact with the water.” 10 CSR 20-7.031(3)(D), (E) (2009); 10 CSR 20-7.031(4)(D), (F) (2020).

4. Disputed in part. On August 16, 2011, EPA disapproved 10 CSR 20-7.031(3)(N). *See* Ex. 1, EPA002978.

5. Objected to and disputed in part. The first sentence restates federal law, not material facts. The final sentence fails to provide a foundation between the materials discussed in the excerpt from Exhibit 1 and the materials discussed in Exhibit 2.

6. Disputed. The paragraph fails to cite admissible evidence to support the alleged fact. Specifically, this paragraph relies on MCE’s Exhibit 3, which is not part of the administrative record but contains “documents that were created in connection with MDNR’s lake nutrients during the period of 2014 to 2017.” MCE’s Mot. for Summ. J. Ex. A, ¶ 3. MCE’s supporting declaration explains where the underlying document originated but does not describe who downloaded the document. *See id.* ¶ 4. The declarant admits that portions of her declaration were not made on personal knowledge and that Exhibit 3 was “downloaded in the original format from

MDNR’s website document in 2014” and “believed to have been created by MDNR” *Id.* ¶¶ 2, 4, 7. Because the declaration of Ms. Hubertz in support of Exhibit 3 did not comply with Fed. R. Civ. P. 56(c)(4), the paragraph is not supported by admissible evidence.

7. Objected to in part. The paragraph summarizes the Clean Water Act and offers a legal opinion regarding EPA’s duties but fails to note that 33 U.S.C. § 1313(c)(4) does not require EPA to promulgate water quality standards after disapproving a State’s water quality criteria if the State adopts a revised or new water quality standard that EPA approves before EPA completes promulgation of its own water quality standard.

8. Disputed in part. The paragraph does not cite “to particular parts of materials in the record” describing what MCE was doing in the fall of 2015. Fed. R. Civ. P. 56(c)(1)(A).

9. Disputed in part. The paragraph does not cite “to particular parts of materials in the record” describing an earlier version of Missouri’s regulations. Fed. R. Civ. P. 56(c)(1)(A).

10. Objected to in part. The second sentence is an opinion, not a material fact. The final sentence summarizes the Clean Water Act and offers a legal opinion, not a material fact.

11. Disputed in part. The final sentence fails to cite admissible evidence to support the alleged fact. Specifically, this paragraph relies on MCE’s Exhibit 5, which is not part of the administrative record but contains “documents that were created in connection with MDNR’s lake nutrients during the period of 2014 to 2017.” MCE’s Mot. for Summ. J. Ex. A, ¶ 3. MCE’s supporting declaration explains where the underlying document originated but does not describe who downloaded the document. *See id.* ¶ 5. The declarant admits that portions of her declaration were not made on personal knowledge and that Exhibit 5 was “downloaded from MDNR’s website in the fall of 2015” and “believed to have been created by MDNR” *Id.* ¶¶ 2, 5, 7. Because the

declaration of Ms. Hubertz in support of Exhibit 5 did not comply with Fed. R. Civ. P. 56(c)(4), the paragraph is not supported by admissible evidence.

12. Objected to in part. The first sentence is argumentative (e.g., “MDNR was very concerned . . .”); the cited document states that MDNR recommended “the use of screening values” to “limit the possibility of false negatives.” Ex. 4, EPA003080. The last sentence fails to cite admissible evidence to support the alleged fact; the cited document lists “[c]ommon fish species found in small lakes of Missouri” but makes no reference to “other forms of aquatic life” or which species better tolerated “higher levels of nutrients.” *Id.*, EPA003076.

13. Uncontroverted with clarification. The paragraph fails to cite admissible evidence (or law) suggesting that MDNR was required to “use the methods recommended by EPA in the” 2011 Final Disapproval, which is Exhibit 1.

14. Disputed. The exhibit cited in support of the paragraph did not state that “EPA Region 7 staff were skeptical” or that EPA “could not approve the standards as written.” Instead, EPA’s May 12, 2016 letter to MDNR conveyed “the combined *preliminary* written comments of EPA Headquarters and Region 7.” Ex. 6, EPA004778 (emphasis added). Moreover, EPA said that MDNR’s proposed water quality standard “may not” comply with the CWA. *Id.*

15. Disputed. The paragraph’s use of “most importantly” is argumentative, and EPA’s comments in its May 12, 2016 letter to MDNR were “preliminary” and, therefore, not material. Ex. 6, EPA004778.

16. Disputed. EPA’s comments in its May 12, 2016 letter to MDNR were “preliminary” and, therefore, not material. Ex. 6, EPA004778.

17. Disputed. EPA’s comments in its May 12, 2016 letter to MDNR were “preliminary” and, therefore, not material. Ex. 6, EPA004778.

18. Objection. The paragraph does not provide material facts because as of February 24, 2016, Missouri had not submitted the water quality standards currently in dispute to EPA for review. *See* Ex. 23, EPA003145 (MDNR letter of April 13, 2018, sending current lake nutrient criteria to EPA for review).

19. Objection. The paragraph does not provide material facts because as of February 24, 2016, Missouri had not submitted the water quality standards currently in dispute to EPA for review. *See* Ex. 23, EPA003145 (MDNR letter of April 13, 2018, sending current lake nutrient criteria to EPA for review).

20. Objected to in part. The first sentence does not provide material facts. The second sentence discusses MDNR and the Consent Decree, yet MDNR was not a party to the Consent Decree. *See* Ex. 7, EPA014847. The exhibit cited in support of the third sentence does not appear to contain any reference to 2017.

21. Disputed. The paragraph fails to cite admissible evidence to support the alleged facts. Specifically, this paragraph relies on MCE's Exhibit 10, which is not part of the administrative record but contains "documents that were created in connection with MDNR's lake nutrients during the period of 2014 to 2017." MCE's Mot. for Summ. J. Ex. A, ¶ 3. MCE's supporting declaration explains where the underlying document originated but does not describe who downloaded the document. *See id.* ¶ 6 The declarant admits that portions of her declaration were not made on personal knowledge and that Exhibit 6 was "made from two pdf files that were downloaded from MDNR's website in early July 2017" and "believed to have been created by MDNR" *Id.* ¶¶ 2, 6, 7. Because the declaration of Ms. Hubertz in support of Exhibit 10 did not comply with Fed. R. Civ. P. 56(c)(4), the paragraph is not supported by admissible evidence.

22. Correction. The cited documents are Exhibits 11 and 12, not 14 and 13.

23. Correction. The cited document is Exhibit 14, not 147.

24. Objection. EPA's proposed criteria for chlorophyll ("chl-a") were lower, but the paragraph's use of "significantly lower" is an unsupported opinion.

25. Objection and Correction. The document cited in the first sentence is Exhibit 14, not 47. The identity of other agencies or offices within the federal government to which EPA submitted draft criteria for approval is not a material fact.

