



# Minnesota Center for Environmental Advocacy

The legal and scientific voice protecting and defending Minnesota's environment

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April 11, 2011

Lisa Jackson  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

VIA U.S. MAIL

Re: *Petition for Rulemaking Under the Clean Water Act for Numeric Water Quality Standards for Nitrogen and Phosphorus and TMDLs for the Mississippi River and Gulf of Mexico*

Dear Administrator Jackson:

We write to request that the Environmental Protection Agency ("EPA") promptly provide its decision in response to the June 30, 2008 Petition for Rulemaking Under the Clean Water Act for Numeric Water Quality Standards for Nitrogen and Phosphorus and TMDLs for the Mississippi River and Gulf of Mexico ("the Petition"). In light of the urgent need for standards and total maximum daily load ("TMDL") cleanup plans to address the on-going degradation of water quality in the Mississippi River and the Gulf of Mexico, the delay in responding to the Petition is unreasonable.

We are providing this notice in an effort to avoid legal action. If, however, EPA fails to respond to the Petition by June 30, 2011, a full three years after it was filed, we will be forced to pursue legal remedies.

**Nutrient pollution in the Mississippi River is an acknowledged national water quality problem requiring urgent attention.**

As well documented by the federal government's own numerous studies and set forth at length in the Petition, nitrogen and phosphorus pollution is causing extensive water quality degradation impacting aquatic life, human health, and the economic, aesthetic and recreational values of our rivers, lakes, streams and oceans. In the Mississippi River Basin, nutrient over-enrichment is causing water quality degradation in both freshwater tributaries of the Mississippi and the Gulf of Mexico. In many cases, this degradation is getting worse.

States have failed to develop standards and criteria sufficient to protect the Mississippi River and northern Gulf of Mexico from worsening nutrient

impairments. EPA found in 1998 that numeric nutrient standards are needed for the states. The following decade proved beyond a doubt that EPA must play a lead role in addressing the problem. EPA's Scientific Advisory Board called for direct action "as soon as possible" to reduce both nitrogen and phosphorus loadings "before the system reaches a point where even larger reductions are required to reduce the area of hypoxia." USEPA, Science Advisory Board, Hypoxia in the Northern Gulf of Mexico (2008). Likewise, the National Research Council has pressed EPA to take a more proactive role, recommending "the EPA should develop water quality criteria for nutrients in the Mississippi River and the Northern Gulf of Mexico[,] . . . should ensure that states develop water quality standards (designated uses and water quality criteria) and TMDLs such that they protect water quality in the Mississippi River and northern Gulf of Mexico from excessive nutrient pollution [and] should develop a federal TMDL..." National Research Council, Mississippi River Water Quality and the Clean Water Act: Progress, Challenges and Opportunities (2008).

Despite years of study, conferences and action plans, commitments by states and EPA have, to date, failed to effectively address nitrogen and phosphorus pollution in the Mississippi watershed and the Gulf of Mexico. The March 16, 2011 Memorandum from Acting Assistant Commissioner Nancy Stoner to Regional Administrators is the most recent in a series of EPA statements acknowledging the costly consequences of nutrient pollution and the urgent need to reduce nitrogen and phosphorus loading. Yet, like previous such memos, it fails to establish concrete and enforceable requirements for developing numeric criteria and TMDLs that will restore water quality in the Mississippi and northern Gulf. Instead, the Memo offers EPA's encouragement and assistance "where states are willing to step forward." Petitioners respectfully suggest that waiting for state action is a recipe for failure when EPA itself fails to lead. The Stoner Memo states plainly that it "has long been EPA's position" that numeric criteria are necessary to make state programs effective at addressing nutrient pollution, citing studies and memos from 1998, 2001, and 2007. Yet, in 2011 not a single state in the Mississippi Basin is calculating permit limits for nutrients based on numeric criteria designed to protect against downstream impacts in the Mississippi River and the Gulf. Few of the states are even calculating nitrogen or phosphorus limits needed to protect the immediate receiving water body of the discharge.

In addition to these failures, EPA has never answered a related petition filed by many of the numeric water quality criteria/TMDL Petitioners, which would have at least secured some reductions in nitrogen and phosphorus pollution. That petition requested that EPA establish generally-applicable nitrogen and phosphorus removal requirements for wastewater treatment plants as part of the agency's "secondary treatment" regulation.

**The EPA has a duty to respond to Petitioners' request for rulemaking and its failure to provide a timely decision is unreasonable.**

EPA has a legal obligation to grant or deny the Petition. The Administrative Procedure Act ("APA") requires that the Agency "conclude a matter" presented to it "within a reasonable time." 5 U.S.C. 555(b). Moreover, the APA provides for judicial review and authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). The

obligation of federal agencies to respond to rulemaking petitions and the reviewability of the reasonableness of agencies' failure to timely act are well-established in case law. *See, e.g., Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 79 (D.C.Cir. 1984); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418-19 (D.C. Cir. 2004); *Families for Freedom, v. Napolitano*, 628 F.Supp.2d 535, 540 (S.D.N.Y. 2009); *Muwekma Tribe v. Babbitt*, 133 F.Supp.2d 30, 33-34 (D.D.C. 2000).

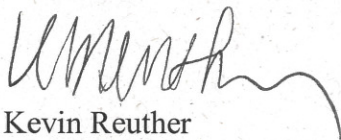
Further delay in responding to the Petition is not warranted and would violate the APA. The EPA has had nearly three years to take action on the Petition. While there is no set rule for when the failure to respond becomes actionable, the D.C. Circuit has said "a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers*, 372 F.3d at 419. In a recent case filed only one year after the plaintiffs had petitioned for rulemaking, the federal district court concluded, as a matter of law, that the delay was unreasonable and ordered a final decision within thirty days. *Families for Freedom*, 628 F.Supp.2d at 540.

Petitioners have made repeated requests that EPA rule on their Petition. We followed the June 30, 2008 Petition with written requests for EPA action on March 31, 2009, and May 24, 2010. In addition, Petitioners have participated in a number of meetings with senior EPA staff. While we have appreciated the willingness of EPA staff to discuss issues raised in the Petition, those meetings do not substitute for the required response. Nor have the meetings resulted in correction of the problems the Petition seeks to address.

### Conclusion

Nitrogen and phosphorus pollution in the Mississippi River Basin is a national problem requiring a response from the federal government consistent with the Clean Water Act. Petitioners requested that the EPA initiate a rulemaking to establish enforceable water quality standards and TMDLs to restore water quality in the Mississippi River and northern Gulf of Mexico. Nearly three years later, the EPA has still failed to respond to the Petition. We respectfully request a formal decision granting or denying the Petition by June 30, 2011. Particularly given the pressing need for effective controls on nitrogen and phosphorus pollution, a three year delay is unreasonable and a violation of law.

Sincerely,



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On Behalf of Petitioners:

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