IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MISSOURI COALITION FOR THE ENVIRONMENT,	)	
Plaintiff,	)	
v.	)	Case Number: 03-4217-CV-C-NKL
MICHAEL O. LEAVITT, Administrator of the United States Environmental Protection Agency, and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendants,	)	
and	)	
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES and URBAN AREAS COALITION,	)	
Intervenors.	)	

DEFENDANTS' SUGGESTIONS IN SUPPORT OF: PARTIAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; PARTIAL MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; AND MOTION FOR SUMMARY JUDGMENT ON REMEDY

Respectfully submitted,

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INTRODUCTION AND SUMMARY

This case concerns the relationship between the United States Environmental Protection Agency ("EPA") and the State of Missouri in the development of certain regulatory standards aimed at protecting the State's waters from pollution. Through the Federal Water Pollution Control Act, or Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1387, Congress established a comprehensive federal-state program to address pollution in our nation's waters. Under that program, the States have the primary responsibility for developing regulations called "water quality standards" to protect the integrity of their waters. To carry out that responsibility, States are required to undergo a triennial review, where at least every three years, the States must review their standards and, where appropriate, revise those standards or adopt new ones.

By comparison, EPA's principal responsibility under this program is one of oversight, whereby EPA will develop federal water quality standards for a State in only two situations. In the first situation, States must submit to the appropriate EPA regional office ("the Region") all *new or revised* water quality standards that the State adopts after the State's triennial review process. When a State adopts a new or revised standard, the Region must, within certain prescribed time frames, review the standard and either: (a) approve the standard, thus making it effective for CWA purposes, or (b) disapprove the standard, after which if the State does not correct the standard within ninety days, EPA must "promptly" propose and then promulgate a federal water quality standard to replace the disapproved State standard.

In the second situation, the EPA Administrator retains discretionary authority to review at any time *existing* State water quality standards to determine whether or not such standards meet the requirements of the CWA. If the Administrator determines that an existing standard

does not meet the requirements of the Act and, thus, that a new or revised standard is necessary, the Act requires EPA to "promptly" propose and then promulgate federal replacement standards.

This requirement to "promptly" propose and then promulgate federal water quality standards is at the heart of this case. Plaintiff seeks to compel EPA to exercise the Agency's rulemaking authority to "promptly propose" and then promulgate certain federal water quality standards for the State of Missouri. Plaintiff's sixteen-count complaint concerns sixteen Missouri state water quality standards that can be divided into three categories.

For the first category, the State previously submitted to EPA Region 7, numerous *revised* water quality standards for the Region to review under the CWA. In a letter to the State, the Region formally disapproved eight of those revisions. The State is in the process of, but has not yet corrected those disapproved standards. Plaintiff's first eight Counts of the complaint correspond to these eight disapproved standards.

The second category covers two *existing* (not new or revised) State water quality standards. For these two standards, the Region explained in its letter to the State that the Region intended to recommend to the Administrator that she exercise the discretionary authority to determine that those two existing standards were not consistent with the CWA and that federal replacement standards were necessary. Counts Nine and Ten correspond to these two water quality standards.

Finally, for the third category, the Region's letter also explained that the State should consider making certain changes to six other *existing* (not new or revised) State water quality standards during the State's next triennial review. Plaintiff's Counts Eleven through Sixteen correspond to these six water quality standards.

Each of Plaintiff's sixteen Counts seeks to compel EPA to "promptly" propose and then promulgate federal water quality standards to replace the sixteen state standards at issue. To this end, Plaintiff asks for declaratory and injunctive relief under two alternative legal theories. Plaintiff first advances a claim under the CWA's citizen suit provision, alleging that EPA has failed to perform a "nondiscretionary" or "mandatory" duty by failing to "promptly" propose and then promulgate federal water quality standards for all sixteen water quality standards at issue. In the alternative, Plaintiff raises a claim under the Administrative Procedure Act ("APA") alleging that EPA's failure to "promptly" propose and then promulgate federal water quality standards constitutes agency action unlawfully withheld or unreasonably delayed and is arbitrary, capricious and an abuse of discretion under APA section 706(1) and (2), 5 U.S.C. §§ 706(1) and (2).

Plaintiff is not entitled to the declaratory and injunctive relief that it seeks for any of the sixteen Counts in the complaint. First, the Court should dismiss under Fed. R. Civ. P. 12(b)(6) Plaintiff's CWA citizen suit claim in all sixteen Counts because Plaintiff has failed to state a claim on which relief can be granted. A CWA claim to enforce a "nondiscretionary duty" is not available where the statute provides no date-certain by which EPA must take action. Here, the CWA provides no date certain by which EPA must propose federal water quality standards; the Act only provides that EPA must do so "promptly." Absent any clear-cut deadline, Plaintiff cannot pursue a CWA citizen suit and must therefore be limited to a claim under the APA for unreasonable delay.

But even Plaintiff's APA claim for unreasonable delay fails to state a claim for Counts Nine through Sixteen. Accordingly, the Court should dismiss those Counts entirely under Rule 12(b)(6). Again, EPA has a duty to promptly propose federal water quality standards only in two

situations: (a) where the State has submitted a *new or revised* standard to the Region, the Region has formally disapproval such standard, and the State has failed to correct the standard within ninety days, or (b) where the Administrator has made a discretionary determination that an existing state standard does not meet the requirements of the CWA and a new or revised standard therefore is necessary. Neither of these two circumstances is present for the water quality standards at issue in Counts Nine through Sixteen. Accordingly, there was no duty that EPA unreasonably delayed performing and, thus, no APA claim available to Plaintiff.

Third, the Court should dismiss under Rule 12(b)(1) Plaintiff's Count One for lack of subject matter jurisdiction. Count One concerns the Region's formal disapproval of the water quality standard applicable to wetlands. Because the Region recently withdrew its disapproval of that standard, Count One is now moot.

Finally, for the remaining seven disapproved water quality standards at issue in Counts Two through Eight, the Court should grant EPA's motion for summary judgment on remedy. EPA does not contest that relief under the APA is warranted for these Counts. EPA therefore urges the Court to order relief that will preserve the State's primary role in establishing water quality standards, while ensuring that the standards are established in a reasonable time frame.

STATEMENT OF FACTS

I. General Factual Background

1. In a letter dated April 14, 1994, the State of Missouri submitted to EPA Region 7 under CWA section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), revisions to certain State water quality standards that the State had adopted as a result of its triennial review. Ex. 1 (Declaration of Cheryl A. Crisler) ("Crisler Decl.") at ¶ 6a and Tab A (attached thereto) (April 14, 1994, letter

from David A. Shorr, Director of Missouri Department of Natural Resources, to Dennis Grams, Regional Administrator, U.S. EPA Region VII) ("1994 Submission") at DEF00077-78.[1/]

2. In another letter dated December 9, 1996, the State submitted to the Region additional revisions to certain State water quality standards. Ex. 1 at ¶ 6b and Tab B (attached thereto) (December 9, 1996, letter from Edwin D. Knight, Director of Missouri Department of Natural Resources, to U. Gale Hutton, U.S. EPA Region VII) ("1996 Submission") at DEF00205-06.