26. Disputed. Regarding the first sentence, even if the departure of EPA Region 7 employees was a relevant, material fact, MCE does not indicate how the employee departures had any impact on EPA's decisions. Regarding the second sentence, EPA's comments in its May 12, 2016 letter to MDNR were "preliminary" and, therefore, there is no reason to believe that MDNR was seeking to secure EPA's withdrawal of it. Ex. 6, EPA004778. Regarding the third sentence, because EPA's comments in its May 12, 2016 letter to MDNR were "preliminary," MDNR was not required to respond. *See id.* Moreover, the exhibit cited in support of the third sentence was not included in MCE's appendix, so MCE has failed to "attach a copy of the relevant excerpt" to the cited document. L.R. 56.1(d).

27. Objection and Correction. The first part of the first sentence is argumentative and an unsupported opinion. The copy of Exhibit 19 in MCE's appendix does not include all pages cited in this paragraph and is, therefore, incomplete.

28. Disputed. The first and last sentences fail to cite "to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A). Regarding the second sentence, whether an office in the federal government offered suggestions to EPA is not a material fact.

29. Disputed. EPA did not adopt the draft nutrients standards described in this paragraph, so the facts in this paragraph, even if true, are not material.

30. Disputed. EPA did not adopt the draft nutrients standards described in this paragraph, so the facts in this paragraph, even if true, are not material.

31. Uncontroverted.

32. Disputed in part. Regarding the last sentence, a lake that “exceeded one, two or even all three Nutrient Screening Thresholds” would be impaired if it also exceeds the Response Impairment Threshold or, as stated in the previous sentence, “also experiences one of the Response Impairment Endpoints in the same year.”

33. Disputed. The exhibit cited in support of the first sentence states “[a]s discussed, the State plans to submit additional information to the U.S. Environmental Protection Agency (EPA) concerning the protection of aquatic life designated uses, as well as a more robust explanation of the state’s plan to implement the criteria, if approved by the EPA.” Ex. 25, EPA002634. The exhibit does not, as the first sentence avers, indicate that EPA “asked MDNR” for additional information.

34. Disputed. Regarding the first sentence, the statement “asking him to provide scientific support for the ‘apex predator’ (sport fish) issue” implies that EPA did not already have scientific support for Missouri’s water quality standard; the exhibit cited in support of the second sentence requested that Mr. Hoskins provide “*more* of the science related to the apex predator issue,” which implies that EPA already had at least some scientific support already. Ex. 26, EPA002619 (emphasis added). The exhibit cited in support of the second sentence is an email from Carol Comer of MDNR to EPA, not an email from Metropolitan St. Louis Sewer District (MSD), as described in the second sentence. *See* Ex. 27, EPA002624; *see also* Index to MCE’s Appendix (describing Ex. 27 as “Email, MDNR to EPA HQ, dated June 20, 2018. [EPA00]2624.”). Because there is no document in MCE’s appendix corresponding to “AR 2621”

and because Exhibit 28 does not relate to the last sentence in Paragraph 34, MCE has failed to cite “to particular parts of materials in the record,” Fed. R. Civ. P. 56(c)(1)(A), and/or failed to “attach a copy of the relevant excerpt” to the cited document, L.R. 56.1(d).

35. Disputed. The paragraph cites to “Exhibit 32, AR 2624,” but MCE’s appendix does not contain an Exhibit 32. Exhibit 27, which is a single page marked EPA002624, is an email from MDNR to EPA that lists several attachments, but this email does not provide any information about the contents of the attachments beyond their titles, does not suggest that anyone other than MDNR was sending the same documents to EPA or anyone else, and none of the attachments are identified by their title as “an Implementation Plan.” *Compare* Ex. 28, EPA004709 (MDNR document entitled “Nutrient Criteria Implementation Plan” and dated July 27, 2018). corresponding to “AR 2621” and because Exhibit 28 does not relate to the last sentence in Paragraph 34, MCE has failed to cite “to particular parts of materials in the record,” Fed. R. Civ. P. 56(c)(1)(A), and/or failed to “attach a copy of the relevant excerpt” to the cited document, L.R. 56.1(d). Regarding footnote 12, there is no mention of “Mr. Hoskins,” any efforts by MDNR to prepare “an Implementation Plan,” that a draft Hoskins “had seen was inadequate,” or a statement that “we’re on it” in Exhibit 27, EPA002624.

36. Uncontroverted.

37. Disputed in part. EPA approved Missouri's water quality standard on December 14, 2018, but that date’s relationship to a Consent Decree is not a material fact. Although EPA’s 2018 Final Approval states that “EPA also received supplemental information from the State after its initial submission,” it does not specify what documents were received, when EPA received them, or whether MSD or anyone else submitted documents to EPA. Ex. 28, EPA004018.

38. Uncontroverted.

39. Uncontroverted.
40. Uncontroverted.
41. Uncontroverted.

UNCONTROVERTED MATERIAL FACTS

I. Missouri's Designated Uses of Its Waters and Narrative Water Quality Standard for Protecting Those Uses.

1. Missouri's surface waters are designated for specific uses, which include, *inter alia*, protection and propagation of fish, shellfish, and wildlife; recreation in and out of the water; and drinking water supply. 10 CSR 20-7.031(1)(C)(1), (2), (6).

2. Missouri protects the designated uses of its waters with the following narrative standard:

General Criteria. The following water quality criteria shall be applicable to all waters of the state at all times including mixing zones. No water contaminant, by itself or in combination with other substances, shall prevent the waters of the state from meeting the following conditions:

(A) Waters shall be free from substances in sufficient amounts to cause the formation of putrescent, unsightly, or harmful bottom deposits or prevent full maintenance of beneficial uses;

(B) Waters shall be free from oil, scum, and floating debris in sufficient amounts to be unsightly or prevent full maintenance of beneficial uses;

(C) Waters shall be free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor, or prevent full maintenance of beneficial uses;

(D) Waters shall be free from substances or conditions in sufficient amounts to result in toxicity to human, animal, or aquatic life. However, acute toxicity criteria may be exceeded by permit in zones of initial dilution, and chronic toxicity criteria may be exceeded by permit in mixing zones

10 CSR 20-7.031(4).

3. Missouri's narrative standard does "not provide numeric thresholds or concentrations above which impacts to designated uses are likely to occur." Ex. 28, EPA004713.

