

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

GULF RESTORATION NETWORK, MISSOURI)	
COALITION FOR THE ENVIRONMENT, IOWA)	
ENVIRONMENTAL COUNCIL, TENNESSEE CLEAN)	
WATER NETWORK, MINNESOTA CENTER FOR)	
ENVIRONMENTAL ADVOCACY, SIERRA CLUB,)	
WATERKEEPER ALLIANCE, INC., PRAIRIE RIVERS)	
NETWORK, KENTUCKY WATERWAYS ALLIANCE,)	
ENVIRONMENTAL LAW & POLICY CENTER, and the)	
NATURAL RESOURCES DEFENSE COUNCIL, INC.,)	
)	Civil Action
)	No.: 2:12-cv-00677
)	Section "E," Division 3
Plaintiffs,)	Honorable J. C. Zainey
)	Magistrate Judge Knowles
v.)	
)	
)	
LISA P. JACKSON, Administrator of the United States)	
Environmental Protection Agency, and THE UNITED)	
STATES ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Defendants,)	
)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's Order of September 20, 2012 (ECF No. 124), Plaintiffs Gulf Restoration Network, Missouri Coalition For The Environment, Iowa Environmental Council, Tennessee Clean Water Network, Minnesota Center for Environmental Advocacy, Sierra Club, Waterkeeper Alliance, Inc., Prairie Rivers Network, Kentucky Waterways Alliance, Environmental Law & Policy Center, and Natural Resources Defense Council, Inc. moves this Court for summary judgment on both of their claims for relief. This motion is accompanied by a Memorandum of Law complying with the Court's Order specifying, "The requirements of Local

Rules 56.1 and 56.2 shall not apply in this matter. Each party shall include a brief statement of pertinent facts in its opening brief, and shall attach copies of all materials cited from the administrative record to its briefs.”

As grounds for their Motion, Plaintiffs state:

1. As set forth in the accompanying Memorandum, there are no genuine issues of material fact relevant to this motion, and plaintiffs are therefore entitled to judgment as a matter of law.
2. As set forth in the accompanying affidavits from Plaintiffs’ members, Plaintiffs have standing to bring this action.

WHEREFORE, this Court should GRANT Plaintiffs’ Motion for Summary Judgment and remand the Environmental Protection Agency’s response to the Petition with an order that it produce a response consistent with the Administrative Procedure Act, and the underlying requirements of the Clean Water Act, within 90 days. Specifically, the Court should order that the Environmental Protection Agency within the 90-day period make a determination concerning the necessity of new or revised nutrient standards that conforms to section 304(c)(4)(B) of the Act.

Dated: November 19, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2012, I caused as copy of the foregoing to be served through the Court's CM/ECF system to all parties.

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT**

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November 19, 2012

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT**

Introduction

Pursuant to the Court's Order of September 20, 2012 (ECF No. 124), Plaintiffs Gulf Restoration Network, Missouri Coalition For The Environment, Iowa Environmental Council, Tennessee Clean Water Network, Minnesota Center for Environmental Advocacy, Sierra Club, Waterkeeper Alliance, Inc., Prairie Rivers Network, Kentucky Waterways Alliance, Environmental Law & Policy Center, and Natural Resources Defense Council, Inc. respectfully submit this memorandum in support of their Motion for Summary Judgment.

Defendant Environmental Protection Agency unlawfully denied plaintiffs' 2008 Petition for Rulemaking under the Clean Water Act on grounds wholly "divorced from the statutory text" – precisely what the U.S. Supreme Court disallowed in a recent ruling against the Agency in a very similar context. The Petition asked the Agency to determine that federally-promulgated numeric water quality criteria¹ are necessary under the Act to limit "nutrient" pollution – nitrogen and phosphorus that act as fertilizer when discharged to water, fueling unchecked growth of algae. The algae blooms into mats of malodorous green slime, and causes fish kills, risks to public health, and the Gulf of Mexico's infamous "dead zone." In denying the Petition, EPA did not deny that numeric nutrient criteria are necessary to achieve compliance with the Act – and, indeed, has many times expressed the view that they are. But rather than answering the Act's – and Petition's – question, EPA denied the Petition for the express purpose of

¹ As discussed in the Statutory Background section, *infra*, water quality standards required under the Act typically include (among other things) designations of protected uses (*e.g.*, fishing and swimming) and numeric criteria specifying the allowable concentration of various pollutants so as to protect those uses. Use designations of one kind or another have been in place for decades, but most states have not promulgated numeric criteria for nutrients (relying instead on much weaker "narrative" criteria). Occasionally throughout this memorandum, cited sources refer generally to numeric "standards" when referencing the criteria portion of water quality standards.

sidestepping the Act’s mandatory duty to promulgate federal criteria that such a “necessity determination” would trigger, stating a preference for its own approach to the problem over Congress’s. This extra-statutory response is unlawful, and the Petition denial must therefore be vacated and remanded.

Summary of Argument

The Clean Water Act (Act) requires the Environmental Protection Agency (EPA or Agency) to step in to set new and revised standards to protect water quality when state regulators (who serve as the environment’s first line of defense under the Act) fail to set the necessary standards. 33 U.S.C. § 1313(c)(4)(B). These water quality standards “define[] the water quality goals of a water body ... by designating the use or uses to be made of the water *and by setting criteria necessary to protect the uses.*” 40 C.F.R. § 131.2 (emphasis added). Congress conditioned its mandate for EPA standard-setting on an EPA determination that “a revised or new standard is necessary to meet the [Act’s] requirements.” But EPA’s judgment as to whether or not to make such a determination may not be based on factors “divorced from the statutory text.” *Massachusetts v. EPA*, 549 U.S. 497, 552 (2007). Rather, an agency must “exercise discretion within defined statutory limits.” *Id.* at 532-33.

Only one out of the ten states abutting the Mississippi River has adopted numeric nutrient criteria for rivers and streams – that is, quantitative limits on the concentration of nutrients in water flowing toward the Mississippi and the Gulf; and even that state has only done so for one of the two critical nutrients.² Although states have adopted “narrative” nutrient criteria that in

² See *infra* – only Wisconsin has adopted numeric criteria for rivers and streams, and those criteria are only for phosphorus, not nitrogen. Illinois and Minnesota have adopted phosphorus criteria for lakes (in the case of Illinois, only some lakes).

general terms prohibit water quality conditions leading to excessive algae growth,³ few states are using these narrative standards to control nutrient pollution either in permits⁴ or in plans to restore impaired waters. In fact, many state agencies are on record refusing to limit nutrient pollution in the absence of numeric criteria. *Id.* at 55-69 (AR at 62-76).

EPA has acknowledged repeatedly that numeric criteria for nutrients are in fact necessary to comply with the Act, *i.e.*, to protect water quality within the Mississippi River Basin and the Gulf of Mexico. Indeed, the Agency acknowledged in the Petition denial itself that nutrient loadings “result in the increasing prevalence of harmful algal blooms, reduced spawning grounds and nursery habitats, fish kills, and oxygen-starved hypoxic or ‘dead’ zones.” Denial Letter at 1-2 (AR at 1, Pl. Ex. 15). EPA also agreed with Plaintiffs in the Petition Denial Letter that nutrient pollution endangers public health, due to “impaired surface and groundwater drinking water sources from high levels of nitrates, formation of disinfection byproducts in drinking water, and increased exposure of swimmers to toxic microbes such as cyanobacteria.” *Id.* at 2. The Agency further acknowledged that water quality degradation from nutrient pollution “can result in economic consequences, such as increased costs for drinking water treatment, reduced property values for stream and lakefront areas, commercial fishery losses, and lost revenue from recreational fishing, boating trips, and other tourism-related businesses.” *Id.* The Denial Letter concluded that “nutrient loadings to the Mississippi River and its tributaries are both harming upstream water quality and contributing significantly to hypoxia (or the ‘dead zone’) in the Gulf of Mexico,” and stated that reducing nutrient pollution “should be a high priority for EPA’s water programs.” *Id.* These findings in the Denial Letter were consistent with the Agency’s repeated

³ For example, an Illinois narrative standard pertaining to algae provides that waters “shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin.” 35 ILL. ADMIN. CODE 302.203.

