

Administrative Procedure Act (“APA”) by defendants Lisa P. Jackson, Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively “EPA”), for EPA’s failure to respond to a November 2007 Petition for Rulemaking requesting that EPA publish updated information concerning the state of secondary treatment technology for publicly owned treatment works (“POTWs”) pursuant to Clean Water Act (“CWA”) § 304, 33 U.S.C. § 1314, as well as discharge limitation requirements reflecting that information pursuant to CWA § 301, 33 U.S.C. § 1311 (“Petition”).¹

2. As set forth in the Petition, attached as Exhibit 1 and incorporated by reference, excess quantities of nitrogen and phosphorus (collectively “nutrients”) discharged to water by POTWs fuel the growth of excessive algae. Unchecked algal growth threatens human health, and has wreaked well-documented harm on freshwater and marine aquatic life communities as well. In particular, nutrient pollution contributes to the formation of “dead zones” where excess algae have consumed so much dissolved oxygen that other aquatic life cannot survive. The Petition notes that the largest such dead zone in the nation is at the mouth of the Mississippi River in the Gulf of Mexico and was approximately the size of the State of New Jersey in 1999.

3. As described in the Petition, the technical information concerning the pollutant removal capability of secondary treatment previously published by EPA pursuant to CWA § 304, and last updated in 1985, is badly outdated. The Petition requests that EPA exercise its authority, as required by CWA § 304, to publish information showing that secondary treatment is now capable of removing a far greater amount of nutrient pollution than is generally being

¹ The Petition was submitted by plaintiffs NRDC, ELPC, Sierra Club, Waterkeeper Alliance, MCE, PRN, IEC, MCEA, and GRN, as well as by Midwest Environmental Advocates and American Rivers. Plaintiffs also include TCWN and KWA. For ease of reference, we will refer to Plaintiffs collectively throughout, and we will refer to the Petition as “Plaintiffs’ Petition.”

achieved currently at POTWs; and to promulgate regulations pursuant to CWA § 301 requiring that these advances in secondary treatment be implemented.

4. EPA has not responded to the Petition since it was filed in November 2007. This action therefore seeks to compel a response pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 555(b), on the ground that such response has been unreasonably delayed.

Jurisdiction and Venue

5. This Court has jurisdiction over this action pursuant to the APA, 5 U.S.C. §§ 701 – 06, which provides for judicial review of agency actions unreasonably withheld or unlawfully denied, for which there is no other adequate remedy in a court; 28 U.S.C. § 1331, because this case presents a federal question; 28 U.S.C. § 1361, because this is an action “to compel an agency officer or employee of the United States to perform a duty owed to the plaintiff[s]”; and 28 U.S.C. §§ 2201 – 2202, which provide for declaratory and further relief.

6. Venue is proper in this judicial district and in this court pursuant to 28 U.S.C. § 1391(e) because no real property is involved in this action and the first-named plaintiff, Natural Resources Defense Council, resides or maintains its principal place of business in New York, New York, which is located in the Southern District of New York.

Parties

7. Plaintiff NRDC is a national, not-for-profit membership corporation with its principal place of business in New York, New York. Founded in 1970, NRDC represents more than 350,000 members nationwide. NRDC’s mission is to safeguard the Earth: its people, its plants and animals, and the natural systems on which all life depends. NRDC’s board and staff of lawyers, scientists, and other environmental specialists have for decades actively supported and advocated for effective enforcement of the CWA on behalf of NRDC’s membership. NRDC

members depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

8. Plaintiff MCE is a not-for-profit membership corporation incorporated under the laws of the State of Missouri. MCE's mission is to work "to protect and restore the environment through education, public engagement, and legal action." MCE currently has more than 1000 members who depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

9. Plaintiff GRN is a not-for-profit membership corporation incorporated under the laws of the State of Louisiana. As stated in its mission, GRN "is committed to uniting and empowering people to protect and restore the natural resources of the Gulf Region for future generations." GRN's vision is that the Gulf of Mexico will continue to be a natural, economic, and recreational resource that is central to the culture and heritage of five states and three nations. The people of the region will be stewards of this vital but imperiled treasure, and they will assume the responsibility of returning the Gulf to its previous splendor. GRN members depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition. GRN maintains offices in New Orleans, LA, and St. Petersburg, FL. GRN currently has more than 4,653 members nationwide.

