

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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

MOTION FOR STAY PENDING APPEAL

Pursuant to Fed. R. Civ. P. 62, Defendants Gina McCarthy, Administrator, United States Environmental Protection Agency, et al. (collectively "EPA") respectfully move to stay this Court's order of September 20, 2013, pending the resolution of EPA's appeal of that ruling. As is more fully detailed in the accompanying Memorandum, a stay is warranted because (1) EPA is likely to succeed on the merits of its appeal, and has at a minimum presented a substantial case on a serious legal question; (2) if the Order is not stayed and EPA is required to make a necessity determination, EPA's appeal rights will be compromised and there will be no way to restore the status quo; (3) given that even a positive necessity determination would be no more than a precursor to the development of actual nutrient criteria, which development would require a thorough rulemaking process, a stay of the order requiring EPA to make such a determination would not substantially harm Plaintiffs; and (4) granting a stay would serve the public interest by preventing the expenditure of scarce Agency resources making one or more necessity determination(s), as well as potential ensuing rulemaking(s), that the Agency may not ultimately

be required to undertake. EPA therefore respectfully requests that the Court stay its order of September 20, 2013.

Counsel for EPA has consulted with counsel for Plaintiffs Gulf Restoration Network, et al. (collectively “Plaintiffs”) and all Intervenors, and is informed that (1) Plaintiffs oppose this motion, (2) State Intervenors do not oppose this motion; and (3) those Non-State Intervenors that have responded as of this writing do not oppose this motion.¹ EPA will inform the Court if it learns of any additional opposition to its Motion for Stay.

February 11, 2014

Respectfully submitted,

Robert G. Dreher
Acting Assistant Attorney General
United States Department of Justice
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/s Angeline Purdy

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¹ Counsel for the following Non-State Intervenors have stated that they do not oppose the Motion for Stay: American Farm Bureau Federation; The Fertilizer Institute; National Pork Producers Council; Agricultural Retailers Association; National Corn Growers Association; Arkansas Farm Bureau Federation; Illinois Farm Bureau; Iowa Farm Bureau Federation; Kansas Farm Bureau; Kentucky Farm Bureau; Louisiana Farm Bureau Federation; Minnesota Farm Bureau Federation; Mississippi Farm Bureau Federation; Missouri Farm Bureau; Nebraska Farm Bureau Federation; Oklahoma Farm Bureau; South Dakota Farm Bureau Federation; Tennessee Farm Bureau Federation; Wyoming Farm Bureau; Illinois Fertilizer & Chemical Association; Missouri Agribusiness Association; Illinois Pork Producers Association; Iowa Pork Producers Association; Minnesota Pork Producers Association; Missouri Pork Association; Tennessee Pork Producers Association; Wisconsin Pork Producers Association; National Association of Clean Water Agencies; Federal Water Quality Coalition; Mosaic Fertilizer LLC

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2014, I filed the foregoing Motion together with the accompanying Memorandum via the CM/ECF system, which will electronically serve all counsel of record.

/s/ Angeline Purdy

Angeline Purdy

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GULF RESTORATION NETWORK, et al.)

Plaintiffs,)

v.)

GINA McCARTHY Administrator, United)
States Environmental Protection Agency,)
and UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY)

Defendants.)

12-cv-00677-JCZ-DEK

NOTICE OF MOTION

Pursuant to Local Rule 7.2, defendants hereby notice their Motion For Stay Pending
Appeal for submission on February 26, 2014.

February 11, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2014, I filed the foregoing Notice via the CM/ECF system, which will electronically serve all counsel of record.

/s/ Angeline Purdy

Angeline Purdy

UNITED STATES DISTRICT COURT
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Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

Pursuant to Fed. R. Civ. P. 62, Defendants Gina McCarthy, Administrator, United States Environmental Protection Agency, et al. (collectively “EPA” or “Agency”), seek a stay of this Court’s order of September 20, 2013, pending the resolution of EPA’s appeal of that ruling. Counsel for EPA has consulted with counsel for Plaintiffs Gulf Restoration Network, et al. (collectively “Plaintiffs”) and all Intervenors, and is informed that (1) Plaintiffs oppose this motion, (2) State Intervenors do not oppose this motion; and (3) those Non-State Intervenors that have responded as of this writing do not oppose this motion.¹ EPA will inform the Court if it learns of any additional opposition to its Motion for Stay.

¹ Counsel for the following Non-State Intervenors have stated that they do not oppose the Motion for Stay: American Farm Bureau Federation; The Fertilizer Institute; National Pork Producers Council; Agricultural Retailers Association; National Corn Growers Association; Arkansas Farm Bureau Federation; Illinois Farm Bureau; Iowa Farm Bureau Federation; Kansas Farm Bureau; Kentucky Farm Bureau; Louisiana Farm Bureau Federation; Minnesota Farm Bureau Federation; Mississippi Farm Bureau Federation; Missouri Farm Bureau; Nebraska Farm Bureau Federation; Oklahoma Farm Bureau; South Dakota Farm Bureau Federation; Tennessee Farm Bureau Federation; Wyoming Farm Bureau; Illinois Fertilizer & Chemical Association; Missouri Agribusiness Association; Illinois Pork Producers Association; Iowa Pork Producers

In this case Plaintiffs challenged 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), to determine whether numeric nutrient criteria are “necessary to meet the requirements of” the Act in as many as 50 states (referred to herein as a “necessity determination”). See 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, ECF No. 142 (“EPA Mem.”) at 8-10. In denying the petition, EPA acknowledged that nutrient pollution causes significant water quality problems, but nonetheless declined to make a necessity determination. As EPA explained, in the Agency’s view the most effective way to address nutrient pollution, and the most effective use of Agency resources at this time, is for EPA to continue to work cooperatively with states and other entities to strengthen nutrient pollution controls. Id.

The Court denied EPA’s Motion to Dismiss and granted Plaintiffs’ Motion for Summary Judgment in part, holding that (1) EPA’s decision not to make a necessity determination is not “committed to agency discretion by law,” and is therefore reviewable, and (2) EPA could not lawfully refuse to make a necessity determination in response to Plaintiffs’ rulemaking petition. The Court then remanded the matter to EPA to make such a determination within 180 days. See Order and Reasons of September 20, 2013, ECF No. 175 (“Order”) at 9, 15. In order to preserve its appeal rights, EPA timely filed a Notice of Appeal; however, it was not until February 10, 2014, that the required internal review process was complete and EPA was authorized to pursue appellate review of the Order. See infra at 7-8.

Association; Minnesota Pork Producers Association; Missouri Pork Association; Tennessee Pork Producers Association; Wisconsin Pork Producers Association; National Association of Clean Water Agencies; Federal Water Quality Coalition; Mosaic Fertilizer LLC

A stay of the Order to maintain the status quo pending appeal is warranted because (1) EPA is likely to succeed on the merits of its appeal, and has at a minimum presented a substantial case on a serious legal question; (2) if the Order is not stayed and EPA is required to make a necessity determination, EPA's appeal rights will be compromised and there will be no way to restore the status quo; (3) given that even a positive necessity determination would be no more than a precursor to the development of actual nutrient criteria, which development would require a thorough rulemaking process, a stay of the order requiring EPA to make such a determination would not substantially harm Plaintiffs; and (4) granting a stay would serve the public interest by preventing the expenditure of scarce Agency resources making one or more necessity determination(s), as well as potential ensuing rulemaking(s), that the Agency may not ultimately be required to undertake. EPA therefore respectfully requests that the Court stay its order of September 20, 2013.

BACKGROUND

A. STATUTORY AND REGULATORY BACKGROUND.

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 once 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 or disapproval. *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 propose and promulgate a standard for the waters involved. Id. § 1313(c)(4)(A).

The Act thus contemplates that states bear the primary responsibility for adopting water quality standards within their borders. See 33 U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution. . . .”). Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), nonetheless provides EPA with backstop authority to determine whether new or revised water quality standards are “necessary to meet the requirements” of the Act. If EPA determines that a new or revised standard is necessary, EPA “shall promptly prepare and publish proposed regulations setting forth” the required standard. 33 U.S.C. § 1313(c)(4). EPA must then promulgate a final standard within 90 days of the publication of the proposal, unless the relevant state has first adopted a new or revised standard that EPA determines conforms to the Act. Id.

