Public Hearing for Proposed Water Quality Standards for the State of Missouri's Lakes and Reservoirs Wednesday, February 7, 2018 9:00 – 11:00 am Central Time Public Hearing Transcript

Gemma Kite: Hello and welcome to today's virtual public hearing titled "Public Hearing for Water Quality Standards for the State of Missouri's Lakes and Reservoirs Proposed Rule." This public hearing is sponsored by EPA's Office of Science and Technology and EPA Region 7. The purpose of today's webinar is for EPA to provide background on the rulemaking and then for interested parties to provide oral comments on the proposed rule. I'm Gemma Kite of the Horsley Witten Group, contractor to EPA and I will be moderating today's hearing. Thank you for joining us. Let's start by going over a few housekeeping items. We are now on slide two of this presentation. If you hear an echo from your computer speakers, please close all browser windows except for the webcast presentation. Alternatively you can press the speaker icon on the lower left-hand corner of your screen. When the speaker button turns red you have muted your computers audio. If you experience technical difficulties you can type your issue into the white box at the bottom of your screen and click the "Ask" button. The responses from our tech team will appear below the white box. Since the response area is small, you may not see all of the questions or answers. Use the scrollbar on the right side of your screen to scroll up and down to see additional text. If you cannot see the white box at the bottom of your screen, change your screen resolution by clicking on tools in your web browser and selecting "Zoom out". If you would like to make an oral comment, we will provide a call in number in just a few minutes. You will need to use a phone to call in and provide your oral comment. Once you call into the phone line, please mute your computer speakers. Directions on how to make an oral comment will be provided after the speakers have introduced the proposed rule. Today's presentation is available to download in the "Downloads" tab. To view the presentation each viewer of today's virtual public hearing must click on the blue "Downloads" tab on top of your screen, scroll down to the item titled "Presentation Slides" and click the hyperlink to initiate the download. To return from the "Downloads" tab back to the presentation slide of today's virtual public hearing click on the "Slides" tab on the top of your screen.

Today's hearing will be recorded and transcribed and all oral comments will be considered part of the official record for this rule. As such, when developing the official response to public comment and finalizing the rule, the oral comments provided today will become part of the official record along with the written public comments submitted via the docket for this rulemaking. If you provide an oral comment during today's virtual hearing, you do not have to submit the same comment in writing in order for to be included in the official record. If you are interested in making a written comment, directions will be provided during this hearing. EPA will not respond to comments today however, EPA will respond to comments received at this hearing along with all comments received during the comment period in EPA's response to

comment document. EPA will also not be responding to questions today. Today's presentation for the virtual public hearing has been reviewed by EPA staff for technical accuracy however, the views of those making an oral comment and their organizations and any supporting visual aids provided by commenters are their own and do not necessarily reflect those of EPA. Mention of commercial enterprises, products or publications does not mean that EPA endorses them.

Now that we have completed the discussion of housekeeping items let's start today's virtual public hearing. We are now on slide three of this presentation. The Environmental Protection Agency is proposing to establish federal nutrient criteria to protect designated uses for the State of Missouri's lakes and reservoirs. On August 16, 2011, EPA disapproved most numeric criteria for total nitrogen, total phosphorus, and chlorophyll-a submitted by the State in 2009. Therefore, under the terms of the December 1, 2016 consent decree, EPA proposes to establish federal nutrient criteria to address the 2011 disapproval. This federal rulemaking will proceed unless Missouri submits criteria to address EPA's 2011 disapproval and EPA approves those criteria as meeting Clean Water Act requirements. In that case, EPA will not proceed with final rulemaking or will withdraw it's final rule if applicable. In developing these proposed federal nutrient criteria EPA has taken into account available science, legal requirements, and EPA policies and guidance. Public comments on the proposed rule must be received on or before February 26, 2018.

We are now on slide four of this presentation. EPA is offering this virtual public hearing so that interested parties may provide oral comments on EPA's proposed rule. Following a brief presentation from EPA the agency will accept oral comments that will be limited to three minutes per commenter, so that each commenter has an opportunity to present his or her view. During this brief presentation from EPA we will hear from our speaker Mario Sengco. Mario is a physical scientist from EPA headquarters and is the rule manager for this rule. Ann Lavaty is the Water Quality Standards Coordinator from EPA Region 7 and she is also one of the rule managers and contacts for this rule. Two other EPA staff will also provide support during today's live hearing. Danielle Anderson is the Regional Branch Team Leader with the Water Quality Standards Program at EPA headquarters and Jeffery Robichaud is the Director of the Water, Wetlands, and Pesticides Division in EPA Region 7. And with that we will begin the presentation by EPA. I will now turn it over to Mario to provide a brief overview of the proposed rule.

