Missouri Pork Association
Missouri Corn Growers Association
Missouri Soybean Association
Missouri Farm Bureau

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OCT 19 2015
Water Protection Program

October 15, 2015

John Madras, Director
Water Protection Program
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102-0176

Re: Lake Numeric Nutrient Criteria

Dear Mr. Madras:

As we understand, the Missouri Department of Natural Resources (DNR) is planning to start the rulemaking process on new regulation that will establish state-wide lake Numeric Nutrient Criteria for protection of aquatic life and drinking water supply designated uses within Missouri's water quality standards. This letter addresses the Missouri Pork Association, the Missouri Soybean Association, the Missouri Corn Growers Association and the Missouri Farm Bureau's current position and recommended action on this DNR rulemaking proposal.

On March 2, 2009, DNR proposed lake numeric nutrient criteria in the *Missouri Register* which was subsequently adopted by the Clean Water Commission and published final on September 15, 2009. After a nearly two-year long review, EPA issued a decision letter dated August 16, 2011 approving in part and disapproving in part Missouri's 2009 lake nutrient criteria. With the sole exception of Table M, EPA disapproved all of Section (4)(N) of 10 C.S.R. § 20-7.031. Section (4)(N) was an attempt by DNR to establish state-wide numeric criteria for nitrogen, phosphorus and chlorophyll in lakes and reservoirs. To date, Missouri has not adopted or submitted to EPA revised lake nutrient criteria, nor has EPA proposed or promulgated lake nutrient criteria for Missouri. While no rulemaking action has been taken by DNR or EPA during this time period, EPA and DNR have advanced other key nutrient related policy actions that are directly germane and should be implemented fully before any further rulemaking action on numeric nutrient criteria.

Throughout the last year, it has become apparent to us that DNR's effort is driven primarily by the prior EPA disapproval. In the meantime, it appears to us that the department has lost sight of whether the regulatory expansion imposed by the rule is justified, worthwhile and most of all, necessary. We have observed very little discussion about how necessary, effective and productive this regulatory approach to nutrients will actually be. There has been little to no discussion about the current aquatic life or drinking water quality conditions within the subject lakes. We wonder, is the aquatic life condition(s) within our lakes threatened at a level that

justifies this state-wide regulatory expansion? Are there other ways that the department can assess conditions and target resources more effectively without the regulatory hardship that mandatory state-wide criteria will bring?

From our perspective, DNR's current approach can be summed up simply as a "regulate first and educate last" strategy. Our position is that DNR should first characterize the on-the-ground need for action; second, substantiate the need for action; third, work with stakeholders to determine the possible universe and scope of pro-active non-regulatory actions to address the need, and then finally after all viable non-regulatory options are fully considered and tried, begin discussing possible regulatory-based action with stakeholders. With these steps in mind, we question whether DNR has given any meaningful consideration to alternatives in lieu of lake criteria. More specifically, has DNR considered non-regulatory alternatives that would otherwise avoid what is certain to be a complex and challenging regulatory burden?

We believe there are more practical solutions available to address nutrients in surface waters. We respectfully request that DNR re-focus its resources and efforts on nutrient reduction plans and policy that have recently been developed in accordance with EPA directives discussed further below. We urge DNR to seek a path that will have stronger stakeholder support and buy-in, is realistic and achievable, and that can remain flexible and adaptable. Consuming time and resources on debating and implementing a scientifically questionable nutrient scheme that we know upfront will prove to be extremely costly and problematic to implement, and may be generally unachievable, serves no good public purpose. Therefore the only rulemaking action on nutrients that we support at this time, as it relates to Missouri's water quality standards, is for DNR to rescind the previously disapproved numeric lake nutrient criteria that is still on the books in state regulation. In the paragraphs that follow, we explain why this is good public policy and a valid option allowed by EPA regulation.