3. On September 8, 2000, the Region sent a letter to the State responding to the 1994 and 1996 Submissions. Ex. 1 at ¶ 6c and Tab C (attached thereto) (September 8, 2000, letter from U. Gale Hutton, Director of Water, Wetlands, and Pesticides Division, EPA Region VII, to Stephan Mahfood, Director of Missouri Department of Natural Resources) ("September 2000 letter") at DEF0001-75.

4. The Region's September 2000 letter was divided into six sections, only three of which are involved in this litigation:

- Section III(a): Items EPA Disapproved, Ex. 1, Tab C at DEF0015-21;
- Section III(b): Existing Provisions For Which EPA Would Request That Administrator Make A Finding Of Inconsistency, *id.* at DEF0021-24;
- Section IV: Items For Attention In The State's 2000 Triennial Review, *id*. at DEF0024-29.

5. Section III(a) of the Region's September 2000 letter formally disapproved eight provisions that the State had officially adopted as revised water quality standards and submitted to the Region for review under CWA section 303(c), 33 U.S.C. § 1313(c). *Id.* at DEF0015-21.

6. Specifically, in Section III(a), the Region disapproved the following under CWA section 303(c):

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[1] Documents bates-numbered "DEF" were provided to Plaintiff in discovery.

1. The revised water quality standard applicable to wetlands, *id.* at DEF0015-16;

2. The revised water quality criterion for the dissolved oxygen content of water and the method of implementing that criterion, *id.* at DEF0016;

3. The revised water quality criteria for metals in waters designated for Drinking Water Supply, *id.* at DEF0017;

4. The revised water quality criteria for the protection of aquatic life from metal contaminants such as cadmium, copper, lead, and zinc, *id.* at DEF0017-18;

5. The revised water quality criteria for people who consume fish to protect those people from six specific chemicals, *id.* at DEF0019;

6. The revised water quality criteria for the protection of the State's Drinking Water Supply from certain contaminants in water and fish, *id.* at DEF0019;

7. The modification of the classification of six streams that had been designated as Cold-Water Sport Fisheries, *id.* at DEF0019-20; and

8. The deletion of designated uses for 21 lakes and 6 streams without following certain procedures, *id.* at DEF0020-21.

7. Consistent with 40 C.F.R. § 131.21(a)(2), the Region's disapproval of these eight revised water quality standards explained why each revision did not comply with the statutory and regulatory requirements and also informed the State of the specific changes that the State needed to make. *Id.* at DEF0015-21.

8. The Region also stated in Section III(a) that if the State did not take action within ninety days of receipt of the Region's letter to revise the disapproved provisions as recommended, EPA would propose new or revised federal water quality standards. *Id.* at DEF0016-21.

9. On May 21, 2004, the Region sent the State a letter that formally withdrew the Region's previous disapproval in the September 2000 letter of the State's revised water quality standards applicable to wetlands. Ex. 1 at ¶ 6s and Tab G (attached thereto) (May 21, 2004, letter from Leo J. Alderman, Director, Water, Wetlands, and Pesticides Division, to Stephan

Mahfood, Director Missouri Department of Natural Resources re: EPA's withdrawal of the outstanding disapproval of 10 CSR 20-7.031(4) and approval of this provision) at DEF00681-83.

10. Section III(b) of the Region's September 2000 letter identified two *existing* (not new or revised) provisions of the State's water quality standards that the Region identified as provisions for which it intended to request the Administrator to make a discretionary determination under CWA section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), that new or revised water quality standards were necessary to replace those two existing standards to ensure compliance with the Act. Ex. 1, Tab C at DEF0021, 24.

11. To date, the Region has not made any recommendation to the Administrator regarding the two existing standards identified in Section III(b) of the Region's September 2000 letter, and the Administrator has never made a determination under CWA section 303(c)(4)(B) for those two existing standards that new or revised standards were necessary to meet the requirements of the Act. Ex. 1 at ¶ 6t.

12. Section IV of the Region's September 2000 letter discussed issues with certain *existing* (not new or revised) standards that the Region recommended the State should consider in its next triennial review. Ex. 1, Tab C at DEF0024-29.

II. Facts Material To Summary Judgment

Previous EPA Region 7 and State Efforts

13. On March 12, 2001, the Region received a letter from John Young, Director, Missouri Division of Environmental Quality, which outlined the State's plan for addressing the revised water quality standards that the Region had disapproved in Section III(a) of its September 2000 letter. Ex. 1 at ¶ 6d and Tab D (attached thereto) (March 8, 2001, letter from

John Young, Director Missouri Division of Environmental Quality, to U. Gale Hutton, Director of Water Wetlands & Pesticides) ("State Plan") at DEF00347, 50, 52-54.

14. The State Plan also outlined a proposal for the State to address other issues the Region had identified for the existing standards discussed in Sections III(b) and IV of the Region's September 2000 letter. *Id.* at DEF00347-48, 50-51, 55-57.

15. The State Plan further identified a proposal to address other revisions that were not discussed in the Region's September 2000 letter, but that the State planned to pursue in order to increase the effectiveness of its state standards. *Id.*

16. To effectuate the proposed Plan, the State intended to conduct separate consecutive rulemakings to revise several of its State water quality standards. *Id.* at DEF00347.

17. The State also planned to convene a group of stakeholders to review and discuss all potential revisions to State water quality standards before such revisions were proposed. *Id.*

18. The State Plan further prioritized the order in which the state would propose revised standards by developing an approach consisting of three separate phases. Ex. 1 at ¶ 6f and Tab D at DEF00347-51.

19. The State included in Phase I the revised state water quality standards that were high priority items and for which the State expected to propose revisions within a certain timeframe. *Id.* at DEF00347-55.

20. Specifically, Phase I included: (a) six of the provisions disapproved by the Region in Section III(a) its September 2000 letter, (b) the two existing standards identified in Section III(b) of the Region's September 2000 letter, for which the Region intended to make a recommendation to the Administrator to exercise the discretionary authority to determine that a new or revised standard was necessary to comply with the CWA, and (c) one of the existing

standards that the Region had identified in Section IV of the September 2000 letter as a standard that the State consider in its upcoming triennial review. *Id.*

21. The disapproved provisions identified in Section III(a) of the Region's September 2000 letter that the State included in Phase I were:

1. Specific Criteria - wetlands, *id.* at DEF00350;
2. Water Quality criteria - aquatic life metals' criteria, *id.*;
3. Specific criteria with natural concentrations of dissolved oxygen below criteria, *id.*;
4. Metals' criteria for drinking water supply, *id.*;
5. Designated cold water sport fisheries (Table C), *id.*; and
6. Designated beneficial uses for contact recreation (swimmable) (Tables G and H), *id.*

22. The two existing standards that the Region identified in Section III(b) of its September 2000 letter that also were included in Phase I were:

1. Outstanding national resource waters, *id.,* and
2. Clean Water Act 101(a) goal for contact recreation use (whole body contact), *id.*

23. The State also decided to include in Phase I, the State's water quality standard concerning a high flow exemption, which was a standard identified in Section IV of the Region's letter as one that the State should consider in its upcoming triennial review. Ex. 1 at ¶ 6g and Tab D at DEF00350.

