

**IN THE UNITED STATES DISTRICT COURT  
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. )

Case No. 2:19-cv-4215-NKL

**STATE OF MISSOURI’S MOTION TO INTERVENE AS A DEFENDANT AND  
BRIEF IN SUPPORT**

Plaintiff in this case challenges the EPA’s approval of water quality standards written and promulgated by the State of Missouri, specifically Mo. Regs. Tit. 10, § 20-7.031(5)(N) (2019). *See* Compl. ¶ 1. The State of Missouri moves to intervene as an Intervenor-Defendant in this case as of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, by permission under Rule 24(b). Missouri’s proposed answer is attached as Exhibit A. Fed. R. Civ. P. 24(c).

Missouri informed counsel for the parties about this motion, and counsel for the parties state that they do not object to Missouri’s intervention.

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## INTRODUCTION

Missouri seeks to intervene as of right (Rule 24(a)) or by permission (Rule 24(b)) in Plaintiff's suit challenging the EPA's approval of water quality standards developed and issued by Missouri and its agencies. Mo. Code Regs. Ann. tit. 10, § 20-7.031(5)(N) (2019). It plainly has a right to do so. The Clean Water Act gives States primary authority to develop, issue, review, and modify water quality standards for bodies of water within their individual borders. 33 U.S.C. § 1313(a). Missouri has an interest in defending its work and the regulations it enforces on a daily basis. Plaintiff's suit threatens to impede Missouri's interests by limiting its authority under the Clean Water Act and by forcing EPA to withdraw approval of regulations already on the books in Missouri. And Plaintiff's complaint notes that EPA and Missouri do not always agree on the scope of Missouri's authority under the Clean Water Act. These facts strongly support intervention under Rule 24.

## BACKGROUND

The Clean Water Act must be read and understood “[i]n the context of the vigorous federalism underlying [it].” *United States v. Homestake Min. Co.*, 595 F.2d 421, 429 (8th Cir. 1979). The Act “recognize[s], preserve[s], and protect[s] the primary responsibilities of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b).

This suit is about regulations that fall primarily within Missouri's purview, not EPA's. Before the Clean Water Act, federal law directed each State to set “water quality standards” for interstate waters “flowing through” the State's borders. *See* S. Rep. 92-414,

at 2 (1971). The Clean Water Act continues this practice, delegating to the States primary authority to set, review, and revise water quality standards for waters within their borders. 33 U.S.C. § 1313(a). The Act directs each State to review these water quality standards at least once every three years. *Id.* § 1313(c). In Missouri, this authority is vested in the Missouri Clean Water Commission. Mo. Ann. Stat. § 644.026.1(7). Whenever a State revises or adopts a new standard, it submits the revised standard to the Administrator of the federal EPA. 33 U.S.C. § 1313(c)(2). The EPA then determines whether the new water quality standards submitted by the State “meet[] the requirements” of the Clean Water Act. *Id.* § 1313(c)(3). If the State’s regulations *do* meet the Act’s requirements, then the State-drafted standard “shall” become the governing standard. *Id.* If the State’s regulations *do not* meet the Act’s requirements, the EPA is required to specify what changes are necessary and then the State has ninety days to submit revised standards. *Id.*

Here, Plaintiffs challenge water quality standards issued by the State of Missouri and codified in Missouri’s regulations—specifically, the nutrient standards found in Mo. Code Regs. Ann. tit. 10, § 20-7.031(5)(N) (2019). *See* Compl. ¶ 1.

Substantively, Plaintiff asserts that these water quality standards do not comply with the Clean Water Act, so EPA should not have approved them. Compl. ¶ 7. In particular, Plaintiff accuses the EPA of overreliance on Missouri’s own explanation for its rules. *Id.* (accusing EPA of acting arbitrarily and capriciously because it “accepted Missouri’s contention that MDNR could not produce numeric nutrients criteria at this time” and “took Missouri at its word that the standard it developed . . . would . . . suffice to protect the swimmable and drinking water uses”). That explanation, Plaintiff alleges, is inconsistent

with the Clean Water Act. Compl. ¶¶ 65-81. Plaintiff asks the Court “to order Defendants to disapprove Missouri’s nutrients standards submission” and tell Missouri to do it over again. Compl. ¶ 9 & prayer for relief.