⁴ The requirement to develop water quality-based permit limits is set forth in Act § 302, 33 U.S.C. 1312.

pronouncements for more than a decade underscoring the seriousness of the problem, the need for numeric nutrient criteria, and the Agency's intention to promulgate criteria itself if the states did not meet deadlines to do so. But although the deadlines were not met, EPA did not act.

Evidently aware that that there can be only one honest answer to the question of whether “a revised or new standard is necessary to meet the requirements” of the Act in the Mississippi River basin and the Gulf, 33 U.S.C. § 1313(c)(4), EPA decided not to answer the question. The Agency instead expressed its preference for dealing with the acknowledged nutrient problem through means other than by following Congress's mandate to “promptly prepare and publish proposed regulations” in the event the answer to that question is yes. *Id.* Arguing that its preferred approach would be more “effective and sustainable” than the standard-setting procedure mandated by Congress, EPA denied the Petition based on its plans to “improve[e] its tracking, accountability and transparency tools,” and engage in “ongoing collaboration,” rather than setting standards as called for in the Act.⁵

The Administrative Procedure Act (APA) does not allow this extra-statutory approach. It requires the type of honest answer to the statute's question regarding need for revised standards that EPA refused to give – *i.e.*, a decision based on “consideration of the relevant factors” and reasoning that “conform[s] to the authorizing statute.” *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Massachusetts v. EPA*, 549 U.S. at 533. As demonstrated below, EPA's supposed “effective and sustainable” alternative to following the law that Congress wrote is not working. But even if EPA's extra-statutory “holistic approach” and endless stakeholder meetings were really better than the tools that Congress prescribed, the agency would still lack discretion to re-write the Act. Congress was clear: upon an EPA determination that new or revised standards are necessary, EPA must promulgate such standards.

⁵ See *infra* Point I, citing EPA's Denial Letter (AR1, Pl. Ex. 15).

33 U.S.C. § 1313(c)(4)(B). The statute does not authorize EPA to address nutrient pollution by endlessly measuring belated “state progress towards developing and adopting N[itrogen] and P[hosphorus] criteria.” EPA Petition Denial at 3. As the Supreme Court ruled on the remarkably similar facts presented in *Massachusetts v. EPA*, when Congress hinges a standard-setting duty on an EPA judgment, that “judgment is not a roving license to ignore the statutory text,” but rather “a direction to exercise discretion within defined statutory limits.” *Massachusetts v. EPA*, 549 U.S. at 532-33.

Thus, EPA’s denial of the Petition was unlawful under the APA due to the Agency’s disregard of the relevant statutory basis for its judgment. Additionally, the Petition denial was arbitrary and capricious in substance because it contravened not only decades of uncontroverted scientific evidence that numeric nutrient criteria are necessary, but EPA’s own pronouncements to that effect. This Court should therefore vacate EPA’s petition denial and remand the petition to EPA with directions to determine specifically whether and where numeric criteria for nutrient pollution in waters in the Mississippi River Basin and elsewhere in the nation are “necessary” to meet the Act’s requirements.

Statement of Facts

1. Before the Petition

EPA has known and publicly declared for decades that nutrient pollution is severely degrading both fresh and marine water bodies throughout the United States, and most critically in the Gulf of Mexico dead zone. In 1985, more than a decade after nutrient-induced hypoxic (low oxygen) areas were discovered in the Gulf, the Louisiana Universities Marine Consortium (LUMCON), funded by the National Oceanographic and Atmospheric Administration (NOAA), began the first “concerted, continuous and consistent” study of Gulf hypoxia. Petition

(Administrative Record (AR) 7)⁶ at 41, Plaintiffs' Exhibit (Pl. Ex.) 1.⁷ A lead LUMCON researcher has stated that "[n]o other environmental variable of such ecological importance to estuarine and coastal marine ecosystems around the world has changed so drastically, and in such a short period of time, as dissolved oxygen"; and that "[t]he severity of hypoxia has increased in the northern Gulf of Mexico . . . as the flux of nitrate increased during the last half of the 20th century." Petition (AR 7, Pl. Ex. 1) at 40.

In 1994, 20 environmental organizations filed a petition with EPA (not the petition at issue here) asking the Agency to address the problem.⁸ *Id.* at 40-41. EPA denied that petition, but convened a meeting to address these issues, and acknowledged at the meeting that something needed to be done to address the dead zone. *Id.* at 40. However, the Agency declined to take action immediately. Instead, its "strategy" called for a study of the problem, and it said it would work through an existing program to educate upriver dead zone contributors. The Agency also promised "on the ground" nutrient reduction strategies with "set goals" by 1997, but neither materialized. *Id.* at 40-41.⁹

In 1997, EPA convened the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force ("Task Force"). *Id.* at 41.¹⁰ Although environmental advocacy groups at the meeting pushed for "action items. . . rather than merely studying the science," and for specific numeric nutrient reduction goals, EPA decided instead to develop another "strategy," and to conduct

⁶ Pages in the Administrative Record are cited by their ending digits only. The full cite for the referenced document is EPA-MARB000007.

⁷ The Petition cited, in support of this and other factual statements, the LUMCON research website, www.gulfhypoxia.net. The web pages themselves were not included in EPA's administrative record. Some, but not all (and not the cited statement), remain available.

⁸ This petition was brought under Act section 319(g)(1), not the provision at issue here, which authorizes EPA to convene a multi-state management conference when a state is not meeting water quality standards as a result of pollution discharged in another state. 33 U.S.C. § 1342.

⁹ The Petition cited to Mississippi River Basin & Gulf of Mexico Hypoxia meeting Summaries, <http://www.epa.gov/msbasin/taskforce/summaries.htm>. The web page has since been updated.

¹⁰ The Petition cited to Task Force meeting summaries at <http://www.epa.gov/msbasin/taskforce/summaries/1stsummary.htm>. The web page has since been updated.

further study. *Id.* at 42. The Task Force agreed it would develop an “Action Plan” for the Gulf in 1999 (not completed until 2001).

In 1998, EPA made two clear pronouncements of its intention to require states to develop numeric nutrient criteria,¹¹ and to step in and develop such criteria itself if states failed. In EPA’s February 1998 Clean Water Action Plan, the Agency set 2003 as a deadline for states to develop criteria before the Agency did it for them:

EPA will develop nutrient criteria – numerical ranges for acceptable levels of nutrients (i.e., nitrogen and phosphorus) in water. ... EPA will develop nutrient criteria for the various water body types and ecoregions of the country by the year 2000. ... Within three years of the EPA issuance of applicable criteria, all states and tribes should have adopted water quality standards for nutrients. Where a state or tribe fails to adopt a water quality standard for nutrients within that three-year period, EPA will begin to promulgate water quality standards for nutrients.

Id. at 45; Clean Water Action Plan at 58 (AR 9120 at 9195, Pl. Ex. 2).¹² In June 1998, EPA followed up by publishing in the Federal Register its National Strategy for the Development of Regional Nutrient Criteria (National Strategy). Petition at 45-46 (AR 7 at 52-53, Pl. Ex. 1), 63 Fed. Reg. 34648 (June 25, 1998). In the National Strategy, EPA stated that “the National Water Quality Inventory cites nutrients (nitrogen and phosphorus) as one of the leading causes of water quality impairment in our Nation’s rivers, lakes and estuaries,” and that “nutrients have also been implicated with the large hypoxic zone in the Gulf of Mexico.” 63 Fed.Reg. at 34649. The Agency said it planned to assist states with their development of numeric criteria by disseminating technical guidance by the end of 2001, and that it expected “all States and Tribes to implement numerical nutrient criteria into their water quality standards by December 31,

¹¹ See Summary of Argument, *supra* (explaining the difference between “narrative” and “numeric” nutrient criteria and why narrative criteria are inadequate to address the problem).