4. "In Missouri, all lakes are manmade reservoirs created by dams on river channels." Ex. 29, EPA004028. The variable water levels and higher nutrient loadings typical for reservoirs

can impede the growth of rooted aquatic plants near shores that provide habitat for aquatic life and potentially “lead reservoirs to have less biological diversity than natural lakes of the same region and comparable size.” *Id.*

II. EPA Approves in Part and Disapproves in Part Missouri’s Nutrient Criteria for Lakes in 2011.

5. On August 16, 2011, EPA issued a final decision (“2011 Final Decision”) that approved sixteen of Missouri Department of Natural Resources’ (MDNR) water quality standards (WQS) that had been new or revised in 2009, took no action on one WQS, and disapproved seven new or revised WQS. Ex. 1, EPA002977–78. In its more detailed explanation of the disapproval of the numeric lake criteria for nutrients (phosphorous and nitrogen), EPA requested that Missouri “revise the criteria to clearly indicate which designated uses the criteria is intended to protect as well as supporting documentation to indicate that the criteria in fact will fully support the associated use” and to allow EPA to “evaluate the soundness of the scientific rationale and protectiveness of the criteria pursuant to the requirement found at 40 CFR § 131.11(a)(1).” Ex. 1, EPA003007.

III. EPA Issues 2013 Guiding Principles, Which MCE Acknowledges Are Not Binding on EPA or Missouri.

6. In September 2013, EPA published a set of “Guiding Principles” that was references in agency documents in the administrative record and MCE’s Suggestion. *See* Ex. 23, EPA003155, –57, –81, –86; Ex. 29, EPA00433; MCE’s Suggestion at 17, 18, n.17, 19–21. EPA’s 2013 Guiding Principles were meant “to offer clarity to states about an optional approach for developing a numeric nutrient criterion that integrates causal (nitrogen and phosphorus) and response parameters into one water quality standard (WQS).” App. to EPA’s Cross-Mot. for Summ. J. and Suggestions in Opp’n to Plf’s Mot. for Summ. J., Ex. 4 at 1 (EPA Guiding Principles on an Optional Approach for Developing and Implementing a Numeric Nutrient Criterion that

integrates Causal and Response Parameters, 2013) (“EPA App., Ex. 4”). Acknowledging that its “understanding of nutrient science” was still in “progress,” EPA recognized that developing numeric values for both nitrogen and phosphorus may present challenges associated with the temporal and spatial variability, as well as the ability to tie them to environmental outcomes.” *Id.*

7. EPA’s 2013 Guiding Principles also included the following disclaimer: “These guiding principles do not impose legally binding requirements on the EPA, states, or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public.” *Id.* It went on to clarify that the Guiding Principles “do not constitute a regulation, nor do they change or substitute for any CWA provision or EPA regulation.” *Id.* “MCE acknowledges that the 2013 EPA guidance . . . is not binding” on either EPA or Missouri. MCE’s Suggestion at 20.

IV. EPA Provides Preliminary Comments in 2016 on Previous Draft of Missouri’s Lake Criteria and Supporting Rationale and Explores Preparing Its Own Criteria.

8. In September 2015, MDNR prepared a draft of new lake nutrient criteria and supporting rationale. Ex. 4, EPA003064–84. The draft lake nutrient criteria were based on a concept discussed at length at a 2013 workshop of experts convened by EPA and proposed for use in other States. *Id.*, EPA003072. MDNR justified the underlying scientific rationale for the criteria by relying on the findings from the EPA’s expert workshop. *Id.*

9. On May 12, 2016, EPA sent MDNR a letter (“2016 Preliminary Comments”) conveying “the combined *preliminary* written comments of EPA Headquarters and Region 7.” Ex. 6, EPA004778 (emphasis added). EPA was concerned that MDNR’s “proposed [chlorophyll] criteria and impairment screening thresholds *may* not” comply with the CWA and encouraged MDNR to double-check its assumptions and address the technical questions EPA had voiced. *Id.* (emphasis added).

10. In November 2016, MCE and EPA entered a Consent Decree that “required EPA to promulgate draft numeric nutrients criteria for Missouri lakes by December 15, 2017 and final numeric criteria by December 15, 2018, unless it approved numeric criteria promulgated by Missouri before either date.” MCE’s Suggestion ¶ 19.

11. EPA explored promulgating numeric criteria by the deadlines of the Consent Decree. *See* Ex. 29, EPA004022 (describing how “EPA issued a proposed rule . . . and sought comments during the same period,” where the proposed rule included “two alternatives, including one alternative that reflected the Missouri’s October 2017 proposal” and “another alternative that used a different methodology to derive the criteria values”); *see also* Ex. 22, EPA001870. However, Missouri completed the development of its nutrient criteria before EPA had completed its own efforts. *See* Ex. 29, EPA004046 (“The EPA is approving Missouri’s numeric nutrient criteria and is therefore no longer pursuing its proposed federal rule.”).

V. Missouri’s Current Nutrient Criteria for Lakes: Its Adoption and How It Works.

12. On April 13, 2018, MDNR sent EPA revised Missouri Water Quality Standards, 10 CSR 20-7.031. *See* Ex. 23, EPA003145; Ex. 24, EPA003569–71, EPA003390. “After considering the relevant science, MDNR determined that the protection of a healthy sport fish population is an appropriate management endpoint for Missouri’s manmade lakes for the protection of aquatic life uses from excess nutrients.” Ex. 29, EPA004028 (internal quotations omitted). “MDNR reasoned that sport fish are apex predators, and that water quality and habitat conditions that maintain a healthy sport fish population in manmade lakes would necessarily maintain a wide-variety of warm water, cool, or cold-water biota that serve as a food web community for those fish populations.” *Id.*

13. Missouri’s lake nutrient criteria are a logical decision framework that includes Response Impairment Thresholds, Nutrient Screening Thresholds, and Response Assessment

Endpoints, as shown in Table 1 below. *See* Ex. 24, EPA003569–71 (10 CSR 20-7.031(5)(N)), EPA003390 (10 CSR 20-7.031 Table L); Ex. 23, EPA003157. The framework is based on the

Table 1. Lake Nutrient Criteria Impairment Decision Process

Evaluation Step	Waterbody Status	Response Impairment Threshold	Nutrient Screening Thresholds	Response Assessment Endpoints
1. Evaluate chlorophyll data against Response Impairment Threshold	Impaired	Above	--	--
	Depends on outcome of Step 2	Below	--	--
2. Evaluate total phosphorus, total nitrogen, and chlorophyll data against Nutrient Screening Thresholds	Depends on outcome of Step 3	--	Above Any	--
	Not Impaired	--	Below All	--
3. Evaluate Response Assessment Endpoints	Impaired	--	Above Any	Documented occurrence
	Inconclusive	--	Above Any	No documented occurrence

“bioconfirmation” guiding principles recommended by EPA for integrating causal (nitrogen and phosphorus) and response variables into one water quality standard. *See* Ex. 23, EPA003157 (“The decision framework integrates causal and response parameters into one water quality standard that accounts for uncertainty in linkages between causal and response parameters. The decision framework includes response impairment thresholds, nutrient screening thresholds, and response assessment endpoints. This framework appropriately integrates causal and response parameters and is based on the bioconfirmation guiding principles that EPA (2013) has suggested as an approach for developing nutrient criteria”); EPA App., Ex. 4. at 1 (describing “an optional approach for developing a numeric nutrient criterion that integrates causal (nitrogen and phosphorus) and response parameters into one water quality standard (WQS)” due to challenges posed by temporal and special variability when “developing numeric values for both nitrogen and

phosphorus” and tying “them to environmental outcomes”); Ex. 22, EPA001909 (EPA’s 2017 Technical Support Document describing the “combined” criteria or “bioconfirmation” approach of determining whether “a waterbody is meeting designated uses despite elevated [total nitrogen and total phosphorous] levels where there is evidence to confirm that the designated uses are in fact not impaired from excess nutrients.”).