Procedurally, Plaintiffs challenge Missouri’s compliance with the required steps for reviewing and revising water quality standards under the Clean Water Act and Missouri law. Compl. ¶¶ 24-28; 35-40; 77.

Missouri seeks to intervene as of right and by permission in order to defend its work and its regulations.



## ARGUMENT

### **A. The State of Missouri is entitled to intervention as a matter of right as a defendant in this case.**

A motion to intervene as of right has four elements. A proposed intervenor has a right to intervene if it: “(1) files a timely motion to intervene; (2) claims an interest relating to the property or transaction that is the subject of the action; (3) is situated so that disposing of the action may, as a practical matter, impair or impede the movant’s ability to protect that interest; and (4) is not adequately represented by the existing parties.” *Nat’l Parks Conservation Ass’n v. U.S. E.P.A.*, 759 F.3d 969, 975 (8th Cir. 2014); Fed. R. Civ. P. 24(a)(2). These requirements “should be construed liberally, with all ‘doubts resolved in favor of the proposed intervenor.’” *Nat’l Parks*, 759 F.3d at 975 (citation omitted).

All four requirements are met here. Missouri files this motion only a few weeks after the litigation began. Missouri has an obvious interest in defending the regulations at issue because it drafted, submitted, and now implements those standards. Compl. ¶ 1; Mo. Code Regs. Ann. tit. 10, § 20-7.031(5)(N) (2019). This action challenges the legality of those Missouri standards and seeks to impede Missouri’s regulatory authority. Compl. ¶¶ 7, 9. And Missouri has an important and distinct role to play in defending and explaining those standards’ substantive and procedural groundwork—Missouri drafted them, after all.

#### ***1. Timely.***

*First*, Missouri’s motion is timely. “Whether a motion to intervene is timely is determined by considering all the circumstances of the case.” *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 998 (8th Cir. 1993). Several specific factors that

are relevant to timeliness are: “(1) how far the litigation ha[s] progressed at the time of the motion for intervention, (2) the prospective intervenor’s prior knowledge of the pending action, (3) the reason for the delay in seeking intervention, and (4) the likelihood of prejudice to the parties in the action.” *United States v. Ritchie Special Credit Investments, Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010) (internal quotations omitted). These factors show Missouri’s motion is timely here. The complaint was filed in December 2019, Missouri filed this motion to intervene within weeks, near the deadline for responsive pleadings. No party is prejudiced by Missouri’s intervention at this early stage in the litigation.

**2. Legally Cognizable Interests and Article III standing.**

Missouri also meets the second element for intervention as of right: a legally cognizable interest in the litigation. *Nat’l Parks*, 759 F.3d at 975. “[T]he ‘interest’ test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *United States v. Union Electric Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995) (quoting *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 949 (8th Cir. 1983)). The test “does not require a specific legal or equitable interest.” *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). Here, however, Missouri has at least three separate legally cognizable interests in the water quality standards that are “the subject of the action.” *Nat’l Parks*, 759 F.3d at 975.

First, the Clean Water Act gives Missouri primary authority to draft and issue water quality standards for bodies of water flowing through it. 33 U.S.C. § 1313(a). In fact, the EPA had no power to reject Missouri’s water quality standards unless they failed to meet

the Clean Water Act's requirements. 33 U.S.C. § 1313(c)(2)-(3). So Missouri has a protectable legal interest in defending regulations it “developed, proposed, and then obtained EPA approval of.” *Waterkeeper Alliance, Inc. v. Wheeler*, 330 F.R.D. 1, 8 (D.D.C. 2018); *Mayo v. Jarvis*, Civ. No. 14-1751, 2014 WL 12804733, at \*3 (D.D.C. Nov. 12, 2014) (“In light of Wyoming’s undisputed interest in preserving its regulatory role as it pertains to the wildlife in its borders . . . the Court concludes that the State of Wyoming has demonstrated a legally protected interest in the action.”). Plaintiff’s complaint demands that the EPA exceed its limited statutory role within the cooperative “federalism” undergirding the Clean Water Act. *Homestake Min. Co.*, 595 F.2d at 429. Missouri has an interest in preventing that from happening.