¹² The scope of this plan extended beyond nutrients and the gulf dead zone, although these were important elements of it. The Clean Water Action Plan contained 111 “key actions designed to reinvigorate efforts to restore and protect the nation’s waters,” and approximately 29 of these related in some way to hypoxia and/or nutrient pollution in the River and the Gulf. See Petition at 44 (AR 7 at 51, Pl. Ex. 1).

2003.” *Id.* at 34648-49. It further said – based on section 303(c)(4)(B) of the Act, the section at issue in this litigation – “If EPA determines that a new or revised nutrient standard is necessary for a State or Tribe . . . , *EPA will initiate rulemaking to promulgate nutrient criteria appropriate to the region and waterbody types.*” *Id.* at 34649 (emphasis added).

In 2001 EPA altered the timeline “until the end of 2004” for states to adopt “either numeric criteria or . . . procedures to translate a narrative nutrient criteria into a quantified endpoint,” but again stated that EPA intended to propose criteria “by the end of 2004” if “necessary to meet the requirements of the Clean Water Act.” Petition at 46 (AR 7 at 53, Pet. Ex. 1), 66 Fed. Reg. 1671, 1673-4 (Jan. 9, 2001). Additionally that year, the Task Force produced its action plan (Action Plan). Petition at 42-43 (AR 7 at 49-50), 2001 Action Plan, AR 7274, Pl. Ex. 3. Although it called for reduction in the size of the dead zone, the Action Plan did not propose any action beyond establishing additional committees, developing additional “strategies,” studying the problem further, and creating “indicators” to determine progress (albeit without an explanation of how these indicators would be used).

In 2003, responding to the lack of progress toward meeting the 2004 deadline for states’ promulgation of numeric nutrient criteria, the Ozark Chapter of the Sierra Club submitted a second petition to EPA (Sierra Club Petition) (not the Petition at issue here). Petition at 46-47 (AR 7 at 53-4), Sierra Club Petition, AR 121, Pl. Ex. 4.¹³ Shortly thereafter, the Natural Resources Defense Council (NRDC) and Environmental Law and Policy Center (ELPC) wrote a letter to EPA (NRDC/ELPC Letter) explaining that states were bogged down using standard-setting methods that EPA had already rejected as being impossibly complex; and that “[t]he states do not have the scientific or political resources to develop standards that protect

¹³ The Sierra Club Petition, narrower in scope than the 1997 petition that EPA had denied, specifically requested that the Agency promulgate standards for the Mississippi and Missouri Rivers in an eight-state region near the River’s confluence. *Id.*

downstream waters” in the Gulf. *Id.* at 47-8 (AR 7 at 54-55, Pl. Ex. 1); NRDC/ELPC Letter, AR 147 at 148, Pl. Ex. 5.¹⁴ EPA nonetheless denied the Sierra Club Petition, once again promising to “work with” the states to help them develop nutrient criteria for the tributaries of the Mississippi River and Gulf. *Id.* at 49 (AR 7 at 56, Pl. Ex. 1).

Although 2004 came and went without any states completing their numeric nutrient criteria for all waters – or the states along the Mississippi completing them for any waters – EPA still did not promulgate such criteria itself. Petition at 46 (AR 7 at 53, Pl. Ex. 1).

In the years that followed, EPA and other scientific bodies produced multiple reports documenting both the extent of the nutrient pollution problems that created the Gulf dead zone and the failure of EPA’s efforts to make any significant progress toward solving them. All emphasized the need for EPA to use its powers under the Act to promulgate numeric nutrient criteria. In 2007, the National Research Council Committee on the Mississippi River and the Clean Water Act (affiliated with the National Academy of Sciences) produced a report entitled *Mississippi River Water Quality and the Clean Water Act: Progress, Challenges and Opportunities* (National Research Council Report). AR 6965, Pl. Ex. 6. The National Research Council Report explained in detail both the ecologic and human dangers of nutrient pollution. The Report concluded that numeric nutrient criteria are critical to any effort to address nutrient problems in the Mississippi River basin and the Gulf of Mexico, and that EPA needs to establish such criteria:

The EPA is authorized to step in and address water quality problems that may exist because of limited state action in setting and enforcing water quality standards related to the Clean Water Act provisions. *Indeed, the EPA has the statutory duty to do so.* A more aggressive role for EPA in this regard is crucial to

¹⁴ These concerns echoed similar concerns expressed in a Government Accountability Office the previous year. Petition at 48 (AR at 55, Pl. Ex. 1).

maintaining and improving water quality in the Mississippi River and the northern Gulf of Mexico.

There are currently neither federal nor state water quality standards for nutrients for most of the Mississippi River, although standards for nutrients are under development in several states. *Both numerical federal quality criteria and state water quality standards for nutrients are essential precursors to reducing nutrient inputs to the river and achieving water quality objectives along the Mississippi River and for the Gulf of Mexico.*

Id. at 137 (AR at 6862, Pl. Ex. 6.) (emphasis added). It concluded that without numeric criteria, “there is little prospect of significantly reducing or eliminating hypoxia in the northern Gulf of Mexico.” *Id.* at 126 (AR at 6851).

In 2008, the EPA Science Advisory Board weighed in concerning the increasing urgency of the need for action:

The [Science Advisory Board] Panel finds that the Gulf of Mexico ecosystem appears to have gone through a regime shift with hypoxia such that today the system is more sensitive to inputs of nutrients than in the past, with nutrient inputs inducing a larger response in hypoxia The recovery of hypoxic ecosystems may occur only after long time periods or with further reductions in nutrient inputs. If actions to control hypoxia are not taken, further ecosystem impacts could occur within the Gulf, as has been observed in other ecosystems.

The management implications are that nutrients should be reduced as soon as possible before the even larger nutrient reductions are required to reduce the area of hypoxia.

EPA-Science Advisory Board, *Hypoxia in the Northern Gulf of Mexico* (2008) at 4 and 51 (AR 4711 at 4746 and 4793 Pl. Ex. 7) (emphasis added). Also in 2008, the Task Force issued a reassessment which found that existing efforts pursuant to the 2001 Action Plan had not reduced the size of the Gulf dead zone, and that in fact it had actually grown larger since 2001. Petition at 50-51 (AR at 57-58, Pl. Ex. 1).¹⁵

¹⁵ The Petition cites the Final Meeting Summary, Sixteenth Meeting of the the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force 16 (2008) at <http://www.epa.gov/msbasin/taskforce/summaries/16thsummary.htm>. The site has since been updated.

2. The Petition

In July 2008, Plaintiff organizations filed the Petition requesting, based on section 303(c)(4)(B) of the Act, that EPA fulfill its commitment and statutory obligation to promulgate necessary numeric nutrient criteria if states did not. The Petition extensively documented the ecological and human health harm associated with nutrients, in general and specifically in the Mississippi River basin and the Gulf dead zone, as follows:

- *Damage to recreational waters.* Beaches have been closed repeatedly in some locations when the nutrient-fueled algal blooms fill recreational waters with enormous mats of foul-smelling green slime and rotting dead fish. Additionally, blooms of blue-green algae, or cyanobacteria, generate toxins that have caused multiple pet deaths and documented human illness. Petition at 15-18, 36-37 (AR at 22-25, 43-44, Pl. Ex. 1).
- *Damage to aquatic life communities.* The Petition explained the scientifically well-documented connection between algal blooms and low dissolved oxygen levels, as well as observed incidence of abnormalities in aquatic life exposed to algal toxins (*e.g.*, limb malformations). The data show significant mortality, and overall decreasing populations, among aquatic life exposed to algal blooms fueled by nutrients. *Id.* at 18-29 (AR at 25-36).
- *Damage to drinking water supplies.* The Petition explained that nitrogen and phosphorus fuel algae that fouls drinking water supplies leading to both taste and odor problems and to human health threats and that the nitrate form of the nutrient nitrogen also causes “blue baby syndrome,” a potentially life-threatening condition in infants. Further, water supply treatment to address algae problems produces carcinogenic trihalomethanes. *Id.* at 29-36 (AR at 36-43).