14. The lake nutrient criteria at issue in this dispute begins with the ambient concentration of chlorophyll—the green material in plants and algae that convert sunlight to fuel—in Missouri’s lakes. *See* Ex. 24, EPA003570 (10 CSR 20-7.031(5)(N)(1)(C)(I)(a)); *see also* Ex. 23, EPA003178. Each lake’s chlorophyll concentration is compared to one of three separate numeric “Response Impairment Thresholds” listed in the WQS. Ex. 24, EPA003390 (10 CSR 20-7.031 Table L); *see also* Ex. 23, EPA003178. As shown in Table 2 below, lakes found in the Missouri Plains, Ozark Border, or Ozark ecoregions of Missouri respectively have Response Impairment Thresholds of 30, 22, or 15 micrograms per liter (“µg/l” or parts per billion). Ex. 24, EPA003390 (10 CSR 20-7.031 Table L); *see also* Ex. 23, EPA003179. Exceedance of the Response Impairment Thresholds for chlorophyll provides clear evidence of a nutrient impairment in a Missouri lake. *See* Ex. 24, EPA003570 (10 CSR 20-7.031(5)(N)(5)); *see also* Ex. 23, EPA003172.

Table 2. Response Impairment Thresholds

Lake Ecoregion	Chlorophyll Response Impairment Thresholds, µg/L
Plains	30
Ozark Border	22
Ozark Highland	15

15. Because the quantity of nutrients in a lake may be high enough to impair typical aquatic life in the lake but nevertheless have a chlorophyll concentration below the applicable Response Impairment Threshold, Missouri’s criteria include an in-depth, second tier evaluation

for lakes that uses “Nutrient Screening Thresholds” specific to each ecoregion for lakes in need of further screening to assess their potential for impairment as an additional measure of water quality protection. Ex. 24, EPA003570 (10 CSR 20-7.031(5)(N)(1)(C)(I)(b)); *see also* Ex. 23, EPA003182. The WQS’ Nutrient Screening Thresholds are expressed in terms of total phosphorous, total nitrogen, and chlorophyll and are shown in Table 3 below. *See* Ex. 24, EPA003570 (10 CSR 20-7.031(5)(N)(1)(C)(I)(b)), EPA003390 (10 CSR 20-7.031 Table L); *see also* Ex. 23, EPA003181. The Nutrient Screening Values are conservatively assigned low numeric values to identify all lakes that *may* be impaired, but because these Values are conservative by design, the Nutrient Screening Values will inevitably identify some lakes that are not actually impaired. Lakes and reservoirs with chlorophyll and nutrient concentrations below the Nutrient Screening Thresholds are considered undoubtedly protective of aquatic life requiring no further evaluation. *See* Ex. 24, EPA003570 (10 CSR 20-7.031(5)(N)(1)(C)(I)(b)), Ex. 23, EPA003181. Lakes and reservoirs with chlorophyll levels below the Response Impairment Threshold but with total phosphorous, total nitrogen, and/or chlorophyll levels above the Nutrient Screening Thresholds are placed in a “Gray Zone” and are subjected to the second tier evaluation by MDNR to determine attainment of the aquatic life designated use. *See id.*

Table 3. Nutrient Screening Thresholds

Lake Ecoregion	Nutrient Screening Thresholds, µg/L		
	Total Phosphorus	Total Nitrogen	Chlorophyll
Plains	49	843	18
Ozark Border	40	733	13
Ozark Highland	16	401	6

16. MDNR evaluates lakes in the Gray Zone for occurrences of any one of five separate “Response Impairment Endpoints,” which are specified in Missouri’s WQS and listed in Table 4 below. Ex. 24, EPA003570–71 (10 CSR 20-7.031(5)(N)(1)(C)(I)(c), (5)(N)(6)); *see also* Ex. 23, EPA003182. The Response Impairment Endpoints are biological or physical details about a lake

that allow MDNR to assess the complex distinctions between impairment and non-impairment. Several of the Endpoints are strictly numeric, one of which assesses the acidity (pH) and dissolved oxygen content of the lake. Ex. 24, EPA003571 (10 CSR 20-7.031(5)(N)(6)(B)); *see also* Ex. 23, EPA003182. The second numeric Endpoint measures the lake’s concentration of potentially toxic cyanobacteria. Ex. 24, EPA003571 (10 CSR 20-7.031(5)(N)(6)(C)); *see also* Ex. 23, EPA003182. The remaining Endpoints are quantitative, if not numeric, parameters that MDNR uses to evaluate a lake for impairment and include aquatic life mortality events (i.e., fish kills), observed shifts in aquatic life attributed to nutrient impairment, and excessive levels of turbidity (i.e., cloudy water). Ex. 24, EPA003571 (10 CSR 20-7.031(5)(N)(6)(A), (5)(N)(6)(D)–(E)); *see also* Ex. 23, EPA003182; Ex. 29, EPA004037 (EPA describes MDNR’s Response Impairment Endpoints as “quantitative” except for shifts in aquatic life, for which more data is needed to become so). Because these last three Endpoints are not based on express numeric values that are clear delineations between impaired and not impaired, MDNR prepared a guidance document (“Implementation Plan”) that described how MDNR would apply these three narrative Endpoints when assessing a typical Missouri lake. Ex. 28, EPA004709.

Table 4. Response Assessment Endpoints

1. Occurrence of nutrient enrichment-related mortality or morbidity events for fish and other aquatic organisms;
2. Lake surface layer excursions from dissolved oxygen or pH criteria;
3. Cyanobacteria counts in excess of one hundred thousand (100,000) cells per milliliter (cells/mL);
4. Observed shifts in aquatic diversity attributed to eutrophication;
5. Excessive levels of mineral turbidity that consistently limit algal productivity during the period May 1 – September 30.

17. According to Missouri’s WQS, a lake is impaired by nutrients if it exceeds one of the three Nutrient Screening Thresholds and exceeds one of the Response Impairment Endpoints in any given year. Ex. 24, EPA003571 (10 CSR 20-7.031(5)(N)(6)). Conversely, a lake is not

impaired by nutrients if it exceeds any of the three Nutrient Screening Thresholds but does not exceed any of the Response Impairment Endpoints in any given year. *See id.*

18. MDNR later provided EPA “supplemental information from the State” regarding “certification by the State Attorney General that the WQS were duly adopted pursuant to State law, holding a public hearing when revising WQS, whether the State has followed applicable legal procedures, methods used and analyses conducted to support WQS revision, and information on general policies which may affect WQS application and implementation.” Ex. 29, EPA004018. MDNR’s supplemental “information on general policies which may affect WQS application and implementation” included MDNR’s guidance document, entitled “Implementation Plan,” describing how MDNR “intends to implement nutrient criteria in accordance with the newly revised WQS.” Ex. 28, EPA004711.

