UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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

PLAINTIFFS' OPPOSITION
TO MOTION FOR STAY PENDING APPEAL

Plaintiffs Gulf Restoration Network, Missouri Coalition For The Environment, Iowa Environmental Council, Tennessee Clean Water Network, Minnesota Center for Environmental Advocacy, Sierra Club, Waterkeeper Alliance, Inc., Prairie Rivers Network, Kentucky Waterways Alliance, Environmental Law & Policy Center, and Natural Resources Defense Council, Inc. submit this Opposition to the request by defendant EPA for a stay pending appeal.

Introduction

This Court gave the Agency a full six months to determine whether or not numeric nutrient standards are necessary to protect water quality. *Gulf Restoration Network v. Jackson*, 2013 WL 5328547 at *3 (Sept. 20, 2013). Now, less than five weeks before that deadline, EPA seeks a last-minute stay, arguing that compliance with the Court's order would require "potentially needless necessity determination(s)," that any necessary regulation could be a "time-consuming" process, and that implementing Clean Water Act § 303(c)(4) would conflict with EPA's "commitment to partnering with states." EPA Mem. (ECF No. 180-2) at 15-17.

EPA's claim that all of this somehow adds up to "irreparable harm" is belied by EPA's own behavior in the case. Having hemmed and hawed for 85 days past the appeal deadline about whether it was going to prosecute this appeal at all, EPA has waited until the last minute before seeking this stay. Presumably, therefore, EPA has already devoted most of the administrative resources needed to make its necessity determination, since more than 80 percent of the time allotted for that decision has already passed.

The law and the equities weigh heavily against EPA's last-minute request. On one side of the equation is EPA's desire to continue its challenge to this Court's straightforward application of Supreme Court precedent requiring compliance with a federal environmental statute. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). On the other side is EPA's history of extreme delay and recalcitrance in assessing the necessity of federal action to address nutrient pollution, which the Agency now seeks to protract even further; and the consequences of that delay for our nation's waters. The stay request should therefore be denied.

Factual and Regulatory Background

Plaintiffs will not reiterate here the basic procedural history of this matter, set forth in the EPA Mem.[1] However, Plaintiffs note the following key facts.

First, Plaintiffs' complaint and moving papers demonstrate that EPA has been acknowledging the severity of the nation's nutrient problem but sidestepping a necessity determination under Clean Water Act § 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), since at least 1998, when it first told states that it would promulgate federal criteria pursuant to that authority if the states did not act first, but never did. *See* Plaintiffs' Mem. in Support of their Motion for Summary Judgment (Plaintiffs' Mem.) (ECF 133-2) at 5-10. EPA's response to the nutrient problem ever since then has been more of the same – *i.e.*, both repeated acknowledgement that the problem is critical and that numeric nutrient standards are a key to solving it, but continued avoidance of a § 303(c)(4)(B) necessity determination, through and including the non-answer set forth in the denial of Plaintiffs' petition. *Id.* at 10-17.

Second, after receiving Plaintiffs' petition in 2008, EPA sat on it without response for nearly three years. It issued its response – the non-answer to the necessity question that this Court held inadequate – only after Plaintiffs threatened legal action for unreasonable delay. *Gulf Restoration Network v. Jackson*, 2013 WL 5328547 at *2.

Third, EPA's 60-day deadline for appeal was November 19, 2013. The government's three-week shutdown ended October 17; but EPA's stay motion was not filed for another four months, on February 12, 2014.

Fourth, the 180 days this Court gave EPA to comply with its Order end on March 19. That date is a mere five weeks from the date of EPA's motion.

[1] Plaintiffs do not concur with all statements and characterizations of events in the Background portion of the EPA Mem., but any disagreement is not relevant to this motion.

Argument

THE STAY SHOULD BE DENIED SINCE THE EQUITIES WEIGH HEAVILY AGAINST IT, AND EPA HAS LITTLE LIKELIHOOD OF SUCCESS ON THE MERITS

A stay is "an intrusion into the ordinary processes of administration and judicial review," and hence is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). Accordingly, the movant has the burden of showing that circumstances warrant a stay, and "[s]ince such an action interrupts the ordinary process of judicial review and postpones relief for the prevailing party at trial, the stay of an equitable order is an extraordinary device which should be sparingly granted." *U.S. v. State of Tex.*, 523 F.Supp. 703, 729 (E.D. Tex. 1981).