On March 16, 2011, Nancy Stoner, Acting Assistant Administrator of the EPA Office of Water, issued a memorandum entitled: "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions." The memorandum (commonly referred to as the "Stoner memo") discusses EPA's commitment to partner with states to make progress in accelerating the reduction of nitrogen and phosphorus loadings to our nation's waters. The memorandum discusses how each state is encouraged to develop and implement its own strategy that allows for flexibility in tailoring a strategy's approach and components. Notably, the Stoner memo placed little emphasis on, much less required, states to adopt numeric nutrient criteria. Instead, the memo simply encouraged states to begin developing work plans. Furthermore, the memo states clearly, "States need room to innovate and respond to local water quality needs, so a one-size-fits-all solution to nitrogen and phosphorus pollution is neither desirable nor necessary." In response to the Stoner memo, Missouri like many other states, proceeded to develop and adopt a state nutrient reduction strategy.

Three years ago DNR assembled a broad based group of stakeholders to discuss and draft a Nutrient Reduction Strategy for Missouri. After many meetings and extensive drafting efforts, in December 2014 the DNR and stakeholders finalized the Missouri Nutrient Reduction Strategy.

The Nutrient Reduction Strategy was designed to work as a non-regulatory mechanism to protect the designated use of water bodies from nutrient enrichment. This idea was captured head-on in the Strategy's vision, that being *"All Missouri waters have acceptable levels of nutrients that maintain water quality for all designated uses."* The Strategy seeks to achieve this vision by presenting broadly-agreed upon recommended actions across all industry sectors that will reduce nutrient loads incrementally and cost-effectively. It follows an adaptive management approach, focusing near-term efforts on practical and proven actions that are available today, while leaving the door open for additions and changes to actions as necessary and as proven effective and practical for Missouri. The Strategy clearly lays this principle out upfront on page 6, stating *"In creating this strategy, Missouri was led by the desire to create a practical strategy containing reasonable recommended actions for the next few years. The strategy can then be broadened to include additional recommendations as new technologies or approaches are proven to be effective while maintaining momentum on existing actions."*

Although the Nutrient Reduction Strategy is a non-regulatory approach to control nutrients, Missouri has long standing general water quality criteria in its water quality standards to identify nutrient impairments to the extent they exist in the state. We believe Missouri's general water quality criteria and the new Nutrient Reduction Strategy are key components of an existing, comprehensive state strategy to achieve nutrient load reductions in lieu of regulatory-based numeric lake nutrient criteria. Therefore, we urge DNR to rescind the lake nutrient criteria from the standards and engage in a more pro-active non-regulatory approach to protect Missouri's waters.

According to 40 C.F.R. § 131.21, Missouri can enact and submit for approval new standards that delete lake nutrient criteria. In order to become the applicable water quality standard, revised standards that delete the lake nutrient criteria need only be approved by the EPA. Upon submission of a state rulemaking that rescinds DNR's lake nutrient criteria together with supporting justification, EPA has the legal obligation to approve such a rescission. This decision would supersede the previous disapproval by EPA of the lake nutrient criteria and place Missouri more in line with EPA's current policy as set forth in the Stoner memo. We also note that most states, including Kansas and Iowa, do not have state-wide numeric lake nutrient criteria.

In conclusion, we believe that the Clean Water Commission should immediately undertake a rulemaking to rescind the previously disapproved lake nutrient criteria from Missouri's water quality standards. DNR can justify this action based on its current regulatory authority, the scientific and practical uncertainty surrounding numeric criteria, and the department's new policy on nutrients articulated in its Nutrient Reduction Strategy. In keeping with this strategy's principles and purpose, promulgating numeric nutrient criteria should be considered a non-viable action at this time. DNR should focus its time and resources on implementing the strategy through pro-active collaboration and partnership which will provide greater and more cost-effective opportunity to produce positive results for Missouri. Our respective organizations stand ready to work with the department and other stakeholders toward this end.

Sincerely,

Missouri Pork Association

Don Nikodim, Executive Director

Missouri Corn Growers Association

Gary Marshall, Executive Director

Missouri Soybean Association

Gary Wheeler, Executive Director

Missouri Farm Bureau

Leslie Holloway, Director, Regulatory Affairs