UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GULF RESTORATION NETWORK, et al. Plaintiffs, v. LISA P. JACKSON, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Defendants.	12-cv-00677-JCZ-DEK

COMBINED MEMORANDUM IN SUPPORT OF EPA'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants Lisa P. Jackson, Administrator, and the United States Environmental Protection Agency (collectively "EPA" or "the Agency") submit this combined memorandum in support of EPA's motion to dismiss or, in the alternative, for summary judgment, and in opposition to plaintiffs Gulf Restoration Network, et al.'s (collectively "plaintiffs'") motion for summary judgment.

Plaintiffs challenge EPA's denial of a rulemaking petition requesting that EPA exercise its discretionary authority under Section 303(c)(4)(B) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1313(c)(4)(B). That section provides that if the Administrator of EPA determines that a new or revised water quality standard is "necessary" to meet the Act's requirements, EPA must promulgate such a standard unless the state adopts, and EPA approves, such standards first. Section 303(c)(4)(B) places no meaningful limits on the Administrator's discretion to make the

necessity determination that is a precondition for promulgating water quality standards – in fact, the statute is so broadly drawn that a determination under Section 303(c)(4)(B) is "committed to agency discretion by law," rendering EPA's denial of plaintiffs' rulemaking petition unreviewable. See 5 U.S.C. § 701(a)(1); Missouri Coal. for the Env't Found. v. Jackson, 853 F. Supp. 2d 903, 912 (W.D. Mo. 2012). Plaintiffs' Complaint should therefore be dismissed.

In the alternative, EPA is entitled to summary judgment. Only in the "rarest and most compelling" circumstances will a court overturn an agency's decision not to institute rulemaking. WWHT, Inc. v. Federal Commc'ns Comm'n, 656 F.2d 807, 818 (D.C. Cir. 1981). Plaintiffs have failed to sustain their burden of demonstrating that such circumstances exist here. EPA's denial of plaintiffs' petition requesting that EPA undertake the significant burden of promulgating water quality standards for anywhere from 10 to 50 states fits comfortably within the breadth of discretion accorded EPA under Section 303(c)(4)(B), and reflects EPA's considered judgment that the Act's purposes are best served by continuing to work with EPA's federal, state, and local partners to improve water quality in the Mississippi River Basin and in the Gulf of Mexico. Plaintiffs' Motion for Summary Judgment should therefore be denied, and summary judgment should be entered for EPA.

II. BACKGROUND

A. Statutory And Regulatory Background.

The Act was adopted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In adopting the Act, Congress endeavored not only to protect water quality, but to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of . . . water

resources[.]" 33 U.S.C. § 1251(b); see also Chevron, U.S.A., Inc. v. Hammond, 726 F.2d 483, 489 (9th Cir. 1984); Environmental Def. Fund, Inc. v. Costle, 657 F.2d 275, 294 (D.C. Cir. 1981). To that end, the Act "anticipates a partnership between the States and the Federal Government." Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992); see also United States v. Homestake Mining Co., 595 F.2d 421, 429 (8th Cir. 1979) (noting the "vigorous federalism underlying the Clean Water Act").

Under Section 303(c) of the Act, each state is required to adopt water quality standards applicable to its intrastate and interstate waters. A water quality standard "defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting [numeric or narrative] criteria necessary to protect those uses." 40 C.F.R. § 130.3. The Act also requires states to review their water quality standards, and modify them as appropriate, at least every three years. 33 U.S.C. § 1313(c)(1). New or revised water quality standards adopted by a state must be submitted to EPA for review and approval. Id. § 1313(c)(2)(A). If EPA determines that a state's new or revised water quality standard is not consistent with applicable requirements of the Act, EPA must itself publish a standard for the waters involved. Id. § 1313(c)(4)(A). EPA must also establish a water quality standard "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter." Id. § 1313(c)(4)(B).

Section 303 further requires that states (1) identify waters within their boundaries that do not meet water quality standards (the "Section 303(d) list"); and (2) establish "total maximum daily loads," or TMDLs, for pollutants that cause nonattainment of water quality standards in waters on the Section 303(d) list. 33 U.S.C. § 1313(d)(1)(A), (C). As with water quality

standards, EPA must either approve or disapprove state actions under these provisions, and, if it disapproves, take action to establish a Section 303(d) list or a TMDL. 33 U.S.C. § 1313(d)(2).

B. Factual Background.

1. Responding To The Complex Problem Of Nutrient Pollution in the Mississippi River Basin.

Nutrient pollution caused by nitrogen and phosphorous is a significant nationwide water quality problem. July 29, 2011 Letter from Michael S. Shapiro, Pl. Ex. 15 ("Denial") at 1-2. [1] High levels of nutrients in fresh and marine waters produce harmful algae blooms, reduce spawning grounds, lead to fish kills, and contribute to oxygen-starved (hypoxic) "dead zones." Id. at 2. Nitrogen and phosphorous can also impair drinking water and expose swimmers to toxic bacteria, and pollution from these sources produces economic impacts such as increased water treatment costs, reduced property values, and lost recreational revenue. Id. at 2. Nutrient pollution is of particular concern in the Mississippi River Basin, where nutrient loadings both harm upstream water quality and contribute significantly to a dead zone in the Gulf of Mexico. Id. at 2.

The Gulf hypoxia problem is vast and complex, and there are no simple solutions that will reduce Gulf hypoxia. Action Plan For Reducing, Mitigating, and Controlling Hypoxia in the Northern Gulf of Mexico (January 2001), EPA Ex. A (excerpts), at 7291. The Gulf hypoxic zone results from complex interactions involving excessive nutrients (primarily nitrogen) carried to the Gulf by the Mississippi and Atchafalaya Rivers; physical changes in the basin (such as

[1] Materials already submitted by plaintiffs are cited herein as "Pl. Ex. ___," and additional materials submitted by EPA are cited as "EPA Ex. ___." As in plaintiffs' opening memorandum, see Plaintiffs' Memorandum Of Law In Support Of Motion For Summary Judgment ("Pl. Mem.") at 6 n.6, the Bates-stamped pages of the administrative record are cited by their concluding digits.