Courts consider four factors in determining whether to grant a stay pending appeal: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *U.S. v. Baylor University Medical Ctr*., 711 F.2d 38, 39 (5th Cir. 1983). The Fifth Circuit Court of Appeals treats these factors as an equitable balancing test. If the balance of equities – *i.e.*, factors (2), (3) and (4) above – is not "heavily tilted" in the movant's favor, then the movant has a much heavier burden on factor (1), the showing of likelihood of success on the merits. *Ruiz v. Estelle*, 650 F.2d 555, 565-66 (5th Cir. 1981). Even where the equities do weigh in favor of a stay, likelihood of success on the merits "remains a prerequisite," and "the issue must be one with patent substantial merit." *Ruiz v. Estelle*, 666 F.2d 854, 857 (5th Cir. 1982).

Here, the balance of equities is heavily tilted *against* movant EPA. The Agency has made no meaningful showing of "irreparable injury" from having to provide Plaintiffs with a

straight answer as contemplated by the CWA and ordered by the Court – which it has presumably already nearly completed at this late date. Grant of a stay would harm Plaintiffs, and work against the public interest, because it would allow EPA to continue its long-term bureaucratic paralysis. Regardless of the equities weighing against it, EPA has not shown that it is likely to prevail on the merits in its appeal of a direct application of Supreme Court precedent weighing against it, ordering it to do nothing more than make an up or down decision.

A. The Balance of Equities Tilts Against Grant of a Stay

Although EPA devotes the bulk of its argument in favor of a stay to a rehash of the merits of its summary judgment arguments, it presents a few limited arguments concerning the equities of granting a stay. None of these arguments have merit.

1. EPA Has Not Demonstrated Irreparable Harm

EPA asserts two types of purported harm – the fact that its appeal will be moot in the absence of a stay, and the purported consequences of having to comply with the Court's order that it make a determination one way or the other regarding the necessity of federal action as required by the CWA.

As an overall matter, EPA's severe delay in requesting a stay cuts against its claim of irreparable harm. Courts do "not generally entertain willfully delayed eleventh hour motions for preliminary relief," *Hirschfeld v. Spanakos*, 909 F.Supp. 174, 178 (S.D.N.Y. 1995), and such a delay "severely undercuts a claim of irreparable injury." *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir. 1993).

The prospect of mootness is insufficient, by itself, to warrant the grant of a stay. "A majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm." *In re Fiesta Inn & Suites, LP*, 2009 WL 5195961 at *3 (W.D. Texas Dec. 21,

2009) (quoting *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 347 (S.D.N.Y. 2007)). Where a strong public interest is at stake, the mere fact that a litigant desires to appeal will not outweigh that interest. *See In re General Motors Corp.* 409 B.R. 24, 33 (S.D.N.Y. 2009) ("Causing all of those interests to be sacrificed for these litigants' ability to avoid mootness arguments is an intolerable result").

Aside from mootness, EPA presents no other credible basis for a finding of irreparable harm. As the Agency itself acknowledges, it has not been called on to actually undertake a federal rulemaking, but only to take the "first step" in such a rulemaking, which is to decide whether it is necessary. *See* EPA Mem. at 16.

The Agency complains that making a necessity determination would interfere with the cooperative federal structure of the CWA by "injecting" EPA into the water quality standard setting process. EPA Mem. at 15. This, however, is a complaint against the CWA itself, not against continued implementation of the Court's order. The statue itself relentlessly "injects" EPA into that process regardless of which way it ultimately decides the necessity question. As discussed in Plaintiffs' Mem., EPA is given a consistently strong oversight role in all circumstances to ensure that states' actions are sufficient, and § 303(c)(4)(B) essentially exists as a backstop to ensure that EPA can address any inadequacies. Plaintiffs' Mem. at 21-22.

