

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

GULF RESTORATION NETWORK, *et al.* )

Plaintiffs )

v. )

LISA P. JACKSON,  
Administrator of the United States  
Environmental Protection Agency,  
and THE UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY, )

Defendants )

Civil Action No. 2:12-cv-00677

Section "A," Division 3

Honorable Jay C. Zainey

Magistrate Judge Knowles

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**INTERVENING STATES' MEMORANDUM IN SUPPORT OF  
THE ENVIRONMENTAL PROTECTION AGENCY'S  
MOTION FOR SUMMARY JUDGEMENT**

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## **I. INTRODUCTION**

The states of Alabama, Arkansas, Iowa, Illinois, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, and South Dakota (“the State Intervenor”) respectfully submit this memorandum in support of the Motion to Dismiss or, in the Alternative, for Summary Judgment by the Environmental Protection Agency (“EPA”). Plaintiffs challenge EPA’s denial of their July 2008 Petition for Rulemaking (“Petition”) requesting that the Agency exercise its discretionary authority under Clean Water Act (“CWA”) § 303(c)(4)(B) to establish national numeric nutrient criteria and total maximum daily loads (“TMDLs”) to address nutrient problems in every water basin in the United States, making specific reference to the current hypoxia issues experienced in portions of the Gulf of Mexico. *See* Petition, Ex. 1. For the reasons set forth herein, EPA properly exercised its discretion under CWA § 303(c)(4)(B) when it denied Plaintiffs’ Petition. EPA provided reasonable justifications for denying the Petition, including its determination that the most effective approach to address nutrient pollution is through continued coordination and cooperation with the states and other federal and local partners, rather than undertaking a sweeping one-size-fits-all approach to reducing nutrient pollution in 31 different states within the Mississippi River Basin. This Court should grant EPA’s Motion to Dismiss, or, in the Alternative, for Summary Judgment.

## **II. STANDARD OF REVIEW**

When conducting a review of an agency’s denial of a rulemaking petition, the Administrative Procedure Act’s standard of review applies, and the reviewing court may hold unlawful and set aside an agency action only if the action is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706; *see also Buffalo Marine Services Inc. v. U.S.*, 663 F.3d 750 (5<sup>th</sup> Cir. 2011). The APA standard is a narrow and

highly deferential standard, and the petitioner has the burden of proving that the agency's determination was arbitrary or capricious. *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687 (5<sup>th</sup> Cir. 2010). The Court should determine "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 (1971). Courts will generally uphold an agency's actions if "its reasons and policy choices satisfy minimum standards of rationality." *Medina County Environmental Action Ass'n*, 602 F.3d at 699, *quoting Pub. Citizen, Inc. v. U.S.E.P.A.*, 343 F.3d 449, 455 (5<sup>th</sup> Cir. 2003). The Court should "be at its most deferential" when reviewing an agency action that involves scientific matters in its area of technical expertise, such as the development of numeric nutrient standards. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983). Moreover, an agency's decision not to institute rulemaking should only be overturned in "the rarest and most compelling circumstances." *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 818 (D.C. Cir. 1981).

### III. ARGUMENT

The Court should uphold EPA's decision to deny the Petition because it was appropriately based upon the observation that Congress provided states with primary authority to restore and maintain the integrity of the Nation's waters.

#### **A. States Are Given Primary Authority Under The Clean Water Act To Address Water Quality Standards.**

In denying the Petition, EPA reasoned the most effective and sustainable way to address nutrient pollution is to work cooperatively with the states to strengthen nutrient management programs. EPA Response to Petition for Rulemaking ("Denial Letter"), States' Ex. A, A.R. 0004. EPA's position that the states bear primary responsibility in addressing nutrient management is consistent with Congress's intent for the CWA "to recognize, preserve, and



protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution....” 33 U.S.C. § 1251(b); *Columbia River United v. Reilly*, C90-1667Z, 1991 WL 338250 (W.D. Wash. May 17, 1991).