24. For Phase II, the State identified medium/longer term priority revisions to certain water quality standards. Ex. 1 at ¶ 6h and Tab D at DEF00348.

25. The water quality standards included in the State's Phase II plan included the following standards that the Region had identified in Section IV of its September 2000, letter as standards that the State should consider in its upcoming triennial review:

1. Bacteriological indicators, *id.* at DEF00350;
2. Biologically refined use designations, *id.*;
3. Protection of threatened and endangered species, *id.*;
4. Water quality criteria, *id.*;
5. Revisions to Tables G and H, *id.*;
6. Site specific water quality criteria, *id.*;
7. Variances, *id.*;
8. Whole effluent toxicity testing, *id.*;
9. Antidegradation implementation procedures, *id.*; and
10. Mixing zones, *id.*

26. Longer term priority items, including use protection for unclassified waterbodies (which was identified in Section IV of the Region's September 2000 letter as an item for consideration in the State's triennial review) were identified for Phase III. Ex. 1 at ¶ 6i and Tab D at DEF00348, 51.

27. Both before and after the State submitted its proposed Plan, the State and the Region held numerous meetings to discuss various technical and scientific issues concerning the State's water quality standards, including the standards identified in Sections III(a), (b), and IV of the Region's September 2000 letter. Ex. 1 at ¶¶ 7, 8 and Tab H (List of Meetings EPA Attended Where Missouri Water Quality Standards Disapproved Were Discussed).

28. Various federal and State agencies were involved in these discussions, including EPA Headquarters staff, the Missouri Department of Conservation, and the United States Fish and Wildlife Service. Ex. 1 at ¶ 8.

29. The majority of these technical discussions focused on the scientific or technical merit behind the State's suggested alternative criteria for three of the disapproved standards in Section III(a) of the Region's September 2000 letter. *Id.* ¶ 9.

30. In addition, these State and federal agencies had several technical discussions concerning the State's water quality standards for whole body contact, which was a standard identified in Section III(b) of the Region's September 2000 letter for which the Region intended to recommend to the Administrator to exercise discretionary authority to determine that a new or revised standard was necessary. *Id.* ¶ 10.

31. There also were technical discussions concerning the State's high flow exemption, which was one of the items identified in Section IV of the Region's September 2000 letter that the Region recommended the State consider in its upcoming triennial review. *Id.* ¶ 11.

32. Most of these technical discussions between the State and the Region (as well as with other State and federal agencies) consumed most of 2001 and the better part of 2002. *Id.* ¶¶ 9, 10.

33. Overall, since the Region's September 2000 letter through May 2004, the State and the Region (together sometimes with other State and federal agencies) have had at least 15 meetings to discuss revisions to the State's water quality standards, including the disapproved standards identified in Section III(a) of the Region's letter. *Id.* ¶ 7 and Tab H.

34. During this same period when the State and the Region were having numerous technical discussions, the State began holding stakeholder meetings in April 2001. *Id.* ¶ 8; Compl. ¶ 27.

35. Due to the ongoing stakeholder meetings, the numerous technical discussions between the State and the Region concerning revisions to the State's water quality standards, and issues concerning other water quality standards that were not part of the State Plan, but that also were a high priority for the State, the State's original proposed Plan for resolving its disapproved water quality standards became delayed. Ex. 1 at ¶¶ 6j, 12.

36. In an effort to try to establish a schedule for the State to resolve its disapproved water quality standards and to address other water quality standards issues, the Region initiated discussions with the State in March or April 2002 to develop a Memorandum of Understanding ("MOU"). *Id.*

37. The Region provided a draft MOU to the State in April 2002. *Id.* at ¶ 6m.

38. The Region's draft MOU provided a specific timeframe for the State to propose revised water quality standards for: (a) three of the disapproved items identified in Section III(a) of the Region's September 2000 letter, and (b) the two existing provisions identified in Section III(b) for which the Region intended to recommend to the Administrator to exercise the discretionary authority to determine that new or revised standards were necessary. *Id.* at ¶ 6k.

39. The draft MOU also provided a placeholder for a date by which the State would either propose revisions or provide additional scientific information for the remaining five disapproved water quality standards identified in Section III(a) of the Region's September 2000 letter. *Id.* at ¶ 6*l*.

40. The State responded to the Region's draft MOU on January 14, 2003. *Id.* at ¶ 6m.

41. Despite negotiations on the MOU, the Region and the State were unable to reach agreement. *Id.* at ¶ 6n.

Anticipated State Actions

42. In a letter dated November 7, 2003, from Jim Hull, Director of Missouri's Water Pollution Control Program, to Leo Alderman, Director, EPA Region 7, Water, Wetlands and Pesticides Division, Mr. Hull stated that the Missouri Clean Water Commission directed the Missouri Department of Natural Resources ("MDNR") to proceed with all proposed revisions to the State's water quality standards that would address all of the disapproved standards identified in Section III(a) of the Region's September 2000 letter, except the disapproved revision to the water quality standard applicable to wetlands. *Id.* at ¶ 6o and Tab E (attached thereto) (November 7, 2003, from Jim Hull, Director of Missouri's Water Pollution Control Program, to Leo Alderman, Director, EPA Region 7, Water, Wetlands & Pesticides Division) at DEF00420-22.

43. According to Mr. Hull's November 7, 2003, letter, the Commission also directed MDNR to propose revisions to the water quality standards for permitting in Outstanding National Resource Waters, which was one of the State's water quality standards that was identified in Section III(b) (for recommendation to the Administrator to make a discretionary determination that a new or revised standard was necessary) of the Region's September 2000 letter. *Id.* at ¶ 6p and Tab E at DEF00421.

44. Mr. Hull's November 7, 2003, letter also stated that MDNR was directed to include the adoption of E.coli (instead of fecal coliform) for use as a bacterial indicator, which was an issue identified in Section IV of the Region's September 2000 letter as an issue the State should consider in its upcoming triennial review. *Id.*

45. In another letter dated January 13, 2004, Mr. Hull notified the Region that as a result of further action by the Commission, MDNR would propose additional revisions to the State's water quality standards. Ex. 1 at ¶ 6q and Tab F (attached thereto) (January 13, 2004, letter from Jim Hull, Director of Missouri's Water Pollution Control Program, to Leo Alderman, Director, EPA Region 7, Water, Wetlands and Pesticides Division) at DEF00418-19.

46. These additional revisions would address three items identified in Section IV of the Region's September 2000 letter. *Id.*

47. Mr. Hull's January 13, 2004, letter also explained that the State intended to include in its proposed rulemaking certain changes to another existing provision that was identified in Section III(b) of the Region's September 2000 letter (the provision regarding designating water bodies for whole body contact recreation). *Id.* at ¶ 6r and Tab F at DEF00418.