B. FACTUAL BACKGROUND.

1. Nutrient Pollution in the Mississippi River Basin and EPA’s Ongoing Response.

Nutrient pollution caused by nitrogen and phosphorous is a significant nationwide water quality problem. July 29, 2011 Letter from Michael S. Shapiro (“Denial”), Ex. A, at 1-2.² Nutrient pollution is of particular concern in the Mississippi River Basin, where nutrient loadings both harm upstream water quality and contribute significantly to a hypoxic “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. See EPA Mem. at 4-5.

² Bates-stamped exhibit pages are cited by their concluding digits, eliminating the “EPA-MARB0000__” prefix.

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. Id.; see generally March 16, 2011 Memorandum from Nancy K. Stoner (“Framework Memo”), Ex. B; EPA Mem. at 4-8. EPA’s view is that although it has multiple regulatory tools at its disposal, its resources are best employed in catalyzing state action. Framework Memo at 681; see also Denial at 4. Among other things, EPA is encouraging and assisting states in developing numeric nutrient criteria. See Denial at 2-3; Framework Memo at 681-82, 684-85. For example, EPA has worked in recent years with the states of Minnesota and Wisconsin to develop approvable numeric nutrient criteria in both states. Denial at 2.

2. Plaintiffs’ Rulemaking Petition and EPA’s Denial.

In July 2008, Plaintiffs petitioned EPA to establish federal numeric nutrient criteria “for *all water bodies in all states* for which numeric water quality standards controlling nitrogen and phosphorus pollution have not yet been established.” Petition For Rulemaking Under The Clean Water Act (“Petition”), Ex. C (excerpt), at 11. Plaintiffs alleged that most states had not adopted any numeric nutrient criteria for the relevant pollutants, and that no state had adopted numeric nutrient criteria for all such pollutants. See Petition at 10-11. Plaintiffs thus were asking EPA to propose and finalize numeric nutrient criteria covering every lake, stream, estuary and coastal water classified as a navigable water that did not already have such criteria. As an alternative, Plaintiffs requested that EPA establish such criteria “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 numeric criteria to control nutrient pollution “in the mainstem of the Mississippi River and the Northern Gulf of Mexico [i.e., for 10 states].” See Petition at 12.

EPA denied Plaintiffs' petition on July 29, 2011. EPA acknowledged that nutrient pollution creates 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 2-4. 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 on a regional or national scale. Id. at 4. EPA did not, however, determine that numeric nutrient criteria are *not* necessary to meet the requirements of the Act – only that making the determination(s) that Plaintiffs requested, and potentially thereafter promulgating criteria on a sweeping scale, is not the best use of EPA's limited resources at this time. Id. at 4, 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. at 6.

3. Plaintiffs' Challenge and the Court's Ruling.

Plaintiffs filed suit under the Administrative Procedure Act ("APA"), alleging that EPA's denial of their rulemaking petition was arbitrary, capricious, or otherwise contrary to law. Plaintiffs moved for summary judgment, and EPA cross-moved to dismiss or, in the alternative, for summary judgment.

EPA's Motion to Dismiss argued that EPA's decision whether to exercise its Section 303(c)(4)(B) authority is "committed to agency discretion by law," and that therefore a decision not to make a necessity determination is unreviewable under the APA. 5 U.S.C. § 701(a)(2); EPA Mem. at 12-15. The Court rejected this argument, holding that determining whether EPA

could decline to make a necessity determination, and the factors it may consider, present “legal questions that this Court can decide without eroding any of the deference owed to EPA.” Order at 9; see generally id. at 6-9. The Court therefore denied EPA’s Motion to Dismiss. Id.

The Court then held on the merits that Massachusetts v. EPA, 549 U.S. 497 (2007), requires EPA to make either a positive or negative necessity determination in response to Plaintiffs’ petition. See Order at 12 (finding in Massachusetts an “implicit conclusion that EPA lacks the discretion to simply decline to make the threshold determination in response to a rulemaking petition even where the statutory text does not explicitly require it to do so.”); see generally id. at 9-13. The Court further held, however, that in making a necessity determination under Section 303(c)(4)(B), EPA is not constrained to considering only scientific data (as Plaintiffs had argued), but may also consider non-scientific factors such as those cited in the Denial. Order at 15; see generally id. at 13-15.

The Court therefore remanded the matter to EPA to make a necessity determination “consistent with the requirements of Massachusetts v. EPA” as explained in the Order. Order at 15. The Court ordered EPA to make this determination within 180 days from the date of the Order, i.e., by March 19, 2014. See id.

4. EPA’s Appeal.

Authority to approve an appeal of an adverse district court decision rests solely with the Solicitor General in DOJ. See 28 C.F.R. § 0.20(b). Before a proposed appeal can be submitted to the Solicitor General for authorization, however, both DOJ and EPA must go through a multi-stage internal review and recommendation process. In this case, the review process had scarcely begun when, on September 30, 2013 (ten days after the Order was entered), appropriations to most federal agencies lapsed. Absent an appropriation, DOJ attorneys and EPA employees are

prohibited from working, even on a voluntary basis, except in very limited circumstances. See 31 U.S.C. § 1342. The internal appeal review and recommendation process did not fall within these limited circumstances; thus, federal employees were precluded from working on this matter from October 1, 2013, until the government re-opened on October 17, 2013.

EPA's deadline to appeal the September 20 Order was November 19, 2013. See Fed. R. App. P. 4(a)(1)(B). Although the review process was not yet complete, Rule 4(a)'s deadlines for filing an appeal are "mandatory and jurisdictional." Bowles v. Russell, 551 U.S. 205, 209-10 (2007) (citations omitted); see also In re Berman-Smith, 737 F.3d 997, 1001 (5th Cir. 2013). EPA therefore filed a notice of appeal on November 18, 2013, as a protective matter. See ECF No. 177. Until all stages of the internal review process were complete and the matter was both submitted to and approved by the Solicitor General, however, EPA was not authorized to pursue appellate review of the Order. EPA received the requisite approval on February 10, 2014, and promptly thereafter filed this Motion For Stay Pending Appeal.

ARGUMENT

"No court can make time stand still while it considers an appeal"; thus, courts have long possessed the authority to stay a final judgment pending appeal.³ Nken v. Holder, 556 U.S. 418, 421 (2009) (citation omitted). The moving party bears the burden of showing that a stay is warranted. See id. at 433-34. In determining whether this burden has been satisfied, courts traditionally evaluate:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether

³ A party seeking to have an order or judgment stayed pending appeal "must ordinarily move first in the district court," Fed. R. App. P. 8(a)(1), where motions to stay are governed by Rule 62. See United States v. Transocean Deepwater Drilling Inc., No. H-11-3638, 2013 WL 3049299 (S.D. Tex. June 17, 2013) at *1 n.1.

issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citation omitted); see also Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981) (“Ruiz I”).

The Fifth Circuit does not, however, apply these factors “in a rigid, mechanical fashion.” United States v. Baylor Univ. Med. Cent., 711 F.2d 38, 39 (5th Cir.1983). In particular, “when a serious legal question is involved and . . . the balance of equities weighs heavily in favor of granting the stay,” a movant “need only present a substantial case on the merits.” Id. (citation omitted); see also Ruiz v. Estelle, 666 F.2d 854, 857 (5th Cir. 1982) (court may issue stay where balance of equities tips heavily in movant’s favor and legal issue is one of “patent substantial merit”).

A. EPA IS LIKELY TO SUCCEED ON THE MERITS, AND AT A MINIMUM HAS PRESENTED A SUBSTANTIAL CASE ON THE MERITS CONCERNING SERIOUS LEGAL QUESTIONS.