The CWA anticipates a partnership between the states and the federal government with the shared objective to restore and maintain the integrity of the Nation's waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Many courts have already recognized that the CWA is implemented by the EPA and the states through a system of cooperative federalism. *See e.g., Save the Bay, Inc. v. Adm'r of Env'tl. Prot. Agency*, 556 F.2d 1282, 1294 (5th Cir. 1977).<sup>1</sup> Section 303 of the CWA highlights Congress' intention to preserve state primacy in preventing, reducing, and eliminating pollution, while still maintaining the federal/state partnership. Under Section 303(c), states are responsible for developing, adopting, and maintaining water quality standards for intrastate and interstate waters. 33 U.S.C. § 1313(c). EPA's responsibility under Section 303(c), on the other hand, is to provide oversight by reviewing new or revised water quality standards adopted by a state and ensuring that the standards “protect the public health or welfare, enhance the quality of the water, and serve the purposes of [the CWA].” 33 U.S.C. § 1313(c)(2)(A).

If EPA determines that a state water quality standard is not consistent with the CWA, the EPA is required to first notify the state and provide it with an opportunity to correct the standard, again recognizing the primary authority of the states in developing water quality standards. 33 U.S.C. § 1313(c)(4)(A). EPA is only authorized to establish water quality standards in a state if a state does not correct the deficiencies within ninety days after the date of notification of the deficiency or if EPA exercises its discretionary authority to determine “that a revised or new

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<sup>1</sup> *See also Florida Clean Water Network, Inc. v. U.S. E.P.A.*, 2012 WL 1072216 (N.D. Fla. Mar. 30, 2012); *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C.Cir.1980); *American Paper Institute, Inc. v. United States Environmental Protection Agency*, 890 F.2d 869, 873 (7th Cir.1989).

standard is necessary to meet the requirements of this chapter.” 33 U.S.C. § 1313(c)(4)(B). In this case, EPA has not made a determination under Section 303(c)(4)(B) that numeric nutrient criteria are necessary. Since no such determination has been made, the CWA does not mandate that EPA promulgate the new or revised water quality standards demanded in Plaintiffs’ Petition.

In denying the Petition, EPA not only recognized Congress’ designation of the states’ primary authority in preserving water quality, but also its own policy of properly deferring to the states to develop water quality standards as required by Section 303(c). Denial Letter, A.R. 0005 (“long-standing policy, consistent with the CWA, has been that states should develop and adopt standards in the first instance, with the EPA using its own rulemaking authority only in cases where it disapproves a new or revised standard, or affirmatively determines that new or revised standards are needed to meet CWA requirements.”) EPA’s Denial Letter also specifically cited its memorandum, "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions" (“Framework Memo”) as the guide for its collaboration with the states. States’ Ex. B, A.R. 0680. The Framework Memo recognizes that “states need room to innovate and respond to local water quality needs so a one-size-fits-all solution to nitrogen and phosphorus pollution is neither desirable nor necessary.” Framework Memo, A.R. 0681. In this respect, the Framework Memo accurately describes the cooperative federalism relationship of the CWA.

It is clear from the plain language of the CWA that Congress intended the states to hold the primary responsibility for determining what standards are necessary to “protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act].” 33 U.S.C. § 1313(c)(2)(A). Given the geographic and regional differences in water body types, this deference to state authority is critical to achieving water quality goals. States are in the best position to

gather and analyze the relevant geographical data needed to make decisions on how to improve water quality. This is not to say that EPA has no role in the development of water quality standards. Rather, EPA is properly exercising its role in addressing nutrient pollution by coordinating with states and other local and federal partners and assisting in the development of nutrient criteria by providing technical guidance, scientific information, and data analysis tools. *See* 33 U.S.C. § 1314 (requiring EPA to provide information and guidelines to the states); *see also, e.g.*, EPA’s nutrient criteria guidance documents at A.R. 3505-3660 and 3696-4542, and EPA’s twenty-five Ambient Water Quality Criteria Recommendation documents at A.R. 14528 – 17173<sup>2</sup>. The proper exercise of the roles and responsibilities of states, EPA, local and federal partners, and other stakeholders provides for the most effective and efficient use of resources, which in turn, promotes the development of scientifically sound and defensible water quality standards.