48. The State's official rulemaking authority for revising the State's water quality standards rests with the Commission. Ex. 2 (Declaration of Philip A. Schroeder) ("Schroeder Decl.") at ¶ 7.

49. The Commission must vote to approve any revisions to the State's water quality standards before such revisions become final. *Id.*

50. Pursuant to the Commission's direction as explained in Mr. Hull's November 7, 2003, and January 13, 2004, letters, MDNR intends to file with the Secretary of State in the summer of 2004, the State's proposed revisions to its water quality standards, which will address the disapproved standards in Section III(a) of the Region's September 2000 letter. *Id.* at ¶ 8.

51. The State's rulemaking process entails numerous requisite steps, including:

- a thirty-day interagency review period;
- a small business impact analysis;

- a meaningful opportunity for public comment of no less than thirty days;
- public hearings before the Commission no less than seven days before the end of the public comment period; and
- review by the State's Joint Committee on Legislative Rules. *Id.* at ¶ 9.

52. In addition to these requisite steps, MDNR also conducts thorough research on technical issues, develops effective program plans for administering new program elements, and engages in a dialogue with stakeholders to assess potential impacts of proposed regulations. *Id.*

53. For the proposed revisions to the State's water quality standards that the State intends to publish in the summer of 2004, MDNR intends to hold an extended public comment period of up to six months. *Id.* at ¶ 10.

54. After the public comment period closes, MDNR will review the comments and recommend any appropriate changes to the proposed revisions to the Commission for adoption as a Final Order of Rulemaking. *Id.*

55. Once adopted by the Commission, the Final Order of Rulemaking will be published in the Missouri Register one month after the Final Order is filed with the Secretary of State. *Id.* at ¶¶ 10, 11.

56. The Final Order will appear in the Code of State Regulations one month after publication in the Missouri Register. *Id.* at ¶ 11.

57. The rulemaking will take effect thirty days following its publication in the Code of State Regulations. *Id.*

58. The State anticipates that the completion of this rulemaking process for the revision of the State's water quality standards will take approximately one year from the date the proposal is filed with the Secretary of State's office. *Id.* at ¶ 12.

59. The State therefore anticipates that the effective date of the revisions to the State's water quality standards, including the revisions to the disapproved standards in Section III(a) of the Region's September 2000 letter, will be approximately the summer of 2005. *Id.*

III. General Facts Regarding Plaintiff's Lawsuit

60. On October 7, 2003, Plaintiff filed its complaint invoking the CWA's citizen-suit provision, 33 U.S.C. § 1365(a)(2), and alleging that EPA failed to carry out a "nondiscretionary duty" under CWA sections 303(c)(3) and (4) to "promptly prepare and publish proposed regulations" for the provisions in Sections III(a), (b) and IV of the Region's September 2000 letter. Compl. ¶¶ 38, 45, 52, 59, 66, 73, 80, 87, 93, 100, 106, 113, 120, 127, 133, 139.

61. Plaintiff also alleges that EPA's failure to promptly propose and promulgate new or revised water quality standards constitutes agency action unlawfully withheld or unreasonably delayed and is arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(1) and (2). Compl. ¶¶ 39, 46, 53, 60, 67, 74, 81, 88, 94, 101, 107, 114, 121, 128, 134, 140.

62. The first eight Counts of Plaintiff's complaint relate to Section III(a) of the Region's September 2000 letter, in which the Region formally disapproved eight revised water quality standards that the State had submitted to the Region for review under CWA section 303(c). Compl., First through Eighth Claims for Relief.

63. In Counts One through Eight, Plaintiff claims that the State's failure to correct these disapproved standards within ninety days of receipt of the Region's September 2000 letter has triggered a nondiscretionary duty under the CWA on the part of EPA to promptly propose federal water quality standards and that by failing to do so, EPA has violated CWA sections

303(c)(3) and (4), 33 U.S.C. § 1313(c)(3) and (4). Compl. ¶¶ 37-38, 44-45, 51-52, 58-59, 65-66, 72-73, 79-80, 86-87.

64. Alternatively, Plaintiff's Counts One through Eight allege that EPA's failure to promptly propose federal water quality standards constitutes agency action unlawfully withheld and unreasonably delayed and is arbitrary, capricious, and an abuse of discretion under the APA, 5 U.S.C. § 706(1), (2). Compl. ¶¶ 39, 46, 53, 60, 67, 74, 81, 88.

65. Plaintiff's Ninth and Tenth Counts pertain to Section III(b) of the Region's September 2000 letter, in which the Region identified two existing provisions for which the Region intended to ask the Administrator to exercise her discretionary authority under CWA section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), to determine that new or revised federal water quality standards were necessary. Compl., Ninth and Tenth Claims for Relief.

66. In Counts Nine and Ten, Plaintiff claims that the Region (rather than the Administrator) has made the necessary determination under section 303(c)(4)(B) that a new or revised standard is necessary, thereby triggering a mandatory duty under the CWA to propose and promulgate such standards. *Id.* ¶¶ 93, 100.

67. Plaintiff's Counts Nine through Ten allege that EPA's failure to propose and promulgate federal water quality standards violates the CWA or, alternatively, violates APA sections 706(1) and (2), 5 U.S.C. §§ 706(1), (2). *Id.* ¶¶ 93-94, 100-101.

68. Plaintiff's remaining allegations in Counts Eleven through Sixteen relate to the provisions identified in Section IV of the Region's September 2000 letter, in which the Region recommended that the State consider certain items and issues in its 2000 triennial review. Compl., Eleventh through Sixteenth Claims for Relief.

69. As in Plaintiff's Ninth and Tenth Counts, Plaintiff alleges in Counts Eleven through Sixteen that such recommendations by the Region constitute determinations that new or revised standards are necessary, thereby triggering a mandatory duty under the CWA to propose and promulgate such standards. *Id.* ¶¶ 106, 113, 120, 127, 133, 139.

70. Plaintiff therefore asserts that EPA's failure to promptly propose federal water quality standards for the provisions identified in Section IV of the Region's September 2000 letter, violates the CWA or, alternatively, violates the APA sections 706(1) and (2), 5 U.S.C. §§ 706(1), (2). *Id.* 106-107, 113-114, 120-121, 127-128, 139-140.

DECISIONAL STANDARD

In deciding a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), "a court must accept the complaint's factual allegations as true and construe them in the light most favorable to the plaintiff." *Bohan v. Honeywell Int'l, Inc.*, 366 F.3d 606, 608 (8th Cir. 2004). The complaint must be dismissed if plaintiff "cannot prove any set of facts that would entitle [it] to relief." *Id.*

In a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the Court must consider whether the attack on the complaint is a "facial attack" or a "factual attack." *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Where, as here, the attack is a factual one, "the court considers matters outside the pleadings . . . and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Id.* Because a Rule 12(b)(1) motion challenges the court's jurisdiction, there is "no presumptive truthfulness [that] attaches to the plaintiff's allegations . . . ." *Id*. at 730. In addition, the plaintiff bears the burden of establishing that jurisdiction does in fact exist. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

Finally, Fed. R. Civ. P. 56(c) provides that summary judgment shall be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Winthrop Resources Corp. v. Eaton Hydraulics, Inc.*, 361 F.3d 465, 468 (8th Cir. 2004). In ruling on a motion for summary judgment, the court "must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the non-moving party." *Winthrop Resources*, 361 F.3d at 468.

