

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

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

**NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' MEMORANDUM IN
SUPPORT OF EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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ABBREVIATIONS

CWA	Clean Water Act
EPA	US Environmental Protection Agency
NACWA	National Association of Clean Water Agencies
NPDES	National Pollutant Discharge Elimination System
POTW	Publicly-Owned Treatment Works
TCEQ	Texas Commission on Environmental Quality
TMDLs	Total Maximum Daily Loads

I. INTRODUCTION

Plaintiffs petitioned the U.S. Environmental Protection Agency (“EPA” or the “Agency”) to establish numeric criteria under the federal Clean Water Act (“CWA” or the “Act”) limiting nitrogen and phosphorus (collectively, “nutrients”) in waters in all states where those criteria do not already exist, including states with waters in the Mississippi River Basin and the Northern Gulf of Mexico. Plaintiffs also petitioned EPA to establish Total Maximum Daily Loads (“TMDLs”) under the CWA for nitrogen and phosphorus discharges into waterways for the Mississippi River Basin and the Northern Gulf of Mexico. EPA denied Plaintiffs’ petition and Plaintiffs seek review and reversal of the Agency’s denial, but only with respect to Plaintiffs’ request for the establishment of federal numeric nutrient criteria.¹ For the reasons set forth below, the Court should deny Plaintiffs’ requested relief.

Intervenor/Defendant, the National Association of Clean Water Agencies (“NACWA”) is a voluntary, non-profit national trade association representing the interests of the nation’s publicly-owned wastewater and stormwater utilities. *See* Dckt. No. 43-2, at ¶ 2. NACWA’s members include nearly 300 of the nation’s municipal clean water agencies, which collectively serve the majority of the United States population served by sewers. *See id.* For over 40 years, NACWA has maintained a leadership role in legal and policy issues affecting the public authorities responsible for managing the nation’s wastewater and stormwater. NACWA is at the forefront of the development and implementation of scientifically-based, technically-sound, and cost-effective environmental programs for protecting public and ecosystem health. NACWA has nearly 100 publicly-owned treatment works (“POTW”) members within the Mississippi River

¹ As noted in EPA’s brief, “Plaintiffs do not challenge EPA’s denial of their request that EPA establish TMDLs.” Dckt. No. 141-2, at 8 n.5. In its denial of Plaintiffs’ petition, EPA set forth its rationale for denying Plaintiffs’ request for the establishment of TMDLs, and that rationale is sound and unchallenged in this matter. Accordingly, in the instant brief, NACWA has limited its arguments to Plaintiffs’ sole challenge – i.e., EPA’s denial of Plaintiffs’ request for numeric nutrient criteria.

Basin, collectively serving a population of nearly 30 million Americans and treating approximately three billion gallons of wastewater each day. *See id.* ¶ 3; *see also* 40 C.F.R. § 403.3 (defining “POTW”).

Each of NACWA’s members is a “point source” under the CWA, and holds, and is required to comply with, the terms of one or more discharge authorization permits issued under EPA’s National Pollutant Discharge Elimination System (“NPDES”) program, or an equivalent state-administered program. *See* 33 U.S.C. §§ 1342, 1362(14); 40 C.F.R. § 122.2; Dckt. No. 43-2, at ¶ 4. NPDES and state-equivalent permits (hereinafter, collectively “NPDES permits”) are required by law to ensure compliance by point sources with all applicable water quality standards, including standards for nutrients. *See* 33 U.S.C. § 1342(a)(1), 40 C.F.R. § 122.44(d). POTWs are among the commonly identified sources of nutrients, both within the Mississippi River Basin and in other watersheds nationwide. *See* EPA-MARB006721, EPA-MARB006828. As a result, all of NACWA’s members would be directly affected by any EPA action to develop federal numeric nutrient criteria as requested by Plaintiffs.² *See* Dckt. No. 43-2, at ¶ 6.

II. ARGUMENT

EPA’s denial of Plaintiffs’ petition was reasonable and lawful and should be upheld. The federal numeric nutrient criteria that Plaintiffs seek for the entire Mississippi River Basin (and beyond) are not “necessary to meet the requirements of” the CWA. 33 U.S.C. § 1313(c)(4)(B). The requested criteria would have a disproportionately greater impact on a subset of nutrient sources that, in turn, represent a disproportionately smaller contribution than other sources to the

² The establishment of federal numeric nutrient criteria would, as a practical matter, have a singular impact on point sources, such as NACWA’s members, due to the way NPDES permit writers are required to use water quality criteria to derive water-quality-based permit effluent limitations. *See* 40 C.F.R. § 122.44(d). Furthermore, since POTWs are unique among point sources with respect to discharges of nutrients due to the nature of municipal wastewater effluent, the impact on NACWA’s members of federal numeric criteria would be particularly acute.

nutrient loadings at issue. The end result of what Plaintiffs seek would be a wholly inequitable and inadequate regulatory scheme, which EPA properly rejected.

