

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

GULF RESTORATION NETWORK,)
MISSOURI COALITION FOR THE)
ENVIRONMENT, IOWA ENVIRONMENTAL)
COUNCIL, TENNESSEE CLEAN WATER)
NETWORK, MINNESOTA CENTER FOR)
ENVIRONMENTAL ADVOCACY, SIERRA)
CLUB, WATERKEEPER ALLIANCE, INC.,)
PRAIRIE RIVERS NETWORK, KENTUCKY)
WATERWAYS ALLIANCE, ENVIRONMENTAL)
LAW & POLICY CENTER, and the)
NATURAL RESOURCES DEFENSE)
COUNCIL, INC.,)

Plaintiffs,)

v.)

LISA P. JACKSON, Administrator of the United)
States Environmental Protection Agency, and)
THE UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendants.)

Civil Action
No.: 2:12-cv-00677

Hon. Jay C. Zainey
Magistrate Daniel E. Knowles, III

**MOTION FOR LEAVE TO INTERVENE BY THE STATES OF NEBRASKA,
ALABAMA, ARKANSAS, IOWA, KANSAS, KENTUCKY, MISSOURI,
NORTH DAKOTA, OKLAHOMA, AND SOUTH DAKOTA,
IN SUPPORT OF DEFENDANTS**

Pursuant to Federal Rules of Civil Procedure 24(a) and (b) and Local Rule 7.6, the States of Nebraska, Alabama, Arkansas, Iowa, Kansas, Kentucky, Missouri, North Dakota, Oklahoma, and South Dakota, (collectively ~~%States+~~) hereby file their Motion For Leave To Intervene In Support Of Defendants (~~%Motion+~~) in this action. The States are entitled to intervene as a matter of right because of their interest in the administration of the National Pollutant Discharge Elimination System (~~%NPDES+~~) programs and its impacts within their borders.

It is the policy of Congress to protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. 33 U.S.C. 1251(b). Consistent with this policy, EPA is engaged with the states in the cooperative process of evaluating and protecting water quality in the Mississippi River basin and has lawfully and appropriately exercised discretion granted by Congress in denying the petition. Heretofore, the interests of the State are not adequately represented in this action. Should the Court elect to find the States are not entitled to intervene as a matter of right, the States request leave be granted for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2)(a) as the authorized permitting authorities for the NPDES program.

The States have fulfilled their obligation under LR 7.6 to consult with Counsel to obtain consent to their Motion from all parties with opposing interests. Counsel for the federal defendants (Lisa Jackson and EPA) have indicated that these parties will take no position with regard to the States' motion. Pursuant to L.R 7.6, the States consulted with counsel for Plaintiffs, but were unable to obtain their consent prior to filing.

Respectfully submitted this 13th day of July, 2012.

**STATE OF NEBRASKA,
JON C. BRUNING
ATTORNEY GENERAL OF NEBRASKA**

**STATE OF KENTUCKY,
JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY**

**STATE OF MISSOURI,
CHRIS KOSTER
ATTORNEY GENERAL OF MISSOURI**

**STATE OF NORTH DAKOTA,
WAYNE STENEHJEM
ATTORNEY GENERAL OF NORTH DAKOTA**

**STATE OF OKLAHOMA,
SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA**

**STATE OF SOUTH DAKOTA,
MARTY J. JACKLEY
ATTORNEY GENERAL OF SOUTH DAKOTA**

DEFENDANTS.