The Petition also documented the states' inaction. It noted that out of the 10 states that abut the Mississippi River, not one had adopted numeric nutrient criteria for rivers and streams (although Wisconsin had draft standards for phosphorus), and only two (Illinois and Minnesota) had phosphorus (but not nitrogen) standards for lakes. *Id.* at 54 (AR at 61).¹⁶

The Petition accordingly requested that EPA take action under Act section 303(c)(4)(B) to promulgate numeric criteria for the nutrients nitrogen and phosphorus, as well as for turbidity and chlorophyll A, which are indicators of nutrient impairment. Petitioners made their request jointly and in the alternative for (i) lakes and reservoirs, (ii) rivers and streams, (iii) the contiguous zone of coastal waters, and (iv) the part of the ocean subject to jurisdiction under the Act but outside the jurisdiction of any state (*i.e.*, the 3-mile state territorial boundary). *Id.* at 71 (AR at 78). Although pointing out that criteria should be established by EPA on a national basis, the Petition stated that, due to the scope of the problems in the River and the Gulf dead zone, EPA should "at least establish standards to control nitrogen and phosphorus pollution within the Mississippi Basin." *Id.* at 72-73 (AR at 79-80).

3. After the Petition

In the years after the Petition, only negligible progress was made toward addressing the problems in the Mississippi River basin states and Gulf dead zone identified in the petition.¹⁷ Wisconsin developed numeric phosphorus criteria (but not criteria for nitrogen, another key contributor to Gulf hypoxia) that EPA approved in December 2010, a little more than a year after Wisconsin environmental organizations served a notice of intent to sue the Agency under the Act

¹⁶ Illinois' phosphorus standard is only for some lakes, not all. Additionally, Tennessee had adopted a numeric "translator" of its narrative nutrient criteria. The translator has never yet been used as a basis for permit limits to protect water quality pursuant to 33 U.S.C. § 1312, a key function of numeric criteria.

¹⁷ In early 2009, EPA found that numeric nutrient criteria are needed for the waters of the State of Florida. 75 Fed. Reg. 75762, 75763 (Dec. 6, 2010). This finding was upheld by the U.S. District Court for the Northern District of Florida in February 2012. *Florida Wildlife Federation, Inc. v. Jackson*, 853 F.Supp.2d 1138 (N.D. Fla. 2012). There is no basis, consistent with the Act, to find that numeric standards are needed to control nutrient pollution in Florida but not in the waters covered by the Petition.

to compel promulgation of such standards. *See* Approval of Wisconsin Phosphorus Criteria dated December 30, 2010 (AR 9099, Pl. Ex. 8); Notice of Intent to Sue Administrator dated November 23, 2009 (AR 8476, Pl. Ex. 9). No other Mississippi River basin state has finalized nutrient criteria since the Petition was filed.

In August 2009, the EPA Inspector General issued a report concluding that EPA's strategy to promote adoption of numeric nutrient criteria by states had been ineffective. *EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality Standards*, August 26, 2009 (Inspector General Report) (AR 1016, Pl. Ex. 10). The Inspector General found as follows:

We found EPA's nutrient criteria strategy lacked management control and an adequate system of accountability for either itself or the States. EPA did not seek State commitment to specific actions or milestones that would provide accountability. As a result few States have made progress adopting numeric nutrient water quality standards. . . . While setting standards does not of itself improve water quality, it generally marks the beginning of serious efforts to identify impaired waters and make improvements where needed. *Ineffective management control and accountability over the approach to promoting State adoption of nutrient water quality standards has resulted in an unnecessary delay to the start of the clean-up process.*

Id. at 5 (AR at 1025) (emphasis added). The Inspector General concluded that "EPA cannot rely on the States alone to ensure that numeric nutrient standards are established." (AR at 1018). It recommended that the Agency "[s]elect significant waters of national value which need numeric nutrient water quality standards to meet the requirements of the [Act]," and "[s]et numeric nutrient water quality standards" for such waters. *Id.* at 10 (AR at 1030).¹⁸

Also in 2009, the State-EPA Nutrient Innovations Task Group, a consortium of state and federal water program administrators, issued a report concerning nutrient pollution entitled "An Urgent Call to Action" (Urgent Call) (AR 1049, Pl. Ex. 12). The Urgent Call concluded that

¹⁸ EPA responded without a commitment to do so, noting that it "may nonetheless provide additional technical support, guidance, and collaboration to assure continued state progress." Memorandum dated November 24, 2009 from Peter Silva, EPA Assistant Administrator, to Wade T. Najjum, Assistant Inspector General (Inspector General Response) at 4 (AR 3661 at 3664, Pl. Ex. 11).

extensive scientific research had determined that “[n]utrient-related pollution significantly impacts drinking water supplies, aquatic life”; and that while data on economic impacts were limited, “what we *do* know paints a sobering picture and a compelling reason for more urgent and effective action.” *Id.*, cover summary at 2 (AR at 1052). The Urgent Call noted that “[c]urrent tools such as numeric nutrient criteria” are “underused and poorly coordinated.” *Id.*

In March 2011, after three and a half years had elapsed without any response from EPA to the Petition, the EPA Acting Assistant Administrator sent a memorandum to the Agency’s regional administrators headed “Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions.” (Framework Memo) (AR 680, Pl. Ex. 13). The Framework Memo recognized that “the amount of nitrogen and phosphorus pollution entering our waters has escalated dramatically.” *Id.* at 1 (AR at 680). Notwithstanding the prior decade-plus of failure, it stated, “While EPA has a number of regulatory tools at its disposal, our resources can best be employed by catalyzing and supporting action by states.” *Id.* at 2 (AR at 681). EPA’s new approach was a “framework” for prioritization and goal-setting “intended to initiate conversation with states, tribes, other partners, and stakeholders on how best to proceed” in reducing nutrient loads. *Id.* at 3 (AR at 682). At the same time, EPA acknowledged the necessity of numeric criteria: “It has long been EPA’s position that numeric nutrient criteria targeted at different categories of water bodies and informed by scientific understanding of the relationship between nutrient loadings and water quality impairment *are ultimately necessary for effective state programs.*” *Id.* at 2-3 (AR at 681-82) (emphasis added).

A month after issuance of the Framework Memo, Plaintiffs told EPA in a letter that its nearly four-year delay in responding to their Petition was unreasonable and violated the APA.

Plaintiffs observed, “Despite years of study, conferences, and action plans, commitments by states and EPA have, to date, failed to effectively address nitrogen and phosphorus pollution in the Mississippi watershed and the Gulf of Mexico.” It stated that “EPA has a legal obligation to grant or deny the Petition,” which Plaintiffs would seek to enforce if a response was not forthcoming. Letter to Lisa Jackson, EPA Administrator, from Plaintiffs dated April 11, 2011 (AR 849, Pl. Ex. 14).

4. The Petition Denial

In July 2011, EPA denied the Petition. Letter dated July 29, 2011 to Plaintiff organizations’ counsel from Michael H. Shapiro, EPA Deputy Assistant Administrator (Denial Letter) (AR1, Pl. Ex. 15).

The Denial Letter stated that “EPA agrees that N[itrogen] and P[hosphorus] pollution presents a significant water quality problem facing our nation” that can “significantly impact aquatic life and long-term ecosystem health, diversity, and balance.” *Id.* at 1-2 (AR at 1-2).

Echoing the factual bases set forth in the Petition, the Denial Letter stated:

N[itrogen] and P[hosphorus] pollution in both fresh and marine systems can significantly impact aquatic life and long-term ecosystem health, diversity, and balance. More specifically, high N and P loadings result in the increasing prevalence of harmful algal blooms, reduced spawning grounds and nursery habitats, fish kills, and oxygen-starved hypoxic or "dead" zones. Public health concerns related to N and P pollution include impaired surface and groundwater drinking water sources from high levels of nitrates, formation of disinfection byproducts in drinking water, and increased exposure of swimmers to toxic microbes such as cyanobacteria. Lastly, degradation of water bodies from N and P pollution and eutrophication can result in economic consequences, such as increased costs for drinking water treatment, reduced property values for stream and lakefront areas, commercial fishery losses, and lost revenue from recreational fishing, boating trips, and other tourism-related businesses.

