

 **Washington University in St. Louis**
SCHOOL OF LAW
Interdisciplinary Environmental Clinic

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

November 6, 2015

Gina McCarthy, Administrator
United State Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Notice of Intent to Bring Civil Suit under 33 U.S.C. § 1365 for Failure to
Perform Non-discretionary Duty Found in 33 U.S.C. § 1313(c)(3)

Dear Ms. McCarthy:

On behalf of the Missouri Coalition for the Environment Foundation (“MCE”), we hereby give you notice, pursuant to the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365(b)(2), that MCE intends to bring suit in federal district court against the Administrator of the United States Environmental Protection Agency (EPA) for the Administrator’s failure to perform a non-discretionary duty imposed by the CWA. 33 U.S.C. § 1365(a)(2).

Although EPA disapproved portions of the new or revised water quality criteria submitted by Missouri in 2009, more than 90 days has elapsed since EPA notified Missouri of the disapproval. Missouri has failed to make the changes to its water quality standards described in EPA’s disapproval letter, and the Administrator has not acted to promulgate such standards as it is required to do by section 303(c)(3) of the CWA. 33 U.S.C. § 1313(c)(3).

EPA’s Mandatory Duty under the Clean Water Act

The CWA requires states to enact water quality standards for all waters of the U.S. within their borders. The standards must “protect the public health and welfare, enhance the quality of the water, and serve the purposes of this act.” 33 U.S.C. § 1313(c)(2)(A).

Missouri is required to review and revise, if necessary, its water quality standards at least once every three years in a “triennial review.” 33 U.S.C. § 1313(c)(1). Upon completion of the review and revision, Missouri must submit its revised and existing water quality standards to EPA’s regional office for review. 40 C.F.R. § 131.20(a).

When it receives the triennial review package, EPA must determine whether the new or revised standards meet the requirements of the CWA. If EPA determines that they do, within 60 days it must approve of the revised standards, which will become Missouri law. 33 U.S.C. § 1313(c)(3).

If EPA determines that submitted standards do not meet the requirements of the CWA, within 90 days it must notify Missouri of the changes required to bring the standards into compliance with the CWA. If Missouri fails to adopt the prescribed changes within another 90 days, EPA is required to promulgate a new standard itself. 33 U.S.C. § 1313(c)(3), (c)(4)(A).

The 2009 Triennial Review

Missouri submitted a triennial review package to the Regional Administrator during the week ending November 6, 2009. As part of the 2009 submittal, Missouri developed lake nutrient and chlorophyll water quality criteria as found in 10 CSR 20-7.031 (3)(N) Nutrients and Chlorophyll.

In a letter dated August 16, 2011, EPA disapproved section 10 CSR 20-7.031 (3)(N) Nutrients and Chlorophyll, except for the waters found in Table M. EPA gave several reasons for its disapproval. First, EPA determined that the methods used and analyses conducted to develop the lake nutrient criteria were not based on a sound scientific rationale as they did not include the data and other necessary information to allow others to independently reproduce the work. Second, EPA also determined that Missouri failed to demonstrate that the values or approaches used by Missouri in promulgating the numeric nutrient criteria for lakes would protect the designated aquatic life or recreational uses per 40 CFR §§131.6(b) and (c). As a result of this disapproval, only the 25 lakes in Table M were accorded specific nutrient criteria, and there are no nutrient standards for the hundreds of lakes in Table G of the Missouri regulations.

Once EPA notified Missouri that the submitted nutrient criteria did not meet the requirements of the CWA, Missouri had 90 days in which to revise the criteria to address the EPA's disapproval or to propose new criteria along those same lines described in EPA's August 16, 2011 letter. 33 U.S.C. § 1313(c)(3). More than four years have elapsed since EPA disapproved Missouri's nutrient standards and during that time Missouri failed to adopt the prescribed changes. Therefore, EPA's nondiscretionary duty to promulgate a revised or new standard has been triggered. 33 U.S.C. § 1313(c)(3), (c)(4)(A).

Although during the last four years, Missouri has from time to time convened stakeholder workgroup meetings to discuss nutrient criteria development for lakes and streams, no final rule has been promulgated as of today's date. EPA has a mandatory duty to promulgate revised or new nutrient standards as provided in 33 U.S.C. § 1313(c)(3) and (c)(4)(A). EPA has failed to perform this nondiscretionary duty and is subject to suit pursuant to 33 U.S.C. § 1365(a)(2).

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Conclusion

The notice letter is submitted on behalf of:

Missouri Coalition for the Environment
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In the lawsuit, MCE will seek injunctive and declaratory relief to remedy the EPA's unlawfully delayed promulgation of revised or new nutrient and chlorophyll criteria for the disapproved Missouri Nutrient Standards. MCE will also petition to award costs, disbursements, and attorney and expert witness fees.

During the sixty-day notice period prior to the institution of this lawsuit, MCE and its counsel will be available to discuss possible remedies of the above-referenced violation. Any communications concerning this notice should be addressed to the undersigned counsel.

Sincerely,



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