channelization, loss of natural wetlands and vegetation, and wetlands conversion); and stratification in the waters of the northern Gulf caused by the interaction of fresh river water and the saltwater of the Gulf. Id. at 7281. The Mississippi River in particular has the third largest basin in the world, exceeded only by the watersheds of the Amazon and Congo Rivers. It drains 41 percent of the 48 contiguous states of the United States; covers more than 1,245,000 square miles, and includes all or parts of 31 states (as well as two Canadian provinces). Mississippi River Basin Healthy Watersheds Initiative (2010), EPA Ex. B, at 8256; Gulf Hypoxia Action Plan 2008 ("2008 Plan"), EPA Ex. C (excerpts), at 4650. The Mississippi River Basin includes waters from several major river systems, including the Missouri/Platte River Basin, the Ohio/Tennessee River Basin, and the Arkansas/Red/White River Basin. 2008 Plan, EPA Ex. C, at 4650. Sources of nutrients deposited in the Mississippi River Basin include fertilizers applied to agricultural fields, golf courses, and suburban lawns; atmospheric deposition; animal manure; soil erosion; and industrial and sewage treatment plant discharges. Moving Forward on Gulf Hypoxia: Annual Report 2010, EPA Ex. D, at 4627. Soils, hydrology, land use, cropping practices, and legal and administrative frameworks vary considerably across the 31 states of the Mississippi River Basin; thus, no single approach to nutrient reduction would be effective in every state. See 2008 Plan, EPA Ex. C, at 4650-4653.

Reducing nitrogen and phosphorous pollution is a high priority for EPA. Denial at 2. EPA is working with its federal, state, and local partners in a multi-pronged joint effort to reduce nutrient pollution in the Mississippi River Basin and to address Gulf hypoxia. Denial at 2; see generally March 16, 2011 Memorandum from Nancy K. Stoner ("Framework Memorandum"), Pl. Ex. 13. EPA's view is that although it has multiple regulatory tools at its disposal, its

resources are best employed in catalyzing state action. Framework Memorandum at 681; see also Denial at 4.

One aspect of EPA's effort to address nutrient pollution is encouraging and assisting states in developing numeric water quality criteria for nutrients (i.e., nitrogen, phosphorous, chlorophyll *a*, and turbidity), known as "numeric nutrient criteria". See Denial at 2-3, Framework Memorandum at 681-82, 684-85. EPA has provided guidance and technical assistance to states in the Mississippi River Basin to aid them in developing such criteria – among other things, EPA has provided its analysis of state and national data, assisted states in using new data analysis tools, and reviewed draft criteria for scientific defensibility. See Denial at 2-3. EPA has published hundreds of pages of detailed technical guidance for developing numeric nutrient criteria for lakes and reservoirs (May 2000, EPA-MARB004311-4542); rivers and streams (June 2000, EPA-MARB004058-4310); estuaries and coastal waters (October 2001, EPA-MARB003696-4057) and wetlands (2007, EPA-MARB003505-3660).[2] EPA continues to provide states with the most current scientific information, additional guidance, and recommended nutrient criteria in an ongoing effort to further support the criteria development process. Denial at 3. EPA has also improved its own tracking and accountability tools to measure state progress in developing and adopting nutrient criteria. Id.

This approach has led to real results – for example, EPA has worked in recent years with the states of Minnesota and Wisconsin to develop approvable numeric nutrient criteria in both

[2] Where EPA does not cite to any specific content in these and other voluminous documents, such documents are not attached as exhibits. They are available through a hyperlinked index on the CD containing the administrative record, a copy of which was previously served on all parties and which will be provided to the Court. EPA will also provide hard copies of these documents to the Court on request.

states.[3] Denial at 2. In addition to working with individual upstream states in the Mississippi River Basin, EPA is playing a lead role in addressing Gulf hypoxia on a region-wide basis. The EPA Administrator chairs the Gulf Coast Ecosystem Restoration Task Force, which is comprised of five Gulf states and eleven federal organizations and has been charged by President Obama with developing a restoration strategy for the entire Gulf ecosystem. Denial at 4. EPA also chairs the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force (or the "Gulf Hypoxia Task Force"), which is comprised of 17 states and federal agencies. Id. This Task Force was established in 1997 to understand and address the causes and effects of Gulf hypoxia, and provides a forum for state and local agencies to work in partnership on local, state, and regional efforts to mitigate nutrient loading. Id. The Task Force is working with states to develop global nutrient reduction strategies, rather than focusing solely on the development of numeric nutrient criteria. See id.

EPA also continues to work with the United States Department of Agriculture (USDA) and the United States Geological Survey (USGS) to achieve water quality goals throughout the Mississippi River Basin and in the Gulf of Mexico. All three agencies are working to coordinate projects funded under the USDA Natural Resource Conservation Service's "Mississippi River Basin Initiative" to ensure that such projects are consistent with the goals and implementation

[3] Plaintiffs assert that no other Mississippi River basin state has finalized nutrient criteria since plaintiffs filed their administrative petition. Pl. Mem. at 13. Although this information does not appear in the administrative record, this is demonstrably untrue. Since 2009 several states have adopted such criteria including Minnesota (Minn. R. 7050.0222 (2012)); Missouri (Mo. Code Regs. Ann. tit. 10, § 20-7.031 (2012)); West Virginia (W. Va. Code St. R. § 47-2-8 (2012)) and Nebraska (Neb. Admin. Code Title 117, Ch. 4, § 003.05 (2012)). All of these states have waters that drain to the Mississippi River.

strategy of CWA Section 319 watershed plans,[4] TMDLs, and other relevant state plans. Denial at 4. EPA and USDA are also coordinating with local groups to reduce phosphorous and nitrogen loadings in watersheds such as the Root River Watershed in Minnesota and the Wabash River Watershed in Ohio and Indiana. Denial at 4. In addition, in 2009, the USDA announced the Mississippi River Basin Healthy Watersheds Initiative, which will provide approximately $320 million in financial assistance for voluntary projects to reduce nutrient pollution from agricultural runoff in 41 priority watersheds in 12 states in the Mississippi River Basin. See EPA Ex. B at 8256; see also USDA News Release of November 23, 2009, EPA Ex. E.

2. Plaintiffs' Rulemaking Petition And EPA's Denial.

In July 2008, plaintiffs submitted a rulemaking petition to EPA requesting that EPA establish numeric water quality standards and TMDLs to control nitrogen and phosphorus pollution for portions of the ocean protected by the Act but outside any state's jurisdiction and, more significantly, "for *all water bodies in all states* for which numeric water quality standards controlling nitrogen and phosphorus pollution have not yet been established." Pl. Ex. 1 ("Petition") at 11 (emphasis added).[5] Although some states have adopted some numeric nutrient criteria (and EPA has promulgated such criteria in others), there is no state in which numeric nutrient criteria exist for *all* water bodies – thus, at its most expansive, plaintiffs' petition seeks to have EPA establish numeric nutrient criteria for all 50 states. As an alternative, plaintiffs

[4] Section 319 of the Act requires states to develop management plans for controlling water pollution from "nonpoint" sources and to submit those plans to EPA for approval. 33 U.S.C. § 1329(b)(1); see also id. § 1329(b)(4) (management plans to be developed and implemented on watershed-by-watershed basis where practicable). Nonpoint source pollution – e.g., agricultural runoff, which is one source of nutrient pollution – "is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source." League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002).