1. EPA’s Decision Whether To Exercise Its Section 303(c)(4)(B) Authority Is Committed To Agency Discretion By Law.

Plaintiffs brought suit under the Administrative Procedure Act (“APA”), which provides that a person “adversely affected or aggrieved” by a final agency action is entitled to judicial review. 5 U.S.C. §§ 702, 704. 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)(2); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (citation omitted). There is “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) states that EPA “shall” establish water quality standards – but only if EPA first determines that such standards are “necessary to meet the requirements of this chapter.” 33 U.S.C. § 1313(c)(4)(B). The statute says nothing about when or under what

circumstances EPA may exercise this authority. Cf. Webster v. Doe, 486 U.S. 592, 600 (1988) (noting that Section 701(a)(2) “requires careful examination of the statute on which the claim of agency illegality is based”). The one district court that previously considered the issue in detail thus concluded that there is no meaningful standard against which to judge EPA’s decision whether to make a necessity determination. See Missouri Coalition for the Env’t Found. v. Jackson, 853 F. Supp. 2d 903, 911 (W.D. Mo. 2012) (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.” . As the court elaborated in Missouri Coalition:

[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); 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)”). Because there is no meaningful standard against which to judge EPA’s decision whether to exercise its authority to make a necessity determination under Section 303(c)(4)(B), the Court lacked jurisdiction to review EPA’s denial of a rulemaking petition asking EPA to do so. See Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv., 677 F.3d 1073, 1084-85 (11th Cir. 2012) (denial of rulemaking petition was unreviewable where agency decisionmaking under underlying statute was committed to agency discretion by law); EPA Mem. at 12-15; Reply in Support of EPA’s Motion to Dismiss Or In The Alternative For Summary Judgment, ECF No. 171 (“EPA Reply”) at 4-8.

In holding that it had jurisdiction to review EPA's denial of the rulemaking petition, the Court correctly noted that the exception for agency actions committed to agency discretion by law is "a very narrow one." Order at 8. The Court did not, however, address Missouri Coalition or any of the other district court decisions that have touched on this issue – it simply held that the issue of whether EPA could decline to make a necessity determination in response to Plaintiffs' petition presented a "legal question[]" the Court could decide "without eroding any of the deference owed to EPA." Order at 9. For purposes of determining whether the Court has jurisdiction, however, what is significant is not whether a question is legal or factual – rather, it is *whether there are meaningful standards to guide the Court's review of that question*, whatever its nature. To be clear, EPA does not dispute that there would be "law to apply" had EPA made a necessity determination (whether positive or negative). In this case, however, EPA made no such determination – it simply declined to exercise its discretion under Section 303(c)(4)(B) at all.

Instead of identifying factors that may be used to guide judicial review of a decision not to make a necessity determination, the Court appears to have viewed the jurisdictional question as having been resolved by Massachusetts, which the Court read as *requiring* EPA to make such a determination in response to Plaintiffs' rulemaking petition. See Order at 9-13. As discussed in the next section, however, this reading of Massachusetts is flawed; moreover, this reading fails to account for the key language in the statute at issue in Massachusetts that "expressly curtail[ed] the exercise of [EPA's] discretion when it denie[d] a request for rulemaking." Order at 13. Section 303(c)(4)(B) contains no such discretion-limiting language. EPA therefore respectfully submits that it is likely to succeed on the merits of its argument that the Court lacked jurisdiction over Plaintiffs' Complaint. At a minimum, however, the question of whether the Court has

jurisdiction under the APA presents a serious legal question as to which EPA has presented a substantial case on the merits. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (“The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States, and is inflexible and without exception.”) (citation omitted).

2. Under Governing Supreme Court Precedent, EPA May Decline To Make A Necessity Determination As Long As It Offers A Reasonable Explanation For Its Decision.

The Court’s holding that EPA is required to make either a positive or negative necessity determination in response to Plaintiffs’ petition turns entirely on the Court’s reading of Massachusetts v. EPA. See Order at 12-15. In Massachusetts, the Supreme Court reviewed EPA’s denial of a rulemaking petition submitted pursuant to Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), which states that EPA “shall” regulate air pollutant emissions from certain classes of motor vehicles if, in EPA’s judgment, those emissions “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Multiple private organizations filed a rulemaking petition requesting that EPA regulate greenhouse gas emissions from new motor vehicles under this provision. 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. Id. at 511; see generally id. at 510-14.

The Supreme 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 generally id. at 528-34. The Court elaborated on the latter point, however, stating that “[u]nder the clear terms of the Clean Air Act” EPA could avoid regulation “only if it determines [in

response to a rulemaking petition] that greenhouse gases do not contribute to climate change *or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.*” Id. at 533 (emphasis added); see also id. at 535 (EPA must “ground its reasons for action or inaction in the statute”); Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2533 (2011) (“Because EPA had authority to set greenhouse gas emission standards *and had offered no reasoned explanation for failing to do so*, [Massachusetts] concluded that the agency had not acted in accordance with law when it denied the requested rulemaking.”) (emphasis added) (internal quotation marks and citation omitted); see also EPA Reply, at 9-13.

EPA respectfully submits that the Court’s holding that EPA *must* make a necessity determination is inconsistent with Massachusetts, under which EPA retains the ability to respond to Plaintiffs’ petition by providing a “reasonable explanation as to why it cannot or will not exercise its discretion” to make a necessity determination. Any such “reasonable explanation” for refusing to make a necessity determination must, of course, be consistent with the Clean Water Act. See generally EPA Mem. at 16-20, 24-25; EPA Reply at 10-13. The Court did not, however, hold that EPA’s explanation for declining to make a necessity determination was unreasonable or inconsistent with the Act – instead, it held that EPA could not decline to make such a determination *at all*, regardless of the reasons proffered. See Order at 12-13. Because this holding is inconsistent with Massachusetts, EPA is likely to succeed on the merits of its appeal of the Court’s ruling on summary judgment.

At a minimum, this case presents a “serious legal question” as to which EPA has made out a substantial case on the merits. See Baylor, 711 F.2d at 40 (finding with “little difficulty” that categorization of Medicare and Medicaid payments raised a “serious legal question that could have a broad impact upon federal/state relations”); see also In re Ingram, No. 12-431, 2012

WL 6840538 (E.D. La. April 30, 2012), at *2 (in Fifth Circuit, serious legal question is one that will broadly impact rights or responsibilities of individuals or governments). As discussed in the next section, either a positive or a negative necessity determination will have a “broad impact” on EPA’s regulatory obligations and its relations with states, as well as a potential impact on states’ own efforts to develop nutrient criteria. Any interference in federal/state relations is particularly significant in the context of the Act, which “anticipates a partnership between the States and the Federal Government.” Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).

EPA is thus likely to succeed on the merits, and at a minimum has presented a substantial case on the merits concerning serious legal questions. For the reasons discussed in the following sections, moreover, the balance of equities tips strongly in favor of granting a stay.

B. EPA WILL BE IRREPARABLY INJURED ABSENT A STAY.

The underlying purpose of a stay is “to prevent irreparable injury so as to preserve the court’s ability to render a meaningful decision on the merits.” Canal Auth. of Florida v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974) (discussing preliminary injunction standard); see also Smith & Nephew, Inc. v. Arthrex, Inc., No. 2:07-CV-335-TJW-CE, 2010 WL 2522428 (E.D. Tex. June 18, 2010), at *2 (purpose of stay pending appeal is “preventative or protective,” as stay “seeks to maintain the status quo pending a final determination of the merits of the suit”) (citation omitted). Irreparable injury is thus established where the right of appeal would be moot absent a stay, and there is no way to restore the status quo following even a favorable decision on appeal. See Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); see also John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, Circuit Justice) (fact that action required by court order would moot one aspect of case would create irreparable injury).

EPA will suffer irreparable injury if it is required to make a necessity determination before its appeal is resolved. EPA's action would very likely render its appeal of substantial legal issues moot, in which case EPA would lose the opportunity to obtain review of an erroneous decision with a potentially significant impact on EPA's administration of the Act. Even if EPA's action somehow did not render its appeal moot, moreover, there would be no way to thereafter restore the status quo if that appeal were successful. If EPA determines that numeric nutrient criteria *are* necessary in one or more states, EPA will be statutorily compelled to begin the time-consuming process of developing and promulgating such criteria, inevitably consuming limited and unrecoverable Agency resources that would otherwise have been available for other purposes. See 33 U.S.C. § 1313(c)(4) (EPA "shall" propose and promulgate water quality standards following necessity determination). The push towards the adoption of federal standards that would follow a positive necessity determination also potentially interferes with the Clean Water Act's "vigorous federalism," United States v. Homestake Mining Co., 595 F. 2d 421, 429 (8th Cir. 1979) – to say nothing of EPA's own policies – by injecting EPA into the regulatory process against its better judgment. See Framework Memo at 680 (noting EPA's "commitment to *partnering* with states" (emphasis added)); id. at 681 (favoring "catalyzing and supporting action by states that want to protect their waters from nitrogen and phosphorous pollution"). If, on the other hand, EPA determines that numeric nutrient criteria are *not* necessary, states may be discouraged from developing such criteria, thus interfering with EPA's efforts to promote state action in this arena.