These concerns are nationwide in scope but have particular relevance to the Mississippi Basin, where nutrient loadings to the Mississippi River and its tributaries are both harming upstream water quality and contributing significantly to hypoxia (or the “dead zone”) in the Gulf of Mexico. Your Petition correctly

identifies the Gulf “dead zone” and upstream N and P pollution as issues of serious concern.

Id. at 1-2. Nonetheless, EPA expressly declined to make any finding, pursuant to section 303(c)(4)(B) of the Act, as to whether new standards including numeric criteria are “necessary to meet the requirements” of the Act. Instead, the agency dodged the central question with a curious double-negative: “In taking this action, the EPA is *not* determining that NNC [numeric nutrient criteria] are *not* necessary to meet Act requirements with respect to the waters you identified.” *Id.* at 6 (AR at 6) (emphasis added). The Denial Letter provided no specific reason for declining to make this technical determination of necessity.

The specific basis given for the denial was that the Agency “do[es] not believe that the comprehensive use of federal rulemaking authority is the most effective or practical means of addressing these concerns at this time.” *Id.* at 1 (AR at 1). The Denial Letter stated, “EPA is exercising its discretion to allocate its resources in a manner that supports targeted regional and state activities to accomplish our mutual goals of reducing N[itrogen] and P[hosphorus] pollution and accelerating the development and adoption of state approaches to controlling N[itrogen] and P[hosphorus].” *Id.* at 6 (AR at 6). EPA explained that it was providing “technical assistance” to states, had “published a number of guidance documents” outlining different approaches to developing nutrient criteria, and was “improving its tracking, accountability, and transparency tools”; and further noted that the EPA Administrator chairs a task force on Gulf Ecosystem restoration. *Id.* at 2-4 (AR at 2-4). The Agency concluded that it “believes that the most effective and sustainable way to address widespread and pervasive nutrient pollution . . . is to build on these efforts and work cooperatively with states and tribes to strengthen nutrient management programs.” *Id.* at 4 (AR at 4).

EPA stated that it preferred its own approach to a “complex set of rulemakings” to promulgate federal numeric criteria, asserting, “[t]he development of [numeric nutrient criteria] for 50, 31, or 10 states at one time would be highly resource and time intensive.” *Id.* The Denial Letter did not otherwise address alternatives presented in the Petition as to the scope of the actions requested, and in particular did not address the more limited possible options presented in the Petition of developing criteria in the first instance for the Gulf waters. Petition at 73 (AR at 80).

5. The Complaint

Plaintiffs filed their complaint challenging EPA’s denial of their Petition in March 2012. The complaint alleges two claims for relief under the APA. The First Claim for Relief alleges that EPA’s Denial Letter fails to provide a basis for the Petition denial that conforms to the relevant statutory factors set forth in the Act. Complaint ¶¶ 43-46. The Second Claim for Relief alleges that, in view of undisputed evidence that numeric nutrient criteria are “‘necessary to meet the requirements of [the Act],’” within the meaning of Section 303(c)(4)(B) of the [Act],” the denial was arbitrary, capricious, an abuse of discretion, and not in accordance with law. *Id.* ¶¶ 47-50. The complaint further alleges that Plaintiffs have standing because they and their members are injured by EPA’s Petition denial and continuing failure to promulgate nutrient criteria for the Mississippi River Basin and the Gulf. *Id.* ¶ 19.¹⁹ The Complaint seeks

¹⁹ For this Court to have jurisdiction over this matter, it is enough for any one of the Plaintiffs to have standing. *Massachusetts v. EPA*, 549 U.S. at 518; *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000). Individual members have standing when (1) threatened with “injury in fact” that is (2) “fairly traceable to the challenged action,” and (3) “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 180-81; *see also Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 556 (5th Cir.1996) (“[A] ‘threatened injury’ will satisfy the ‘injury in fact’ requirement for standing.”). To demonstrate injury, it is sufficient for environmental plaintiffs to show that “they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Laidlaw*, 528 U.S. at 183 (internal quotation marks and citation omitted). Thus, the Fifth Circuit has found that residents who used Galveston Bay established an injury from an oil company’s releases of “produced water” into the bay, based on members’ testimony that “I am concerned that the continued discharge of produced water will

declaratory relief and an injunction ordering EPA to provide a response that conforms to the requirements of the APA within 90 days.

Standard of Review

A motion for summary judgment may be granted where the Court determines that there is no genuine issue of material fact to be tried, and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed.R.Civ.P. 56, *Celotex Corp. v. Catrett*, 477 U.S. 317, 22-23 (1986); *Firman v. Life Ins. Co. of North America*, 684 F.3d 533 (5th Cir. 2012).

A challenge to an agency's decision under 5 U.S.C. § 706(2)(A), including a decision to deny a rulemaking petition, is reviewed to determine whether the agency's failure to act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Massachusetts v. EPA*, 549 U.S. at 534; *Texas v. E.P.A.*, 690 F.3d 670, 676 (5th Cir. 2012) *citing* *Sun Towers, Inc. v. Schweiker*, 694 F.2d 1036, 1038 (5th Cir.1983); *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). A decision is arbitrary and capricious where "the agency has considered impermissible factors, failed to consider important aspects of the problem, offered an explanation for its decisions that is contrary to the record evidence, or is so irrational that it could not be attributed to a difference in opinion or the result of agency expertise." *BCCA*

impair my ability to enjoy the activities in which I participate." *Sierra Club, Lone Star Chapter.*, 73 F.3d at 556 (5th Cir. 1996). Here Plaintiffs' standing is established by declarations affirming that this lawsuit is germane to the Plaintiff organizations' purposes, and that individual members are injured by EPA's failure to appropriately regulate nutrients. See Pl. Ex. 16 (Kohl Declaration, for Gulf Restoration Network), Pl. Ex. 17 (Lobbeg Declaration, for Missouri Coalition for the Environment), Pl. Exs. 18 and 19 (Kinman and Delaney Declarations, for Iowa Environmental Council), Pl. Exs. 20, 21, and 22 (Sigford, Clark, and Moore Declarations, for Minnesota Center for Environmental Advocacy), Pl. Exs. 23 and 24 (Makek-Wiley and Wilson Declarations, for Sierra Club), Pl. Ex. 25 (Bullard Declaration, for Prairie Rivers Network), Pl. Exs. 26, 27, and 28 (Garner, Petersen, and Wicks Declarations, for Kentucky Waterways Alliance), Pl. Ex. 29 (Dann Declaration, for Environmental Law & Policy Center), and Pl. Ex. 30 (French Declaration, for Natural Resources Defense Council). There is no need for individual members to participate as parties because this is an action for declaratory and injunctive relief, not individual damages. See *Ass'n of Am. Physicians & Surgeons v. Tex. Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010). The Plaintiffs' members' injuries are redressable because this Court has authority under the APA to set aside and remand EPA's denial of the Petition. 5 U.S.C. § 706(2).

Appeal Group v. U.S. E.P.A., 355 F.3d 817, 824 (5th Cir. 2003) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted). A reviewing court is more deferential to an agency where its decision is grounded in “evaluation of complex scientific data within its technical expertise.” *Id.*, quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103, 103 S.Ct. 2246 (1983). However, it is clear that abuse of discretion has occurred where there has been substantial reliance on an improper factor. *Rio Grande Silver Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1132 (10th Cir 2010).

Notwithstanding general principles of deference to agency judgment, courts will review a denial of a rulemaking petition to determine whether the reasons for denial provided by the agency “conform to the authorizing statute,” and do not rest “on reasoning divorced from the statutory text.” *Id.*, 549 U.S. at 533. *See also Am. Horse Prot. Ass’n*, 812 F.2d at 5, 7 (denial of a rulemaking petition overturned under APA where denial demonstrates “plain errors of law,” suggesting that the agency has been “blind to the nature of [its] mandate from Congress”); *NRDC v. FDA*, __ F.Supp.2d __, 2012 WL 1994813 (S.D.N.Y. 2012) (denial of a rulemaking petition overturned under APA where agency “did not discuss or appear to consider the controlling statute's governing criteria and overall purpose”). Thus, even in the context of the generally applicable APA standard of review, denial of a rulemaking petition is reviewable under the statutory criteria governing the substance of the requested rulemaking (here, the Act). *See Jack M. Beermann, The Turn Toward Congress in Administrative Law*, 89 B.U. L. Rev. 727, 742 (2009) (*Massachusetts v. EPA* requires that “when Congress specifies the criteria for decisionmaking, courts are required to enforce those criteria in the face of contrary agency policies and preferences”).