VI. EPA Approves Missouri’s Current Nutrient Criteria for Lakes.

19. In a 2018 letter (“2018 Final Decision”), EPA approved Missouri’s lake nutrient WQS, finding that it would be protective of aquatic life. *See* Ex. 29, EPA004016. EPA’s 2018 Final Decision provided a detailed analysis of MDNR’s justification for adopting the WQS. Regarding the effect of nutrients and algae on lakes, EPA cited a dozen research articles in support of its statement that “[s]cientific literature abounds with studies indicating that increased levels of nutrients and primary production (algal growth) measured by [chlorophyll] are associated with increased biomass of fish, with different levels of productivity favoring certain types of species over others in many cases depending on many other factors affecting habitat.” *Id.* at EPA004029.

EPA continued:

Researchers have also described that there are likely limits to lake productivity (meaning algal growth that leads to increased fish biomass), and that at some point increased enrichment (nutrient loading or eutrophication) may lead to loss of productivity as water quality conditions such as dissolved oxygen levels deteriorate; however, those levels appear to be quite high, higher than the levels

Missouri has established for either their Response Impairment Thresholds or Nutrient Screening Thresholds.

Id. EPA summarized 15 different research articles on the effects of algae and aquatic life and concluded that “as a general matter, as nutrient levels increase in a lake system, algal growth and fish biomass increase, with increasing abundance of most, if not all, fish species” while acknowledging that increased productivity can result in “a shift in the relative proportion of species present in a lake.” *Id.* at EPA004029–31.

20. EPA noted that it generally supports the “combined criterion” approach, which “integrates causal (nitrogen and phosphorus) and response parameters and has provided Guiding Principles (USEPA 2013) for their development and construction.” Ex. 29, EPA004033. Although EPA had proposed two different approaches, the alternative least similar to Missouri’s WQS had the same purpose—“to establish a floor below which lakes are presumed to support designated uses they are intended to protect”—and were “comparable in magnitude.” EPA was confident that Missouri’s WQS was as appropriate as the alternatives EPA had prepared because their “sets of values closely approximate each other.” *Id.* at EPA004035.

21. EPA also concluded that MDNR’s approach was quantitative in all aspects (“except for the observed shifts in aquatic diversity,” which required more data before a quantitative approach could be defined) when considered with MDNR’s Implementation Plan, which was a guide describing “some initial approaches for permitting” that MDNR planned to use when implementing Missouri’s WQS. Ex. 29, EPA004037, –46. Based on these findings, “EPA determined that MDNR’s Nutrient Screening Thresholds and Response Assessment Endpoints,” which are the foundation of Missouri’s lake nutrient criteria, “are based on sound science and protective of the aquatic life use.” *Id.* at EPA004037.

22. EPA further explained that although the WQS would not protect recreation and drinking water supply uses, Missouri's narrative criteria remained to protect those uses. *See* Ex. 29, EPA004023–26, –47. EPA acknowledged the concerns stated in its 2016 Preliminary Comments regarding the need to “protect designated uses” before lakes become impaired but confirmed that Missouri's new WQS was appropriate and protected all designated uses what considered with other existing WQS, including narrative criteria. *Id.* at EPA004024, –25. EPA also provided the legal authority to permitted it “to consider narrative and numeric criteria holistically when evaluating whether criteria together protect the most sensitive use.” *Id.* at EPA004024 (citing *Nat. Res. Def. Council Inc. v. EPA*, 16 F.3d 1395, 1404–05 (4th Cir. 1993)).

VII. MCE Submits Evidence Regarding Its Members Interest in Protecting Recreational Uses of Missouri's Lakes.

23. “MCE is a state-wide membership organization, with approximately 800 individual members” who “engage in various recreational activities in and on lakes and other waters throughout the state of Missouri, including, but not limited to, swimming, fishing, kayaking, and canoeing.” MCE's Compl. at 3–4, ¶ 13. MCE identified itself as “a statewide environmental organization whose members are concerned about the impact of nutrient build-up in Missouri lakes” and the potential that “nutrient accumulation” may diminish their “ability to engage in and enjoy recreational activities on Missouri lakes.” MCE's Suggestion at 11, ¶ 38. MCE did not indicate that drinking water supply uses were germane to its purpose.

24. MCE attached the declarations of three of its members in support of its arguments for standing. *See* MCE's Suggestion at 11–12, 13 n.13; MCE's Mot. for Summ. J. Exs. B–D (Decls. of S. Brewer, J. Pitts, and V. Colletti). Out of its “approximately 800 individual members,” MCE did not provide a declaration of a member whose current or future use of Missouri lakes is or would be affected by EPA's approval of Missouri's lake nutrient WQS.

25. MCE member Steve Brewer, a St. Louis resident, declared that he uses “several lakes in Missouri for activities such as pleasure boating, kayaking, canoeing, and fishing” but did not indicate he currently uses or has plans to use Missouri lakes for water skiing, swimming, or drinking water sources. MCE’s Mot. for Summ. J. Ex. B at 1, ¶¶ 1, 3, 4. Brewer states that he is “concerned about nutrients pollution in Lake of the Ozarks,” which he still uses “for pleasure boating,” but ceased using “that lake for water skiing and swimming” at some point “before the lake became covered with algae.” *Id.* at 1–2, ¶¶ 5–6. Brewer did not say whether the presence of algae in Lake of the Ozarks was related to his cessation of water skiing and swimming activities. Brewer also states that he is “concerned about excess nutrients in Creve Coeur Lake,” which he acknowledges is not so impaired by nutrients to prevent him from continuing to use the lake for canoeing and kayaking. *Id.* at 2, ¶¶ 8–9.

26. Joe Pitts, Christian County resident and MCE member, declared that he uses “several lakes in Missouri, including Lake Springfield, for activities such as kayaking and fishing” and declared that he is “concerned about nutrients pollution in Lake Springfield” but not at any other Missouri lakes. *Id.* Ex. C at 1, ¶¶ 1, 3–5. Pitts stated that he continues to catch fish while fishing at Lake Springfield but stopped eating the fish he caught there at some point during the last 55 years because of his “concerns about the water quality,” although he did not state whether his concerns about Lake Springfield’s water quality was due to “nutrients pollution” or other concerns. *Id.* at 1–2, ¶¶ 5, 6, 8. Pitts does not indicate that he currently uses or has plans to use Missouri lakes for drinking water sources.