Any program to control nutrients in the nation's waters, and particularly in the Mississippi River Basin, must be fair and balanced among all contributing sources in order to achieve effective control of nutrients that will result in meaningful water quality improvements. From NACWA's municipal point source perspective, the only way to achieve meaningful progress on nutrient reduction is for all sources of nutrient impairment, both point and nonpoint, to be part of the solution.³ In addition to the significant efforts of POTWs and other point sources, NACWA acknowledges that nonpoint sources have made significant strides in recent years to address nutrient impairment issues, including within the Mississippi River Basin as well as in other watersheds nationwide. Both point sources, including some NACWA members, and nonpoint sources are working together on solutions that reduce nutrients on a local basis in a manner that is fair and equitable to all. Ongoing efforts by both categories of sources are necessary to make continued progress.

The positions advanced by NACWA in this memorandum are not intended to criticize the efforts of any particular sector or source of impairment, but instead to convey, from the municipal clean water utility perspective, the unique challenges presented by the multi-source nature of nutrients, the inadequacy of federal numeric nutrient criteria to solve these challenges, and the need for a more comprehensive solution. Focusing resources on federal numeric nutrient criteria would undercut these collaborative efforts, which support meaningful improvements in water quality.

³ Whereas a point source discharges from a "discernible, confined and discrete conveyance," such as a pipe, *see* 33 U.S.C. § 1362(14), discharges from nonpoint sources are diffuse and not confined to a defined discharge point. *See* EPA-MARB006798, EPA-MARB006807

A. Federal Numeric Nutrient Criteria Cannot Achieve The Holistic Water Quality Improvements Needed For Nutrients

Federal numeric nutrient criteria cannot accomplish the overall nutrient reductions that are necessary in the Mississippi River Basin. The federal numeric nutrient criteria advocated by Plaintiffs would only result in additional controls for POTWs and other point sources of nutrients, without addressing the nutrient impairment issues in a holistic way. A holistic approach to the problem of nutrient loading – one that includes both point and nonpoint sources – is absolutely imperative to achieve any appreciable reductions in nutrient loading in the Mississippi River Basin. *See* Dckt. No. 43-2, at ¶ 11; EPA-MARB006733; EPA-MARB006734, EPA-MARB006743, EPA-MARB006767, EPA-MARB006828, EPA-MARB006882, EPA-MARB006897. Nonpoint sources also contribute nutrients to the Mississippi River Basin. Plaintiffs’ demand that EPA federalize numeric nutrient criteria that would impact some but not all sources of nutrients fails to achieve equitable, comprehensive, or effective water quality improvements.

Because federal numeric nutrient criteria would ultimately result in mandatory new nutrient reduction requirements for NPDES permit holders (i.e., point sources), such criteria would likely impose draconian new treatment obligations on NACWA’s members, even where such treatment upgrades are not needed based on local water quality conditions.⁴ Such reductions would be extraordinarily expensive to implement, even where technically feasible (which for many POTWs will not be the case), and would not solve nutrient water quality issues

⁴ NACWA’s members are not adverse to enhanced nutrient reduction where such measures are necessary. Indeed, many POTWs and NACWA members have already installed nutrient controls and adopted targeted measures in areas where local water quality needs so require. This tailored approach, which NACWA members continue to support in locations with a demonstrable scientific need for additional treatment, is superior to the impracticable and scientifically unsupported approach that would be used if Plaintiffs prevail.

attributable to other sources of nutrients. Under Plaintiffs' approach, tremendous resources would be spent to federalize numeric nutrient criteria, to implement the new criteria in all affected states via NPDES permit renewals, to upgrade wastewater treatment technology – and the end result would still be a vast number of waterbodies that remain impaired for nutrients.

POTWs will continue to make investments, at considerable cost to their local ratepayers and communities, where necessary and scientifically appropriate to reduce nutrient discharges. However, from a technological, financial, and equitable perspective, there is a limit to what is practical and feasible for the municipal wastewater sector to contribute in terms of significant additional nutrient reductions in the Mississippi River Basin's nonpoint source-dominated watershed. The law of diminishing returns will dramatically reduce the water quality benefit associated with each additional dollar invested. Controls on point sources alone cannot get the job done, since affected waterbodies would still be impaired due to nutrient loadings from nonpoint sources. All nutrient sources must contribute equitably to nutrient reduction efforts, and the federal numeric nutrient criteria that Plaintiffs demand would do nothing to foster such equitable contributions.