In addition, the Clean Water Act gives Missouri primary authority to *implement* water quality standards within its borders. As the governmental entity tasked with implementation of the standards being challenged here, Missouri has a vested interest in their ongoing vitality. *Western Org. of Resource Councils v. Jewell*, No. 14-1993, 2015 WL 13711094, at \*6 (D.D.C. July 15, 2015) (finding that state has unique protectable legal interest in enforcing its “natural resource management, environmental, and public safety regulations”); *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 18 (D.D.C. 2010) (finding that state has legally protected interest in “preserving its role in regulating environmental quality within its borders”). Missouri has a strong legal interest in litigation that threatens to undermine the very standards it administers on a daily basis.

Finally, Missouri has a *parens patriae* interest in defending the water quality standards that apply within its borders on behalf of the people of Missouri. “*Parens patriae*

is a common-law standing doctrine that permits the state to commence an action to protect a public interest, like the safety, health or welfare of its citizens.” *Lynch v. Nat’l Prescription Adm’rs, Inc.*, 787 F.3d 868, 872 (8th Cir. 2015). Missouri “has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Plaintiff’s suit asks the Court to direct EPA to reject Missouri’s water quality standards; their success would undermine the “health and well-being—both physical and economic” of Missouri’s citizens. *Id.*

To the degree an intervenor-defendant must establish standing before intervening under Rule 24(a), these interests also establish that Missouri has Article III standing to intervene. *Nat’l Parks*, 759 F.3d at 974. Missouri would suffer concrete injuries to each of these interests if Plaintiff’s suit succeeded. *Id.*

### **3. Impairment.**

Missouri’s interests will also be impaired if Plaintiff’s challenge succeeds. *Nat’l Parks*, 759 F.3d at 975. This element “presents a minimal burden.” *WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010). It asks only whether the disposition of a lawsuit “may as a practical matter impair or impede” the intervenor’s interests. *Nat’l Parks*, 759 F.3d at 976; *see United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002) (“[T]he relevant inquiry is whether the [disposition] ‘may’ impair rights ‘as a practical matter’ rather than whether the [disposition] will ‘necessarily’ impair them.” (quoting Fed. R. Civ. P. 24(a)(2))). If Missouri may be affected “in a practical sense by the determination made in an action, [it] should, as a general rule, be entitled to

intervene.” *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting Fed. R. Civ. P. 24 advisory committee’s note).

First, Missouri’s power to issue standards under the Act would be impaired and impeded if the Court ordered EPA to reject those standards. Missouri would not only lose its existing standards but also be forced to issue new ones. *See WildEarth Guardians*, 604 F.3d at 1199 (recognizing that “the interest of a prospective defendant-intervenor may be impaired where a decision in the plaintiff’s favor would return the issue to the administrative decision-making process, notwithstanding the prospective intervenor’s ability to participate in formulating any revised rule or plan”). That easily meets the “impairment” element. *Id.* But, perhaps more importantly, Plaintiff challenges Missouri’s *authority* under the Clean Water Act to issue the kind of standards that Plaintiff alleges Missouri issued. Compl. ¶¶ 5-6. If Plaintiff succeeded on this claim, it would impair Missouri’s regulatory authority under the Clean Water Act.

Second, Missouri’s implementation of its regulations would be adversely affected if Plaintiff’s suit were to succeed. This constitutes impairment for purposes of Rule 24(a). *See WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 4 (D.D.C. 2017) (allowing intervention by group of States to defend against environmental groups’ challenge to federal government’s approval of certain oil and gas leases on public lands because the intervening States would be affected by the revocation of that approval); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003) (permitting Mongolia to intervene in an action challenging the Secretary of the Interior’s classification of a Mongolian sheep as threatened).

Third, Missouri's citizens would be adversely affected if Plaintiff's suit were to succeed. Missourians have vested environmental, health, and recreational interests in Missouri's environmentally- and legally- sound water quality standards. *Alfred L. Snapp & Son*, 458 U.S. at 607. Missourians have acted in reliance on existing standards—as issued by Missouri and approved by the EPA—in their personal and professional decision-making. Those vested interests would be impeded by revocation of those standards at this late date.

**4. *Inadequately represented.***

Missouri's motion also meets the fourth element of Rule 24(a): the federal EPA cannot adequately represent Missouri's interests. *Nat'l Parks*, 759 F.3d at 975. "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). "[I]t is not Applicants' burden at this stage in the litigation to anticipate specific differences in trial strategy." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001). It is enough to show potentially divergent interests.