27. MCE member Vincent Colletti, Franklin County resident and MCE Member, declared that he uses “Peaceful Valley Lake for fishing, swimming, and boating,” and is “concerned about changes in the water quality” there. *Id.* Ex. D at 1, ¶¶ 3, 6, 7. Colletti has

“observed a significant increase in algae growth” and challenges in boating, swimming, and fishing at Peaceful Valley Lake but did not associate his observations and challenges with excess nutrients or any other potential cause. *id.* at 1–2, ¶¶ 8, 9. Pitts also fails to state that he currently uses or plans to use Missouri lakes for drinking water sources.

STANDARD OF REVIEW

The Administrative Procedure Act (“APA”) requires a reviewing court to set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), a “highly deferential” standard of review that “presumes the agency’s action to be valid,” *Env’tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). As is true of APA judicial review of agency actions pursuant to federal law, the burden of proof lies on the party challenging EPA’s approval of State actions under the Clean Water Act (“CWA”). *See Thomas v. Jackson*, 581 F.3d 658, 668 (8th Cir. 2009) (burden of proof in challenge of EPA’s approval of Iowa’s CWA § 303(d) list “lies with [p]laintiffs”); *see also Guar. Sav. & Loan Ass’n v. Fed. Home Loan Bank Bd.*, 794 F.2d 1339, 1342 (8th Cir. 1986) (party seeking judicial review of agency action under APA § 706(2)(A) bears burden of overcoming “presumption of regularity”). An agency’s action is “arbitrary and capricious” if it “has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (quotations omitted). The court is “not empowered to substitute its judgment for that of the agency,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but may only consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment,” *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 378

(1989) (citations omitted). “[I]n performing a searching and careful inquiry into the facts, [courts] do not look at the agency’s decision as would a scientist . . .” but “must unquestionably defer to an agency’s expertise in weighing and evaluating the merits of scientific studies.” *Am. Trucking Ass’ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 249–50 (D.C. Cir. 2013) (internal quotations omitted); *see also Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983) (“When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”).

ARGUMENT

EPA’s approval of Missouri’s WQS was appropriate and neither arbitrary nor capricious. MCE’s belief that EPA was required to force Missouri’s nutrient WQS to comply with the Agency’s preferences or prior assessments of prior WQS overlooks the strict constraints Congress placed on EPA’s authority to review a State’s WQS, which is limited to determining the WQS’ compliance with federal law. Missouri addressed the concerns raised in EPA’s 2011 decision to deny a prior WQS when it adopted the WQS currently in dispute, notwithstanding MCE’s baseless allegations to the contrary. Additionally, EPA’s decision to approve a WQS that protects fewer than all uses of State waters must be assessed in view of the State’s other WQS when determining compliance with the CWA and certainly cannot be shown to be inappropriate by concerns that are based on rank speculation. Finally, MCE’s proffered evidence establishes that its purpose is to protect its members’ use of Missouri’s lakes for recreational purposes, which necessarily means that MCE lacks standing to challenge Missouri’s WQS for allegedly failing to protect other uses (*e.g.*, drinking water sources) of Missouri’s lakes.

I. Congress Limited EPA's Role to Reviewing State WQS for Compliance with CWA, not Its Preferences.

EPA approved Missouri's numeric nutrient criteria for its lakes because the numeric nutrient criteria, when considered in conjunction with Missouri's narrative criteria, protected all uses of Missouri's lakes and complied with all other aspects of the Clean Water Act. MCE's challenge to EPA's approval is based on MCE's misunderstanding of the law that (a) EPA was required to force Missouri to protect all uses of its lakes with a single numeric nutrient criterion in compliance with EPA's Guiding Principles, or (b) Missouri's and EPA's methodological choices were constrained by EPA's rejection of a different WQS that Missouri adopted nearly a decade prior to the instant one. Not only was EPA allowed to approve any numeric nutrient criteria that did not protect drinking water uses for Missouri's lakes, but Congress specifically limited EPA's review of a State's WQS to mere approval or rejection and prohibited it from demanding inclusion of its preferences in the State's WQS.

Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the CWA requires WQS to be prepared for all surface waters, and the duty to prepare WQS is reserved to States, not EPA. *See* Clean Water Act § 303(a), (c)(2)(A), 33 U.S.C. § 1313(a), (c)(2)(A). EPA's supervisory role is confirmed by the fact that "Congress provided the EPA sixty days for approval and ninety days for disapproval of water quality standards proposed by states," which evinces a clear intent for "EPA to have a very limited role" in its assessment of a State's WQS. *City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996) (citing 33 U.S.C. § 1313(c)(3)); *see also Barnum Timber Co. v. EPA*, 835 F. Supp. 2d 773, 780 (N.D. Cal. 2011) (EPA's "role is one of mere oversight"). In this regard, EPA's "duty is not to determine whether the states used EPA's recommended criterion but instead to review state water quality standards" and "determine

whether the states' decision is *scientifically defensible and protective of designated uses*" as an umpire "with approval and rejection powers only." *Nat. Res. Def. Council Inc. v. EPA*, 16 F.3d 1395, 1399, 1401 (4th Cir. 1993). If EPA properly determines that a State agency's decision-making actually violates a provision of the Clean Water Act and the State fails to adopt EPA's proposed changes, EPA must begin the process of preparing and publishing its own proposed standards. *See* 33 U.S.C. § 1313(c)(3), (4). However, if the State adopts WQS before EPA completes preparing its own WQS, the State's WQS must be implemented if EPA determines it complies with the CWA. *See* 33 U.S.C. § 1313(c). Missouri adopted the disputed numeric nutrient criteria for specific lakes to ensure attainment of the aquatic habitat protection use. *See* Ex. 28, EPA004713.

A. MCE Has No Evidence That All Designated Uses of Missouri's Lakes Will Not Be Adequately Protected by the Combination of the Numeric Nutrient Criteria and the Narrative Criteria.

EPA's approval of Missouri's numeric nutrient criteria was appropriate because no designated use of Missouri's lakes was unprotected when EPA considered the numeric nutrient criteria with Missouri's narrative criteria while invoking the holding in *Natural Resources Defense Council v. EPA*, 16 F.3d 1395 (4th Cir. 1993). *See* Ex. 29, EPA004024. The CWA requires new or revised State WQS that "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). By regulation, a State's water quality criteria must "protect the designated use" and be "based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." 40 C.F.R. § 131.11(a)(1). Moreover, the Fourth Circuit rejected the contention that "[s]tates have an obligation under the CWA or its accompanying regulations to adopt a single numeric criterion to protect against all identifiable effects to human health, aquatic life and

wildlife.” *Nat. Res. Def. Council Inc.*, 16 F.3d at 1405. So long as EPA’s assessment of a numeric criteria for one designated use was evaluated in conjunction with a State’s narrative criteria that will protect the remaining designated uses, EPA’s approval of the numeric criteria does not violate the CWA. *See id.* at 1404–05.