<u>Mario Sengco:</u> Thank you, Gemma. This is Mario Sengco, I'm moving on to slide number five. On December 15, 2017 the EPA Administrator signed a proposed rule that would establish federal Clean Water Act or CWA criteria for nutrients to protect designated uses for Missouri's lakes and reservoirs consistent with the terms of a 2016 consent decree.

Moving on to slide six. Let me go over some background information to provide context for this proposed rulemaking. Under the EPA's regulation at 40 CFR part 131.11(a)(1) it states that states and authorized tribes shall "adopt those water quality criteria that protect the designated

use" as described under the Clean Water Act section 101(a)(2) and that such criteria "must be based on sound scientific rationale and must contain sufficient parameters for constituents to protect the designated use." For waters with multiple use designations the criteria shall support the most sensitive use.

Moving on to slide seven. In 2009, Missouri submitted to the EPA for review and approval numeric criteria for total nitrogen or TN, total phosphorus, TP, and chlorophyll-a for the State's lakes and reservoirs. EPA concluded that Missouri had failed to demonstrate the criteria would protect the State's designated uses and were not based on sound science consistent with the Clean Water Act statutory and EPA regulatory requirements and disproved most of Missouri's criteria on August 16, 2011. The Clean Water Act directs the EPA to promptly propose water quality standards that meet Clean Water Act requirements if a state does not adopt standards addressing an EPA disapproval.

Slide eight. On February 24, 2016 the coalition for the Missouri Coalition for the Environment, or MCE, sued the EPA for failure to perform it's mandatory duty under the Clean Water Act to propose and promulgate criteria to address the EPA's 2011 disapproval. On December 1, 2016, the EPA entered a consent decree with MCE that committed EPA to sign a Notice of Proposed Rulemaking by December 15, 2017 to address EPA's 2011 disapproval unless the State submits and EPA approves nutrient criteria that addresses the disapproval on or before December 15, 2017. At the time that this proposal was signed on December 15, 2017, Missouri had not adopted and submitted its rule for the EPA's Clean Water Act 303(c) review.

Moving to slide nine. Under the current consent decree, the EPA is required to sign a final rule by December 15, 2018 unless the State adopts and the EPA approves water quality criteria addressing the EPA's 2011 disapproval. If this occurs, the EPA would not proceed with the final rulemaking for those waters and/or pollutants for which the EPA approves Missouri's new or revised criteria.

If the EPA finalizes its proposed rule, and Missouri's subsequently adopts and submits new or revised criteria that the EPA finds meets Clean Water Act requirements, the EPA would expeditiously undertake a rulemaking to withdraw the federal criteria such that Missouri's criteria would be effective for Clean Water Act purposes.

Slide 10, now let me tell you about EPA's perspective on nutrient criteria. The EPA has long recommended that states adopt numeric criteria for total nitrogen and total phosphorus, the nutrients that in excess can ultimately cause adverse effects on designated uses. For this reason, TN and TP are often referred to as causal parameters. Additionally the EPA also recommends response parameters as well like chlorophyll-a and turbidity. However, the EPA recognizes that the specifics levels of TN and TP that adversely affect designated uses may vary from water body to water body, depending on many factors, including geomorphology and hydrology among others. As a result, EPA has worked with several states as they developed a

combined criterion approach that allows a state to further consider whether a water body is meeting designated uses when elevated TN and TP levels are detected.

Under this approach, an exceedance of a causal variable acts as a trigger to consider additional physical, chemical, and biological parameters that serve as indicators to determine protection or impairment of designated uses. These additional parameters are collectively termed response parameters.

Onto slide 11. Now let me tell you about the scope of EPA's proposed rule. The EPA included two alternatives for establishing federal water quality criteria for nutrients in its proposal for public comment. Under the first alternative, the EPA proposes a set of nutrient protection values and eutrophication impact factors in a combined criterion approach. This alternative mimics Missouri's proposal. Under the second alternative, EPA proposes a similar combined criterion approach that would mirror the State of Missouri's October 2017 proposal for lake nutrient water quality standards that includes standalone chlorophyll-a criteria, screening values, and eutrophication impacts.