[5] Plaintiffs do not challenge EPA's denial of their request that EPA establish TMDLs.

requested that EPA establish water quality standards "for the Northern Gulf of Mexico and for all waters of the United States within the Mississippi River Basin [i.e., for 31 states]" or, at a minimum, establish water quality standards to control nutrient pollution "in the mainstem of the Mississippi River and the Northern Gulf of Mexico [i.e., for 10 states]." Petition at 11-12; Denial at 1.

EPA denied plaintiffs' petition on July 29, 2011. EPA acknowledged that – as discussed above – nitrogen and phosphorus pollution create significant water quality problems in the nation in general and in the Mississippi River Basin in particular, and that reducing such pollution is a high priority. Denial at 1-2. As EPA explained, however, the Agency's view is that the most effective way to address widespread nutrient pollution is to build on its ongoing efforts, continuing to work cooperatively with states, tribes, and other federal agencies to strengthen controls on nutrient pollution. Id. at 4. For EPA to change course now and step in to develop federal nutrient criteria would require an unprecedented commitment of time and resources, potentially involving staff across the entire Agency as well as outside technical experts. Id. EPA would need to first make the necessity determination required by Section 303(c)(4)(B) (a significant task in itself, see infra at 25) and then undertake a full rulemaking process, including (1) developing a detailed technical record; (2) proposing appropriate water quality criteria; (3) responding to what EPA anticipates would be a large volume of comments on the proposed criteria; and (4) promulgating final water quality criteria. See Denial at 4; see also infra at 25-26. EPA would, moreover, have to follow this process for each set of criteria it develops. EPA thus concluded that the use of its Section 303(c)(4)(B) authority at this time is not an efficient way to address nutrient pollution in the Mississippi River Basin. Denial at 4.

EPA did not, however, foreclose the possibility of more targeted actions in the future. It did not affirmatively determine that numeric nutrient criteria are not necessary to meet the requirements of the Act – only that promulgating such criteria on the sweeping scale that plaintiffs requested is not the best use of EPA's limited resources at this time. Id. at 6. EPA will continue to assess state progress, and recognizes that there may ultimately be situations in which it is appropriate for the Agency to exercise its authority under Section 303(c)(4)(B). Id.

III. STANDARD OF REVIEW

A. Motion to Dismiss.

EPA seeks dismissal of plaintiffs' complaint for lack of subject matter jurisdiction, which may be raised at any time.[6] See Fed. R. Civ. P. 12(h)(3) (if a court determines at any time that it lacks subject matter jurisdiction, it must dismiss the action); Gonzalez v. Thaler, 132 S.Ct. 641, 648 (2012) (subject-matter jurisdiction can never be waived or forfeited; valid jurisdictional objection "may lead a court midway through briefing to dismiss a complaint in its entirety"). As the parties asserting jurisdiction, plaintiffs bear the burden of proof. Choice Inc. of Tex. v. Greenstein, 691 F.3d 710, 714 (5th Cir. 2012). In assessing whether plaintiffs have met this burden, the Court must accept the factual allegations of the complaint as true. Id. The Court need not, however, accept plaintiffs' legal conclusions as true. Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009); see also Bass v. Stryker Corp., 669 F.3d 501, 507 (5th Cir. 2012).

[6] Because EPA has answered the Complaint, the appropriate procedural vehicle to seek dismissal is Fed. R. Civ. P. 12(c). See Fed. R. Civ. P. 12(c) (after pleadings are closed, any party may move for judgment on the pleadings); 5C Charles A. Wright & Miller, Federal Practice and Procedure, § 1367 at 516 (3d ed.1990) (Rule 12(c) may be employed to raise Rule 12(b) defenses after close of the pleadings). Regardless of whether a motion to dismiss for lack of jurisdiction is filed initially under Rule 12(b)(1) or later under Rule 12(c), the standard of review is the same. Wright & Miller at 516; GATX Leasing Corp. v. Nat'l Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995) ("We review a motion pursuant to Rule 12(c) under the same standard as a motion to dismiss under Fed. R. Civ. P. 12(b)").

B. Motion for Summary Judgment

A motion for summary judgment in a record-review case under the Administrative Procedure Act "stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court's review." Texas Comm. on Natural Res. v. Van Winkle, 197 F. Supp. 2d 586, 595 (N.D. Tex. 2002) (citation omitted). In such cases, "the function of the district court is to determine whether as a matter of law, evidence in the administrative record permitted the agency to make the decision it did." Id. (citation omitted) The burden of proving that an agency action was arbitrary or capricious rests with the party seeking to overturn the agency's decision. Id.

In determining whether plaintiffs have met their burden, the Court applies the familiar APA standard of review, i.e., that a court may "hold unlawful and set aside" an agency action only where that action is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. In reviewing an agency decision under this standard, "there is a presumption that the agency's decision is valid, and the plaintiff has the burden to overcome that presumption by showing that the decision was erroneous." Texas Clinical Labs, Inc. v. Sebelius, 612 F.3d 771, 775 (5th Cir. 2010). This is a "highly deferential" standard that does not permit a court to "substitute [its] own judgment for the agency's." Id. (citing F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009)); see also Public Citizen, Inc. v. EPA, 343 F.3d 449, 455 (5th Cir. 2003).

To determine whether plaintiffs have met their burden, courts generally consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). As long as an agency gave "at least minimal consideration to the relevant facts

contained in the [administrative] record," the agency's decision must be upheld. See Texas Clinical Labs, 612 F.3d at 775; Public Citizen, 343 F.3d at 455 ("We will uphold an agency's actions if its reasons and policy choices satisfy minimum standards of rationality.").