As many courts have held, a federal government agency cannot adequately represent a State's sovereign interests. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (noting that the federal government is "required to represent a broader view than the more narrow, parochial interests" of the proposed state and county intervenors); *see also Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242,

1256 (11th Cir. 2002) (holding that federal defendant did not adequately represent State's interest in interstate waters); *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994) (finding that the government did not adequately represent the interests of intervenors because "[t]he government must represent the broad public interest"); *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible."); *Jewell*, 320 F.R.D. at 4-5 ("While the Federal Defendants' duty runs to the interests of the American people as a whole, the state-intervenors will primarily consider the interests of their own citizens.").

Moreover, Plaintiff's complaint alleges that the EPA has changed its position on the legality of Missouri's water quality standards. Compl. ¶ 84. If it were true that Missouri and the EPA had divergent interests in the past, they may again have divergent interests in the course of this litigation. Missouri is not required to take that gamble. If EPA *may* not adequately represent Missouri's interests in the future, then Missouri has a right to intervene now in order to represent its "special interest in preserving [Missouri's] regulatory authority . . . to the exclusion of federal jurisdiction." *Waterkeeper Alliance*, 330 F.R.D. at 9.

In addition, the EPA and Missouri have different roles to play under the Clean Water Act. These divergent roles mean the EPA cannot adequately represent Missouri on either substantive or procedural issues. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995) ("[w]here those interests are disparate, even though directed at a common

legal goal, . . . intervention is appropriate.”). Substantively, Missouri “can provide expertise to the issues in this dispute,” *Nat’l Parks*, 759 F.3d at 977, because the Clean Water Act gives the *States*, not the EPA, primary authority to create and revise water quality standards, 33 U.S.C. § 1313(a). Procedurally, Plaintiff accuses Missouri of procedural shortfalls in the course of proposing and issuing its water quality standards. *E.g.*, Compl. ¶ 77. Missouri can and will “assert ‘defenses’ of [its] rulemaking that squarely respond to the challenges made by [P]laintiffs” on these state law issues. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002).

**B. In the alternative, the Court should grant Missouri permission to intervene.**

In the alternative, the Court should grant Missouri permission to intervene. Fed. R. Civ. P. 24(b). That Rule provides: “On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). “Normally, parties seeking permissive intervention pursuant to Rule 24(b) must show: (1) an independent ground for jurisdiction, (2) timeliness of the motion, and (3) that the applicant’s claim or defense and the main action have a question of law or fact in common.” *Flynt v. Lombardi*, 782 F.3d 963, 966 (8th Cir. 2015). Here, too, “Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.” *S. Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003).

These requirements are met here.

Because Missouri seeks to intervene as a defendant and without adding any new claims, it does not need to show an independent jurisdictional ground. *Freedom from*



*Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (“[T]he independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.”).

Its motion is timely for the reasons already explained above. Missouri filed this motion within weeks of Plaintiff’s complaint, near the deadline for responsive pleadings, and before the Court set a schedule. Intervening now will not prejudice any party.

Finally, Missouri seeks to inject defenses that share common questions of law and fact with the claim raised by Plaintiff’s complaint. Missouri seeks to defend the water quality standards it submitted to the EPA and the process behind that submission. It also has a strong interest in defending its standard-making authority under the Clean Water Act. Plaintiff challenges the EPA acceptance of those standards on the basis that Missouri’s submitted standards do not meet the requirements of the Clean Water Act—i.e., exceeded Missouri’s authority. Compl. ¶¶ 5-7. Plaintiff also suggests that Missouri may not have complied with the procedural requirements for issuing the revised standards. Compl. ¶ 77. In sum, ample common questions of law and fact strongly support granting Missouri permission to intervene.

## CONCLUSION

For the foregoing reasons, Missouri respectfully asks the Court to grant its motion to intervene.

Dated: Feb. 6, 2020

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that, on February 6, 2020, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all parties, and a true and correct electronic copy was further served by email on counsel for all parties.