10. Plaintiff ELPC is a Midwest public interest environmental advocacy organization. ELPC's goals include developing sound environmental management practices that conserve natural resources and improve the quality of life in our communities. ELPC strives to help effectively enforce the Clean Water Act in order to improve the quality of life in our communities and ensure clean water. ELPC currently has 467 members nationwide who depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

11. Plaintiff IEC is a state-wide non-profit organization focused on protecting Iowa's natural environment. IEC is an alliance of nearly 60 member and cooperator organizations--ranging from agricultural, conservation, and public health organizations, to educational groups, business associations, and churches--along with hundreds of individual members. Its vision is an Iowa where waters run clean, soil stays on the land, the air is clear, flora and fauna are diverse, and people are proud to call it home. Its members enjoy swimming, boating, fishing, hiking, biking and many other activities in and along Iowa's rivers, streams and lakes. IEC members rely on these sources for clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

12. Plaintiff TCWN is a not-for-profit corporation organized under the laws of the State of Tennessee. TCWN was organized to advocate for strong policies and programs that result in more effective protection and restoration of Tennessee waters; to educate organizations, decision-makers, and the public about important water resource issues; and to ensure the

protection and restoration of Tennessee's waters. TCWN organizes Tennesseans to exercise their right to clean water and healthy communities by fostering civic engagement, building coalitions, and advancing water policy. TCWN is a membership organization whose members depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

13. Plaintiff MCEA is a not-for-profit organization based in St. Paul, Minnesota, whose mission is to use law, science and research to preserve and protect Minnesota's wildlife, natural resources and the health of its people. The organization has worked for effective enforcement of the Clean Water Act in the state. MCEA represents 1,000 members across Minnesota who depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

14. Plaintiff Sierra Club is a national, not-for-profit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club advocates for effective enforcement of the Clean Water Act to preserve our nation's waters for recreational, aesthetic, and economic uses. The Club's members depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and

jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

15. Plaintiff Waterkeeper Alliance is a national not-for-profit corporation organized under the laws of the State of New York representing the interests of more than 49,500 individual members and nearly 200 member Waterkeeper Organizations. Waterkeeper Alliance and Waterkeeper Organizations promote water quality protection and the restoration of waters, through litigation, education, scientific research, and other legal means; advocate for compliance with environmental laws such as the CWA; respond to citizen complaints; identify threats to water bodies; and generally work to guarantee the public's right to a pollution-free environment. Individual members of Waterkeeper Alliance and Waterkeeper Organizations depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

16. Plaintiff PRN, the state affiliate of the National Wildlife Federation, is a not-for-profit organization that strives to protect the rivers, streams and lakes of Illinois and to promote the lasting health and beauty of watershed communities. PRN represents more than 600 members depend on clean water for drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

17. Plaintiff KWA is a not-for-profit organization that strives to protect and restore the rivers, streams and lakes of Kentucky and to promote the lasting health and beauty of watershed communities. KWA represents more than 700 members depend on clean water for

drinking water, aesthetic and/or recreational use and enjoyment, and/or for their businesses and jobs, including water bodies that are adversely affected by nitrogen and phosphorous pollution and would be improved by the actions requested in the Petition.

18. Plaintiffs bring this action on their own behalf and on behalf of their members. Plaintiffs and their members have been and continue to be injured by EPA's failure to respond to the Petition and to promulgate updated information and standards concerning secondary treatment as required by CWA §§ 301 and 304. Proper treatment of wastewater required by an updated definition of "secondary treatment" would reduce the amount of nitrogen and phosphorus pollution which currently harms the interests of plaintiffs and their members in water that is suitable for drinking, fishing, swimming and other uses. These injuries are actual, concrete and irreparable. They cannot be redressed by money damages. The requested relief will redress plaintiffs' injuries.

19. Defendant Lisa P. Jackson, Administrator of the United States Environmental Protection Agency, is charged with the supervision and management of the agency's responsibilities under the CWA, including the statute's requirements under §§ 301 and 304 that are at issue here. Ms. Jackson is sued in her official capacity only.