A decision by the Court of Appeals that EPA was not required to make a necessity determination at all (provided, of course, that EPA offered a reasonable explanation for declining to do so) would not unring either of these bells, as EPA would not be able to withdraw either a

positive or a negative necessity determination without adequate justification. See Acadian Gas Pipeline Sys. v. FERC, 878 F.2d 865, 870 (5th Cir. 1989) (an agency changing course must provide a reasoned explanation). Nor would EPA be able to recover Agency resources expended on one or more potentially needless necessity determination(s) and the possible ensuing regulatory process. If the requirement that EPA make a necessity determination is not stayed, EPA will therefore suffer irreparable injury by being unable to secure meaningful review of the Order. See Providence Journal Co., 595 F.2d at 890 (finding stay justified where hardship to plaintiffs was outweighed by “the total and immediate divestiture of appellants’ rights to have effective review” if stay was not granted).

C. A STAY WILL NOT SUBSTANTIALLY INJURE PLAINTIFFS.

In contrast to the harm that would accrue to EPA if EPA is denied the opportunity to refrain from making a necessity determination pending appeal, Plaintiffs will not suffer significant harm if the Order is stayed. Initially, there is no reason to believe that the appeal process will be unduly protracted. For the year ending September 30, 2013, the median time from filing a notice of appeal to disposition in the Fifth Circuit was approximately nine months. See Ex. D.⁴ EPA’s Notice of Appeal was filed in November 2013, and EPA’s opening brief is due on February 20; thus, it seems likely that EPA’s appeal will be resolved by fall 2014.

In assessing the potential harm to Plaintiffs, it is important to bear in mind that even if EPA were to make a positive necessity determination on March 19, *that would only be the first step towards federal regulation*. Numeric nutrient criteria would not follow immediately on the heels of such a determination. Such criteria would, in fact, take a significant amount of time to develop and propose, see EPA Mem. at 25-27 – in all likelihood, longer than it will take to

⁴ Retrieved from <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/courts-appeals-september-2013.aspx> (last visited February 10, 2014).

resolve EPA's appeal. If EPA prevails on appeal, Plaintiffs thus will have lost nothing by a stay other than a necessity determination that EPA was never obligated to make. If, on the other hand, Plaintiffs prevail, EPA will ultimately make a necessity determination, albeit at a slightly later date. In the meantime, moreover, EPA will proceed with the work that it is already doing with states, tribes, and other federal agencies to reduce nutrient pollution and develop numeric nutrient criteria as appropriate. See EPA Mem. at 4-8. A stay thus will do nothing to delay existing progress towards reduction of nutrient pollution.

D. THE PUBLIC INTEREST FAVORS A STAY.

As discussed supra at 14-16, a stay would serve the public interest by protecting the integrity of the appeal process and ensuring that EPA can receive meaningful review. Cf. In re Butan Valley, N.V., No. 07-36856, 2009 WL 941508 (S.D. Tex. April 6, 2009), at *2 (recognizing principle that public interest favors having appeals decided on merits and not rendered moot). A stay would also serve the public interest by protecting EPA from expending a substantial portion of its limited resources on one or more potentially needless necessity determinations, to say nothing of any ensuing regulatory process. See Ruiz I, 650 F.2d at 569 (public interest was best served by maintaining status quo until merits of appeal were resolved, rather than by requiring state to comply with particular provision of injunction; if state prevailed on appeal, public would be served by state having avoided burden of implementing injunction by deadline imposed in order). And in the meantime, the public's interest in environmental protection is preserved by EPA's ongoing work with respect to control and reduction of nutrient pollution and development of nutrient criteria (as appropriate) by states and authorized tribes. A stay of the Order pending appeal is therefore in the public interest.

CONCLUSION

For the foregoing reasons, EPA's Motion for Stay should be granted.

February 11, 2014

Respectfully submitted,

Robert G. Dreher
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United States Department of Justice
Environment and Natural Resources
Division

s/ Angeline Purdy

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GULF RESTORATION NETWORK, et al. v. EPA

No. 12-677

EPA'S MOTION TO STAY

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 29 2011

OFFICE OF
WATER

Kevin Reuther
Legal Director
Minnesota Center for
Environmental Advocacy
26 E. Exchange Street, Suite 206
St. Paul, MN 55101-1167

Albert Ettinger
53 W. Jackson Suite 1664
Chicago, IL 60604

Dear Mr. Reuther and Mr. Ettinger:

We have reviewed and considered your letter to Administrator Jackson from April 11, 2011, and your Petition on behalf of thirteen organizations from July 30, 2008. This letter constitutes the U.S. Environmental Protection Agency's (EPA) response to your letter and Petition. While the EPA is in agreement with many of your environmental concerns, we are denying the petition for the reasons explained below. We do not believe that the comprehensive use of federal rulemaking authority is the most effective or practical means of addressing these concerns at this time.

You request that the EPA conduct rulemaking to: (1) develop and promulgate numeric water quality standards¹ for nutrients (i.e., nitrogen, phosphorus, chlorophyll *a* and turbidity) for all navigable waters in all 50 states where such criteria do not already exist; (2) promulgate such criteria for the Mississippi-Atchafalaya River Basin (MARB) and the northern Gulf of Mexico (i.e., 31 states) in the alternative; and (3) promulgate the same numeric water quality standards for nutrients in the states along the mainstem of the Mississippi River and the northern Gulf of Mexico (i.e., 10 states) at a minimum. Your Petition also requests that the EPA establish total maximum daily loads (TMDLs) for nitrogen (N) and phosphorus (P) for: (1) the mainstem of the Mississippi River and every segment thereof; (2) the tributaries of the Mississippi River that do not meet the criteria the EPA establishes for N or P; (3) the portion of the contiguous zone within the Gulf of Mexico; and (4) the portion of the ocean that is within the coverage of the Clean Water Act (CWA) in the Gulf of Mexico.

The EPA agrees that N and P pollution presents a significant water quality problem facing our nation. N and P pollution in both fresh and marine systems can significantly impact aquatic life and long-term ecosystem health, diversity, and balance. More specifically, high N and P

¹ Wherever the Petition requests that numeric nutrient water quality "standards" be promulgated, EPA understood this to mean numeric nutrient criteria (NNC).

loadings result in the increasing prevalence of harmful algal blooms, reduced spawning grounds and nursery habitats, fish kills, and oxygen-starved hypoxic or “dead” zones. Public health concerns related to N and P pollution include impaired surface and groundwater drinking water sources from high levels of nitrates, formation of disinfection byproducts in drinking water, and increased exposure of swimmers to toxic microbes such as cyanobacteria.^{2,3} Lastly, degradation of water bodies from N and P pollution and eutrophication can result in economic consequences, such as increased costs for drinking water treatment, reduced property values for stream and lakefront areas, commercial fishery losses, and lost revenue from recreational fishing, boating trips, and other tourism-related businesses.

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

As the Agency has previously recognized, reducing N and P pollution is and should be a high priority for EPA’s water programs. On March 16, 2011, EPA released a memorandum entitled “Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions”⁴ (Framework Memo). The Framework Memo synthesizes key principles that guide Agency technical assistance and collaboration with states and places a strong emphasis on working with states to achieve near-term reductions in nutrient loadings. The Framework Memo includes recommended elements of a State Nutrients Framework as a tool to guide ongoing collaboration between the EPA and states and among federal, state, and local partners in our joint effort to make progress on reducing N and P pollution. Development of numeric nutrient criteria is one aspect of this coordinated and comprehensive approach.

We are taking several actions to provide technical assistance to states in the MARB for the development of numeric nutrient criteria (NNC), including: (1) the analysis of state and national data sets for setting nutrient thresholds; (2) the use of new data analysis tools; and (3) reviews of the scientific defensibility of draft and proposed NNC. For example, Minnesota adopted numeric phosphorus, chlorophyll *a*, and Secchi depth criteria for all lakes statewide in 2008. The EPA worked closely with the State early in the process and during rulemaking by providing technical input to ensure that the criteria were scientifically defensible. In 2010, Wisconsin adopted numeric phosphorus criteria for rivers and lakes statewide and at the same time adopted NPDES rules for implementation of those phosphorus criteria. The EPA similarly worked closely with Wisconsin in providing both technical and programmatic guidance for the development of NNC for phosphorus, which the Agency recently approved, and for the development of NPDES implementation rules, which EPA is presently reviewing.