B. MCE’s Challenge to EPA’s Approval of Missouri’s WQS Is Supported by Nothing but Baseless, Conclusory Allegations.

Because MCE’s allegations that EPA arbitrarily approved Missouri’s WQS are unsupported, MCE inappropriately attempts to shift the burden of proof from itself as the plaintiff to the defendant by suggesting that EPA has failed to justify its decision with sufficient evidence. However, MCE alone bears the burden of proof. *See Thomas*, 581 F.3d at 668; *Guar. Sav. & Loan Ass’n*, 794 F.2d at 1342. At the summary judgment stage, MCE must provide more than unsupported arguments and conclusory allegations. *See Ferring B.V. v. Barr Labs, Inc.*, 437 F.3d 1181, 1193 (Fed. Cir. 2006) (“Conclusory allegations and attorney arguments are insufficient to overcome a motion for summary judgment.”); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005) (“A plaintiff may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff’s favor.”). Because MCE cannot support its Motion for Summary Judgment with admissible evidence, this case should be dismissed.

First, MCE erroneously suggests that EPA must prove to this Court that Missouri’s narrative criteria “are or could be more stringent than” its numeric nutrient criteria.² MCE’s

² MCE also argues that EPA has no evidence “that Missouri had been or would be implementing the narrative criteria in permits to impose [drinking water supply] restrictions more stringent than” the numeric nutrient criteria. MCE’s Suggestion at 15 n.15. If MDNR were to issue a future National Pollutant Discharge Elimination System (NPDES) permit for discharges into a lake that

Suggestion at 15. However, it is MCE that bears the burden of providing admissible evidence to overcome the presumption of validity that accompanies EPA's approval of Missouri's WQS. *See Env'tl. Def. Fund.*, 657 F.2d at 283 (for APA judicial review, a court "presumes the agency's action to be valid."). MCE's Motion for Summary Judgment and Suggestion offer no evidence that Missouri's narrative criteria would be insufficient to protect recreation or drinking water uses or that Missouri would not be implementing appropriate limits in future permits based on its narrative criteria. *See* MCE's Suggestion at 15, n.15 (EPA "did not" demonstrate "that the narrative criteria are or could be more stringent than" the Missouri's aquatic life criterion) In truth, MCE's assertion entire case is founded upon nothing more than unsupported assumptions, which are simply insufficient. *See Thomas*, 581 F.3d at 668 ("The burden of proof lies with Plaintiffs, however, and Plaintiffs cannot meet that burden through unsupported assumptions.").

Second, MCE argues, without citation of any legal or other authority, that EPA's 2018 Final Approval of Missouri's numeric criteria was "constrained by" EPA's 2011 Final Decision and that EPA failed to "offer a reasoned analysis" to justify EPA's purported reversal in "policy or standard." MCE's Suggestion at 17, 15. Yet neither EPA's 2011 Final Decision nor its 2018 Final Decision are policy or standard; they both are the Agency's assessment of whether a predecessor of Missouri's WQS complied with the CWA. Although Missouri did supply EPA with

lacked sufficient limits to protect the lake's use as a drinking water supply, any person (or association of persons) with standing (i.e., having an interest in the use of the lake as a drinking water supply which is or may be adversely affected by MDNR's issuance of the NPDES permit) may challenge its issuance under the CWA. *See generally* 33 U.S.C. § 1365. As explained in Section II below, MCE has alleged that EPA's approval of Missouri's WQS has harmed and will harm MCE's members' use of Missouri's lakes for recreational activities, not for use as drinking water supplies.

the information the Agency believed was missing from Missouri's prior WQS submission,³ EPA did what the CWA requires: assess Missouri's WQS to "determine whether the states' decision is scientifically defensible and protective of designated uses" and either approve or reject it. *Nat. Res. Def. Council Inc.*, 16 F.3d at 1399, 1401. MCE can point to no proof in the administrative record suggesting that EPA's assessment of Missouri's submissions was incomplete, incorrect, or in violation of the CWA.

Third, MCE assails EPA's approval of Missouri's WQS for being a "combined criteria" that fails to conform with EPA's 2013 "Guiding Principles" and "is different and less protective than" the nutrient criteria of other States. MCE's Suggestion at 18. For the reasons discussed above in Part I, EPA can only review a State's WQS for compliance with the CWA—not EPA guidance or the criteria of other States. Moreover, the 2013 Guiding Principles explicitly state that they "do not impose legally binding requirements on the EPA, states, or the regulated community" and do not "confer legal rights or impose legal obligations upon any member of the public," "constitute a regulation," or "change or substitute for any CWA provision or EPA regulation." EPA App., Ex. 4 at 1. MCE tries to circumvent EPA's inability to force Missouri's compliance with its 2013 Guiding Principles by suggesting that Missouri's WQS focuses on "restoring impaired lakes rather than focusing on preventing lakes from becoming impaired in the first place," which would "allow the water to become worse until it is definitely impaired," which "is exactly the situation the EPA

³ In its 2011 Final Decision, EPA requested that Missouri "revise the criteria to clearly indicate which designated uses the criteria is intended to protect as well as supporting documentation to indicate that the criteria in fact will fully support the associated use" and allow EPA to "evaluate the soundness of the scientific rationale and protectiveness of the criteria pursuant to the requirement found at 40 CFR § 131.11(a)(1)." Ex. 1, EPA003007. In its 2018 Final Decision, EPA thoroughly describes how Missouri supplied the information EPA had requested in 2011. Ex. 29, EPA004022–40. MCE has offered no evidence suggesting that EPA's assessment of Missouri's submissions was incomplete or incorrect.

2013 [Guiding Principles] warns against.” MCE’s Suggestion at 18, 20. However, MCE cannot identify any evidence in the administrative record that this hypothetical situation will develop in a Missouri lake, which means that MCE has failed to establish that “such an injury is imminent,” *i.e.*, “is not too speculative” or “is certainly impending.” *Mo. Coal. for Env’t v. Wheeler*, No. 2:19-cv-4215-NKL, 2020 U.S. Dist. LEXIS 82409, at *10 (W.D. Mo. May 11, 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). Without proof that Missouri’s WQS creates an imminent danger of injuring designated uses of Missouri’s lakes, MCE has a “contingent and speculative” concern, not an Article III dispute. *Id.* at *19.

Fourth, MCE argues that EPA’s approval of Missouri’s WQS improperly relied on MDNR’s Implementation Plan, which MCE criticizes as being neither a WQS, a legally adopted rule, nor consistent with EPA’s 2013 Guiding Principles. MCE’s Suggestion at 21–22. MCE is correct that the Implementation Plan is not a WQS or a rule. It is, in fact, guidance from MDNR that interprets the numeric nutrient criteria with respect to a specific set of facts that is exempted from Missouri’s rulemaking procedures. *See* Mo. Rev. Stat. § 536.010(6)(b); 40 C.F.R. § 131.11(b). For the reasons explained above, EPA’s 2013 Guiding Principles are irrelevant to EPA’s assessment of Missouri’s WQS for compliance with the CWA.