ARGUMENT

I. STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act ("CWA" or "the Act") created a comprehensive federal-state system for achieving the Act's statutory goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Through this system, Congress sought to strike a "delicate balance of federalism," *Nat'l Wildlife Fed'n v. Browner*, No. Civ. A. 95-1811 (JWG), 1996 WL 601451, at *2 (D.D.C. Oct. 11, 1996) ("*NWF*"), *aff'd* 127 F.3d 1126 (D.C. Cir. 1997), by "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." *See* 33 U.S.C. § 1251(b). Under this system, EPA's role is essentially one of oversight, whereas the States have the primary role in preventing water pollution and planning for the use of State waters.[2]

The "symbiotic relationship between EPA and the states is reflected, in part, through the rights and obligations assigned in Section 303 of the [CWA]." *NWF*, 1996 WL 601451, at *3.

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[2] *See City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996) ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards").

Part of the States' responsibilities under section 303, 33 U.S.C. § 1313, involves developing and implementing "water quality standards" to protect and enhance the quality of water within the State. 33 U.S.C. §§ 1313(a)-(c).[3/] Water quality standards generally consist of three elements: (1) one or more designated "uses" of the waterway (e.g., public water supply, recreation, propagation and/or human consumption of fish, or agriculture); (2) "criteria" expressed as pollutant concentration levels or narrative statements that protect the designated use of the waterbody; and (3) an "antidegradation policy" to protect existing uses and high quality waters. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-131.12. States are required to review their applicable water quality standards at least once every three years and, as appropriate, modify them or adopt new standards. 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20. This process is known as the triennial review.

EPA has a limited role regarding the establishment of water quality standards. In fact, the Agency's authority to develop federal water quality standards is triggered in only two circumstances. First, whenever a State revises or adopts a new water quality standard, the State must submit the new or revised standard to the appropriate EPA Region for a determination as to whether the standard is consistent with the CWA and its implementing regulations. 33 U.S.C.

[3] "Water quality standards" define the water quality goals of a waterbody by designating the use or uses for the waters and by setting water quality criteria necessary to protect the use. Water quality standards are "to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act." 40 C.F.R. § 131.2(d).

§ 1313(c)(2)(A); 40 C.F.R. § 131.21(a).[4] The Region can then either approve or disapprove the new or revised standard. 40 C.F.R. § 131.5(a).

If the Region determines that the new or revised water quality standard submitted by the State is consistent with the CWA and its implementing regulations, the Region must approve the standard within sixty days.[5] *Id.* § 131.5(b). That new or revised standard then becomes the applicable water quality standard for the associated State waterbodies and EPA is not required to take any further action. 33 U.S.C. § 1313(c)(3). If, however, the Region determines that the new or revised standard is not consistent with the CWA and its implementing regulations, the Region must disapprove the standard. *Id.*; 40 C.F.R. § 131.5(b). In that case, the Region must notify the State of the disapproval within ninety days after the State submits its officially adopted new or revised standard. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(2). To help achieve Congress' desire that the State have primary responsibility for the standards, 33 U.S.C. § 1251(b), the Region's notification must inform the State of the specific changes that need to be made and shall explain why the State's new or revised standard does not comply with the statutory and regulatory requirements. 40 C.F.R. § 131.21(a)(2). The State then has ninety days after the Region's notification to adopt those specific changes. 33 U.S.C. § 1313(c)(3). If the State does not do so, EPA must then "promptly prepare and publish proposed regulations setting

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[4] Under the Act, this authority of EPA's Administrator to review new or revised standards has been delegated by regulation to the ten EPA Regional Administrators. 40 C.F.R. § 131.21(a), (b); *see NWF*, 1996 WL 601451, at * 3 ("the EPA Administrator has delegated [the authority to approve or disapprove new or revised standards] to [the] ten Regional Administrators"). In Region 7, this authority has been further delegated to the Director of Water, Wetlands, and Pesticides Division.

[5] The regulatory factors and minimum elements that the Region considers in determining if a water quality standard is consistent with the Act and the regulations are found in 40 C.F.R. §§ 131.5(a)(1)-(5) and 131.6.

forth a revised or new water quality standard . . . ." 33 U.S.C. § 1313(c)(4); 40 C.F.R. § 131.22(a). EPA must promulgate final new or revised water quality standards ninety days after publishing such proposed standards. 33 U.S.C. § 1313(c)(4).

The second circumstance under which EPA must promptly propose federal water quality standards is where the *Administrator* has made a determination that a new or revised standard is necessary to meet the requirements of the Act. The CWA gives EPA's Administrator exclusive discretionary authority to determine *sua sponte* that a new or revised standard is necessary to meet the requirements of the Act. *Id.* § 1313(c)(4)(B)[6]; 40 C.F.R. § 131.22(b). The Administrator could exercise this authority if, for example, the science regarding what constitutes a protective criterion changes and a State's standard therefore no longer meets the requirements of the Act. The Administrator could also exercise this authority if he determines that a certain requirement was missing from the State's water quality standard. Unlike the decision whether to approve or disapprove new or revised standards, which has been delegated to the Regional Administrators, the authority to make this discretionary determination under section 303(c)(4)(B) rests exclusively with the Administrator and has not been delegated to any of the ten EPA Regional Administrators.[7] If the Administrator makes the determination that a new or revised standard is necessary to meet the requirements of the Act, EPA must "promptly

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[6] CWA section 303(c)(4)(B) provides, in relevant part: "[t]he Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved . . . in any case where *the Administrator* determines that a revised or new standard is necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(B) (emphasis added); *see also Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1091 (E.D. Pa. 1996) ("Authority to make such a determination resides with the Administrator") (citing 40 C.F.R. § 131.22(b))

[7] *See NWF,* 1996 WL 601451, at *3 ("Unlike Section 303(c)(4)(A) . . . whether to exercise the authority of Section 303(c)(4)(B) is discretionary, and the Administrator has not delegated it to the Regional Administrators") (citing 40 C.F.R. § 131.22(b)).

propose" new or revised water quality standards and then promulgate final standards within ninety days after the proposed standards are published. 33 U.S.C. § 1313(c)(4)(B).

II. THE COURT SHOULD DISMISS PLAINTIFF'S CWA CAUSE OF ACTION FOR FAILURE TO STATE A CLAIM AND LIMIT PLAINTIFF TO AN UNREASONABLE DELAY CLAIM UNDER THE APA

All sixteen of Plaintiff's Counts invoke the CWA's citizen-suit provision, 33 U.S.C. § 1365(a)(2), in alleging that EPA failed to carry out a "nondiscretionary duty" under CWA sections 304(c)(3) and (4) to "promptly prepare and publish proposed regulations" for new or revised water quality standards. *See* Compl. ¶ 4. Plaintiff, however, has failed to state a claim under 33 U.S.C. § 1365(a)(2) that EPA has violated a nondiscretionary duty.