/s/ Justin D. Smith

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
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MISSOURI COALITION FOR THE )  
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v. )  
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ANDREW R. WHEELER, in his official )  
capacity as the Administrator )  
of the United States Environmental )  
Protection Agency, )  
 )  
Defendant. )

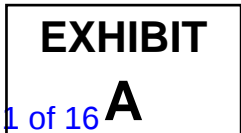
Case No. 2:19-cv-4215-NKL

**Answer of Proposed Intervenor-Defendant State of Missouri**

Pursuant to Federal Rule of Civil Procedure 24(c), proposed Intervenor-Defendant the State of Missouri submits the following answer to the complaint filed by the Missouri Coalition for the Environment Foundation. All allegations not expressly admitted are denied.

1. Missouri only admits that the EPA approved Missouri’s Water Quality Standards for nutrients in lakes within Missouri’s borders. The remainder of this paragraph summarizes Plaintiff’s legal conclusions and no response is required. Missouri denies that Plaintiff is entitled to relief.

2. Missouri admits in part and denies in part. Nitrogen and phosphorus are nutrients that are natural parts of aquatic ecosystems. *See* <https://www.epa.gov/nutrientpollution/issue>. These nutrients can be delivered through natural processes, such as weathering of rocks and atmospheric deposition, in addition to human activities. Human activities may in some



circumstances accelerate the impact of nutrients on a water body, but these interactions and impacts of human activities on nutrient levels can be complex.

3. Missouri denies the allegations in this paragraph. In its 2011 letter, EPA encouraged Missouri to resolve the disapproval “as expeditiously as possible” and to seek “prompt resolution” rather than a complete redo.

4. Missouri admits that EPA disapproved some criteria submitted in 2011; however, EPA approved site-specific numeric nutrient criteria for the 25 lakes contained in 10 CSR 20-7.031 Table N (what was Table M as of 2011 has since renamed Table N). EPA’s written response to criteria Missouri submitted in 2011 speaks for itself and is the best evidence of its contents. The remainder of this paragraph asserts legal conclusions, no response is required, and to the extent a response is required, Missouri denies.

5. Missouri admits that, in 2018, it issued regulations setting some nutrient Water Quality Standards. This paragraph characterizes those standards as found in Missouri’s regulations. Those regulations speak for themselves and are the best evidence of their contents, so no response is required. Moreover, this paragraph asserts legal conclusions, to which no response is required, and to the extent a response is required, Missouri denies.

6. Missouri denies the allegations in this paragraph. The methodology for development of the Missouri impaired waters list is governed by state statute (644.036.5) and regulation (10 CSR 20-7.050). The methodology for determining the impaired waters list provides quantitative and statistical tests to determine the attainment or impairment status of a water body.

7. This paragraph summarizes Plaintiff’s legal conclusions, no response is required, and to the extent a response is required, Missouri denies.

8. This paragraph summarizes Plaintiff's legal conclusions, no response is required, and to the extent a response is required, Missouri denies. This paragraph also purports to characterize EPA's decision letter approving Missouri's regulations. That document is the best evidence of its contents, so no response is required.

9. This paragraph characterizes Plaintiff's proposed relief, no response is required, and to the extent a response is required, Missouri denies that Plaintiff is entitled to relief.

### **JURISDICTION AND VENUE**

10. Missouri lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph. Moreover, this paragraph asserts conclusions of law, to which no response is required.

11. Missouri lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph. Moreover, this paragraph asserts conclusions of law, to which no response is required.

### **PARTIES**

12. Missouri lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and so denies the same.

13. Missouri lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and so denies the same.

14. Missouri lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and so denies the same.

15. Missouri denies that EPA's approval of Missouri's water quality standards resulted in "excessive nutrients in the waters of Missouri." The rest of this paragraph asserts

legal conclusions to which no response is necessary. To the extent a response is required, Missouri denies.

16. Missouri admits that Andrew R. Wheeler is the Administrator of the Environmental Protection Agency.

#### **FEDERAL STATUTORY AND REGULATORY BACKGROUND**

17. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

18. This paragraph characterizes a statute and regulation. Those speak for themselves and are the best evidence of their contents, so no response is required.

19. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

20. This paragraph characterizes a statute and regulation. Those speak for themselves and are the best evidence of their contents, so no response is required.

21. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

22. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

23. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

24. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

25. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

26. This paragraph characterizes a statute and regulation. Those speak for themselves and are the best evidence of their contents, so no response is required.