Finally, MCE offers its unsupported, purportedly expert opinion that “[t]he most accurate assessment of the” numerous scientific literature cited in MDNR’s justification for its use of apex predators as a method of biomonitoring aquatic life provides “no clear relationship between the growth/productivity /health of the apex predator sport fish . . . and the other organisms in the food web.” MCE’s Suggestion at 23–24. However, EPA reviewed over a dozen studies in the scientific literature and concluded that although potential “limits to lake productivity (meaning algal growth that leads to increased fish biomass)” and potential nutrient levels above which aquatic life may

experience some harm, existing scientific research indicates that this nutrient tipping point appears “to be quite high” and indeed “higher than the levels Missouri has established for either their Response Impairment Thresholds or Nutrient Screening Thresholds.” Ex. 29, EPA004016. MCE’s Suggestion fails to identify even one of the numerous scientific studies evaluated and relied on by MDNR and EPA to justify and assess, respectively, Missouri’s numeric nutrient criteria that was allegedly misinterpreted or misunderstood. *See* Ex. 29, EPA004029–31. MCE was already facing an arduous challenge to prove that both MDNR’s choice of WQS and EPA’s approval was contrary to the scientific evidence upon which both were based or “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Nat’l Ass’n of Home Builders*, 551 U.S. at 658 (quotations omitted); *see Am. Trucking Ass’n, Inc.*, 724 F.3d at 249–50 (courts “must unquestionably defer to an agency’s expertise in weighing and evaluating the merits of scientific studies.”); *Baltimore Gas & Elec. Co.*, 462 U.S. at 103 (“a reviewing court must generally be at its most deferential” when examining scientific determinations). But it is impossible for MCE satisfy its burden of proof that EPA’s approval of Missouri’s WQS was arbitrary or capricious with no evidence at all.

In short, MCE lacks evidence to support its claim that EPA’s approval was arbitrary, and MCE bore the burden of proof to produce such evidence and submit it with its Motion for Summary Judgment. Therefore, MCE’s claims should be dismissed.

II. MCE’s Arguments Should Be Limited to Challenging EPA’s Approval of Missouri’s Water Quality Standards on the Basis of Potential Injury to Its Members’ Recreational Uses of Missouri’s Lakes.

The Water Quality Associations separately request that the Court limit its focus when reviewing MCE’s Motion for Summary Judgment to arguments raised by MCE that EPA’s approval of Missouri’s WQS was arbitrary and capricious due to a purported failure to protect recreational uses of Missouri’s lakes—and ignore arguments suggesting that the WQS failed to

protect uses of Missouri’s lakes for drinking water purposes—because recreational uses are the only “interests” that “are germane to the organization’s purpose.” *Mo. Coal. for Env’t*, 2020 U.S. Dist. LEXIS 82409, at *12–*13 (quoting *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012)). This is because the evidence MCE proffered to establish Article III standing in its Motion for Summary Judgment fails to show that any of its members have any interest at risk of injury by Missouri’s WQS except their recreational uses of Missouri’s lakes.

“[S]tanding is a jurisdictional prerequisite that must be resolved before reaching the merits of a suit.” *Sanzone v. Mercy Health*, 954 F.3d 1031, 1046 (8th Cir. 2020). “[A]n association has standing to bring suit on behalf of its members when ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’” *Kuehl v. Sellner*, 887 F.3d 845, 851 (8th Cir. 2018) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)). To satisfy the first element, MCE must show a member with “an injury in fact, meaning the actual or imminent invasion of a concrete and particularized legal interest; a causal connection between the alleged injury and the challenged action of defendant; and a likelihood that the injury will be redressed by a favorable decision of the court.” *Id.* at 850 (internal quotation omitted). At the summary judgment stage, the movant must support their facts with citations to materials in the record or through appropriate declarations. *See* L.R. 56.1(a); Fed. R. Civ. P. 56(c).

Acknowledging its obligation to prove standing, MCE has proffered evidence of the interests of its members in protecting their “ability to engage in and enjoy recreational activities on Missouri lakes,” MCE’s Suggestion at 11 ¶ 38. The three members who submitted supporting declarations all expressed concern that nutrient pollution and algae growth may have impaired

their recreational uses of Missouri lakes for fishing, swimming, and boating. *Id.* at 11–12, ¶¶ 29–41, Exs. B–D. MCE has proffered no evidence that drinking water uses of Missouri lakes are germane to its purpose or that an alleged failure to protect such uses would harm its members’ interests. Moreover, even if the Court were to require MDNR to revise the WQS to account for drinking water uses, such efforts would not impact the recreational interests of MCE or its members.

MCE lacks standing to challenge EPA’s approval of MDNR’s WQS under the APA on the basis of an alleged failure to consider the WQS’ impacts on drinking water uses of Missouri lakes because MCE has failed to establish that drinking water uses are germane to its purpose, that an alleged failure to protect drinking water uses is an actual or imminent invasion of a concrete and particularized interest of its members, or that an ordered change of the WQS to address drinking water uses would redress MCE’s concerns about recreational uses. Although MCE alleges that it represents members who “have been and will be injured in their use of Missouri lakes that is caused by Missouri’s unprotective nutrients WQS,” the evidence MCE has proffered is insufficient to establish standing for past and future injuries to any uses of Missouri’s lakes by its members. As the Supreme Court noted in *Lewis v. Casey*,

standing is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

518 U.S. 343, 358 n.6 (1996); *see also Steger v. Franco*, 228 F.3d 889, 893 (8th Cir. 2000) (visually impaired plaintiff lacked standing to sue property owner for lack of appropriate wheelchair accessibility or any other violation of the Americans with Disabilities Act unrelated to plaintiff’s visual impairment). If MCE wished to contest an alleged failure of MDNR’s WQS to protect the use of Missouri lakes as drinking water sources, it could have supported its Motion for

Summary Judgment with admissible evidence that any of its members use or intend to use those lakes as a source of drinking water.

The Water Quality Associations therefore request that this Court not entertain MCE's first argument—that EPA's approval of Missouri's WQS was arbitrary and capricious because the State's WQS do not protect drinking water uses of its lakes—because MCE does not have standing to assert it or any other argument that involves a failure to protect any use of Missouri lakes other than recreational uses. Even if Missouri's numeric nutrient criteria were required to protect drinking water uses and were determined to be inadequate to do so, neither MCE nor its members have established that this purported deficiency would harm any interest described in their Motion for Summary Judgment, Suggestion, or supporting declarations and grant them standing to challenge EPA's approval of Missouri's WQS in this regard.

CONCLUSION

For the foregoing reasons, the Water Quality Associations respectfully request that the Court deny MCE's Motion for Summary Judgment and grant the Motions for Summary Judgment of EPA and Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November 2020, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the attorney of record listed below:

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