The CWA's citizen-suit provision allows a citizen to sue EPA for an alleged failure "to perform any act or duty under [the Act] which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). Thus, this section requires the identification of a duty that is "not discretionary" under the statute, *i.e.*, one that is "mandatory under the legislation." *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F. Supp. 692, 696 (W.D. Wash. 1996). A nondiscretionary duty is narrowly construed and will exist only if the statute specifies a date-certain deadline for the particular action at issue. *See Sierra Club v. Thomas*, 828 F.2d 783, 791, 794-95 & nn.77-80 (D.C. Cir. 1987) ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline").[8] When a statutory provision imposes a duty but leaves the exact timing to the agency's discretion, that duty is enforceable *only* under APA section 706(1), 5

[8] *See also Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (citizen suit provision of Clean Air Act was intended to "provide relief only in a narrowly-defined class of situations in which the Administrator failed to perform a mandatory function") (internal quotation marks and citation omitted); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) (requiring "specific non-discretionary clear-cut requirements").

U.S.C. § 706(1), through a lawsuit to compel agency action "unreasonably delayed." *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) ("when an agency is required to act . . . within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable").

Here, the CWA does not impose a date-certain deadline by which EPA must propose new or revised water quality standards. EPA's nondiscretionary duty to propose new or revised water quality standards ripens *only* when (a) the Region disapproves a new or revised state water quality standard and the State fails to correct the standard within ninety days, or (b) the Administrator makes a discretionary determination that a new or revised standard is necessary. Only then is EPA required to "promptly" publish proposed new or revised water quality standards. But that duty to "promptly" publish proposed standards is not enforceable under the CWA's citizen-suit provision as a nondiscretionary duty claim because it is not a "clear-cut," "date-certain" deadline. *Sierra Club*, 828 F.2d at 791.[9] Rather, that duty to "promptly" propose is only enforceable under APA section 706(1), 5 U.S.C. § 706(1), as a claim for unreasonable delay. Plaintiff's suit therefore should be limited accordingly.[10]

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[9] *See Defenders of Wildlife v. Browner*, 888 F. Supp. 1005, 1008-09 (D. Ariz. 1995) (under similar circumstances, court dismissed plaintiff's nondiscretionary duty claim under the CWA's citizen-suit provision).

[10] Plaintiff also cannot pursue an APA claim for "unlawfully withheld" agency action. If the Court agrees with EPA and finds that there is no mandatory duty under the CWA because there is no date-certain by which to propose federal water quality standards, Plaintiff's "unlawfully withheld" claim under the APA fails for the same reasons. *See, e.g., Forest Guardians v. Babbitt*, 164 F.3d 1261, 1272 (10th Cir. 1998) (finding that statutory language that requires an agency to take an action within a "prompt" time can only lead to an APA claim that the action has been "unreasonably delayed" under 5 U.S.C. § 706, as opposed to a claim that the action has been "unlawfully withheld"). But, even if the Court finds that the CWA imposes a mandatory duty to "promptly" propose federal water quality standards, Plaintiff still cannot pursue an APA claim for "unlawfully withheld" agency action. Such a claim is not available where a more

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III. THE COURT SHOULD DISMISS PLAINTIFF'S NINTH THROUGH SIXTEENTH COUNTS FOR FAILURE TO STATE A CLAIM BECAUSE THEY DO NOT ALLEGE THE EXISTENCE OF ANY MANDATORY DUTY

Plaintiff's Ninth through Sixteenth Counts demonstrate an erroneous understanding of the Region's statements and actions in its September 2000 letter. These Counts allege that (1) Sections III(b) and IV of EPA's 2000 letter constituted a determination by EPA that certain aspects of the State's water quality standards were not consistent with the CWA, (2) that the State "failed to correct [these] inconsisten[cies]," and (3) EPA therefore had a mandatory duty under the CWA to promptly propose and then promulgate compliant standards for the State. *See* Compl. ¶¶ 91-93, 98-100, 104-106, 111-113, 118-120, 125-127, 131-133, 137-139. Plaintiff claims that EPA's failure to promptly prepare and publish proposed compliant standards constitutes agency action unlawfully withheld or unreasonably delayed under the APA section 706(1), 5 U.S.C. § 706(1), and is arbitrary, capricious and an abuse of discretion under APA section 706(2), 5 U.S.C. § 706(2). *See* Compl. ¶¶ 94, 101, 107, 114, 121, 128, 134, 141. The plain language of the CWA, however, demonstrates that EPA had no duty to propose federal water quality standards for the State standards identified in Sections III(b) and IV of the Region's September 2000 letter. Absent any "legally required" duty, there is no "agency action

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[10](...continued)
particular statute provides a separate remedy to enforce a mandatory duty. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action") (citation omitted); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981) (comprehensive scheme of remedies under the CWA, including its citizens' suit provision, displaces remedies afforded by other federal statutes); *NWF*, 1996 WL 601451, at *6 ("To the extent that the plaintiffs are attempting to sue under the APA to enforce a nondiscretionary duty under section 303(c)(4)(A), [the relevant counts] will be dismissed, because APA review of mandatory duties is not available under the [CWA]"). Therefore, if the Court finds that the CWA imposes a mandatory duty for EPA to "promptly" propose federal water quality standards, then Plaintiff's only way to pursue the mandatory duty claim is through the CWA; not through an APA claim for agency action unlawfully withheld.

that can be compelled under the APA." *Norton v. Southern Utah Wilderness Alliance*, No. 03-1-1, 2004 WL 1301302, at *5 (U.S. June 14, 2004).

"The first step in statutory interpretation is to look at the text of the statute itself." *Haley v. Retsinas*, 138 F.3d 1245, 1249 (8th Cir. 1998) (citing *United States v. Talley*, 16 F.3d 972, 975 (8th Cir. 1994)). "If the plain meaning of the language clearly expresses the meaning Congress intended, the judicial inquiry ends there." *Id.* (citation omitted). As discussed above, the explicit language of CWA sections 303(c)(3) and (4)(A) place duties on EPA to promptly propose federal water quality standards *only* under two circumstances: (1) if and when the State has submitted *new or revised* standards to the Region for review under CWA section 303(c), 33 U.S.C. § 1313(c), that the Region disapproves and that the State does not subsequently correct, or (2) if the Administrator himself makes a discretionary determination that a new or revised standard is necessary to meet the requirements of the Act.[11/] Under this plain language, EPA has no duty absent one of these circumstances.[12/]

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[11] *See* 33 U.S.C. § 1313(c)(2)(A) ("Whenever the State *revises* or adopts a *new* standard, *such revised or new standard* shall be submitted to the Administrator") (emphasis added); *id*. 1313(c)(3) ("If the Administrator determines that any such *revised or new standard* is not consistent with the applicable requirements . . . "); *id.* § 1313(c)(4)(A) (the Administrator shall "promptly prepare and publish proposed regulations" for a new or revised water quality standard "if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection . . . is determined by the Administrator not to be consistent with the applicable requirements"); *id.* § 1313(c)(4)(B) (the Administrator shall "promptly prepare and publish proposed regulations" for a new or revised water quality standard "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter").