Statutory Background

Section 303 of the Act governs adoption of standards to protect water quality. In keeping with the overall “cooperative federalism” structure of the Act, the section is designed to give states an opportunity to take responsibility for setting protective standards, but requires EPA to scrutinize the process closely, and to step in to promulgate federal standards if state action is inadequate to serve the purposes of the Act. 33 U.S.C. § 303(c); *New York v. U.S.*, 505 U.S. 144 (1992) (citing the Act as an example of “cooperative federalism,” wherein Congress is authorized to “offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation”).

Section 303 contemplates that states will promulgate water quality standards which include use designations, *i.e.*, what recreational, aquatic life, and other uses various bodies of water should be clean enough to support; and water quality criteria, *i.e.*, how clean the water needs to be in order to support those uses.²⁰ As discussed *supra*, criteria are generally numeric, specifying an allowable level of particular pollutants, although states sometimes supplement these with narrative criteria. 33 U.S.C. § 1313(c)(2)(A). The standards are required to “serve the purposes” and “meet the requirements” of the Act. 33 U.S.C. §§ 1313(a) and (c). Those water quality purposes and requirements include, *inter alia*, section 101 of the Act, 33 U.S.C. § 1251, which calls for “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water” to be achieved “wherever attainable,” as well as the use designations established toward that goal. 33 U.S.C. § 1251(a)(2).²¹ This section 101 provision is often referred to as the “fishable and swimmable”

²⁰ See 40 C.F.R. § 131.2 (Water quality standards “define[] the water quality goals of a water body ... by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.”)

²¹ Section 303 of the Act specifies, consistent with section 101, that standards (including use designations and criteria) shall “protect the public health or welfare, enhance the quality of water and serve the purposes of this

standard. *See Mississippi Division of Natural Resources v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980) (upholding EPA’s disapproval of a state standard that did not meet the “fishable and swimmable” standard of Act section 101).

The water quality standards are subject to frequent reviews and updates. In each instance, states are given a chance to craft standards that meet the purposes of the Act, but if they fail to do so, EPA is required to step in and promulgate standards itself. When the Act took effect, states were given an initial opportunity to submit standards for approval by EPA, but EPA was required to promulgate the standards if necessary. 33 U.S.C. § 1313(a)(3)(C), (b)(1). After that, states have been required to review their standards at least once every three years, modifying them and adopting new standards as necessary “to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.” 33 U.S.C. § 1313(c)(1). If the state proposes new standards, they must be submitted to EPA for approval; and if those standards are inadequate then EPA must (if the state does not fix the problem) promulgate the standards itself. 33 U.S.C. § 1313(c)(2) and (3).

The Act provision at issue in this matter, subsection 303(c)(4), adheres to the same cooperative federalism pattern. Subsection 303(c)(4), a catch-all requirement of federal action in the absence of adequate state action on water quality standards, reads in its entirety as follows:

(4) The Administrator shall promptly prepare and publish proposed regulations

chapter,” and shall be established “taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.” 33 U.S.C. § 1313(c)(2)(A). *See also* 40 C.F.R. § 131.2 (“Serve the purposes of the Act” (as defined in Sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.”). Water quality criteria are required to “protect the designated use” and “be based on sound scientific rationale.” 40 C.F.R. § 131.11(a)(1). These criteria, in turn, “serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies.” 40 C.F.R. § 131.2. For example regulators use them to calculate permit limits for particular sources, 40 C.F.R. § 122.44(d)(1)(i), and to develop regulations to reduce loadings to impaired waters. 33 U.S.C. § 1313(d).

setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) *in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.*

33 U.S.C. § 1313(c)(4) (emphasis added).

Argument

Point I

EPA’S BASIS FOR DENIAL OF THE PETITION DOES NOT CONFORM TO THE APPLICABLE REQUIREMENTS OF THE CLEAN WATER ACT

The plain language of section 303(c)(4)(B) of the Act requires that, whenever EPA “determines” that a new or revised standard is “necessary” to meet the requirements of the Act, it “shall promptly prepare and publish” such a standard. Thus, where a state has not acted to promulgate a new or revised standard, a determination of this nature is the *sole basis* provided in the statute for any decision by EPA whether or not to promulgate the needed standard. This determination, in turn, is bounded in the plain language by scientific and technical criteria. That is, EPA must determine whether, upon evaluation of information concerning water quality, it is “necessary” to upgrade the applicable standard – including its numeric criteria for allowable pollutant levels – in order to ensure that the waters in question support the requirements of the Act (which include, *inter alia*, the section 101 “fishable and swimmable” standard and requirements flowing from it, including any established use designations). Nothing in the statutory language allows extraneous concerns regarding the standards rulemaking triggered by a necessity determination – *e.g.*, bureaucratic preferences – to creep into the determination itself.

EPA's Petition Denial was unlawful in that the Agency declined altogether to make a scientifically-based section 303(c)(4)(B) necessity determination, but rather relied on statutorily extraneous – and therefore legally impermissible -- concerns regarding events that would follow such a determination.

Massachusetts v. EPA, a definitive statement from the U.S. Supreme Court concerning agencies' obligations in responding to rulemaking petitions, flat-out prohibits the evasion of statutory responsibility that lies at the heart of the Petition Denial. *Massachusetts v. EPA* is remarkably analogous to the situation at issue here: EPA's governing statute required it to make a technical determination whether an environmental problem needed to be addressed, and if the answer were "yes" then address it. In *Massachusetts v. EPA*, as here, EPA declined to make the required technical determination because it feared the cumbersome and politically problematic consequences that might attend addressing the problem in the event of a "yes" determination. The Supreme Court struck down EPA's decision – as this Court should here – because it failed to conform to the underlying statutory requirement that the Agency either make the required determination or present statutorily-conforming reasons why it cannot.

Massachusetts v. EPA concerned a rulemaking petition under a section of the Clean Air Act (CAA) that is strikingly parallel to section 303(c)(4)(B) of the Act. The statutory provision at issue in that case was CAA § 202:

The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”

CAA § 202(a)(1), 42 U.S.C. § 7251(a)(1); *Massachusetts v. EPA*, 549 U.S. at 506. Under this provision, as under § 303(c)(4)(B), EPA is required to make a finding as to whether any pollutant

is impeding achievement of the statute's overarching goal (here, "endanger[ing] public health or welfare," *see* 42 U.S.C. § 7401(a)(2)). An "endangerment finding" under CAA § 202 triggers EPA's duty to promulgate federal regulations to mitigate the problem, in roughly the same manner as a "necessity determination" under Act section 303(c)(4)(B) of the Act triggers such a duty.

Plaintiffs in *Massachusetts v. EPA* had petitioned EPA pursuant to § 202 to make an endangerment finding concerning CO₂ and other greenhouse gases, and to promulgate regulations governing vehicle emissions of greenhouse gases that flow from such a finding. 549 U.S. at 510. EPA denied the petition, finding that even if it had authority to regulate greenhouse gases, "it would be unwise to do so at this time." *Id.* The reasons provided by EPA to support this conclusion were strongly reminiscent of those it provided here. The Agency stated first, that notwithstanding a National Research Council report on climate change causation, a link between greenhouse gases and climate change "cannot be unequivocally established"²²; and second, that regulating motor vehicle emissions pursuant to CAA § 202 would amount to a "piecemeal approach" to climate change, which would conflict with the President's "comprehensive approach" to the problem through support for technological innovation, the creation of non-regulatory voluntary programs, and further research – but not, as the Court noted, "actual regulation." *Id.* at 513.