² Villanueva, C.M. *et al.*, 2006. Bladder Cancer and Exposure to Water Disinfection By-Products through Ingestion, Bathing, Showering, and Swimming in Pools. *American Journal of Epidemiology* 165(2):148–156.

³ USEPA. 2009. *What is in Our Drinking Water?*. United States Environmental Protection Agency, Office of Research and Development. <http://www.epa.gov/extrmurl/research/process/drinkingwater.html>. Accessed December 2009

⁴ http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/memo_nitrogen_framework.pdf

The CWA and the EPA's implementing regulations at 40 CFR Part 131 require states and authorized tribes to designate the use(s) for waters within their jurisdiction, and to adopt water quality criteria to support and protect those uses. The EPA has provided to states and authorized tribes guidance, technical assistance, and publications of recommended criteria for pollutants, including N and P at the ecoregional level.⁵ The EPA has also published a number of guidance documents outlining different approaches for developing NNC by waterbody type.⁶ The EPA continues to be engaged and committed to providing the most current scientific information to strengthen the underlying rationale and defensibility of the criteria development process. Some of these efforts have included, but are not limited to: (1) the publication of an additional NNC development technical support document on use of stressor-response approaches;⁷ (2) providing technical support to MARB states to develop NNC through N-STEPS⁸ (Nutrient Scientific, Technical Exchange, Partnership and Support); (3) continuing to strengthen and communicate the science that supports NNC development to state water quality agencies and the public;⁹ (4) consulting with the EPA's Science Advisory Board regarding scientific methods to develop numeric nutrient criteria;¹⁰ and (5) engaging with state coalition efforts to advance NNC development.¹¹

The EPA is also improving its tracking, accountability and transparency tools to measure state progress towards developing and adopting N and P criteria. The EPA has established three new measures addressing proposal and adoption of N and P criteria for states and territories for the following major waterbody types: (1) lakes and reservoirs (excluding the Great Lakes); (2) rivers and streams; and (3) estuaries.¹² The first two cumulative measures indicate state progress from year to year. Under the first measure, a state receives credit when it adopts an N or P criterion that covers an entire major waterbody type; the EPA must approve each criterion in order to receive the credit. Similarly, the second measure gives credit for each N or P criterion a state proposes¹³ for each major water type. The third measure indicates whether a state is providing current and specific milestone information regarding N and P criteria adoption for three or more waterbody types. Complete details for these accountability measures are included within the EPA's *National Water Program Guidance*.¹⁴

⁵ <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/ecoregions/index.cfm>

⁶ http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/guidance_index.cfm

⁷ <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/finalstressor2010.pdf>

⁸ <http://n-steps.tetrattech-ffx.com/>

⁹ <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/>, <http://n-steps.tetrattech-ffx.com/>

¹⁰ <http://yosemite.epa.gov/sab/sabproduct.nsf/95eac6037dbec075852573a00075f732/5972e2a88464d45e85257591006649d0!OpenDocument>;

http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/FL%20Estuaries%20TSD?OpenDocument

¹¹ <http://www.gulfofmexicoalliance.org/index.php>, <http://www.neiwpcc.org/>, <http://www.orsanco.org/>

¹² http://water.epa.gov/aboutow/goals_objectives/waterplan/def_wq11.cfm#WQ-1

¹³ "Proposed (in WQ-1b) by states and territories means that a state or territorial agency has either (a) proposed and published the criteria for public comment, (b) formally provided the criteria for review to a legislative body, legislative committee, public commission, or similar body as part of a prescribed regulatory process, (c) recommended the criteria to a legislature, public commission, or agency responsible for promulgating standards under its own public process, or (d) otherwise issued the draft criteria to begin a similar public process. For federal promulgations, proposed means that EPA has issued a Federal Register notice of proposed rulemaking that seeks public comment."

¹⁴ http://water.epa.gov/aboutow/goals_objectives/waterplan/def_wq11.cfm#WQ-1

In addition to working with upstream states in the MARB, EPA is playing a lead role in addressing Gulf Hypoxia. The EPA Administrator chairs the Gulf Coast Ecosystem Restoration Task Force. The Task Force was created by President Obama through Executive Order 13554, is comprised of five Gulf states and 11 federal organizations, and is charged with developing a restoration strategy that proposes a Gulf Coast ecosystem restoration agenda that could potentially address a range of priority water quality issues, including Gulf Hypoxia. The EPA also co-chairs the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force (Gulf Hypoxia Task Force), which is comprised of 17 state and federal agencies. The Gulf Hypoxia Task Force provides a forum for state water quality and agriculture agencies to partner on local, state, and regional efforts to mitigate nutrient loading, encouraging a holistic approach that takes into account upstream sources and downstream impacts. The federal agency partners on the Task Force are providing coordinated support as states move forward to develop nutrient reduction strategies/state frameworks for managing N and P pollution in the MARB.

Finally, the EPA continues to work with USDA and USGS to focus on achieving water quality goals throughout the Mississippi River watershed and in the Gulf of Mexico. These federal agencies are collectively working to coordinate implementation of projects funded under the USDA Natural Resource Conservation Service's "Mississippi River Basin Initiative" (MRBI) with the goals and implementation strategies of CWA section 319 watershed plans, TMDLs, and other relevant state plans. The EPA, USDA, and USGS are also targeting monitoring investments to best assess water quality trends and demonstrate water quality improvements. Examples of watersheds where the EPA and USDA are coordinating with local groups to reduce nitrogen and phosphorus loadings are the Root River Watershed in Minnesota and the Wabash River Watershed in Ohio and Indiana. Stewardship initiatives in these areas are coordinating across multiple USDA agencies, state agencies, the EPA, and other stakeholders to target implementation of suites of best management practices to achieve significant reductions in N and P pollution.

The EPA believes that the most effective and sustainable way to address widespread and pervasive nutrient pollution in the MARB and elsewhere is to build on these efforts and work cooperatively with states and tribes to strengthen nutrient management programs. This approach, in the Agency's judgment, is preferable to undertaking an unprecedented and complex set of rulemakings to promulgate federal NNC for a large region (or even the entire country). The development of NNC 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. Following rulemaking, implementation of federal standards simultaneously in multiple states would likewise place sizable regulatory and oversight burdens on the EPA, as well as affected states. Therefore, the Agency believes that the 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.

That is not to say that the EPA's authority to promulgate federal NNC is not a useful tool that may have a role to play in nutrient management initiatives. The EPA has used this authority in one recent instance (Florida) to develop federal NNC and retains its discretion to use it elsewhere, as appropriate. However, 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. While the EPA may at some future time use its authority in response to specific circumstances, the EPA's current approach, consistent with the CWA and Agency policy, is to address N and P pollution and accelerate state adoption of NNC by working in partnership with states and stakeholders to reduce nutrient loadings from both point and non-point sources.

The petition also asks that the EPA take the significant step of establishing *federal* N and P TMDLs for the entire Mississippi River mainstem, all the mainstem's impaired tributaries, and certain portions of the Gulf of Mexico. Generally, the development of lists of impaired waters and TMDLs, and the submission of those lists and TMDLs to EPA for review and approval, is the responsibility of the states. CWA section 303(d); 40 CFR section 130.7(b) (1); 40 CFR section 130.7(c) (1); 40 CFR section 130.7(d). As is the case with water quality standards, the EPA has broad discretion regarding coordination and oversight of state development of impaired waters lists and TMDLs. For the MARB waters at issue, the EPA believes that the best use of its resources and personnel is to provide national technical and policy guidance regarding impaired waters listing and TMDL development associated with nutrient pollution, working in partnership with states and stakeholders at both the national and Regional level to reduce nutrient loadings from both point and non-point sources.