Plaintiffs argue that the denial of a rulemaking petition is reviewable "under the statutory criteria governing the substance of the requested rulemaking," and appear to suggest that courts may enforce their own view of the statute even in the face of contrary agency policies.[7] Pl. Mem. at 19. In fact, an agency's decision not to initiate rulemaking proceedings is at the *high* end of the range of deference, and only in the "rarest and most compelling" circumstances will a court overturn an agency's judgment in this regard. Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 921 (D.C. Cir. 2008); see also Massachusetts v. EPA, 549 U.S. 497, 527-28 (2007) (judicial review of refusal to promulgate rule is "extremely limited and highly deferential"); American Horse Protective Asso'n v. Lyng, 812 F.2d 1, 4-5 (D.C. Cir. 1987). As already discussed, moreover, assuming that an agency has at least considered all relevant factors, a court cannot substitute its own judgment or policy preferences for those of the agency. See also Walker v. EPA, 802 F. Supp. 1568, 1575 (S.D. Tex. 1992) (EPA is entitled to summary judgment as long as denial of rulemaking petition is consistent with Congress' mandate and rationally connected to facts in administrative record).

IV. ARGUMENT

A. The Court Lacks Jurisdiction Over Plaintiffs' Complaint.

Plaintiffs seek review of EPA's denial of their rulemaking petition under the APA, which provides that a person "adversely affected or aggrieved" by a final agency action is entitled to

[7] An agency cannot, of course, ignore explicit statutory criteria established by Congress. As discussed infra at 13-15, Section 303(c)(4)(B) contains no criteria limiting the Administrator's discretion to make a necessity determination.

judicial review. 5 U.S.C. § 702. Review under the APA is, however, unavailable where "agency action is committed to agency discretion by law;" that is, when a statute is "drawn in such broad terms that in a given case there is no law to apply." 5 U.S.C. § 701(a)(1); Citizens to Preserve Overton Park,, 401 U.S. at 410. There is, in turn, "no law to apply" where a statute provides "no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985).

Section 303(c)(4)(B) is just such a statute. It provides that EPA "shall" establish water quality standards – but *only* if "the Administrator determines" that such standards are "necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(B). In Missouri Coalition for the Environment Foundation v. Jackson, 853 F. Supp. 2d 903 (W.D. Mo. 2012), the plaintiffs challenged EPA's failure to exercise its discretionary authority under Section 303(c)(4)(B). Id. at 907. The court found that this claim was unreviewable, explaining that Section 303(c)(4)(B) contains "no language . . . which identifies the factors to be used by the agency in deciding whether to exercise its discretion." Id. at 911. As the court elaborated:

> [Section 303(c)(4)(B)] specifies no standard as to when a revised or new standard should be issued, other than when the Administrator determines that it is necessary to "meet the requirements of this chapter." *Such broad language cannot subject the EPA to judicial review for failing to exercise its discretion.* If the Court were to determine that EPA acted arbitrarily whenever rulemaking is necessary to ensure compliance with the Clean Water Act, it would strip the agency of its discretion under the clause. The agency would essentially be forced to act whenever a state was not in compliance with the Act.

Id. at 911-12 (emphasis added).

Having concluded that Section 303(c)(4)(B) provides no legal standards for the court to apply, the court held that "the EPA's refusal to promulgate regulations under 303(c)(4)(B) is committed to agency discretion by law and is unreviewable by the Court." Id. at 912; see also Davis v. Jackson, No. 8:09-CV-1070-T-17 TBM, 2010 WL 2431952, at *3 (M.D. Fla. June 16,

2010) (EPA's discretionary power under Section 303(c)(4)(B) to determine whether standards meet requirements set forth in the Act "is the type that is exempted from action under 5 U.S.C. § 701(a)(2)").[8] This conclusion is consistent with those of courts that have concluded, in other contexts, that a grant of authority to act as the agency deems necessary is broadly discretionary, and that the agency's exercise or non-exercise of that authority is not reviewable under the APA. See, e.g., Webster v. Doe, 486 U.S. 592, 600 (1988) (statute allowing termination of employee whenever Director of Central Intelligence Agency deemed it necessary or advisable "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review"); Gifford v. Small Bus. Admin., 626 F.2d 85, 86 (9th Cir. 1980) (where statute empowered Small Business Administration (SBA) to provide small business assistance "whenever [the SBA] determines such action is necessary," decision of when and to what to degree to provide assistance was "to be left within the discretion and expertise of the SBA," and was therefore unreviewable) (citation omitted); Haitian Refugee Ctr., Inc. v.

[8] But see Northwest Envtl. Advocates v. EPA, 268 F. Supp. 2d 1255 (D. Or. 2003); National Wildlife Fed'n v. Browner, No. 95-1811, 1996 WL 601451 (D.D.C. Oct. 11, 1996), aff'd 127 F.3d 1126 (D.C. Cir. 1997). In both Northwest Environmental Advocates and National Wildlife Federation, the district court held that EPA's failure to exercise its discretion under Section 303(c)(4)(B) could be challenged under the APA, concluding that regulatory criteria existed to guide EPA's discretion. Northwest Envtl. Advocates, 268 F. Supp. 2d at 1264; National Wildlife, 1996 WL 601451, at *6. Neither court grappled with the fact that Section 303(c)(4)(B) provides for EPA regulation *only when the Administrator determines such regulation is necessary*, and neither court explained if, why, or how regulations implementing the substantive requirements of the Act could be used to guide EPA's decision whether to exercise its discretion under Section 303(c)(4)(B) at all (or, for that matter, the court's review of that decision). In neither case, moreover, were the plaintiffs asking EPA to step in and solve a vast, complex, multi-pronged, multi-state environmental issue through comprehensive federal regulation – instead, each addressed a single narrow instance of EPA inaction. Northwest Envtl. Advocates, 268 F. Supp. 2d at 1262 (plaintiffs challenged fact that EPA had not promulgated antidegradation implementation plan for Oregon waters); National Wildlife Fed'n, 1996 WL 601451 at *6 (plaintiffs challenged fact that EPA had not designated Lake Superior as an "Outstanding National Resource Water" (ONRW)).

Baker, 789 F. Supp. 1552, 1575 (S.D. Fla. 1991) (where exercise of authority under statute was geared to, inter alia, what was deemed necessary by agency, statute provided "no discernible standards by which this court can review the challenged actions under the APA.").

Because the Court lacks jurisdiction to review an EPA decision not to exercise its authority under Section 303(c)(4)(B) at this time, it similarly lacks jurisdiction to review the denial of a rulemaking petition asking EPA to do so. See Missouri Coal., 853 F. Supp. 2d at 913; Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv., 677 F.3d 1073, 1085 (11th Cir. 2012) (denial of rulemaking petition was unreviewable where agency decisionmaking under underlying statute was committed to agency discretion by law). Plaintiffs' Complaint should therefore be dismissed.

B. Plaintiffs Have Not Sustained Their Burden Of Demonstrating That EPA's Denial Of Their Rulemaking Petition Was Arbitrary Or Capricious.