This perspective is not held just by the POTW community. Others have observed that individual permits for existing point sources “have been squeezed down on a great deal over the past 20 years—in part, in order to avoid having to do something serious about nonpoint sources.” Oliver A. Houck, *The Clean Water Act Returns (Again): Part I, TMDLs and the Chesapeake Bay*, 41 ELR 10208, 10224 (2011). This strategy – targeting point sources with ever-more-expensive pollutant reduction requirements – has run its course. Without commensurate nonpoint source reductions, which federal numeric nutrient criteria cannot achieve, water quality improvements will not be meaningful. There is simply no way around this fact.

B. State Primacy Under The CWA Is Critical To Ensuring That All Sources Of Nutrients Contribute Fair And Appropriate Reductions

Plaintiffs ask the Court to direct EPA to find that numeric nutrient criteria are required in all states under all circumstances, thus compelling EPA to take action in the states' stead. NACWA has long advocated against inappropriate federal action with regard to water quality criteria, including the imposition of federal numeric nutrient criteria, which would displace the appropriate state lead on this issue.

Congress placed states in the lead for establishing water quality standards and strictly limited EPA's role to supervising state compliance with CWA § 303's requirements, for good reason. In particular, this structure is an explicit recognition that water quality is a localized concern that is impacted by site-specific conditions such as geography, temperature, and land use. State programs may include elements that are either legally unavailable to EPA, or reflect innovations by the state that go beyond EPA's requirements, including unique state programs for controlling nutrient-contributing land uses.

The historical purpose behind assigning states primacy under § 303 was also based on Congress' concern that "federal promulgation [of water quality standards] . . . 'would place in the hands of a single Federal official the power to establish zoning measures over [sic] to control the use of land within watershed areas' throughout the nation." *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1272 (5th Cir. 1980) (citations omitted). If a state's water quality standard has been found by EPA to be "consistent with" the CWA's requirements, then EPA's role is completed until the next triennial review. *See id.* at 1276. The federal "zoning" scenario that the Fifth Circuit warned against and that Congress sought to avoid, would take place if EPA were to federalize numeric nutrient criteria for the Mississippi River Basin, as Plaintiffs demand.

In the instant case involving nutrient criteria, NACWA believes the states are uniquely positioned to effectuate nutrient reductions across all sectors – point and nonpoint sources – that are needed in order to achieve a holistic and comprehensive approach to improving water quality. States are not only empowered by the CWA to take the lead in water quality criteria development, but are also in the best position to create control programs and implementation plans that account for, in an equitable and scientifically appropriate manner, the respective contributions of point sources and nonpoint sources. A state-driven nutrient criteria development process coupled with other state nutrient control programs are much more effective than federal numeric nutrient criteria in achieving effective and comprehensive reductions from all sources.

Texas, for example, has had delegated NPDES permit authority since 1998 and has a robust water quality program, including water quality standards for addressing nutrients such as phosphorus and nitrogen. *See* 30 Tex. Admin. Code §§ 307.3(a)(40)-(41), 307.4(e). Beyond these traditional CWA programs, Texas is among the states that are innovating approaches to reduce various forms of pollution, including nutrients, that reach water bodies from nonpoint sources. As the Texas Commission on Environmental Quality (“TCEQ”) has aptly noted, “[t]he large number of nonpoint sources and the fact that they are difficult to regulate make the voluntary efforts of citizens, businesses, service organizations, and other groups an essential part of the effort to address [nonpoint source] pollution in Texas.” Management Program for Nonpoint Source Water Pollution, TCEQ, at <http://www.tceq.texas.gov/waterquality/nonpoint-source/mgmt-plan>. Texas employs “a coordinated effort of state and local officials, planners, developers, and citizens” to address nonpoint source pollution at the individual watershed level. Texas Nonpoint Source Management Program 2012, at 15, 17-18, 32-33, 41-49 *available at* [7](http://www.tceq.texas.gov/assets/public/compliance/monops/nps/mgmt-plan/2012-006-MIS-</p></div><div data-bbox=)

NR_Nonpoint_Source_Update.pdf. Texas uses a combination of state and local regulatory, non-regulatory, financial, and technical programs to implement effective nonpoint source pollution controls. *See id.* at 22.

Like Texas, other states are pursuing an array of nonpoint source controls.⁵ As these states have recognized, and as EPA's consistent support for such state efforts acknowledges, solving water quality impairment for nutrients and other pollutants requires efforts and reductions from all sectors.⁶ These examples underscore why the federalization of numeric nutrient criteria is such a woefully misguided approach to a complex problem: even if implemented flawlessly, federal numeric nutrient criteria would not solve the problem of widespread nutrient impairments.