BY: /s/ Ryan Seidemann
Ryan M. Seidemann, RPA, #28991
SeidemannR@ag.state.la.us
Assistant Attorney General
Section Chief, Lands & Natural Resources
Civil Division, Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 326-6085

BY: s/ Katherine J. Spohn
Katherine J. Spohn, #22979
Special Counsel to the Attorney General
Blake E. Johnson, #24158
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Phone (402) 471-2682
katie.spohn@nebraska.gov
blake.johnson@nebraska.gov

**STATE OF ALABAMA,
LUTHER STRANGE
ATTORNEY GENERAL OF ALABAMA**

BY: Luther Strange
Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
P.O. Box 300152
Montgomery, AL 36130-0152
(334) 242-7300

**STATE OF ARKANSAS,
DUSTIN MCDANIEL
ATTORNEY GENERAL OF ARKANSAS**

BY: s/Charles L. Moulton
Pro Hac Vice Counsel
Charles L. Moulton, Ark. Bar No. 91105
Sr. Assistant Attorney General
Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201

**STATE OF IOWA,
THOMAS J. MILLER
ATTORNEY GENERAL OF THE STATE OF IOWA**

BY: s/David R. Sheridan
DAVID R. SHERIDAN
Assistant Attorney General
Environmental Law Division
Iowa Department of Justice
Lucas State Office Building
321 E. 12th Street, Ground Flr.
Des Moines, IA 50319
(515) 281-5351

**STATE OF KANSAS
DEREK SCHMIDT
ATTORNEY GENERAL OF KANSAS**

BY: s/Jeffrey A. Chanay
Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Deputy Attorney General,
Civil Litigation Division
OFFICE OF THE ATTORNEY GENERAL
Memorial Building, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1597
Tel.: (785) 296-2215
Fax: (785) 291-3767
jeff.chanay@ksag.org

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I, Ryan Seidemann, hereby certify that on July 13, 2012, a copy of the States Motion to Intervene in Support of Defendants was served on all parties or their counsel via the United States District Court for the Eastern District of Louisiana's CM/ECF system.

/s/ Ryan Seidemann

Ryan M. Seidemann, RPA, #28991

Assistant Attorney General

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MEMORANDUM IN SUPPORT OF THE STATES MOTION TO INTERVENE

Plaintiffs filed an Amended Complaint with this Court on April 3, 2012, seeking, among other things, to have the United States Environmental Protection Agency's (EPA) July 29, 2011 denial of Plaintiffs' July 30, 2008 Petition for Rulemaking Under the Clean Water Act (Petition) declared arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the Administrative Procedure Act (APA) and the Clean Water Act (CWA). See, Document 22 at 17. The States Nebraska, Alabama, Arkansas, Iowa, Kansas, Kentucky, Missouri, North Dakota, Oklahoma, and South Dakota, seek to intervene in this action and urge the Court to

afford EPA the requisite administrative deference warranted by the denial of the Petition and dismiss the Plaintiff's Complaint.

BACKGROUND

The Petition requested, among other things, EPA conduct a rulemaking to establish numeric nutrient criteria (~~NNC~~) for all jurisdictional waters where such standards did not already exist and establish total maximum daily loads (~~TMDLs~~) for nitrogen and phosphorus for specific segments of the Mississippi River Basin and Gulf of Mexico. See, Document 22-1 at 70-71. Clearly, the scope of the Petition's request has the potential to affect not only those states within the Mississippi River Basin, but all 50 states.

As to NNC, EPA denied the Petition reasoning ~~that~~ the most effective and sustainable way to address widespread and pervasive nutrient pollution in the MARB and elsewhere is to build on these efforts and work cooperatively with states and tribes to strengthen nutrient management programs.+ See, Document 22-2 at 4. EPA noted that ~~the~~ long-standing policy, consistent with the CWA, has been that states should develop and adopt standards in the first instance, with the EPA using its own rulemaking authority only in cases where it disapproves a new or revised standard, or affirmatively determines that new or revised standards are needed to meet CWA requirements.+ *Id* at 5. As to TMDL, EPA denied the Petition on similar grounds noting that ~~the~~ development of lists of impaired waters and TMDLs, and the submission of those lists and TMDLs to EPA for review and approval, is the responsibility of the states.+ *Id*. EPA considered ~~working~~ in partnership with states and stakeholders at

both the national and Regional level to reduce nutrient loadings from both point and non-point sources to be a more efficient allocation of administrative resources. *Id.*

THE STATES ARE ENTITLED TO INTERVENE

A party is entitled to intervene in an action where the party claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. Fed. R. Civ. P. 24(a)(2).