If the Court does not dismiss plaintiffs' Complaint for lack of jurisdiction, it should nonetheless deny plaintiffs' motion for summary judgment and enter summary judgment for EPA. The question in this case is not whether nutrient pollution can cause significant adverse environmental effects – there is no dispute that it can. See supra at 4-5. Nor is there any dispute that exercising the Administrator's authority under Section 303(c)(4)(B) is one way that EPA could choose to address some of those effects. The question is, instead, whether EPA's denial of plaintiffs' petition requesting that EPA exercise that authority meets "minimum standards of rationality." Louisiana Envtl. Action Network v. EPA, 382 F.3d 575, 582 (5th Cir. 2004). EPA's denial of the petition more than meets this standard, and summary judgment should therefore be entered for EPA.

1. Section 303(c)(4)(B) grants the Administrator broad discretion to determine whether new or revised water quality standards are necessary.

Plaintiffs argue that EPA's reasons for denying their administrative petition under Section 303(c)(4)(B) do not conform to the requirements of the Clean Water Act. Pl. Mem. at 22-28. In so arguing, plaintiffs rely heavily on Massachusetts v. EPA, in which the Supreme Court held that EPA's reasons for denying a rulemaking petition submitted pursuant to Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), did not conform to that statute. The Clean Air Act provision at issue in Massachusetts and the Clean Water Act provision at issue here on their face are neither "remarkably analogous" nor "strikingly parallel," Pl. Mem. at 23, and the two provisions are "structured similarly," Pl. Mem. at 25, only in the general sense that both provide for EPA regulation following a determination by the Administrator. This is the relevant language from Section 202(a)(1):

> The Administrator shall by regulation prescribe . . . 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.

42 U.S.C. § 7521(a)(1). And this, by contrast, is Section 303(c)(4)(B), the statutory provision at issue here:

> The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard . . . 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)(B).

In Massachusetts, the Court reviewed EPA's denial of a rulemaking petition filed by several organizations requesting that EPA regulate greenhouse gas emissions from new motor vehicles. Massachusetts, 549 U.S. at 510. EPA denied the petition on the grounds that (1) EPA

believed it lacked statutory authority to regulate greenhouse gas emissions, and (2) even if it had such authority, it would decline to do so for various policy reasons. See id. at 510-514, 528. The Court held both that EPA had the requisite statutory authority and that EPA's policy reasons for denying the petition did not conform to the authorizing statute. See id. at 533-34. Plaintiffs suggest that Massachusetts stands for the broad principle that in considering a rulemaking petition, EPA is *always* required to determine "whether any pollutant is impeding achievement of the statute's [here, the Clean Water Act's] overarching goal," Pl. Mem. at 23-24, but that is simply not what the Court held. The Court held only that EPA's exercise of its judgment *under Section 202(a)(1)* "must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" Massachusetts, 549 U.S. at 532-33 (citing 42 U.S.C. § 7521(a)(1)).

Massachusetts thus does not support plaintiffs' argument that EPA's discretion under Section 303(c)(4)(B) to determine whether new or revised water quality standards are "necessary" is "bounded . . . by scientific and technical criteria." Pl. Mem. at 22; see also id. at 23, 26. In Massachusetts, the Court properly focused on the statutory text before it, and the degree to which *that text* limited EPA's discretion in responding to a rulemaking petition. Massachusetts, 549 U.S. at 532-33. Section 303(c)(4)(B) of the Clean Water Act – unlike Section 202(a)(1) of the Clean Air Act – contains "no language . . . which identifies the factors to be used by the agency in deciding whether to exercise its discretion." Missouri Coal., 853 F. Supp. 2d at 911; see supra at 12-15.

Plaintiffs' reliance on Natural Resources Defense Council, Inc., v. U.S. Food & Drug Administration, 872 F. Supp. 2d 318 (S.D.N.Y. 2012) ("NRDC"), is similarly misplaced. Pl. Mem. at 26-27. The plaintiffs in that case had petitioned the FDA requesting that the agency

begin proceedings to withdraw its approval of non-therapeutic uses of certain antibiotics in animals. NRDC, 872 F. Supp. 2d at 324. The FDA denied the petitions, explaining both that it was pursuing other alternatives to address plaintiffs' concerns and that withdrawal proceedings would require significant agency resources. Id. at 337. On review, the court concluded that the FDA had improperly failed to address the scientific evidence presented in the administrative petitions or to assess the safety of the relevant drugs, and therefore held that the agency's denial of the petitions was arbitrary and capricious. Id. at 337-38. 341-43.

Although the reasons proffered by the agency in NRDC bear some surface resemblance to EPA's reasons for denying plaintiffs' rulemaking petitions here, plaintiffs again ignore critical differences in statutory language. The plaintiffs in NRDC had petitioned EPA under a statute requiring the FDA to withdraw its approval of animal drugs if (following notice and hearing) the agency finds, among other possibilities, "that experience or scientific data show that such drug is unsafe for use," or that new evidence "shows that such drug is not shown to be safe for use." 21 U.S.C. § 360b(e)(1)(A), (B). Given these statutory criteria, the court found that the FDA's decision of whether to initiate withdrawal proceedings "must be based on an evaluation of the scientific evidence of a drug's safety." NRDC, 872 F. Supp. 2d at 337. As already discussed, Section 303(c)(4)(B) of the Act, unlike 21 U.S.C. § 360b(e)(1)(A), (B), contains no language identifying factors on which the Administrator is to base her exercise of discretion. See Missouri Coal., 853 F. Supp. 2d at 911. NRDC thus does not support plaintiffs' argument.

It is also significant that the statutes at issue in both Massachusetts and NRDC contemplate action by federal agencies in the first instance. It is EPA that is charged with determining whether air pollutant emissions from motor vehicles or motor vehicle engines cause or contribute to air pollution that may reasonably be anticipated to endanger human health, and if

so with promulgating appropriate regulations. 42 U.S.C. § 7521(a)(1). It is the FDA that is charged with initiating withdrawal proceedings for unsafe drugs. 21 U.S.C. § 360b(e). Section 303 of the Clean Water Act, by contrast, charges *states* with the primary responsibility for developing water quality standards. See supra at 3. Plaintiffs underplay the Clean Water Act's emphasis on state authority, suggesting that states are merely given an "opportunity" to set standards, and urging that EPA must "step in" whenever state action is "inadequate to serve the purposes of the Act." Pl. Mem. at 20. In fact, Congress explicitly stated that it is Congress' policy "to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b) (emphasis added); see also Natural Res. Def. Council v. EPA, 16 F.3d 1395, 1399 (4th Cir. 1993) (primary responsibility for establishing appropriate water quality standards is left to states; EPA "sits in a reviewing capacity of the state-implemented standards").