**B. EPA’s Rulemaking Authority Under CWA Section 303(c)(4)(B) Is Discretionary.**

Before exercising its discretionary authority under § 303(c)(4)(B), EPA must make two requisite findings: 1) such action is “necessary”; and 2) there has been a lack of action by the State. There has been no formal finding by EPA on these points, nor is there any evidence in the record suggesting that such official determinations have been made. Seeking to avoid the reality that § 303(c)(4)(B) only requires the EPA to act after determining that new or revised standards are necessary, and that the EPA has made no such determination, Plaintiffs argue that this provision mandates that the EPA determine whether numeric nutrient standards are necessary to

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<sup>2</sup> Where this memorandum 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 has been provided to the Court by EPA.

meet the requirement of the CWA. Plaintiffs' Memo at 22. However, such an interpretation is contrary to both the plain language of the CWA and case law interpreting § 303(c)(4)(B).

In *Missouri Coalition for the Environment Foundation v. Jackson*, 853 F.Supp.2d 903 (W.D. Mo. 2012), the plaintiffs sought a declaration, *inter alia*, that EPA's failure to make a necessity determination was arbitrary and capricious and an injunction ordering the EPA to make a Section 303(c)(4)(B) determination. The court denied both requests, specifically referring to Section 303(c)(4)(B) as a "discretionary clause." *Id.* at 905. Moreover, the court held that "EPA's authority under Section 303(c)(4)(B) is committed to agency discretion by law." *Id.* at 911. In so holding, the court reasoned:

[t]his clause 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 the 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.

*Id.* at 911-12.

Additionally, the Supreme Court, albeit in the context of air regulation, has held that EPA is not required to promulgate regulations "if it provides a reasonable explanation as to why it cannot or will not exercise its discretion ...." *Massachusetts v. EPA*, 549 U.S. 497 (2007). Here, the EPA not only provided a reasonable explanation for not exercising its discretion to determine whether numeric nutrient criteria were necessary, but the explanation provided is rationally related to the administrative record. Thus, EPA's denial of the Plaintiffs' Petition is based on sound scientific and policy judgments that are within the Agency's discretion, supported by law, and not arbitrary or capricious. EPA's decision not to exercise its discretionary authority regarding nutrient criteria is just the sort of highly complex, scientific balancing of factors to

which courts should – and do – defer. *Baltimore Gas & Elec. Co., supra.*<sup>3</sup> EPA’s justification also comports with Congress’s stated goal of making states the primary authority for determining how to achieve the interstate and intrastate water quality goals.

**C. States Are Actively Asserting Their CWA Authority To Address Nutrient Levels.**

It is reasonable for EPA to consider the states’ progress in addressing nutrient pollution as a factor in the decision whether to make a determination that new or revised standards are necessary. *See generally Florida Wildlife Fed’n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1158 (N.D. Fla. 2012). The states are, in fact, making progress in achieving nutrient reductions, contrary to the Plaintiffs’ attempt to portray the states as refusing to limit nutrient pollution.<sup>4</sup> Additionally, EPA has acknowledged that the timetable outlined in their Framework Memo is a “flexible one” as long as the “state is making meaningful near-term reductions in nutrient loadings to state waters while numeric criteria are being developed.” Framework Memo, A.R. 0682. The states are achieving these nutrient reductions through regulatory procedures such as narrative and numeric nutrient criteria, NPDES permit limitations, and implementation of total maximum daily loads (“TMDLs”), as well as through partnerships with agriculture, forestry and other nonpoint source pollution stakeholders.<sup>5</sup>

A number of states either have already adopted or are in the process of developing numeric criteria for nutrient parameters. “State Adoption of Numeric Nutrient Standards (1998-2008)”, A.R. 3409-3504. For example, Nebraska has adopted criteria for nitrogen (“TN”) and

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<sup>3</sup> *See e.g. Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 16 F.3d 1395 (4<sup>th</sup> Cir. 1993) (“[t]his court is also mindful that the CWA is a lengthy and complex statute and that its mandate and policy often require the evaluation of sophisticated data...in reviewing EPA’s actions here, this court does not sit as a scientific body, meticulously reviewing all data under a laboratory microscope.”)