The 31 MARB states have been quite active in addressing their CWA section 303(d) listing and TMDL responsibilities for nutrient-impaired waters. Of the 71,000 303(d) List impairments nationally, 15,305 (21%) can be categorized as nutrient-related.¹⁵ The 31 MARB states have listed over 10,000 nutrient-related impairments throughout the MARB. Of the 44,400 TMDLs nationally, 8,009 (19%) can be categorized as nutrient-related. All of the 31 MARB states have developed TMDLs to address nutrient-related causes of impairment. Over 5,000 nutrient-related TMDLs have been completed throughout the 31 MARB states at levels necessary to attain and maintain the applicable narrative and numeric water quality standards. Of these approximately 5,000 TMDLs, the 31 MARB states developed over 4,400 nutrient-related TMDLs, and the EPA established 682 nutrient-related TMDLs. There are likely many waters in the MARB that have yet to be assessed by the states for nutrient impairment. The EPA believes that collaborative national technical and policy support to listing and TMDL development, along with targeted state and regional efforts, is a more sustainable and likely successful approach in achieving nutrient reductions in the near and longer term than the EPA unilaterally developing impaired waters lists and TMDLs for multiple states at one time.

¹⁵ Note that "nutrient-related" is defined as including the following parent impairment categories in EPA's Assessment, TMDL Tracking and Implementation System (<http://www.epa.gov/waters/ir/>): nutrients, organic enrichment/oxygen depletion, noxious plants, algal growth, and ammonia. Database accessed on March 29, 2011.

For the above reasons, and after careful consideration of the issues you raised and actions you requested, the EPA is hereby denying the Petition. In taking this action, the EPA is not determining that NNC are not necessary to meet CWA requirements with respect to the waters you identified. Rather, in this petition response, EPA is exercising its discretion to allocate its resources in a manner that supports targeted regional and state activities to accomplish our mutual goals of reducing N and P pollution and accelerating the development and adoption of state approaches to controlling N and P.¹⁶

The EPA agrees that N and P pollution is a significant water quality problem in the MARB and northern Gulf of Mexico. The EPA also recognizes that nutrient over-enrichment and eutrophication is a national problem that requires state action with strong technical support and oversight from the EPA. As an important national priority, the EPA is strongly committed to working in partnership with other federal agencies, state and local agencies, and other stakeholders in promoting the development and adoption of effective nutrient controls and developing TMDLs where they are needed. The EPA will periodically assess progress and, as provided in the Framework Memo, is not foreclosing the possibility that there may be circumstances where, despite the best efforts of all, Agency action may be appropriate and the EPA could exercise its CWA section 303(c)(4)(B) authority.

Sincerely,



Michael H. Shapiro
Deputy Assistant Administrator

¹⁶ EPA lacks clear legal authority to promulgate NNC for the contiguous zone of U.S. coastal waters, i.e., the portion of the Gulf of Mexico beyond the territorial sea, which is requested in the Petition. These waters are not considered navigable waters or Waters of the U.S. under CWA sections 303(c) and 502.

GULF RESTORATION NETWORK, et al. v. EPA

No. 12-677

EPA'S MOTION TO STAY

EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 16 2011

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions

FROM: Nancy K. Stoner
Acting Assistant Administrator

A handwritten signature in black ink, appearing to read "Nancy K. Stoner", is written over the "FROM:" line.

TO: Regional Administrators, Regions 1-10

This memorandum reaffirms EPA's commitment to partnering with states and collaborating with stakeholders to make greater progress in accelerating the reduction of nitrogen and phosphorus loadings to our nation's waters. The memorandum synthesizes key principles that are guiding and that have guided Agency technical assistance and collaboration with states and urges the Regions to place new emphasis on working with states to achieve near-term reductions in nutrient loadings.

Over the last 50 years, as you know, the amount of nitrogen and phosphorus pollution entering our waters has escalated dramatically. The degradation of drinking and environmental water quality associated with excess levels of nitrogen and phosphorus in our nation's water has been studied and documented extensively, including in a recent joint report by a Task Group of senior state and EPA water quality and drinking water officials and managers.¹ As the Task Group report outlines, with U.S. population growth, nitrogen and phosphorus pollution from urban stormwater runoff, municipal wastewater discharges, air deposition, and agricultural livestock activities and row crop runoff is expected to grow as well. Nitrogen and phosphorus pollution has the potential to become one of the costliest and the most challenging environmental problems we face. A few examples of this trend include the following:

- 1) 50 percent of U.S. streams have medium to high levels of nitrogen and phosphorus.
- 2) 78 percent of assessed coastal waters exhibit eutrophication.
- 3) Nitrate drinking water violations have doubled in eight years.

¹ *An Urgent Call to Action: Report of the State-EPA Nutrients Innovations Task Group*, August 2009.

- 4) A 2010 USGS report on nutrients in ground and surface water reported that nitrates exceeded background concentrations in 64% of shallow monitoring wells in agriculture and urban areas, and exceeded EPA's Maximum Contaminant Levels for nitrates in 7% or 2,388 of sampled domestic wells.²
- 5) Algal blooms are steadily on the rise; related toxins have potentially serious health and ecological effects.

States, EPA and stakeholders, working in partnership, must make greater progress in accelerating the reduction of nitrogen and phosphorus loadings to our nation's waters. While 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. Where states are willing to step forward, we can most effectively encourage progress through on-the-ground technical assistance and dialogue with state officials and stakeholders, coupled with cooperative efforts with agencies like USDA with expertise and financial resources to spur improvement in best practices by agriculture and other important sectors.

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. Nonetheless, our prior work with states points toward a framework of key elements that state programs should incorporate to maximize progress. Thus, the Office of Water is providing the attached "Recommended Elements of a State Nutrients Framework" as a tool to guide ongoing collaboration between EPA Regions and states in their joint effort to make progress on reducing nitrogen and phosphorus pollution. I am asking that each Region use this framework as the basis for discussions with interested and willing states. The goal of these discussions should be to tailor the framework to particular state circumstances, taking into account existing tools and innovative approaches, available resources, and the need to engage all sectors and parties in order to achieve effective and sustained progress.

While the Framework recognizes the need to provide flexibility in key areas, EPA believes that certain minimum building blocks are necessary for effective programs to manage nitrogen and phosphorus pollution. Of most importance is prioritizing watersheds on a state-wide basis, setting load-reduction goals for these watersheds based on available water quality information, and then reducing loadings through a combination of strengthened permits for point-sources and reduction measures for nonpoint sources and other point sources of stormwater not designated for regulation. Our experience in almost 40 years of Clean Water Act implementation demonstrates that motivated states, using tools available under federal and state law and relying on good science and local expertise, can mobilize local governments and stakeholders to achieve significant results.

It has long been EPA's position that numeric nutrient criteria targeted at different categories of water bodies and informed by scientific understanding of the relationship between nutrient loadings and water quality impairment are ultimately necessary for effective state

² *Nutrients in the Nation's Streams and Groundwater: National Findings and Implications*, US Geological Survey, 2010.

programs. Our support for numeric standards has been expressed on several occasions, including a June 1998 National Strategy for Development of Regional Nutrient Criteria, a November 2001 national action plan for the development and establishment of numeric nutrient criteria, and a May 2007 memo from the Assistant Administrator for Water calling for accelerated progress towards the development of numeric nutrient water quality standards. As explained in that memo, numeric standards will facilitate more effective program implementation and are more efficient than site-specific application of narrative water quality standards. We believe that a substantial body of scientific data, augmented by state-specific water quality information, can be brought to bear to develop such criteria in a technically sound and cost-effective manner.

EPA's focus for nonpoint runoff of nitrogen and phosphorus pollution is on promoting proven land stewardship practices that improve water quality. EPA recognizes that the best approaches will entail States, federal agencies, conservation districts, private landowners and other stakeholders working collaboratively to develop watershed-scale plans that target the most effective practices to the acres that need it most. In addition, our efforts promote innovative approaches to accelerate implementation of agricultural practices, including through targeted stewardship incentives, certainty agreements for producers that adopt a suite of practices, and nutrient credit trading markets. We encourage federal and state agencies to work with NGOs and private sector partners to leverage resources and target those resources where they will yield the greatest outcomes. We should actively apply approaches that are succeeding in watersheds across the country.

USDA and State Departments of Agriculture are vital partners in this effort. If we are to make real progress, it is imperative that EPA and USDA continue to work together but also strengthen and broaden partnerships at both the national and state level. The key elements to success in BMP implementation continue to be sound watershed and on-farm conservation planning, sound technical assistance, appropriate and targeted financial assistance and effective monitoring. Important opportunities for collaboration include EPA monitoring support for USDA's Mississippi River Basin Initiative as well as broader efforts to use EPA section 319 funds (and other funds, as available) in coordination with USDA programs to engage creatively in work with communities and watersheds to achieve improvements in water quality.