Slide 12. Under alternative one, this alternative is comprised of nutrient protection values that are defined as maximum ambient concentrations of TP, TN, and chlorophyll-a based on the three year rolling average geometric mean of nutrient data collected April through September. Alternative one includes five eutrophication impacts that operate in coordination with the nutrient protection values to determine impairment. These factors are: one, eutrophication related mortality or morbidity events for fish and other aquatic organisms; two, an excursion from the dissolved oxygen, or DO, or pH criteria in Missouri water quality standards applicable for Clean Water Act purposes; three, cyanobacteria counts equal to or greater than 100,000 cells per milliliter; four, observed shifts in aquatic diversity directly attributable to eutrophication or five, excessive levels of mineral turbidity that consistently limit algal productivity under the period May 1 to September 30, or Secchi depth measurements of turbidity equal to or less than EPA's recommended level three ecoregion nine at 1.53 meters or eleven at 2.86 meters.

Slide 13. Alternative one uses nutrient protection values for TN, TP, and chlorophyll derived using a reference condition approach, built on earlier collaborative efforts among the four states of EPA Region 7 for the Plains ecoregion and a combined Ozarks ecoregion. The nutrient protection values for chlorophyll-a function as standalone criteria independent from the TN and TP nutrient protection values and other eutrophication impact factors. Under alternative one, lake and reservoir water quality must not exceed protection values for TN or TP unless each of the eutrophication impacts are evaluated and data demonstrates that none occur within the same three year rolling average period as a TN or TP exceedance. EPA included this presumption to address potential of data gaps for eutrophication impacts. As such, when TN and TP levels are exceeded, the designated uses would be considered impaired unless sufficient information exists demonstrating no eutrophication impacts are occurring.

Slide 14. Alternative two includes chlorophyll-a criteria for three ecoregions. Plains, Ozark Border, and Ozark Highland that determine impairment independent of screening values and eutrophication impacts. Alternative two also includes screening values for TN, TP, and chlorophyll-a at a lower value than the chlorophyll-a criteria above, based on the three year rolling average geometric mean of nutrient data collected April through September. Alternative two includes five eutrophication impacts that operate in coordination with the screening values to determine impairment as I have outlined them on slide 12.

Moving onto slide 15. Under alternative two, a lake with water quality that exceeds the TN, TP, or chlorophyll-a screening values at a screening level is deemed impaired for excess nutrients only if one or more of the eutrophication impacts are documented to occur within the same year. Exceeding screening values of TN, TP or chlorophyll-a at a screening level would not be considered to be impaired unless and until additional information for the eutrophication impacts is collected and evaluated to confirm the impairment.

Slide 16. Both alternatives would apply to all lakes and reservoirs that A) are listed in Table G and the Missouri Use Designation Data Set in Missouri's Water Quality Standards, or WQS, B) equal or exceed 10 acres, C) are located outside the Big River Floodplain ecoregion, and D) are not listed in Table M of Missouri's Water Quality Standards. EPA is also taking public comment on whether the scope is appropriate for the current rule.

Slide 17. The EPA is providing a 60-day comment period then ends on February 26, 2018. Written comments must be received in the docket on or before this date. Please submit your comments identified by docket ID number EPA-HQ-OW-2017-0010 at http://www.regulations.gov. To access the proposed rule, supporting documents, and more details on how to make written comments, visit EPA's water quality standards website at the link below. I will pause here for 10 seconds so you can mark this information.

Thank you and I look forward to your comments. I turn it back over to Gemma for additional information.

<u>Gemma Kite:</u> Thank you, Mario for providing an overview of the proposed rule. If listeners would like to contact our speakers following today's presentation, their contact information is on slide 18. I will pause here for a few moments to allow time to record this contact information.

In a moment we will provide instructions for making an oral comment today by using your telephone but first we will provide instructions for submitting written comments in one of the following ways. You can submit a written comment through the website regulations.gov, e-mail your written comment, mail your comment, or submit a written comment via hand delivery. The information for submitting a written comment through these mechanisms is explained in more detail on this slide. In addition, you can also obtain this information if you navigate to the "Downloads" tab in this webinar, find the document titled "Comment Submittal Instructions" and

download it as needed. Remember when submitting a written comment please make sure to reference the docket ID number EPA-HQ-OW-2017-0010. I will pause here for a few moments to allow time to record this information.

We will now open the hearing for interested parties to make an oral comment. Oral comments will be taken by telephone only. Before calling, please make sure to mute your computer speakers to avoid an echo. Do not worry about losing the public hearing audio when you mute your computer speakers. All call-in participants will still be able to hear the audio portion of this hearing through the conference phone line after their computer speakers have been muted. Remember EPA will not respond to comments today however, EPA will respond to comments received at this hearing along with all comments received during the comment period in EPA's response to comment document. In addition, EPA will not be answering any questions during the hearing today.