Consistent with this statutory structure, although EPA has authority to promulgate federal standards when the Administrator determines such standards are "necessary to meet the requirements of the Act," Congress contemplated that EPA would exercise that authority only where state efforts had failed. As stated in the legislative history of Section 303(c), "[t]he Committee expects the Administrator to work closely with the States to obtain approved standards before he promulgates standards for any waters." H.R. Rep. No. 92-211, at 105 (1972), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, at 792 (1973); see also Environmental Def. Fund v. Costle, 657 F.2d 275, 294 (D.C. Cir. 1981) (EPA intercession under Section 303(c)(4)(B) prior to completion of state review process would "disserve" Congressional policy of placing primary responsibility with states "to prevent, reduce, and eliminate" water pollution (citing 33 U.S.C. § 1251(b)).

There is no dispute that EPA's reasons for action or inaction on a petition for rulemaking ultimately "must conform to the authorizing statute." Massachusetts, 549 U.S. at 533; NRDC, 872 F. Supp. 2d at 337; Pl. Mem. at 25. In this case, however, the "authorizing statute" – Section 303(c)(4)(B) – provides no criteria that EPA must "conform" to in exercising its discretion. Plaintiffs' attempts to create such criteria would require the Court to read words into the statute that Congress simply did not put there. See Pl. Mem. at 22-23, 26. Plaintiffs have offered nothing that might give the Court a basis to import limitations on the Administrator's discretion that Congress did not impose, and their statutory argument should therefore be rejected.

2. The Administrator has not made a Section 303(c)(4)(B) determination that numeric nutrient criteria are necessary.

EPA's regulations specifically recognize that the authority to issue a determination under Section 303(c)(4)(B) reposes solely in the Administrator. See 40 C.F.R. § 131.22(b); Raymond Proffitt Found. v. EPA, 930 F. Supp. 1088, 1091 (E.D. Pa. 1996) (authority to make determination under 33 U.S.C. § 1313(c)(4)(B) resides with Administrator). It is a formal necessity determination by the Administrator (or an Agency official to whom the Administrator has delegated her authority) that, in turn, triggers EPA's duty to promulgate water quality standards.[9] See Florida Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296, 1300 (11th Cir. 2011).

There is no ambiguity as to when the Administrator or her delegatee makes a Section 303(c)(4)(B) determination. On January 14, 2009, EPA made such a determination with regard to the State of Florida. See Letter of January 15, 2009, from Benjamin H. Grumbles, EPA Ex. F

[9] Although there has been no permanent delegation of this authority to other Agency officials, the Administrator has delegated the authority to make a Section 303(c)(4)(B) determination in specific instances. See, e.g., EPA. Ex. F at 1040.

("Florida Determination"). The Florida Determination states on its face that it "constitutes a determination under Clean Water Act (CWA) section 303(c)(4)(B) that new or revised water quality standards for nutrients are necessary to meet the requirements of the CWA for the State of Florida," and it is signed by an authorized agency official. Id. at 1039-40, 1046-47. It carefully reviews factors specific to the State of Florida: (1) the State's existing narrative nutrient criteria and efforts toward the adoption of numeric nutrient criteria (id. at 1040-44, 1047); (2) water quality degradation due to nutrient over-enrichment in the State (id. at 1044); and (3) the physical characteristics of the State that impact nutrient over-enrichment (id. at 1045-46). Based upon these factors, the letter expressly sets forth a determination that new or revised water quality standards are necessary in the State of Florida in order to meet the requirements of the Act (id. at 1046-47).

The Administrator has not made a Section 303(c)(4)(B) determination that new or revised water quality standards are necessary to meet the requirements of the Act in any of the multitude of states for which plaintiffs seek such standards. Plaintiffs do not argue that she has; instead, they point to "necessity determination-like pronouncements" and statements that supposedly "reflect[] the essential substance of a necessity determination." Pl. Mem. at 28, 29. The 1998 documents that plaintiffs rely on do not, however, contain such a determination.

EPA's 1998 Clean Water Action Plan ("1998 Plan"), Pl. Ex. 2, is a multi-agency planning document that lays out a coordinated government-wide strategy to address the full range of issues relating to clean water. In keeping with its role as a comprehensive strategic planning document, the 1998 Plan sets forth potential actions relating to nutrients as broad programmatic goals. See 1998 Plan at 9195-96. In the page-and-a half that discusses plans to

address nutrient over-enrichment, the Plan focuses on assessing the problem and working with states to address it:

> Although nutrient over-enrichment is clearly a major challenge for the nation's waters, the assessment of the seriousness and extent of the problem is often based on subjective criteria that can result in widely varying assessments. Research to improve the basis for understanding and assessing nutrient over-enrichment problems is critical to better control of nutrient levels in waters and to meeting the nation's clean water goals.
>
> EPA is developing a strategy to establish an objective, scientifically sound basis for assessing nutrient over-enrichment problems. Specifically, EPA will develop nutrient criteria – numerical ranges for acceptable levels of nutrient (i.e., nitrogen and phosphorous) in water. Unlike other criteria that EPA has developed, nutrient criteria will be established as a menu of different numeric values based on the type of water body (i.e., river, estuary, lake) and the region of the country in which the water is located. It is vital that this work be done to provide the technical basis for pollution reduction plans.

1998 Plan at 9195 (emphasis added). The 1998 National Strategy for the Development of Regional Nutrient Criteria ("1998 Strategy"), 63 Fed. Reg. 34,648 (June 25, 1998) is similarly programmatic in nature, describing "the approach EPA will take for development of scientific information relating to nutrients . . . and to working with States to assure adoption of nutrient criteria into State water quality standards." Id. at 34,649. Neither the 1998 Plan nor the 1998 Strategy cites Section 303(c)(4)(B) as authority, and neither contains findings or conclusions that any existing state standards are inadequate to meet the requirements of the Act. Although the 1998 Plan mentions in passing that nutrient over-enrichment contributes to the hypoxic zone in the Gulf of Mexico, see 1998 Plan at 9195, it contains no findings or conclusions that existing nutrient standards in this region are inadequate.