Accordingly the attached framework envisions that as states develop numeric nutrient criteria and related schedules, they will also develop watershed scale plans for targeting adoption of the most effective agricultural practices and other appropriate loading reduction measures in areas where they are most needed. The timetable reflected in a State's criteria development schedule can be a flexible one provided the state is making meaningful near-term reductions in nutrient loadings to state waters while numeric criteria are being developed.

The attached framework is offered as a planning tool, intended to initiate conversation with states, tribes, other partners and stakeholders on how best to proceed to achieve near- and long-term reductions in nitrogen and phosphorus pollution in our nation's waters. We hope that the framework will encourage development and implementation of effective state strategies for managing nitrogen and phosphorus pollution. EPA will support states that follow the framework but, at the same time, will retain all its authorities under the Clean Water Act.

With your hard work, in partnership with the states, USDA and other partners and stakeholders, I am confident we can make meaningful and measurable near-term reductions in nitrogen and phosphorus pollution. As part of an ongoing collaborative process, I look forward to receiving feedback from each Region, interested states and tribes, and stakeholders.

Attachment

Cc: Directors, State Water Programs
Directors, Great Water Body Programs
Directors, Authorized Tribal Water Quality Standards Programs
Interstate Water Pollution Control Administrators

Recommended Elements of a State Framework for Managing Nitrogen and Phosphorus Pollution

1. Prioritize watersheds on a statewide basis for nitrogen and phosphorus loading reductions

- A. Use best available information to estimate Nitrogen (N) & Phosphorus (P) loadings delivered to rivers, streams, lakes, reservoirs, etc. in all major watersheds across the state on a Hydrologic Unit Code (HUC) 8 watershed scale or smaller watershed (or a comparable basis.)
- B. Identify major watersheds that individually or collectively account for a substantial portion of loads (e.g. 80 percent) delivered from urban and/or agriculture sources to waters in a state or directly delivered to multi-jurisdictional waters.
- C. Within each major watershed that has been identified as accounting for the substantial portion of the load, identify targeted/priority sub-watersheds on a HUC 12 or similar scale to implement targeted N & P load reduction activities. Prioritization of sub-watersheds should reflect an evaluation of receiving water problems, public and private drinking water supply impacts, N & P loadings, opportunity to address high-risk N & P problems, or other related factors.

2. Set watershed load reduction goals based upon best available information

Establish numeric goals for loading reductions for each targeted/priority sub-watershed (HUC 12 or similar scale) that will collectively reduce the majority of N & P loads from the HUC 8 major watersheds. Goals should be based upon best available physical, chemical, biological, and treatment/control information from local, state, and federal monitoring, guidance, and assistance activities including implementation of agriculture conservation practices, source water assessment evaluations, watershed planning activities, water quality assessment activities, Total Maximum Daily Loads (TMDL) implementation, and National Pollutant Discharge Elimination System (NPDES) permitting reviews.

3. Ensure effectiveness of point source permits in targeted/priority sub-watersheds for:

- A. Municipal and Industrial Wastewater Treatment Facilities that contribute to significant measurable N & P loadings;
- B. All Concentrated Animal Feeding Operations (CAFOs) that discharge or propose to discharge; and/or
- C. Urban Stormwater sources that discharge into N & P- impaired waters or are otherwise identified as a significant source.

4. Agricultural Areas

In partnership with Federal and State Agricultural partners, NGOs, private sector partners, landowners, and other stakeholders, develop watershed-scale plans that target the most effective practices where they are needed most. Look for opportunities to include innovative approaches, such as targeted stewardship incentives, certainty agreements, and N & P markets, to accelerate adoption of agricultural conservation practices. Also, incorporate lessons learned from other successful agricultural initiatives in other parts of the country.

5. Storm water and Septic systems

Identify how the State will use state, county and local government tools to assure N and P reductions from developed communities not covered by the Municipal Separate Storm Sewer Systems (MS4) program, including an evaluation of minimum criteria for septic systems, use of low impact development/ green infrastructure approaches, and/or limits on phosphorus in detergents and lawn fertilizers.

6. Accountability and verification measures

- A. Identify where and how each of the tools identified in sections 3, 4 and 5 will be used within targeted/priority sub-watersheds to assure reductions will occur.
- B. Verify that load reduction practices are in place.
- C. To assess/demonstrate progress in implementing and maintaining management activities and achieving load reductions goals: establish a baseline of existing N & P loads and current Best Management Practices (BMP) implementation in each targeted/priority sub-watershed, conduct ongoing sampling and analysis to provide regular seasonal measurements of N & P loads leaving the watershed, and provide a description and confirmation of the degree of additional BMP implementation and maintenance activities.

7. Annual public reporting of implementation activities and biannual reporting of load reductions and environmental impacts associated with each management activity in targeted watersheds

- A. Establish a process to annually report for each targeted/priority sub-watershed: status, challenges, and progress toward meeting N & P loading reduction goals, as well as specific activities the state has implemented to reduce N & P loads such as: reducing identified practices that result in excess N & P runoff and documenting and verifying implementation and maintenance of source-specific best management practices.
- B. Share annual report publically on the state's website with request for comments and feedback for an adaptive management approach to improve implementation, strengthen collaborative local, county, state, and federal partnerships, and identify additional opportunities for accelerating cost-effective N & P load reductions.

8. Develop work plan and schedule for numeric criteria development

Establish a work plan and phased schedule for N and P criteria development for classes of waters (e.g., lakes and reservoirs, or rivers and streams). The work plan and schedule should contain interim milestones including but not limited to data collection, data analysis, criteria proposal, and criteria adoption consistent with the Clean Water Act. A reasonable timetable would include developing numeric N and P criteria for at least one class of waters within the state (e.g., lakes and reservoirs, or rivers and streams) within 3-5 years (reflecting water quality and permit review cycles), and completion of criteria development in accordance with a robust, state-specific workplan and phased schedule.

GULF RESTORATION NETWORK, et al. v. EPA

No. 12-677

EPA'S MOTION TO STAY

EXHIBIT C



Washington University in St. Louis

SCHOOL OF LAW

Civil Justice Clinic
Interdisciplinary Environmental Clinic

July 30, 2008

Benjamin H. Grumbles
Assistant Administrator for Water
U.S Environmental Protection Agency
Office of Water (4101M)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Grumbles:

Please find enclosed a Petition for Rulemaking Under the Clean Water Act for Numeric Water Quality Standards for Nitrogen and Phosphorus and Total Maximum Daily Loads for the Mississippi River and the Gulf of Mexico.

This Petition is submitted on behalf of the Gulf Restoration Network, Louisiana Environmental Action Network, Tennessee Clean Water Network, Public Employees for Environmental Responsibility, Kentucky Waterways Alliance, Missouri Coalition for the Environment, Iowa Environmental Council, Prairie Rivers Network, Environmental Law & Policy Center, Midwest Environmental Advocates, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and the Sierra Club.

The Exhibits to the Petition will follow under separate cover.

If you have any questions, please call Kris Sigford at 651.223.5967, Albert Ettinger at 312.795.3707 or Elizabeth Hubertz at 314.935.8760.

Sincerely,

Elizabeth J. Hubertz

cc: Petitioners

Numeric Water Quality Standards for Nitrogen and Phosphorus and TMDLs for the Mississippi River and the Gulf of Mexico

EPA-MARB000008

human health by stimulating the growth of cyanobacteria. As the National Research Council Committee on the Mississippi River and the Clean Water Act (“NRC”)³ recently explained:

Excess nutrients in lakes, ponds, slow-moving streams, and brackish areas in the upper ends of estuaries often lead to blooms of cyanobacteria (blue-green algae) that produce toxic substances. Exposure of humans to these toxic substances through contact, inhalation of water spray, or oral ingestion can cause debilitating illness and even death. Recreational activities such as swimming and water skiing can result in exposure to contaminated water, as can being on the water in recreational or commercial fishing. Little is known about the transfer of cyanobacterial toxins into the food web, but recent studies indicate that there may be both environmental effects and human health concerns.⁴

In fact, as demonstrated by the NRC Report and by numerous documents and studies discussed below, nitrogen and phosphorus pollution:

- is causing a huge dead zone in the Gulf of Mexico that threatens numerous human and ecological communities as well as the basic health of the Gulf,
- is impairing fresh water systems in the Mississippi River Basin and in other watersheds across the country, and
- has not been addressed by effective EPA action although EPA has long recognized the massive problems caused by nitrogen and phosphorus pollution.