Now for the call-in information. If you would like to make an oral comment please dial 877-407-4035 on your telephone keypad and enter the following passcode: 13675251. Once you have joined the conference, press *1 to be placed in queue to speak. Participants will be prompted to record their name and affiliation. Please speak clearly as this audio will be used in the public record along with your comment. If you missed the call-in details the phone number and passcode will be provided on multiple slides throughout the hearing. Each commenter will be announced before providing an oral comment. Each commenter will have a minimum -- a maximum of three minutes to make an oral comment. A timer will appear on the screen indicating approximately how much time each caller has left. Commenters are responsible for watching their own time. At the three minute mark the slide will read "Time is Up" and the phone line will automatically be disconnected. After you have made your comment please hang up the phone and unmute your computer speakers to listen to the rest of the hearing. If there are a number of callers wishing to make a public comment, your call may be placed in a queue to speak. Again once you've joined the conference press *1 to be placed in queue to speak. Please wait patiently as others provide their oral comments. When it is your time to make an oral comment, your name will be announced and your phone line will be opened. At this point, your three minute time will start. If you provide one oral comment and would like to provide a second comment, you may do so after all commenters have provided their first comment. Please call back into the call-in number at that time. At this time if you are calling the number to make a verbal comment please mute your computer speakers to avoid an echo. Again you must mute your speakers while providing your oral comment or the entire audience will hear an echo. Please listen as the operator announces your name to ensure your name and affiliation are pronounced correctly. We will now hear from our commenters. There may be a short pause before the first caller is introduced. Operator, do we have any commenters on the line?

Operator: We have no phone comments at this time.

Gemma Kite: Thank you. We will pause here to wait for commenters.

Operator: We do have a comment. The comment comes from --

Gemma Kite: Okay.

Operator: Leslie Holloway from the Missouri Farm Bureau. Please proceed with your comment.

Leslie Holloway: Thank you. I am Leslie Holloway Senior Director for regulatory affairs representing Missouri Farm Bureau. Missouri Farm Bureau is the State's largest general farm organization and we appreciate this opportunity to be heard today. Despite legal action that short-circuited the process the proposal put forth by the State and represented as alternative two in EPA's proposed rule is solid. It is scientifically and legally defensible. At substantial cost to the regulated community and ultimately Missouri residents, Missouri's proposed criteria will significantly ramp up the states regulatory protection of water quality in Missouri's Lakes. It targets impairment and minimizes the risk of overregulation in the form of unsubstantiated impairment designations. As someone who has represented my organization in countless meetings and discussions over many years leading to the development of the State numeric nutrient criteria, I can attest the process has been thorough and deliberative. Alternative two, Missouri's proposal is specifically tailored to Missouri's lakes and environmental conditions based on careful analysis of Missouri data and research. Compared to alternative two. alternative one is overly protective and less specific to Missouri's data and conditions. It would be far more costly and far more likely to result in unwarranted impairment designations. In short, we urge EPA to drop alternative one and approve Missouri's proposal. Building on Missouri's proposal, Missouri's DNR is on record with plans to develop State nutrient criteria specific to additional designated uses. Our State's water quality standards are our State's responsibility and our State is taking appropriate action. Thank you again for the opportunity to speak today.

Gemma Kite: Thank you for providing your comment. You may now hang up and listen to the virtual hearing audio through your computer speakers. Let's hear from our next commenter. Operator, do we have another commenter in the gueue?

Operator: There are no other comments at this time.

Gemma Kite: Thank you. We will pause here to wait for more.

[Long Pause]

Gemma Kite: As previously mentioned to make an oral comment please dial 877-407-4035 on your telephone keypad and enter the following passcode: 13675251. Once you've joined the conference you must press *1 to be placed in queue to speak. Participants will be prompted to record their names and affiliations. Please speak clearly as this audio will be used in the public record along with your comment.

<u>Operator:</u> Thank you. Our next comment comes from the line of Maggie Brown with the Washington University's Interdisciplinary Environmental Clinic. Please proceed with your comment.

<u>Maggie Brown:</u> Good morning. The clinic is representing Missouri Coalition for the Environment. MCE has concerns with EPA's proposal and I will present three of those concerns today. First EPA's alternative two is identical to the State's nutrient standards adopted earlier this year and solely uses the State's analysis as support. The second alternative fails to protect the most sensitive designated uses such as drinking water and whole body contact recreation. In fact, MDNR removed the stricter standards deemed to protect drinking water from the proposal due to pressure from special interest groups. Missouri did not provide any specific scientific support for their claim that the current standards in alternative two will protect more sensitive uses. Without stricter standard to protect drinking water supply and whole body contact recreation, human health is at risk. Because of this, EPA must reject alternative two and the State's proposed standards.