[12] *See Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599, 602 (11th Cir. 1997) ("Administrator has a mandatory to review any new or revised state water quality standards"); *NWF*, 1996 WL 601451 at *4 ("plaintiffs' theory unravels at the outset because, by its own text, Section 303(c)(3) of the [CWA] . . . applies only to new or revised water quality standards"); *id.* at *5 ("[s]imilarly, the regulatory requirement to review water quality standards is triggered only '[a]fter the State submits its officially adopted revisions'") (quoting 40 C.F.R. 131.21(a)); *NWF*

(continued...)

Counts Nine through Sixteen do not involve either of the situations that would have triggered EPA's authority to propose federal water quality standards. None of these Counts involve *new or revised* State standards that the Region disapproved and that the State subsequently did not correct. Even Plaintiff's Complaint acknowledges the difference between the *revised* standards that the Region disapproved, which are at issue Counts One through Eight, and the *existing* standards that the Region did not disapprove, which are at issue in Counts Nine through Sixteen. For example, Plaintiff states that the Region's September 2000 letter "*formally disapproved* eight categories of . . . *revisions*" that the State had submitted to EPA in its 1994 and 1996 Submissions. Compl. ¶ 23 (emphasis added); *see id.* ¶¶ 24, 34, 41, 48, 55, 62, 69, 76, 83. Such reference, however, to a "disapproved" "revised" standard, is notably absent from Plaintiff's Counts Nine through Sixteen.

In addition, nothing in Counts Nine through Sixteen alleges that under CWA section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), the *Administrator* made a determination that new or revised standards were necessary to meet the requirements of the CWA. These Counts only loosely assert that "EPA has determined that a revised or new standard is necessary to meet the requirements of the CWA," (without any factual assertion that such a determination was actually made by the EPA Administrator) and that such "determination" triggered a mandatory duty on the part of EPA to propose and promulgate compliant standards. Compl. ¶¶ 93, 100. But as discussed above, the EPA Administrator has *exclusive* discretionary authority to determine at

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[12](...continued)
V. Browner, 127 F.3d 1126, 1131 (D.C. Cir. 1997) (the regulations do no impose a nondiscretionary duty on EPA to approve unmodified water quality standards); *NRDC v. Fox*, 909 F. Supp. 153, 161 (S.D.N.Y. 1995) ("The statutory language clearly only requires review of new or revised standards by the EPA"); *Envt'l. Def. Fund v. Costle*, 657 F.2d 275, 293 n.53 (D.C. Cir. 1981) (noting that because the states had not submitted revised or new standards for EPA approval, the agency was under no duty to act under CWA section 303(c)(4)(A)).

any time that a new or revised water quality standard is necessary to meet the requirements of the Act. 33 U.S.C. § 1313(c)(4)(B). Here, the EPA Administrator did not make any determination that new or revised standards were necessary for any of the categories in Sections III(b) and IV of the Region's 2000 letter. In fact, for the categories in Section III(b), the letter is abundantly clear that the Region was stating its intention "to ask the Administrator to make a determination under CWA section 303(c)(4)(B) that new or revised water quality standards are necessary" for the two categories identified. Ex. 1, Tab C at DEF0021. For the categories in Section IV, the Region did not even express an intention to make this recommendation. *Id.* at DEF0024-29. Thus, this language did not and cannot constitute a determination by the Administrator that new or revised standards were necessary so as to trigger a mandatory duty on the part of EPA to promptly publish proposed new or revised water quality standards.[13] To hold otherwise would chill communication by the Regions with the States in contravention of the purposes of the CWA.

Because Plaintiff's Counts Nine through Sixteen fail to allege facts demonstrating either of the two circumstances that would have triggered a mandatory duty on the part of EPA to promptly propose federal water quality standards, Plaintiff has failed to state a claim on which relief can be granted. The Court therefore should dismiss Counts Nine through Sixteen.

IV. THE COURT SHOULD DISMISS COUNT ONE FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE EPA RECENTLY WITHDREW ITS DISAPPROVAL OF THAT CORRESPONDING WATER QUALITY STANDARD

Section III(a) of the Region's September 2000 letter formally disapproved eight categories of revised water quality standards that the State submitted to the Region for review

[13] In addition, the Region to date has not recommended to the Administrator that he make such a determination under CWA section 303(c)(4)(B). Statement of Fact No. 11.

under CWA section 303(c). Statement of Fact No's 5-6. Plaintiff's Count One addresses the revised water quality standards applicable to wetlands, which was one of the disapproved standards in Section III(a) of the Region's September 2000 letter. Compl. ¶¶ 33-39; Statement of Fact. No. 6.

Count One should be dismissed because on May 21, 2004, the Region sent a letter to the State that formally withdrew the Region's September 2000 disapproval of the water quality standard applicable to wetlands. Statement of Fact No.9; Ex. 1, Tab G (May 21, 2004, letter from Leo J. Alderman, Director, Water, Wetlands, and Pesticides Division, to Stephan Mahfood, Director Missouri Department of Natural Resources). The Region decided to withdraw its previous disapproval of this standard because the disapproval was based "on an erroneous analysis of the level of protection afforded to wetlands under the revised regulations." Ex. 1, Tab G at DEF00681.

By virtue of the withdrawal of the Region's previous disapproval, this water quality standard is now approved and, thus, there is no remaining duty on the part of EPA. Count One therefore should be dismissed because it is moot and no further relief can be granted.[14] *See e.g., One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 893 (8th Cir. 2004) (request for declaratory and injunctive relief under National Environmental Policy Act mooted by subsequent agency action that completed project at issue).

[14] Plaintiff's recourse as to EPA's withdrawal of its disapproval of this water quality standard would be to file a claim under the APA challenging that final agency action as arbitrary, capricious or otherwise not in accordance with law.

V. EPA IS ENTITLED TO SUMMARY JUDGMENT AS TO REMEDY FOR COUNTS TWO THROUGH EIGHT BECAUSE THE UNDISPUTED FACTS DEMONSTRATE THAT JUDICIAL INTERVENTION IS NOT APPROPRIATE IN THIS CASE

For the remaining disapproved water quality standards in Counts Two through Eight, EPA does not contest that relief is authorized. Under the APA section 706(1), 5 U.S.C. § 706(1), the Court may compel agency action "unreasonably delayed." The Supreme Court has established, however, that where Congress has authorized injunctive relief, the federal courts retain their traditional discretion to formulate equitable relief appropriate in the particular case, based on the facts and the statutes at issue, except to the extent that Congress has specifically provided otherwise. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Here, if the Court finds unreasonable delay on Plaintiff's Counts Two through Eight for the categories of standards that EPA disapproved, the Court may compel EPA to take the action at issue, *i.e.*, promptly prepare and publish proposed new or revised water quality standards. But, as discussed below, the attached declarations from Cheryl A. Crisler (Ex. 1) and Philip A. Schroeder (Ex. 2) demonstrate that such relief is not appropriate in this case. Rather, the appropriate relief would be for the Court to retain jurisdiction over this case to allow the State to follow through on its schedule and only if the State fails to meet its schedule, should the Court order EPA to submit a schedule for federal rulemaking.