The Agency additionally complains that following a determination on necessity, "there would be no way to thereafter restore the status quo." EPA Mem. at 15. But as EPA points out, regulatory implementation of that determination would "take a significant amount of time to develop and propose." Mem. at 16. If somehow, the problem were solved in the meantime, EPA would have a basis for modifying the determination.[2] EPA's related assertion that the lingering

[2] EPA has found it quite possible to modify such determinations in the past. Indeed, although Plaintiffs strongly object to the substance of EPA's actions, it bears note that the Agency amended its § 303(c)(4)(B) necessity

threat of a positive necessity determination is serving to "promote state action" on nutrients, EPA Mem. at 15, borders on the absurd given that states have blithely ignored such threats by EPA for more than a decade with no consequences from the Agency whatsoever. Plaintiffs' Mem at 5-10.

2. A Stay Would Harm Plaintiffs and Not Serve the Public Interest

EPA asserts that Plaintiffs and the public interest would not be harmed by a stay in this matter given that it would only be a stay of the "first step" of the process. EPA Mem. at 16. That argument could make sense only if it were utterly divorced from the context of this litigation. The entire history of the issue, as Plaintiffs have explained, revolves around EPA's extraordinarily stubborn refusal to take that first step. *See* Plaintiffs' Mem. at 7-17. Ever since EPA expressed an intention in 1998 to make a necessity determination for states without nutrient standards, it has been relentlessly refusing to do so – first letting the deadline lapse, then ignoring Plaintiffs' petition until threatened with legal action, and finally issuing the non-answer that this Court found unacceptable. In a similar situation in which EPA had long delayed taking action under the CWA, and had been ordered to do so by a district court, the court denied the Agency's motion for a stay on the ground that continuing pollution would harm the plaintiffs and the public. Noting EPA's "history [of] recalcitrance," the court held that "[t]he twenty-eight year dereliction argues eloquently in Plaintiffs' favor." *Friends of the Wild Swan v. EPA*, 130 F.Supp.2d 1207, 1213 (D. Mont. 2000). It observed regarding the state co-defendant, "[e]ven when it has the fullest possible range of discretion, the State seems unable to act. These facts indicate that it is Plaintiffs, and the general public, who will suffer irreparable harm if a stay is granted." *Id.* at 1211.

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determination for the State of Florida twice based upon purported actions by the state to address the nutrient problem. *See* EPA fact sheet dated November 2012, and EPA letter dated June 28, 2013, attached collectively as Ex. 1, describing the two separate amendments.

In this case, as in *Friends of the Wild Swan*, the harm from EPA's extreme recalcitrance is continuing with each passing day. Indeed, Plaintiffs last week sent EPA further documentation that states are not only continuing in their failure to make progress toward developing numeric nutrient criteria, but in some cases are making *backward* progress, by abandoning their previous efforts and taking steps to minimize even their documentation of nutrient-impaired waters. *See* letter dated February 13, 2014 to Nancy Stoner, EPA Acting Administrator for Water, from various Plaintiff organizations, attached as Ex. 2. The letter also documents the worsening algal growth problem in numerous states, and the continuing failure of efforts to shrink the size of the Gulf Dead Zone. *Id.*

Equally unavailing is EPA's suggestion that the public interest is served by sparing it the need to do work to comply with the Court's order. EPA Mem. at 17. The stay motion was filed five weeks before the end of EPA's allotted 6-month time window to complete a necessity determination. Assuming, therefore, that EPA has worked in good faith to meet this Court's order, EPA will already have completed the bulk of the substantive work necessary for the determination, and is at or close to the stage of seeking management approval for it. In such case, there is no significant administrative burden to complying with the Court's deadline.

EPA's weak attempts to blame the government shutdown for its delay in seeking a stay have no merit. EPA had 60 days to decide whether or not to appeal and seek a stay in conjunction with that appeal, until November 19, 2013 – which is twice the 30 days afforded private litigants. Fed. R. App. P. 4(a)(1). The government might have had a colorable argument that it needed an additional three weeks beyond its already extended appeal timeframe to make up for the three-week government shutdown that occurred before the appeal deadline. But EPA does not even attempt to explain why a three-week hiatus would justify waiting another *three*

months to file the stay motion, if its concern was avoiding the need to spend time complying with the Court's order. Clearly, the public interest lies in favor of implementing the first step toward curbing the nation's nutrient problem ordered by this Court, and not rewarding EPA's unconscionable delay following on the heels of years of such delays.