Second, EPA has the duty under Section 301 in the Clean Water Act to ensure that all NPDES permits incorporate effluent limits that are protective of water quality standards. Alternatives one and two both fail to establish water quality criteria for total nitrogen and total phosphorus that translate into effluent limits and NPDES permits. Chlorophyll-a, the only binding criterion under alternatives one and two, is not considered a contaminant and thus no limits can be included in NPDES permits. Phosphorus and nitrogen on the other hand, are pollutants that are commonly discharged into Missouri's waters in significant concentrations and should be subject to limits in NPDES permits to prevent degradation of the State's waters, but because total phosphorus and total nitrogen are labeled as protective values in alternative one and screening values in alternative two, they are not considered binding criteria. Missouri has stated that total phosphorus and total nitrogen as screening values will not be implemented into NPDES permits nor used for TMDLs. EPA's failure to correct this would fly in the face of the Clean Water Act objectives to protect water quality and to eliminate effluent discharges to navigable waters. EPA must establish total phosphorus and nitrogen criteria in both alternatives to ensure they apply to NPDES permits and to meet Clean Water Act goals.

Finally, the proposed weight of evidence approaches in alternatives one and two are inadequate. Alternative one does not protect water quality because it does not consider water bodies exceeding total nitrogen or total phosphorus values to be impaired if no eutrophication impact factors are exceeded. Alternative two fails to protect water quality because it does not consider the water body impaired if the water body exceeds either the screening value or the chlorophyll-a criterion unless an exceedance of the eutrophication factors is documented. To comply with Clean Water Act goals, EPA must establish total phosphorus and total nitrogen as independent criteria and deem the water body impaired when either value is exceeded irrespective of any eutrophication impacts. EPA must reject alternatives one and two as written

because they fail to protect water quality and fail to prevent future degradation of the State's waters. Thank you for the opportunity to comment.

<u>Gemma Kite:</u> Thank you for providing your comment. You may now hang up and listen to the virtual hearing audio through your computer speakers. Let's hear from next commenter. Operator, do we have another commenter in the queue?

Operator: There are no other comments at this time.

Gemma Kite: We will pause here to wait for more commenters.

[Long Silence]

Gemma Kite: This is the moderator. Thank you for tuning into the virtual public hearing titled "Public Hearing for Water Quality Standards for State of Missouri's Lakes and Reservoirs Proposed Rule." This public hearing is sponsored by EPA's Office of Science and Technology and EPA Region 7. The phone lines are open if you would like to provide oral comments on EPA's proposed rule. All oral comments will be considered part of the official record for this rule. If you would like to make an oral comment, please follow the directions on this slide and call in using your telephone keypad. Please remember to mute your computer speakers at that time. If you have already provided one oral comment and would like to provide a second comment you may do so at this time. Please call back into the phone line to make your second comment. You may hear silence as we wait for commenters. The phone lines will remain open for the duration of this hearing until 11:00 a.m. Central time or 12:00 p.m. Eastern time. Thank you.

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[Long Silence]

Gemma Kite: This is the moderator. While we are waiting let's talk about how to submit a written comment on the rule. As previously mentioned if you would like to submit a written comment, there are several ways that you can do this. If you provide an oral comment today you do not have to submit the same comment in writing in order for it to be included in the official record. You can submit a written comment through regulations.gov, e-mail your written comment, mail your comment, or submit a written comment via hand delivery. The information for submitting a written comment through these mechanisms is explained in more detail on this slide. In addition, you can also obtain this information if you navigate to the "Downloads" tab in this webinar. Find the document titled "Comment Submittal Instructions" and download it as needed. Remember when submitting a written comment, please make sure to reference the docket ID number listed on this slide.

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[Long Silence]

Gemma Kite: This is the moderator. As a reminder you can access the proposed rule and supporting documents by visiting the water quality standards website listed on this slide. Please note that written comments must be received on or before February 26, 2018. Today's presentation is available to download and the "Downloads" tab. To view the presentation, each viewer must click on the blue "Downloads" tab on top of your screen. Scroll down to the item titled "Presentation Slides", and click the hyperlink to initiate the download. To return from the "Downloads" tab back to the presentation slide click on the "Slides" tab at the top of your screen.

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[Long Silence]

Gemma Kite: At this time, I would like to conclude today's public hearing. Thank you to

everyone who joined us and provided an oral comment. Remember if you would like to provide a comment you can submit a written comment to the docket. Please follow the directions on this slide. That ends our hearing for today. Thank you again for joining us.