27. This paragraph characterizes a statute and regulation. Those speak for themselves and are the best evidence of their contents, so no response is required.

28. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

29. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

30. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

31. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

32. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

#### **STATE STATUTORY AND REGULATORY BACKGROUND**

33. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

34. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required. MDNR implements and enforces the Water Quality Standards. The MCWC is also involved, but does not necessarily always act in a supervisory capacity.

35. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.



36. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

37. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

38. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

39. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

40. This paragraph characterizes a statute. The statute speaks for itself and is the best evidence of its contents, so no response is required.

## **STATEMENT OF FACTS**

### **PRIOR LITIGATION**

41. Missouri admits that it submitted water quality standards to EPA in or around November 2009. Those standards speak for themselves and are the best evidence of their contents, so no further response is required.

42. Missouri admits that EPA disapproved some of the water quality standards submitted in 2009, by letter dated on or around August 2011. EPA approved standards for 25 lakes contained in what is now Table N to those regulations. EPA's letter speaks for itself and is the best evidence of its contents, so no further response is required.

43. This paragraph purports to characterize EPA's 2011 letter. That letter speaks for itself and is the best evidence of its contents, so no further response is required.

44. This paragraph asserts legal conclusions to which no response is necessary.

45. Missouri admits that Plaintiff filed a lawsuit in or around February 2016. Missouri was not a party to that suit and lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and so denies the same.

46. This paragraph purports to characterize a consent decree entered into by Plaintiff and EPA. That document speaks for itself and is the best evidence of its contents, so no further response is required.

#### **DEVELOPMENT OF THE CURRENT NUTRIENTS WATER QUALITY STANDARDS**

47. It is unclear what MDNR draft is being referenced by paragraph 47 of the complaint. To the degree this paragraph is meant to reference a specific MDNR draft, that writing speaks for itself and is the best evidence of its contents, so no response is required.

48. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

49. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

50. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

51. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

52. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

53. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

54. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

55. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

56. This paragraph purports to summarize a written letter from EPA to MDNR. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

57. Missouri agrees that draft nutrient standards were published in October 2017. That writing speaks for itself and is the best evidence of its contents, so no response is required. Again, it is difficult to determine which earlier draft or drafts are being referenced by the comparison made in the second sentence of this paragraph. To the extent a response is required, Missouri lack sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and so denies the allegations in the second sentence.

58. The Washington University Interdisciplinary Environmental Clinic submitted comments and testified at a public hearing on or around November 2017. Both statements speak

for themselves and are the best evidence of their contents, so no response is required. To the extent a response is required, Missouri denies.

59. Missouri lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies.

60. Missouri admits that EPA announced a notice of proposed rulemaking and published the notice in or around December 2017. Missouri lacks sufficient knowledge or information to form a belief as to the truth of the allegations regarding prior court proceedings in this paragraph, and therefore denies.

61. This paragraph purports to summarize EPA's notice of proposed rulemaking. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

62. Missouri admits that it sent nutrient standards to EPA for review in or around April 2018.

63. Missouri admits that it sent a document titled "Nutrient Criteria Implementation Plan" dated July 2018 along with other materials to EPA on or around August 2018. The rest of this paragraph purports to characterize the contents of that document. That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies, because this paragraph mischaracterizes the purpose and intent of the document.

64. The "Implementation Plan" document and the Missouri Register speak for themselves and are the best evidence of their contents, so no response is required. The Nutrient Criteria Implementation Plan does not establish state Water Quality Standards and EPA neither approved nor disapproves such guidance. Previous efforts to promulgate water quality criteria

have also included development of implementation procedures (e.g., total ammonia nitrogen) following promulgation of the rule to guide permit implementation and monitoring efforts.

## **MISSOURI'S WATER QUALITY STANDARDS FOR NUTRIENTS**

65. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

66. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

67. Chlorophyll-a is a measure of the amount of algae growing in a waterbody and can be used to classify the trophic condition, i.e. the extent of nutrient enrichment, of a waterbody. What constitutes a "pollutant" is a legal question to which no response is required.

68. What constitutes a "pollutant" is a legal question to which no response is required.

69. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. The last part of this paragraph states a legal conclusion to which no response is required. To the extent a response is required, Missouri denies.

70. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

71. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

72. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

73. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

74. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. The last sentence of this paragraph states a legal conclusion to which no response is required. To the extent a response is required, Missouri denies.

75. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

76. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required.

77. The first part of this paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. The second half of this paragraph purports to characterize a document titled "Implementation Plan." That writing speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

78. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. This paragraph also purports to state legal conclusions about that regulation. Again, no response is required, and to the extent one is, Missouri denies.

79. This paragraph characterizes Missouri's regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. This paragraph also purports to state legal conclusions about that regulation. Again, no response is required, and to the extent one is, Missouri denies.

80. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. This paragraph also purports to state

legal conclusions about that regulation. Again, no response is required, and to the extent one is, Missouri denies. Missouri specifically denies the allegation that its reasoning lacked scientific evidence.

81. This paragraph characterizes a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. The last two sentences of this paragraph purport to state legal conclusions about that regulation. Again, no response is required, and to the extent one is, Missouri denies.

### **EPA APPROVAL OF MISSOURI WATER QUALITY STANDARDS FOR NUTRIENTS**

82. Missouri admits that EPA approved Missouri's Water Quality Standards for nutrients on or about December 2018. Missouri hereby incorporates its responses to paragraphs 65-81.

83. This paragraph purports to characterize EPA's decision letter. That letter speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

84. This paragraph purports to characterize EPA's decision letter. That letter speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

85. This paragraph purports to characterize EPA's decision letter. That letter speaks for itself and is the best evidence of its contents, so no response is required. This paragraph also purports to state legal conclusions about EPA's current and past legal positions. Again, no response is required, and to the extent one is, Missouri denies.

86. This paragraph purports to characterize EPA's decision letter. That letter speaks for itself and is the best evidence of its contents, so no response is required. This paragraph also

purports to state legal conclusions about whether EPA did or should have relied on the Implementation Plan. Again, no response is required, and to the extent one is, Missouri denies.

87. This paragraph purports to characterize EPA's decision letter. That letter speaks for itself and is the best evidence of its contents, so no response is required. This paragraph also purports to state legal conclusions about Missouri's regulations and EPA's approval of them. Again, no response is required, and to the extent one is, Missouri denies.

88. This paragraph purports to characterize EPA's decision letter. That letter speaks for itself and is the best evidence of its contents, so no response is required.

89. This paragraph purports to characterize EPA's decision letter. That letter speaks for itself and is the best evidence of its contents, so no response is required. This paragraph also purports to characterize a regulation. The regulation speaks for itself and is the best evidence of its contents, so no response is required. To the extent a response is required, Missouri denies.

**COUNT ONE: APA**

90. Missouri repeats its answers in all preceding paragraphs.

91. This paragraph characterizes a statute and asserts legal conclusions. The regulation speaks for itself and is the best evidence of its contents. Legal conclusions do not require a response. To the extent a response is required, Missouri denies.

92. This paragraph asserts a legal conclusion. No response is required.

93. This paragraph asserts a legal conclusion. No response is required. To the extent a response is required, Missouri denies.

94. This paragraph asserts a legal conclusion. No response is required. To the extent a response is required, Missouri denies.



95. This paragraph asserts a legal conclusion. No response is required. To the extent a response is required, Missouri denies.

96. This paragraph asserts a legal conclusion. No response is required. To the extent a response is required, Missouri denies.

**PRAYER FOR RELIEF**

No response is required to Plaintiff's prayer for relief. To the extent any response is required, Missouri denies that Plaintiff is entitled to the relief it seeks.

**AFFIRMATIVE DEFENSES**

1. Plaintiff has failed to state a claim upon which relief can be granted.
2. Plaintiff lacks standing.
3. Plaintiff's claim may not be ripe.
4. Plaintiff may have failed to exhaust administrative remedies.

Dated: Feb. 6, 2020

Respectfully submitted,

**ERIC S. SCHMITT,**  
Attorney General of Missouri

/s/ Justin D. Smith

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*Counsel for Intervenor-Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 6, 2020, the foregoing was filed electronically through the Court's electronic filing system to be served electronically on all parties, and a true and correct electronic copy was further served by email on counsel for all parties.

/s/ Justin D. Smith