20. Defendant United States Environmental Protection Agency is an agency of the federal government, which has the primary responsibility under the CWA to protect the waters of the United States from pollution.

Statutory Framework

21. The CWA is the principal federal statute enacted to protect the quality of the waters of the United States. Stated goals of the CWA are "to restore and maintain the chemical,

physical and biological integrity of the Nation's waters" and "to eliminate[]" "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a).

22. Section 301(b)(1)(B) of the CWA obligates POTWs "in existence on July 1, 1977" to achieve "effluent limitations based upon secondary treatment as defined by the Administrator pursuant to [§ 304(d)(1)]."

23. Section 304(d)(1) requires EPA to "publish within 60 days after October 18, 1972 (and from time to time thereafter) information in terms of amounts of constituents, and chemical, physical and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment."

24. By its terms, § 304(d)(1) requires EPA to periodically assess the state of the science concerning the ability of "secondary treatment" to remove pollutants, and to publish its assessment.

25. By its terms, § 301(b)(1) requires EPA to update its POTW secondary treatment discharge standards to reflect any new information published from time to time pursuant to § 304(d)(1).

26. EPA first promulgated effluent limitations pursuant to § 301 based on secondary treatment standards in 1973. It then published additional information concerning secondary treatment pursuant to § 304, and revised its POTW discharge regulations pursuant to § 301, several times thereafter. However, EPA's last assessment of the state of secondary treatment technology pursuant to § 304 was made in 1985.

27. The APA requires at 5 U.S.C. § 553(e) that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

28. The APA further requires at 5 U.S.C. § 555 that agencies are required to “conclude a matter” before them, including a petition for rulemaking, “within a reasonable time.”

29. The APA authorizes courts at 5 U.S.C. § 706(1) to compel agency action that is “unlawfully withheld or unreasonably denied.”

Statement of Facts

30. EPA has not, in previous information concerning secondary treatment published pursuant to § 304, included information concerning nutrient removal achievable through secondary treatment.

31. The current POTW secondary treatment standards promulgated pursuant to § 301 do not include a specific requirement to remove nutrients, aside from the incidental nutrient removal achieved through secondary treatment processes as currently defined.

32. The physical and biological treatment systems for wastewater treatment that were found to be “Secondary treatment” technology in 1973 have improved over the years to the point where it is capable of a high degree of nutrient removal. To a significant degree, this technological improvement has occurred in the intervening years since EPA last published information concerning secondary treatment capabilities in 1985.

33. In November 2007, Plaintiffs and other petitioners submitted the Petition to EPA requesting (i) that it publish updated information concerning secondary treatment pursuant to § 304 that includes information concerning the current capability of secondary treatment to remove nitrogen and phosphorus from POTW wastewater, and (ii) that it update standards for secondary treatment applicable to POTWs pursuant to § 301 so as to reflect the information published pursuant to § 304.

34. To date, EPA has not responded to the Petition.

35. To date, EPA has not provided Plaintiffs with notice of when it intends to respond to the Petition, or information concerning the reason(s), if any, for the delay.

First Claim for Relief

36. EPA's failure to respond to the Petition within more than four years since its filing in November 2007 represents a failure to conclude the matter of the Petition within a reasonable time as required by 5 U.S.C. § 555.

37. EPA's failure to respond to the Petition within more than four years since its filing in November 2007 constitutes unreasonable delay of agency action pursuant to 5 U.S.C. § 706(1).

38. Plaintiffs have no adequate remedy for EPA's unreasonable delay other than an action to compel a response to the Petition pursuant to 5 U.S.C. § 706(1).

Prayer for Relief

WHEREFORE, Plaintiffs request that this Court enter a judgment:

(1) declaring that EPA's failure to respond to the Petition since its filing in November, 2007 constitutes agency action unreasonably delayed or unlawfully withheld for purposes of 5 U.S.C. § 706(1);

(2) ordering EPA pursuant to 5 U.S.C. § 706(1) to provide a response to Plaintiffs' Petition within 90 days;

(3) awarding Plaintiffs their litigation costs and reasonable attorneys' fees in this action, as authorized in 28 U.S.C. § 2412; and

(4) ordering such other relief as the Court may deem just and proper.

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Respectfully submitted,

s/ Thomas Cmar

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