B. EPA Has Not Demonstrated a Likelihood of Success on the Merits

As discussed above, unless the balance of equities is "heavily tilted" toward a grant of a stay, the movant bears a heavy burden to show likelihood of success on the merits. *Ruiz v. Estelle*, 650 F.2d at 565-66. Even where the equities do weigh in favor of a stay, the issue raised on appeal must be "one with patent substantial merit," and present a "serious legal question." *Ruiz v. Estelle*, 666 F.2d at 857; *U.S. v. Baylor Univ. Med. Ctr.*, 711 F.2d at 39.

For all of the reasons described in the previous section, it is clear that the balance of equities tips heavily toward Plaintiffs, not EPA. Regardless, however, EPA has not met its burden of showing a likelihood of success, or that the legal issues it raises are "serious" in the sense of being unsettled. *See U.S. v. Transocean Deepwater Drilling*, 2013 WL 3049299 at * 3 (S.D. Tex. June 17, 2013) (allowing a stay pending appeal where case presented "unsettled questions" of statutory and regulatory interpretation concerning reach of the Clean Air Act). The Agency's motion, which largely rehashes unsuccessful arguments made on summary judgment, is more in the nature of an "untimely motion for reconsideration" that does not merit a stay. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi NegaraI*, 264 F.Supp.2d 484, 487 (S.D. Tex. 2002).

With respect to the Administrative Procedure Act jurisdictional question, EPA complains that the court did not specifically address all of the district court decisions that have "touched on the issue." EPA Mem. at 10-11. However, the Court plainly saw no need to delve into multiple

district court holdings, as it correctly concluded that EPA's arguments were overall "unpersuasive" given that Plaintiffs' lawsuit seeks an up or down determination on necessity, not a rulemaking, and hence "Plaintiffs' complaint does not implicate the question of whether the necessity determination itself is guided by sufficient law to render it subject to judicial review." *Gulf Restoration Network v. Jackson*, 2013 WL 5328547 at *4. Moreover, as discussed in Plaintiffs' Combined Memorandum of Law in Opposition to EPA's Cross-Motions and Reply Memorandum of Law in Support of Plaintiffs' Motion For Summary Judgment (Response-Reply) (ECF 165), the district court cases do not effectively support EPA's position, and largely support Plaintiffs' position. Response-Reply at 18-21.

With respect to the applicability of *Massachusetts v. EPA*, 549 U.S. 497 (2007), to require a necessity determination, EPA likewise presents no plausible grounds why the Supreme Court's requirement that the Agency give a straight answer to a statutory question should not apply here as well. As this Court explained at considerable length, the Supreme Court squarely addressed the question of whether a citizen petition could trigger an obligation to make a statutory determination potentially triggering a rulemaking, and resolved it against EPA. *Gulf Restoration Network v. Jackson*, 2013 WL 5328547 at *6 ("[P] perhaps the most important aspect of *Massachusetts v. EPA* for the case at bar is the Court's 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"). The fact that EPA is uncomfortable with that result does not render the matter unsettled for purposes of assessing whether it is a "serious" question of law warranting a stay. *Ruiz v. Estelle*, 666 F.2d at 857; *U.S. v. Baylor Univ. Med. Ctr.*, 711 F.2d at 39; *U.S. v. Transocean Deepwater Drilling*, 2013 WL 3049299 at * 3.

Conclusion

For the foregoing reasons, EPA's motion for a stay pending appeal should be denied.

Dated: February 18, 2014

Respectfully submitted,

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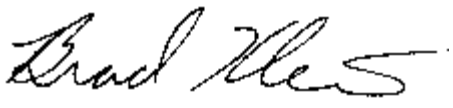

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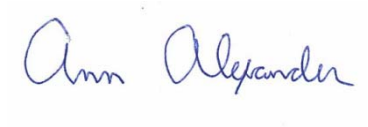
CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, I caused as copy of the foregoing to be served through the Court's CM/ECF system to all parties.



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