The Supreme Court rejected EPA's grounds for denial of the petition for the same reason this Court should reject its very similar grounds for denial here. The Court held that, notwithstanding the Agency's inherently broad discretion in regulatory decision-making, a rulemaking petition requesting action under § 202 created an affirmative duty to articulate

²² Before responding to the petition, EPA asked the National Research Council to evaluate the level of certainty associated with theories of human-caused climate change, and Council responded with a report finding a significant level of certainty. *Id.* at 511.

reasons for action or inaction that conform to the statutory text. The Court concluded that EPA could not choose an unauthorized third way out: explaining why it did not think the regulation triggered by an endangerment finding would be “wise” from a policy and resources standpoint. *Id.* at 533-36.

The Court concluded, “Put another way, the use of the word ‘judgment’ *is not a roving license to ignore the statutory text.* It is but a direction to exercise discretion within defined statutory limits.” *Id.* at 533 (emphasis added). Accordingly, it held that while “EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations, . . . *once EPA has responded to a petition for rulemaking its reasons for action or inaction must conform to the authorizing statute.*” *Id.* at 533 (emphasis added). Thus, under section 202 (structured similarly to section 303(a)(4)(B)), after receiving such a petition, “EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.*” *Id.* (internal citations omitted, emphasis added).

Accordingly, while the Court acknowledged that it had “neither the expertise nor the authority to evaluate [EPA’s] policy judgments” as to why regulation would be “unwise,” it nonetheless held that these policy judgments “do not amount to a reasoned justification for declining to form a scientific judgment.” *Id.* at 533-34. It further held, “[i]f the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether green house gases contribute to global warming, EPA must say so.” *Id.* at 534.

Just as the Agency declined in *Massachusetts v. EPA* to make the scientific judgment required for an “endangerment finding” (*i.e.*, a threat to public health or welfare), in the instant case EPA expressly declined to weigh the scientific evidence and other technical factors needed to make its “necessity determination” (*i.e.*, whether new standards are necessary to meet the requirements of the Act). The Denial Letter’s linguistic gymnastics – “EPA is *not* determining that NNC [numeric nutrient criteria] are *not* necessary to meet Act requirements” – obscure the agency’s statutory obligation under Act section 303(c)(4) to determine whether numeric nutrient criteria are necessary. Denial Letter at 6 (AR at 6) (emphasis added). As in *Massachusetts v. EPA*, the Agency here justified its failure to make the required scientific and technical determination on policy grounds – indeed, very similar policy grounds, with EPA citing in both instances its desire to continue to work through its ongoing outreach programs and cooperative voluntary strategies.

Here, moreover, unlike in *Massachusetts v. EPA*, EPA has not even attempted to raise scientific uncertainty as an impediment to making the requisite scientific determination. While in *Massachusetts v. EPA*, the Court offered EPA the option of declining to render a determination if it concluded that “the scientific uncertainty is so profound” as to preclude a reasoned judgment, 549 U.S. at 534, EPA has foreclosed that option by expressly acknowledging in the Denial Letter that nutrient pollution is a serious national problem, in the Gulf dead zone and elsewhere. Denial Letter at 1-2 (AR at 1-2) (“EPA agrees that N[itrogen] and P[hosphorus] pollution presents a significant water quality problem facing our nation” that can “significantly impact aquatic life and long-term ecosystem health, diversity, and balance”). Indeed, it could not have reached any other conclusion given the abundant information in the record of the harm wreaked by nutrient pollution. *See* Point II.A., *infra*. While an agency will be afforded particular deference for

decisions involving “evaluation of complex scientific data within its technical expertise,” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43, EPA’s denial was not grounded in any such scientific evaluation.

Prior precedent concerning rulemaking petition denials, some cited in *Massachusetts v. EPA*, articulated a very narrow but not insurmountable standard of review. *See Am. Horse Prot. Ass’n*, 812 F.2d at 5, 7, *cited in Massachusetts v. EPA*, 549 U.S. at 527 (overturning agency’s rulemaking petition denial as inconsistent with the clearly expressed intent of Congress to protect show horses). However, after *Massachusetts v. EPA*, a district court decision closely following it, *NRDC v. FDA*, *supra*, appropriately gave particular weight – notwithstanding this general standard of review – to the Court’s specific mandate to ground judicial review of a rulemaking petition denial in the substance of the underlying statute. In that case, factually parallel to both *Massachusetts v. EPA* and the instant matter, NRDC had petitioned FDA to initiate proceedings to withdraw approval of certain antibiotics in livestock based on scientific evidence that such use endangers public health. FDA denied the petition based on the “time and expense” associated with withdrawal proceedings, and the fact that it was “pursuing a different strategy to promote the judicious use of antibiotics,” largely consisting of issuing guidance documents. *Id.* at *5, *17. Based on *Massachusetts v. EPA*, the court overturned the denial as inconsistent with the governing statute:

Denying the Petitions on the grounds that it would be too time consuming and resource-intensive to evaluate each individual drug’s safety . . . is arbitrary and capricious. The Agency did not discuss or appear to consider the controlling statute’s governing criteria and overall purpose—whether the drugs at issue pose a threat to human health and, if so, the obligation to withdraw approval for such health-threatening drugs. *See Massachusetts v. EPA*, 549 U.S. at 535, 127 S.Ct. at 1463 (holding that an agency “must ground its reasons for action or inaction in the statute”). . . . *The fact that withdrawing approval may be costly or time-consuming is not a sufficient justification, under the FDCA, for the Agency to abdicate its duty to ensure that the use of animal drugs is safe and effective.*

Id. at *16 (internal citations omitted, emphasis added). This Court, like the *NRDC v. FDA* court, must hold EPA to the decision-making criteria established by Congress, which should be presumed aware that its mandates to ensure environmental health and safety involve expenditure of agency time and resources.

Point II

EPA’S FAILURE TO MAKE A NECESSITY DETERMINATION IN RESPONSE TO THE PETITION WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND OTHERWISE NOT IN ACCORDANCE WITH LAW

Under the Act’s statutory criteria governing necessity determinations, EPA’s refusal to determine in response to the Petition that numeric nutrient criteria are necessary to meet the purposes of the Act was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). EPA’s pronouncements in 1998 concerning the severity of the problem and the need for federal action reflected the essential substance of a necessity determination under section 303(c)(4)(B) of the Act.²³ In view of EPA’s express acknowledgement in the Denial Letter – once again – of the severity of the damage from nutrient pollution, as well as the overwhelming evidence of the problem EPA has amassed since 1998, the Agency’s failure to render a necessity determination cannot be defended on rational grounds. Additionally, as discussed below, EPA did not even rationally apply the extra-statutory grounds it improperly looked to in denying the Petition.

A. Section 303(c)(4)(B) Compels a Necessity Determination Based on EPA’s Recognition of Extensive Evidence of Nutrient-Related Water Quality Impairment

More than 15 years ago, in its 1998 Clean Water Action Plan and National Strategy, EPA expressly declared its intention to promulgate numeric nutrient criteria if states failed to meet a

²³ Plaintiffs take no position in this matter as to whether any such prior pronouncements had the actual legal effect of a § 303(c)(4)(B) determination triggering an obligation to promulgate standards.

2003 deadline for doing so, based on a finding that nutrients are “one of the leading causes of water quality impairment in our Nation’s rivers, lakes and estuaries” and responsible for the formation of the Gulf dead zone. Clean Water Action Plan at 58 (AR 9120 at 9195, Pl. Ex. 2); 63 Fed.Reg. at 34648-49. This proclamation, in and of itself, reflected all of the statutory elements of a necessity determination, embodying both a finding that nutrients are causing severe water quality impairment inconsistent with the Act, and that federal numeric criteria will be necessary in the absence of prompt state action. EPA’s Denial Letter makes no attempt to backtrack from the substance of that judgment, only from its necessary implications. Indeed, the Denial Letter expressly affirms the scientific substance of its 1998 findings, stating, “EPA agrees that N[itrogen] and P[hosphorus] pollution presents a significant water quality problem facing our nation” that can “significantly impact aquatic life and long-term ecosystem health, diversity, and balance.” Petition at 1-2 (AR at 1-2). For this reason alone, EPA has failed to provide a reasoned scientific basis for its failure to re-articulate its 1998 determination in the form of a § 303(c)(4)(B) necessity determination.