<sup>4</sup> Pl. Mem. at 3. For State progress, generally, *see* “States’ Progress toward TN and TP Numeric Criteria Adoption (Regions 4-7),” States’ Ex. C, A.R. 6492-6494; “Current total nitrogen and total phosphorus criteria,” States’ Ex. D A.R. 6497-6498.

<sup>5</sup> A TMDL is a pollution budget for a specific water body. It is the maximum amount of a pollutant that can be released into a water body without causing a violation of water quality standards.

phosphorus (“TP”) criteria for lakes and reservoirs. *Id.* States’ Ex. E (excerpt), A.R. 3455. Alabama and Oklahoma have adopted numeric criteria for chlorophyll *a* (“Chl-*a*”) in certain non-flowing bodies of water. *Id.* States’ Ex. F (excerpt), A.R. 3425, States’ Ex. G (excerpt), A.R. 3464. Chlorophyll *a* is a good indicator of the presence of nutrients at levels that may adversely impact water body uses. Oklahoma has also established a criterion for TP for a select group of water bodies. *Id.* In 2008, Minnesota developed statewide numeric criteria for TP and Chl-*a* for all lakes. *Id.* States’ Ex. H (excerpt), A.R. 3452. Illinois has numeric criteria for TP that applies in any reservoir or lake with a surface area of twenty acres or more, or in any stream at the point where it enters any such reservoir. *Id.* States’ Ex. I (excerpt), A.R. 3441. Montana has numeric criteria for TN, TP, and Chl-*a* for selected streams. *Id.* States’ Ex. J (excerpt), A.R. 3454. Wisconsin adopted numeric phosphorous criteria for rivers and lakes statewide in 2010. Letter requesting approval of water quality standard, State’s Ex. K, A.R. 9119. Missouri adopted narrative criteria and is continuing to work with EPA to obtain approval of proposed numeric criteria for lakes and reservoirs.<sup>6</sup> Additionally, almost all of the intervening States and numerous other states have also implemented nitrogen, phosphorous, and nutrient-related TMDLs. List of nitrogen and phosphorous TMDLs across the country, A.R. 6272- 6365; list of nutrient-related TMDLs across the country, A.R. 6366-6491.

States have also undertaken other voluntary efforts to address nutrient levels both through their point source and nonpoint source programs. For example, South Dakota has disallowed point source discharges to lakes.<sup>7</sup> Kansas is achieving significant nutrient reduction through its regulated wastewater facilities, and is moving towards achieving a technologically-based 65%

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<sup>6</sup> Mo. Code Regs. tit. 10, § 20-7.031(3); [http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/states\\_mo.cfm](http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/states_mo.cfm).

<sup>7</sup> Admin. R.S.D. 74:51:01:27.

reduction in nutrients discharged to surface waters of the state. “Surface Water Nutrient Reduction Plan”, States’ Ex. L (excerpt), A.R. 6005.

States also have financial assistance programs for the implementation of measures to reduce nonpoint source pollution. Iowa provides millions of dollars each year in cost-share funds and loans for construction of a wide variety of watershed protection projects, implementation of soil and water conservation practices, and implementation of animal waste management practices to reduce nutrient loadings. “FY11 Operating Plan: A Compilation of Actions to Implement the Gulf Hypoxia Action Plan 2008”, States’ Ex. M (excerpt), A.R. 6607-6609. Louisiana has worked with industries and municipalities through the Nutrient Reduction Workgroup to reduce nitrogen and phosphorus discharges. “Moving Forward on Gulf Hypoxia Annual Report 2010,” States’ Ex. N (excerpt), A.R. 4637.

Not only are the States individually addressing nutrient pollution, but they have also engaged in a collective, unified effort to address the contribution of nutrients. State and federal agencies are working together through both the Gulf Coast Ecosystem Restoration Task Force and the Gulf Hypoxia Task Force. *See, e.g.*, June 27, 2011, Gulf Coast Ecosystem Restoration Task Force, Meeting Agenda, States’ Ex. O, A.R. 6256-57; “FY11 Operating Plan A Compilation of Actions to Implement the Gulf Hypoxia Action Plan for 2008”, A.R. 6499 - 6636. The Mississippi River Basin Healthy Watersheds Initiative works with conservation partners to address nutrient and sediment loading, which have contributed to local water quality problems and hypoxia in the northern Gulf of Mexico. Mississippi River Basin Healthy Watersheds Initiative States’ Ex. P (excerpt), A.R. 8256-8261.