Plaintiffs simply cannot cobble together a necessity determination from EPA's broad plans and general intentions. See, e.g., Natural Res. Def. Council, Inc. v. Thomas, 885 F.2d 1067, 1075 (2d Cir. 1989) (Federal Register notices were not functional equivalent of determinations under relevant statute where notices focused on information needs and described

future actions rather than setting forth finding on health effects); California ex rel. Coastal Comm'n v. Norton, 150 F. Supp. 2d 1046, 1054 (N.D. Cal. 2001) (Secretary of Interior's letter was not a "de facto" determination where it merely gave notice regarding agency's information gathering activities and future plans.). The fact that these and other documents cited by plaintiffs might help to *support* one or more necessity determinations, see Pl. Mem. at 29-30, does not mean that the Administrator has actually *made* such determinations. Plaintiffs' claim that the various scientific and technical determinations they cite demand such a determination is, moreover, merely a variation on the argument rebutted in the preceding section – i.e., that EPA is somehow constrained to consider only technical or scientific issues under Section 303(c)(4)(B). Plaintiffs have thus failed to demonstrate that the Administrator has already made the necessity determination that is a precondition for regulation under Section 303(c)(4)(B).

In a curious inversion of the statute, plaintiffs also suggest that EPA was required to grant plaintiffs' petition unless the Administrator affirmatively determined that there is no necessity for new or revised water quality standards. See Pl. Mem. at 30-31. That is not what Section 303(c)(4)(B) says – it provides that EPA must promulgate water quality standards if the Administrator determines that new or revised standards *are* necessary, not that EPA must do so unless the Administrator determines that they are *not* necessary. Nor was EPA "dodg[ing]" anything by reserving the possibility of a future necessity determination. Pl. Mem. at 16. EPA has not foreclosed the possibility that Agency action under Section 303(c)(4)(B) may be appropriate at some point; thus, it explicitly stated that it is not determining that federal criteria will never be necessary. Denial at 6. What plaintiffs dismiss as mere "linguistic gymnastics," Pl. Mem. at 26, is in fact EPA's wholly appropriate reservation of its discretionary authority to

determine at some future point that federal criteria are necessary and, if so, to promulgate such criteria in accordance with Section 303(c)(4)(B).

3. EPA reasonably denied plaintiffs' rulemaking petitions.

EPA's denial of the petitions was rooted in EPA policy and in the Agency's well-founded concern with the overwhelming demand that plaintiffs' proposed rulemaking would place on Agency resources. See supra at 5-6, 9-10. Policy judgments and priority assessments of this nature are precisely the sort that courts routinely leave to administrative agencies. See National Cong. of Hispanic Am. Citizens v. Marshall, 626 F.2d 882, 889 (D.C. Cir. 1979) (agency's judgment to prioritize development of certain standards entitled to "great[] respect;" "[w]ith its broader perspective, and access to a broad range of undertakings . . . the agency has better capacity than the court to make the comparative judgments involved in determining priorities and allocating resources."); see also Natural Res. Def. Council, Inc. v. Sec. and Exch. Comm'n, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (agency's discretionary decision not to regulate a given activity "is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution," including internal management considerations and weighing of competing policies). Viewed in light of the significant deference due EPA's judgment in this regard, EPA's denial of the rulemaking petitions was entirely reasonable.

As already discussed, there is no dispute that nutrient pollution contributes significantly to water quality problems in the Mississippi River Basin and the Gulf of Mexico. As EPA explained in denying the petition, however, in its view "the comprehensive use of federal rulemaking authority is [not] the most effective or practical means of addressing these concerns at this time." Denial at 1; see also id. at 4 ("[T]he Agency believes that use of its rulemaking authority, especially in light of the sweeping scope of the Petition, is not a practical or efficient

way to address nutrients at a national or regional scale."). EPA has instead been working steadily to guide, coordinate, and support states in their efforts to address nutrient pollution, viewing this as "the most effective and sustainable way to address widespread and pervasive nutrient pollution" in the Mississippi River Basin and elsewhere in the country. Denial at 4; see generally id at 2-4; supra at 4-8. EPA's approach is consistent both with the structure of the Act (which, as already discussed, gives primacy to states in addressing water pollution) and with EPA's own longstanding policy. See Denial at 5.

EPA also considered the overwhelming and unprecedented demands that a rulemaking of this scope would place on the Agency. As EPA explained:

> The development of [numeric nutrient criteria] for 50, 31, or 10 states at one time would be highly resource and time intensive and involve the EPA staff across the entire Agency, as well as support from technical experts outside the Agency. The Agency would need to develop a technical record for each affected state, a task of substantial magnitude in light of the need for thorough review and analysis of state water quality data and the frequency and severity of nutrient-related impacts. Completing the rulemaking process would pose 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 at 4.

The record demonstrates that these concerns are well-founded. On January 14, 2009, EPA determined pursuant to Section 303(c)(4)(B) that new or revised nutrient criteria are necessary to meet the requirements of the Act for the State of Florida. Florida Determination, EPA Ex. F. This Determination required a significant agency effort in itself, and was supported by an administrative record of over 250 documents. See Administrative Record Index For Water Quality Standards for the State of Florida's Lakes and Flowing Waters Final Rule ("Florida Index"), EPA Ex. G (excerpts) at 1219, 1238. The subsequent EPA rulemaking was divided into two phases. In the first phase (which addressed inland waters), EPA published a proposal based

on an extensive analysis of data pertaining to Florida lakes and waters and a subsequent supplemental notice of data availability and request for comments with over 1500 pages of supporting documents. 75 Fed. Reg. 4,174, 4,183-90 (Jan. 26, 2010); 75 Fed. Reg. 45,579 (Aug. 3, 2010); see generally Technical Support Document for EPA's Final Rule for Numeric Criteria for Nitrogen/Phosphorous Pollution in Florida's Inland Surface Fresh Waters (EPA MARB-001727-1882); Appendices A and B to the Technical Support Document (EPA MARB-001883-2743, EPA-MARB002744-2747). EPA then responded to over 22,000 public comments and revised the proposal as appropriate in light of those comments. See Response to Public Comments, Water Quality Standards for the State of Florida's Lakes and Flowing Waters, EPA Ex. H (excerpts), at 10209. EPA ultimately compiled an administrative record containing thousands of documents to support the final standards. See generally Florida Index (EPA-MARB-001219-001639). From EPA's original determination through the proposal and on through final action, this first phase alone consumed almost two years.[10] After EPA had finalized the inland waters standards, moreover, twelve lawsuits were filed challenging both the inland waters standards and EPA's original 303(c)(4)(B) determination. See 77 Fed. Reg. 74,985, 74,987 (December 18, 2012). Nor was that the end of the matter – the second phase of regulation (which addresses estuaries and marine waters) is ongoing, as are Agency proceedings on remand following litigation over the phase one standard.