Moreover, in the intervening time since EPA made these 1998 necessity determination-like pronouncements, the volume of scientific evidence supporting a determination that nutrient pollution is severely impairing water quality, and that federal action is needed to address it, has grown from compelling to overwhelming. The 2007 National Research Council report provided extensive detail confirming nutrient pollution as the cause of the Gulf dead zone, and describing its harmful impacts on Gulf Coast fisheries; and concluded that without numeric criteria, “there is little prospect of significantly reducing or eliminating hypoxia in the northern Gulf of Mexico.” National Research Council Report at 61, 126, 137; AR at 6786, 6851, 6862 (Pl. Ex. 6). Shortly thereafter, the EPA-Science Advisory Board concluded that the Gulf was growing

continually more sensitive to nutrient inputs, such that the “management implications are that nutrients should be reduced as soon as possible before . . . even larger nutrient reductions are required to reduce the area of hypoxia.” *Id.* at 4 and 51 (AR at 4746 and 4793 Pl. Ex. 7). The Petition itself provided an abundant compilation of scientific research describing the severity of the nutrient pollution problem in the Gulf and the River basin and the need for immediate action to promulgate numeric nutrient criteria. Petition at 5-37 (AR at 12-44, Pl. Ex. 1).

In the Denial Letter, EPA did not contest any of this scientific information provided in the Petition, but rather expressly affirmed and supported it. *Id.* at 1-2 (AR at 1-2). Moreover, after the Petition was filed, EPA’s Inspector General determined, once again, that “EPA cannot rely on the States alone to ensure that numeric nutrient standards are established,” and recommended that the Agency “[s]elect significant waters of national value which need numeric nutrient water quality standards to meet the requirements of the [Act],” and “[s]et numeric nutrient water quality standards” for such waters. Inspector General Report at 10 (AR at 1030). The 2009 Urgent Call, jointly crafted by EPA and a consortium of state water quality administrators, made similar findings, noting that “[c]urrent tools such as numeric nutrient criteria” are “underused and poorly coordinated.” *Id.*, cover summary at 2 (AR at 1052). And EPA stated in its 2001 Framework Memo, “It has long been EPA’s position that numeric nutrient criteria . . . are ultimately necessary for effective state programs.” *Id.* at 2-3 (AR at 681-82).

If EPA had provided a colorable scientific argument that nutrient pollution – and the mats of toxic green slime and massive oxygen deprivation associated with it – were not actually a threat to complying with the Act or that numeric nutrient criteria would not assist meaningfully in addressing such pollution, then this Court might have a judgment to which it could in theory defer. But EPA has not done so; and the facts clearly preclude such an argument. EPA has not

even attempted to present a rational scientific and technical basis for its failure to find – as the National Research Council, the EPA-Science Advisory Board, the EPA Inspector General, Petitioners, and countless others have recommended – that federal numeric nutrient criteria are necessary to meet the requirements of the Act.

By the same token, EPA presents no meaningful basis to conclude that its current strategy has rendered federal criteria unnecessary. The Denial Letter clings tenaciously to the same failed non-regulatory strategies EPA has been pursuing for decades – guidance documents, the Task Force, “technical assistance,” “accountability and transparency tools,” coordination, and “stewardship initiatives” – without providing any substantive argument as to why these strategies are likely to be any more successful in the future. Petition Denial at 2-4 (AR at 2-4, Pl. Ex. 15). Indeed, the Petition made clear – and EPA has never contested – that it is inherently unlikely that states without the technical and political ability to promulgate criteria to address their *own* water quality problems will do so to address a problem hundreds of miles downstream in the Gulf of Mexico. Petition at 47-8 (AR at 54-55, Pl. Ex. 1); NRDC/ELPC Letter (AR at 148, Pl. Ex. 5).

The Petition Denial therefore fails to pass muster under the APA. A decision is arbitrary and capricious not only where, as discussed *supra*, “the agency has considered impermissible factors,” but also “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.” *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 43. While the APA standard of review is deferential, courts “do not hear cases merely to rubber stamp agency actions,” since “[t]o play that role would be ‘tantamount to abdicating the judiciary’s responsibility under the Administrative Procedure Act.’” *NRDC v. FDA* at *14, *quoting NRDC v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000).

B. Even the Extra-Statutory Factors Considered by EPA Were Arbitrarily and Capriciously Applied

As discussed in Point I, *supra*, it was not proper under the APA and section 303(c)(4)(B) of the Act for EPA to consider any factors in its Petition denial not pertaining to a scientific and technical judgment regarding the necessity of federal nutrient criteria to support the water quality goals of the Act. However, even the non-statutory factors relied upon by EPA in the Denial Letter were applied in an arbitrary and capricious manner. The Agency's reasoning concerning these factors, even if they could have been permissibly considered, is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

The central premise of EPA's denial is its complaint that a federal rulemaking following a § 303(c)(4)(B) determination would be unduly cumbersome – "a daunting management challenge given the complexity of the technical issues, large volume of comments from stakeholders and local governments, and the need for the Agency to respond to the array of comments filed." Denial Letter at 4 (AR at 4, Pl. Ex. 15). Leaving aside the fact that EPA rulemakings for the most part routinely require work of this nature, EPA makes no real effort to consider the array of alternatives for the scope of rulemaking proposed in the Petition. Although Plaintiffs made clear that a federal rulemaking should address the broadest geographic region possible, the Petition acknowledged the possibility of a narrower approach, suggesting more limited alternatives in terms of types of water bodies covered and geographic reach. It identified the nutrient pollution as national in scope, but stated that EPA should "at least establish standards to control nitrogen and phosphorus pollution within the Mississippi Basin." Petition at 72-73 (AR at 79-80).

EPA largely ignored this nuanced, tiered proposal and its suggested hierarchy of alternatives, stating only that “development of [numeric nutrient criteria] for 50, 31, or 10 states at one time would be highly resource and time intensive.” Denial Letter at 4 (AR at 4, Pl. Ex. 15). The Agency provided no basis for its assumption that the states’ numeric criteria would need to be developed “at one time” as opposed to serially -- prioritized based on the severity of the problem in each state, for example. It provides no further analysis of the presumably quite different regulatory burden of promulgating criteria for 50 as opposed to 10 states (or 1 or 2 states), simply lumping all such scenarios together as “not. . .practical or efficient.” *Id.*

Finally, EPA’s expressed concern with the time required to promulgate federal nutrient criteria is irrational given that the agency has been using its preferred non-regulatory strategies for more than 18 years – four of those years while the Petition was pending without a response – and water quality continues to get worse. The Court in *NRDC v. FDA* described the irony of an agency complaining that complying with the requirements of law would be time consuming after having spent more than a decade ducking those requirements:

In effect, the FDA is refusing to follow the statutory mandate of withdrawal proceedings on the ground that such proceedings are not effective because they take too long. Yet, the Petitions at issue have been pending for thirteen and seven years, respectively. The position that instituting withdrawal proceedings—what the statute mandates—is too time consuming is both ironic and arbitrary. Had the Agency addressed the Petitions in a timely fashion, withdrawal proceedings could have been commenced and completed by now.

Id. at *16. For the same reason, EPA should not be heard to complain of the time needed to promulgate numeric criteria when nearly a decade has passed since its declared 2003 deadline for doing so.

CONCLUSION

For the foregoing reasons, this Court should remand EPA's response to the Petition with an order that it produce a response consistent with the APA, and the underlying requirements of the Act, within 90 days. Specifically, the Court should order that EPA within the 90-day period make a determination concerning the necessity of new or revised nutrient standards that conforms to section 303(c)(4)(B) of the Act.

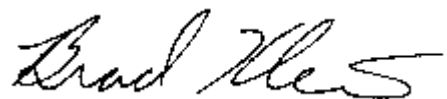
Dated: November 19, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2012, I caused as copy of the foregoing to be served through the Court's CM/ECF system to all parties.

A handwritten signature in blue ink that reads "Ann Alexander". The signature is written in a cursive style. Below the signature is a solid horizontal line.