EPA’s position that these individual and collaborative efforts are the most effective and sustainable way to address nutrient pollution is reasonably based upon the complexity of the

nutrient pollution problem, EPA's scientific judgment, and the cooperative federalism envisioned by the CWA. The efforts made by the States and the EPA, along with other federal and local partners, and the progress resulting from these efforts, are well-documented in the administrative record. Further, EPA's Denial Letter evidences that EPA considered all of the above-mentioned relevant factors before making its decision. Denial Letter, A.R. 0001-0006.

**D. There Are Other Relevant Factors Supporting EPA's Denial of the Petition.**

EPA's denial of Plaintiffs' Petition, and the reasons provided therein, are rationally related to the purposes of Section 303(c)(4)(B) and the CWA as a whole. One critical factor in deciding to exercise its discretion is determining whether the process of establishing new or revised standards would hinder or otherwise limit the EPA's ability to fulfill its CWA obligations of protecting public health or welfare and enhancing water quality. In other words, reasoning that the use of its rulemaking authority "is not a practical or efficient way to address nutrients at a national or regional scale," is rationally related to the goal of protecting water resources because EPA has made a policy decision to focus its time and resources on other more practical and effective methods of managing nutrients. *See e.g.* "Framework Memo", A.R. 00681 ("[w]hile EPA has a number of regulatory tools at its disposal, our resources can best be employed by catalyzing and supporting action by states that want to protect their waters from nitrogen and phosphorus pollution."). It is also reasonable for EPA to determine that its resources are better spent, for example, on developing the most "current scientific information to strengthen the underlying rationale and defensibility of the criteria development process." Denial Letter, A.R. 0003.



**1. For most water bodies, EPA lacks adequate scientific data with which to develop meaningful and defensible national numeric nutrient criteria.**

While there is no dispute that excessive nutrients can cause harm to water bodies, some level of nutrients is needed. As the term suggests, nutrients are essential to the biological health of any water body. Aquatic plants, the basis of the food chain, need nitrogen and phosphorus to live and grow. Therefore, management of nutrients requires a determination of how much of each nutrient is needed and how much is excessive. This is not possible without a thorough understanding of the sources and amounts of nutrients in a particular lake, stream, river, or estuary, as well as what happens to them once they get there.

Forcing EPA to establish criteria without the requisite data would not effectively address nutrient pollution. The criteria must be based on sound science. *Florida Wildlife Federation, Inc., supra* at 1142-43.

The administrative record in this matter reflects the complexity of nutrient management. For example, according to the U.S. Geological Survey and its co-authors of a recent study: “[t]here is growing recognition, however, of a need for an expanded and complementary understanding of the sources and transport of both nitrogen and phosphorus and their complex interactions toward developing effective nutrient management plans in coastal waters.” Alexander *et al.*, “Differences in Phosphorus and Nitrogen Delivery to the Gulf of Mexico from the Mississippi River Basin,” States’ Ex. Q (excerpts), A.R. 7057. The National Research Council of the National Academy of Sciences found that the development of nutrient standards depends “on the development of a water quality database adequate to support numeric nutrient water quality criteria.” “Nutrient Control Actions for Improving Water Quality in the Mississippi River Basin and Northern Gulf of Mexico,” States’ Ex. R (excerpt), A.R. 6986.

EPA and the States need geographically specific information to achieve the necessary level of understanding. “Because of differences in geologic parent material, climate, and geography, reference conditions are different from one region to another. Similarly, water bodies, especially estuaries, often respond differently to nutrient inputs. Lakes and reservoirs are different from streams and rivers, and estuaries and coastal marine waters have characteristics different from both. Criteria have to be designed for particular water body types and the regions in which they lie.” U.S. EPA, “Nutrient Criteria Development Guidance – Estuarine and Coastal Waters,” States’ Ex. S (excerpt), A.R. 3711.