Plaintiffs' petition asks EPA to undertake rulemakings that would multiply this effort as to Florida by orders of magnitude, requesting that EPA promulgate numeric nutrient criteria for a *minimum* of 10 states and a maximum of all 50. See supra at 8-9. Against EPA's assessment of

[10] The necessity determination was issued in January 2009, and EPA took final action in December 2010. See EPA Ex. F; Water Quality Standards For the State of Florida's Lakes and Flowing Waters: Final Rule, 75 Fed. Reg. 75,762 (December 6, 2010).

its available resources and its capability to conduct the rulemakings that plaintiffs seek, plaintiffs offer only the casual assertion that rulemakings "routinely require work of this nature." Pl. Mem. at 32. Certainly, EPA typically analyzes technical information, responds to comments, and so forth when it takes rulemaking action – however, plaintiffs cite nothing that even suggests that doing so on the *scale* that plaintiffs demand is in any way "routine." As demonstrated above, establishing nutrient criteria for even 1 state has required a significant Agency effort. Plaintiffs offer nothing whatsoever to suggest that EPA's conclusion that it is not reasonable to multiply that effort by a minimum of 10 – as opposed to continuing to work with states and to support their efforts to develop appropriate criteria – is somehow arbitrary. To suggest that EPA would have adequate resources if it proceeded serially, Pl. Mem. at 33, is no answer. EPA's experience in Florida suggests that serially making the required necessity determinations and then proposing and promulgating numeric nutrient criteria for each of the 10 states that touch the mainstream Mississippi River could take at least half a century – and would consume significant Agency time and effort in both administrative proceedings and litigation throughout that period.

Plaintiffs' casual dismissal of EPA's solid reasons for denying the petition as mere "bureaucratic preferences," Pl. Mem. at 22, is thus contradicted by the administrative record. Plaintiffs go even further than this, accusing EPA of denying their petition "for the express purpose of *sidestepping* the Act's mandatory duty to promulgate federal criteria that such a 'necessity determination' would trigger." Pl. Mem. at 1-2 (emphasis in original). An "express purpose" would, presumably, be expressed somewhere – and yet plaintiffs do not even attempt to cite anything in the record to support their assertion that EPA denied the petition in an effort to evade a statutory obligation. This claim is, at best, a wild distortion of EPA's conclusion that the best and most efficient path forward is to continue to work cooperatively with its federal, state,

and local partners to address water quality concerns in the Mississippi River Basin and the Gulf of Mexico, rather than undertaking the overwhelming burden of multiple complex and time-consuming federal rulemakings.[11] Plaintiffs would have to offer significantly more than a self-serving re-casting of EPA's reasoning to overcome the presumption of good faith that attaches to agency actions. See United States v. New Orleans Pub. Serv., Inc., 723 F.2d 422, 428 (5th Cir. 1984) (recognizing that agency is entitled to presumption of regularity); Federal Trade Comm'n v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 975 (D.C. Cir. 1980) (agencies entitled to presumption of administrative regularity and good faith).

Plaintiffs clearly would prefer it if EPA proceeded differently. To survive review, however, EPA's denial of the rulemaking petition need not be the only course the Agency could have followed, or the course that plaintiffs would have preferred – it need only be rational and supported by the administrative record. See, e.g., Texas Clinical Labs, 612 F.3d at 775 (agency's decision need not be ideal as long as agency gave minimal consideration to facts contained in record); Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923, 934 (5th Cir. 1998) (if agency's reasons and policy choices "conform to minimal standards of rationality," agency action must be upheld). EPA has amply satisfied these standards, and is therefore entitled to summary judgment.

[11] Plaintiffs similarly assert that EPA has expressed a "preference" for addressing nutrient pollution through some means other than regulation *even if the Administrator determines that federal water quality standards are necessary*. Pl. Mem. at 4. Plaintiffs have cited nothing that even suggests that EPA will refuse to follow Congress' directive to promulgate federal water quality standards if the Administrator makes a necessity determination under Section 303(c)(4)(B).

C. Plaintiffs Are Not Entitled To Their Requested Relief.

For all of the reasons discussed above, plaintiffs' Complaint should be dismissed, or in the alternative summary judgment should be entered for EPA. Even if plaintiffs prevail, however, they are not entitled to an order directing EPA to "make a determination concerning the necessity of new or revised nutrient standards that conforms to Section 303(c)(4)(B) of the Act." Pl. Mem. at 34. All that the Court can do if it determines that EPA's denial of the petition was arbitrary or capricious is to remand the matter to EPA. See Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952) ("[T]he guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration.").

Even if the Court remanded the matter to EPA, moreover, it would not be appropriate to establish a deadline for further Agency action. See Pl. Mem. at 34 (requesting that EPA be ordered to act within 90 days). Orders requiring an agency to act on a particular schedule are typically issued when a plaintiff establishes that the agency has unreasonably delayed in taking a discrete action that it is required to take. See 5 U.S.C. § 706(1) (court may compel agency action unreasonably delayed). Plaintiffs have not, however, asserted an unreasonable delay claim in this case – nor could they have done so, since EPA has already acted on their administrative petition.

If the Court remands the matter to EPA, and if plaintiffs believe that EPA is unreasonably delaying in responding to that order, they may seek appropriate remedies at that time. Courts have, however, repeatedly refused to impose *ex ante* deadlines on agency responses in similar circumstances. See, e.g., NRDC v. EPA, 489 F.3d 1364, 1375 (D.C. Cir. 2007) ("We decline to set a two year limit on EPA's proceedings on remand as the NRDC requests; mandamus affords

a remedy for undue delay."); North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) (declining to set deadline for proceedings in response to remand of rule, and noting availability of mandamus relief if appropriate); cf. Portland Cement Ass'n v. EPA, 665 F.3d 177, 194 (D.C. Cir. 2011) (noting availability of unreasonable delay claim). Even if the Court grants plaintiffs' motion for summary judgment, it should similarly decline plaintiffs' request for a deadline on remand.

V. CONCLUSION

For the foregoing reasons, plaintiffs' Complaint should be dismissed, or in the alternative plaintiffs' Motion for Summary Judgment should be denied and summary judgment should be entered for EPA.

January 18, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2013, I filed the foregoing Memorandum and its supporting exhibits via the CM/ECF system, which will electronically serve all counsel of record.

/s/ Angeline Purdy

_____

Angeline Purdy