C. EPA's Denial Recognizes That Point Sources And Nonpoint Sources Must Continue To Make Reductions In Nutrients And Fosters The Necessary State-Federal Collaboration For This Result

Nonpoint sources are the primary sources of nutrient loadings to the Mississippi River Basin. *See* EPA-MARB006728, EPA-MARB006733, EPA-MARB006748-49, EPA-MARB006761, EPA-MARB006765, EPA-MARB006788, EPA-MARB006853, EPA-MARB006890, EPA-MARB006912, EPA-MARB006989. Indeed, in denying Plaintiff's petition, EPA acknowledged the need for reductions from all sources of nutrients – point and nonpoint sources – as one factor influencing its decision to continue the Agency's collaborative watershed approach over the approach preferred by Plaintiffs. *See* EPA-MARB000005. Given

⁵ *See, e.g.*, California Nonpoint Source Pollution Control Program, California Environmental Protection Agency, State Water Resources Control Board, *available at* http://www.waterboards.ca.gov/water_issues/programs/nps/protecting.shtml; Washington State's Plan to Control Nonpoint Pollution, Washington Department of Ecology, *available at* http://www.ecy.wa.gov/programs/wq/nonpoint/nps_plan.html; Ohio Nonpoint Source Pollution Control Program, Ohio Environmental Protection Agency, *available at* <http://www.epa.ohio.gov/dsw/nps/index.aspx>.

⁶ The CWA § 319 planning process for nonpoint source management programs envisions and encourages just this sort of collaboration. *See* 33 U.S.C. § 1329.

the significant nonpoint source loads, it was reasonable and appropriate for EPA to deny Plaintiffs' petition, the granting of which would have resulted in an inequitable and inadequate approach to addressing the Mississippi River Basin's nutrient problem. EPA could not have reasonably and lawfully found that such an approach "is necessary to meet the requirements of" the CWA. 33 U.S.C. § 1313(c)(4)(B).

As referenced in EPA's denial of the petition, the Agency recognizes the criticality of achieving meaningful nutrient reductions from the nonpoint source sector if there is to be actual water quality improvement over time. *See* EPA-MARB000005. Simply stated, what Plaintiffs seek from this Court is a finding that CWA § 303(c)(4)(B) compels EPA to develop regulations that will disproportionately impact point sources of nutrients while the Agency and the states are deep into the process of developing collaborative programs that will appropriately spread nutrient control obligations to all sources. EPA's continued efforts to foster the development of innovative programs in collaboration with states, in order to garner nutrient reductions from all sources, is consistent with the CWA and reflects the reality that it is demonstrably impossible to solve the nation's nutrient enrichment problem by targeting point sources alone. *See* Dckt. No. 43-2, at ¶¶ 10, 11; EPA-MARB006743.

There are multiple lawful and appropriate paths that EPA and the states can take to control nutrients from a wide variety of sources. *See* EPA-MARB000002-05. NACWA has consistently advocated for adoption of approaches that spread the burden to all responsible parties, whether they are point or nonpoint sources of nutrients. *See* Dckt. No. 43-2, at ¶ 11. NACWA has also argued in favor of both federal and state action to address nutrients, depending on the legal circumstances and which approach will further advance the holistic effort to address all sources of nutrient impairment. In the instant case, federal numeric nutrient criteria are not

only unlawful and unnecessary, but will impede the ability to adequately address all sources of nutrient pollution. As the representative of municipal point source dischargers, NACWA supports EPA's and the states' continuing pursuit of federal and state programs that spread the responsibilities and costs of nutrient control equitably among all sources.

III. CONCLUSION

For the foregoing reasons, NACWA urges the Court to uphold EPA's denial of Plaintiffs' petition. Upholding the Agency's denial will allow for a more holistic approach to the nutrient problem in the Mississippi River Basin, one that addresses both point and nonpoint sources in a more effective and equitable manner than through development of federal numeric nutrient criteria as requested by Plaintiffs. Point sources, such as NACWA's members, which have already made significant progress in reducing pollutants to the basin, should not be unfairly saddled with reductions in nutrients that are disproportionate to their relative contribution. Instead, reasonable pollutant reductions should be made by all source sectors in the watershed through a watershed approach.

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AFFIRMATION

Per the Court's scheduling order (Dckt. No. 124, at ¶ 4.c), I hereby affirm that counsel for NACWA has consulted with counsel for the other Non-State Intervenor and the other Non-State Intervenor do not join in the arguments advanced in this brief by NACWA.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, a true and correct copy of the foregoing document was served on all parties or their attorneys via the Court's CM/ECF system.

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