**2. Numeric criteria do not constitute the sole, or even the most effective, solution to reducing nutrient pollution.**

Even after a state or EPA has gathered and analyzed enough data to understand the nutrient dynamics in a particular water body, it must determine the best way to manage them. Promulgating numeric criteria for nitrogen and phosphorus may not be the answer; other options may be more appropriate, all things considered, for a particular water body or watershed. For example, numeric criteria for other parameters that reflect the effects of nutrient imbalances can be better than limits on the nutrients themselves. When EPA rejected a petition that it promulgate criteria for nitrogen and phosphorus in the Chesapeake Bay Watershed, it stated that criteria for dissolved oxygen, water clarity and chlorophyll

are superior to criteria for total nitrogen and total phosphorus because levels of dissolved oxygen, water clarity and chlorophyll are a reflection of how nutrients express themselves as problems in the natural environment. That is, the nutrients promote nuisance amounts and species of algae, thus the chlorophyll criteria chlorophyll *a* is an indicator of algae. The clarity criteria stem from the fact that these algae along with sediments cloud the water making it difficult for submerged aquatic vegetation growth. Finally, the dissolved oxygen criteria reflect the fact that as the algae die and settle to the bottom of the Bay they decay, reducing oxygen levels.

U.S. EPA, “Decision on Petition for Rulemaking to Address Nutrient pollution from Significant Point Sources in the Chesapeake Bay Watershed,” States’ Ex. T, (excerpt), A.R. 0787.

In its 2007 study of hypoxia in the Gulf of Mexico, EPA’s Science Advisory Board found that the most significant opportunities for nitrogen and phosphorus reductions occur in five areas:

- promotion, via research and economic incentives, of environmentally sustainable approaches to biofuel production and associated cropping systems (e.g., perennials);
- improved management of nutrients by emphasizing infield nutrient management efficiency and effectiveness to reduce losses;
- construction and restoration of wetlands, as well as criteria for targeting those wetlands that may have a higher priority for reducing nutrient losses;
- introduction of tighter N and P limits on municipal and private industrial point sources; and
- improved targeting of conservation buffers, including riparian buffers, filter strips and grassed waterways, to control surface-borne nutrients.

“Hypoxia in the Northern Gulf of Mexico: An Update by the EPA Science Advisory Board,” States’ Ex. U (excerpt), A.R. 4749. The Board further noted that, “[i]mportantly, not all approaches will be cost-effective in all locations; the optimal combination and location of these practices will vary across and within watersheds.” *Id.* (emphasis supplied.) In a 2009 report, the State-EPA Innovations Task Group provided a review and analysis of the existing tools available to reduce nutrients and the effectiveness of these tools. “An Urgent Call to Action – Report of the State-EPA Nutrients Innovations Task Group,” States’ Ex. V (excerpts), A.R. 1108-1115. More specifically, the Task Group noted that the usefulness of numeric water quality standards for reducing nutrients was moderate. *Id.* at 1108. In contrast, the Task Group identified the following tools as having a high overall usefulness in reducing nutrients: NPDES permits, wastewater utility tools, state effluent limits, federal technology requirements, phosphate bans,

optimization of agricultural fertilizer application, and drinking water utility tools. *Id.* at 1108-1115. The Task Group further noted the following limitations on numeric criteria:

- (1) One numeric criterion may not be applied uniformly across the Nation.
- (2) Additional analysis and site specific monitoring data are needed to develop numeric nutrient limits.
- (3) WQSs adopting process may be quite lengthy, especially due to lack of scientific basis for establishing effects-based numeric criteria for pollutants like nutrients that do not exhibit threshold response.

*Id.* at 1108. This report reiterates the EPA's continued focus on utilizing multiple tools and innovative approaches to achieve nutrient reductions, while taking into consideration specific state circumstances, available resources, and the "need to engage all sectors and parties in order to achieve effective and sustained progress. Framework Memo, A.R. 0681.