Moreover, although EPA has offered many plans and methods for addressing the nitrogen and phosphorus pollution problem, those plans have failed, because they have not been backed by direct action by EPA. As discussed below, it is unreasonable to expect states to develop numeric nitrogen and phosphorus standards to protect their own waters, let alone protect downstream waters which they may have little political will to protect. Further, purely voluntary programs to control nitrogen and phosphorus pollution are not getting the job done. Still further,

³ National Research Council Committee on the Mississippi River and the Clean Water Act, *Mississippi River Water Quality and the Clean Water Act: Progress, Challenges and Opportunities*, 44-45, 74 (2008), <http://nap.edu/catalog/12051.html> (“NRC Report”).

⁴ NRC Report at 45.

although EPA has claimed in the past that the states' narrative water quality standards are adequate to allow states to write National Pollutant Discharge Elimination System ("NPDES") permit limits and establish total maximum daily loads ("TMDLs") for nitrogen and phosphorus, as a practical matter, these claims are demonstrably untrue. Most states are doing precious little to control nitrogen and phosphorus pollution and as long as EPA continues its hands-off approach, the situation will not improve.

Currently, the states in the Mississippi River Basin have no numeric water quality standards for phosphorus in rivers or streams or for nitrogen in any waters. Further, most states do not even try to limit nitrogen and phosphorus discharges in NPDES permits. As a result, the impairment of fresh water systems in the Mississippi River Basin and across the country is largely uncontrolled and this year's Gulf of Mexico Dead Zone is the second largest on record. This is true even though EPA long ago recognized that important steps could be taken by the states to address the problem of nitrogen and phosphorus pollution, and that EPA has the clear authority to act if the states fail to do so. In particular, EPA has clear authority to establish numeric water quality standards governing nitrogen and phosphorus pollution under Section 303(c) of the Clean Water Act (CWA), 33 U.S.C. §1313(c), and to establish TMDLs under Section 303(d), 33 U.S.C. §1313(d). As was recently explained in the NRC Report:

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

There are currently neither federal nor state water quality standards for nutrients for most of the Mississippi River, although standards for nutrients are under development in several states. Both numerical federal quality criteria and state water quality standards for nutrients are essential precursors to reducing nutrient inputs to the river and achieving water quality objectives along the Mississippi River and for the Gulf of Mexico. A TMDL could be set for the Mississippi River and the northern Gulf of Mexico. This would entail the adoption by EPA of a numerical nutrient goal (criteria) for the terminus

of the Mississippi River and the northern Gulf of Mexico. An amount of aggregate nutrient reduction, across the entire watershed, necessary to achieve that goal then could be calculated. Each state in the Mississippi River watershed then could be assigned its equitable share of reduction. The assigned maximum load for each state then could be translated into numerical water quality criteria applicable to each state's waters.

The EPA should develop water quality criteria for nutrients in the Mississippi River and the northern Gulf of Mexico. Further, the EPA should ensure that states establish water quality standards (designated uses and water quality criteria) and TMDLs such that they protect water quality in the Mississippi River and the northern Gulf of Mexico from excessive nutrient pollution. In addition, through a process similar to that applied to the Chesapeake Bay, the EPA should develop a federal TMDL, or its functional equivalent, for the Mississippi River and the northern Gulf of Mexico.⁵

Petitioners Gulf Restoration Network, Louisiana Environmental Action Network, Tennessee Clean Water Network, Public Employees for Environmental Responsibility, Kentucky Waterways Alliance, Missouri Coalition for the Environment, Iowa Environmental Council, Prairie Rivers Network, Environmental Law & Policy Center, Midwest Environmental Advocates, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and the Sierra Club request under Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553(e), that EPA use its powers to control nitrogen and phosphorus pollution. Petitioners and/or their members commercially fish, swim, drink water, work with, recreationally fish, canoe, engage in nature study, and otherwise use water bodies that are negatively impacted by nitrogen and phosphorus pollution. For the reasons set forth in greater detail below, EPA should adopt numeric water quality standards for the portion of the ocean protected by the Clean Water Act but outside the jurisdiction of any state and for all water bodies in all states for which numeric water quality standards controlling nitrogen and phosphorus pollution have not yet been established. In the alternative, EPA should do this for the Northern Gulf of Mexico and for all

⁵ NRC Report at 137.

waters of the United States within the Mississippi River Basin. At a minimum, EPA should establish water quality standards to control nitrogen and phosphorus pollution in the mainstem of the Mississippi River and the Northern Gulf of Mexico.

Further, EPA should establish TMDLs for nitrogen and phosphorus for the Gulf of Mexico, the Mississippi River and each Mississippi River tributary that fails to meet the numeric standards set for nitrogen and phosphorus for which a TMDL has not already been prepared. In any event, EPA should prepare a TMDL for nitrogen and for phosphorus for the mainstem of the Mississippi River and the Northern Gulf of Mexico.

II. NITROGEN AND PHOSPHORUS POLLUTION NEGATIVELY AFFECTS THE GULF OF MEXICO.

Nutrient pollution is devastating the Northern Gulf of Mexico. According to many reports, including those recently drafted by the respected scientists at the NRC and the United States Environmental Protection Agency Science Advisory Board ("USEPA-SAB"), as well as by the Mississippi River/Gulf of Mexico Watershed Nutrients Task Force ("Task Force"), excessive levels of nitrogen and phosphorus — known collectively as "nutrients" — have observable and detrimental effects on saltwater environments, such as the Northern Gulf of Mexico.

The excess nitrogen and phosphorus in these systems have serious consequences, including the creation of harmful algal blooms; the development of areas of lowered dissolved oxygen known as "hypoxic zones" or "dead zones;" the loss of sub-aquatic vegetation, changes in the species composition of benthic organisms, and damage to coral reefs.⁶

⁶ NRC Report at 209; National Research Council, *Clean Coastal Waters: Understanding and Reducing the Effects of Nutrient Pollution* (2000); E. Selman, S. Greenhalgh, R. Diaz, and Z.

GULF RESTORATION NETWORK, et al. v. EPA

No. 12-677

EPA'S MOTION TO STAY

EXHIBIT D

U.S. Court of Appeals - Judicial Caseload Profile

FIFTH CIRCUIT

FIFTH CIRCUIT			12-Month Periods Ending						2013 Numerical Standing		
			Sep 30 2008	Sep 30 2009	Sep 30 2010	Sep 30 2011	Sep 30 2012	Sep 30 2013			
Actions per Panel ¹	A p p e a l s F i l e d	Number of Judgeships/ Number of Panels		17 / 5.7	17 / 5.7	17 / 5.7	17 / 5.7	17 / 5.7			
		Number of Sitting Senior Judges		4	5	5	6	7	7		
		Number of Vacant Judgeship Months ²		7.2	1.7	12.0	16.5	10.8	24.0		
		Total		1,353	1,279	1,317	1,306	1,348	1,313	3	
	A p p e a l s T e r m i n a t e d	Prisoner		411	396	409	414	379	369	2	
		Other		381	350	379	387	410	447	3	
		Criminal		447	445	430	429	475	409	1	
		Administrative		113	87	99	76	85	87	5	
		Total		1,427	1,298	1,345	1,358	1,291	1,337	3	
		Consolidations & Cross Appeals ³		18	22	22	24	108	110	1	
		Procedural		682	643	658	649	473	490	4	
		O n t h e M e r i t s	Total		727	633	666	685	711	737	4
			Prisoner		92	76	90	82	187	185	7
			Other		244	223	205	221	211	224	5
			Criminal		349	289	324	342	283	293	1
			Administrative		42	46	47	39	30	35	8
		Pending Appeals		891	870	841	789	846	821	4	
Median Time	Median Time From Filing Notice of Appeal to Disposition		11.3	11.0	10.6	10.2	9.0	9.3	7		
Other Caseload per Judgeship	Applications for Interlocutory Appeals ²		1	1	1	1	4	3	5		
	Petitions for Rehearing		35	31	28	30	34	32	10		

¹ See "Explanation of the Judicial Caseload Profiles."² See "Explanation of Selected Terms."³ Prior to December 2011, cases disposed of by consolidation and cross appeals were counted separately. From December 2011 forward, they are counted as a subset of procedural and merit terminations to reflect the manner in which the appeal was disposed.