In considering whether to order an agency to act and if so, under what time frame, courts will order agencies to complete consideration of issues only in an "exceptionally rare case." *In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991); *see also In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (the mandamus inherent in the unreasonable delay remedy "is an extraordinary remedy, reserved only for extraordinary circumstances"). The Court should view this case prospectively and not be governed by what alleged noncompliance has happened in the

past. *See American Littoral Soc'y v. EPA*, 199 F. Supp. 2d 217, 240 (D.N.J. 2002) (in CWA unreasonable delay case, the court found that "EPA's past noncompliance is irrelevant to the question of the agency's present compliance, and to whether the Court will compel EPA to act in a particular manner") (citing *NRDC v. Fox*, 93 F. Supp. 2d 531, 536 (S.D.N.Y. 2000), *aff'd in part, vacated in part*, 268 F.3d 91 (2d Cir. 2001)). In addition, the Court should consider whether there is a need for judicial intervention, particularly where as here the State has committed to correct the issues in the near future. *See American Littoral Soc'y*, 199 F. Supp. 2d at 240 (if a mandatory duty "has been triggered, the nature and extent of that duty must be assessed in light of continuing developments, including progress in [the State's] efforts").

With these principles in mind, judicial intervention is not appropriate in this case. Since the Region's September 2000 letter, in the spirit of Congress' intent to foster consultation between EPA and the States, the Region and the State have been working to resolve the State's disapproved standards, as well as the other standards discussed in the Region's September 2000 letter. Statement of Fact No's 13-41.

Shortly after the Region's September 2000 letter, the Region and the State started having technical and scientific discussions concerning the State's disapproved water quality standards. Statement of Fact No's 27-33; Ex. 1, Tab H (identifying the first meeting between the Region and the State regarding the disapproved standards occurring on October 4, 2000). These meetings and discussions have continued until as recently as May 13, 2004, often with participation from EPA Headquarters and other State and federal agencies. Statement of Fact No. 28. Overall, since the Region's September 2000 letter, the Region and the State have had at least 15 meetings to discuss the State's disapproved standards. Statement of Fact No. 33.

Also, in keeping with Congress' goal of fostering consultation between the States and EPA, the Region attempted to negotiate a Memorandum of Understanding ("MOU") with the State for the purpose of establishing a schedule under which the State would address the disapproved water quality standards. Statement of Fact No's 36-41. After over nine months of negotiations, the Region and the State were unable to come to agreement on the terms of a MOU. Statement of Fact No. 41. After these negotiations stalled in January 2002, the Region continued to have numerous technical meetings and discussions with the State in an effort to resolve issues concerning the disapproved water quality standards. Ex. 1, Tab H. These technical discussions, as well as the ongoing stakeholder meetings that the State has conducted, Statement of Fact No. 17; Compl. ¶ 27, have served to provide the State with necessary information for revising its water quality standards.

Based on the progress made thus far, the Missouri Clean Water Commission ("the Commission") has specifically directed the Missouri Department of Natural Resources ("MDNR") to proceed with a proposed rulemaking the revise the State's water quality standards and, specifically, to address the disapproved water quality standards (except the standard applicable to wetlands for which the Region has withdrawn its disapproval) identified in the Region's September 2000 letter. Statement of Fact No. 42; Ex. 2 (Schroeder Decl) at ¶ 8. MDNR anticipates filing the proposed revisions within a few months. Statement of Fact No. 50; Ex. 2 at ¶ 8. Once the proposed revisions have worked their way through the State's rulemaking process, Statement of Fact No's 51-57, MDNR anticipates that the final revisions will be effective in the summer of 2005. Statement of Fact No's 58-59.

As these declarations demonstrate, the "[s]ufficient progress by [the State] even after a period of delinquency," should serve to "reduce the extent of EPA intervention required or even

render moot the need for any intervention." *American Littoral Soc'y*, 199 F. Supp. 2d at 240. Allowing the State to correct the disapproved aspects of its water quality standards would serve Congress' stated goal of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." 33 U.S.C. § 1251(b). If the Court were to order federal promulgation by EPA at this time, it would cut off the State's ongoing process and discourage further State efforts to move the regulatory process forward, thus hindering EPA's and the State's efforts to develop the "symbiotic relationship" that Congress envisioned. *NWF*, 1996 WL 601451, at *3. In addition, requiring EPA to take action within a certain time frame would constitute a wasteful expenditure of both state and federal resources while the State is conducting its parallel process. Based on the State's anticipated schedule, the Court therefore should retain jurisdiction of the case and order that EPA submit a schedule for rulemaking only if the State fails to meet its anticipated schedule.

Even if the Court decides, however, not to allow the State's process to run its course, then EPA is "entitled to considerable deference in establishing a timetable for completing its proceedings," particularly when the proceedings, as here, present complex scientific and technical issues. *See Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987).[15] As a general rule, "respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities." *Barr*

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[15] *See Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 476 (D.C. Cir. 1998) (rejecting intrusive remedial measures, the court stated that "[a]lthough the APA gives courts the authority to 'compel agency action . . . unreasonably delayed,' . . . we are acutely aware of the limits of our institutional competence in the highly technical area at issue in this case."); *Oil, Chem., & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (deciding not to second-guess the agency's judgment where the court was "cognizant . . . of the complex scientific and technical issues involved in deciding whether to revise the current standards and in formulating a revision").

Labs., 930 F.2d at 74. Federal courts have recognized that they generally are "'ill-suited to review the order in which an agency conducts its business.'" *Sierra Club*, 828 F.2d at 797 (quoting *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970)). Thus, to minimize the "intru[sion] into the quintessential discretion of the [Administrator] . . . to allocate [EPA's] resources and set its priorities," *Oil, Chem. & Atomic Workers v. OSHA*, 145 F.3d 120, 123 (3d Cir. 1998), the Court, at most, should order the parties to submit additional briefing on an appropriate schedule, which would avoid the unnecessary intrusion into the Agency's complex and resource-intensive federal rulemaking task.[16/]

CONCLUSION

For the reasons stated above, EPA respectfully requests that its motions be granted.

Respectfully submitted,

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[16] See *Forest Guardians*, 174 F.3d at 1193 (given inaction despite a nondiscretionary duty to public a final rule, the court remanded with instructions to order the Secretary to publish a rule as soon as possible); *In re International Chemical Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (noting the court's "grave cause for concern," OSHA was ordered to comply with the Agency's own target date for completion of the rulemaking).

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ATTORNEYS FOR DEFENDANTS

DATED: June 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2004, I electronically filed the foregoing Defendants' Suggestions in Support of Partial Motion to Dismiss for Failure to State a Claim; Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction; and Motion for Summary Judgment on Remedy with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the counsel of record listed below, and I also served by Federal Express hard copies of the Notice Regarding Exhibit Attachments, along with the corresponding exhibits, on these same counsel:

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