Despite the overwhelming evidence that multiple regulatory and nonregulatory practices are needed to effectively reduce nutrients in the Mississippi-Atchafalaya River Basin, the Plaintiffs' Petition focused only on the development of federal numeric nutrient criteria nationwide, or alternatively for the ten states along the main stem of the Mississippi River. As an initial matter, EPA, States, and the Plaintiffs appear to agree that improving water quality along the Mississippi-Atchafalaya River Basin is critical. However, this challenge is not about whether nutrient reduction is necessary to improve water quality along the Mississippi-Atchafalaya River Basin – the evidence clearly establishes that it is – but rather whether the CWA provides the States and the EPA with authority to determine how best to achieve nutrient reduction. Stated differently, the Plaintiffs' challenge amounts to a plea that there is a better way to manage nutrients than the methods being utilized by the States and approved by EPA. In *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275 (D.C. Cir. 1981), the court rejected a similar plea regarding a challenge to states' plans for controlling salinity in the Colorado River, noting "[i]t is

not the function of the court, however, to establish a preference between conflicting approaches to salinity control.” *Id.* at 292.

Interstate movement of nutrients within the Mississippi-Atchafalaya River Basin adds another layer of regulatory complexity. “While the upper Mississippi and Ohio-Tennessee River subbasins represent about 31% of the total drainage area of the Basin, they contribute about 82% of the nitrate-N [nitrogen] flux, 69% of the total Kjeldahl nitrogen flux, and 58% of the total P [phosphorus] flux to the Gulf. ... Perhaps more importantly, the upper Mississippi and Ohio-Tennessee River subbasins currently represent nearly all of the spring N flux to the Gulf.” “Hypoxia in the Northern Gulf of Mexico: An Update by the EPA Science Advisory Board,” States’ Ex. W (excerpt), A.R. 4826.

### **3. Numeric nutrient criteria do not apply to non-point sources.**

Further complicating the matter is the fact that the largest portion of nutrient pollution in the Mississippi-Atchafalaya River Basin (estimated at 78% of nitrogen and 66% of phosphorus) comes from nonpoint sources that are not subject to mandatory limitations under the CWA. *Id.*, States’ Ex. X, at 4750. Storm water runoff from agricultural lands, recreational areas and parking lots are all sources of nutrients from non-point source pollution. Only point source dischargers are subject to enforceable effluent limitations under the Clean Water Act’s permit program, the National Pollutant Discharge Elimination System (“NPDES”). 42 U.S.C. §1342(a) and §1362(12). As a result, establishing numeric criteria will not address the nutrient contribution of nonpoint sources. Instead, promulgation of numeric criteria for nutrients is likely to have a much greater, and therefore disproportionate, impact on point source discharges via the tightening of permit limits, than on nonpoint source discharges.

Reductions in nonpoint source discharges must be achieved through voluntary efforts by stakeholders, such as farmers, foresters, and golf course managers, and coordinated efforts of the states, local governments, EPA, and other federal partners. In fact, EPA and the states, along with the U.S. Department of Agriculture, have been implementing such voluntary efforts for years and significant reductions have been achieved. *See e.g.* “Gulf Hypoxia Action Plan 2008”, States’ Ex. Y (excerpt), A.R. 4666 (“increased assistance to agricultural producers through U.S. Department of Agriculture programs for voluntary actions resulted in an additional 1.4 million acres of wetlands restored, enhanced, or created an additional 2.3 million acres of conservation buffers installed within the Basin during fiscal years 2000-2006”).

### **III. CONCLUSION**

Careful consideration of EPA’s decision and the administrative record upon which it is based, with the appropriately high level of deference, should convince the Court that EPA was not arbitrary, capricious, or contrary to law in its interpretation of the Clean Water Act, or in its application of its scientific expertise to the complex issues and data involved in the issue of nutrient management. For these reasons, as well as those detailed in EPA’s memorandum, the Court should grant EPA’s Motion to Dismiss or, in the Alternative, for Summary Judgment.

Respectfully submitted,

FOR THE STATE OF LOUISIANA

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### **CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing memorandum was electronically filed this 4th day of March, 2013, using the Court's CM/ECF System, which will send notification of such filing to the attorneys of record for each party, who have registered with the Court's CM/ECF system.

/s/ Christopher A. Ratcliff  
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