In evaluating motions to intervene, courts often refer to the criteria of Federal Rule of Civil Procedure 24(a)(2) for intervention as of right in the district courts. Those criteria are that: (1) the application for intervention must be timely; (2) the applicant must claim an interest relating to the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interest. *See, e.g., John Doe No. 1 v. Glickman*, 256 F. 3d 371, 375 (5th Cir. 2001).

The inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application [and] intervention of right must be measured by a practical rather than technical yardstick. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F. 2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The States Motion meets each of these prerequisites under the present circumstances, as will be discussed in turn.

I. The States Motion Is Timely

The Court should consider four factors when evaluating the timeliness of a motion to intervene: 1) length of time movant knew, or should have known, of its interest in the action; 2) prejudice, if any, the existing parties may suffer because the movant failed to intervene when it knew, or reasonably should have known, of its interest in the action; 3) prejudice if any, the movant may suffer if intervention is denied; and 4) any unusual circumstances favoring or disfavoring intervention. See e.g., *Sierra Club v. Espy*, 18 F. 3d 1202, 1205 (5th Cir. 1994).

The States Motion is timely under these factors. The Motion is being filed early in the proceedings. According to the Court's Order from the scheduling conference held on July 11, 2012, the Administrative Record will not be filed with the Court until August 17, 2012, and a proposed Case Management Order is to be filed 14 days following. Thus, the States intervention will not in any manner interfere with the briefing schedule imposed by the Court. There will be no prejudice to the existing parties as a result of intervention. However, denying intervention will prejudice the States since the remedy sought by Plaintiffs has a significant impact on the scope of States authority under the CWA and these interests are not otherwise represented.

II. The Proposed Intervenor-Petitioner States Have Interests That Will Be Impaired By The Challenged EPA Action

The States have significant interests in this action that will be impaired by the Plaintiffs proposed remedy. Each of the States seeking to intervene in this action assumed the authority to implement the various programs created by the CWA. That authority is exercised through the cooperative federalism framework established by Congress in the CWA. Although Plaintiffs seek to force EPA to establish *federal* NNC

and TMDLs, the States are ultimately obligated to implement and enforce those standards.

Furthermore, the Plaintiffs' proposed remedy does not merely implicate issues of federalism. Forcing EPA, and thereby the States, to establish NNC and TMDLs for nutrients divests them of their Congressionally-authorized discretion to establish water quality standards taking into consideration their use and value for agricultural, industrial, and other purposes. See, 33 U.S.C. § 1313(c)(2)(A).

III. The Existing Parties Cannot Adequately Represent The Proposed Intervenor-Petitioner State's Interests

The burden of showing inadequate representation in a motion for intervention is not too onerous. *Dimond v. District of Columbia*, 792 F. 2d 179, 192 (D.C. Cir. 1986). The applicant need only show that representation of his interest may be inadequate, not that representation will in fact be inadequate. *Id.*

The States have interests that are separate and apart from those existing parties in the litigation. For example, although the States may have some interests in common with the nongovernmental Petitioners in these consolidated cases, the States must take into account competing needs from the broader perspective of the public interest. See, e.g., *Dimond*, 792 F.2d at 192-193. Moreover, each State has unique interests distinct from those of other States. For example, in states like Iowa where 88% of the land is in agricultural production, state officials are concerned that numeric nutrient regulation imposed by the EPA could dramatically impact the economy. (Exhibit A, B - Branstad & Northey letters) State agencies that are committed to protecting the environment

strongly prefer to work collaboratively with the EPA to solve the complex problem of water quality in state waterways and, ultimately, in the Gulf. (Exhibit C - Gipp letter)

THE STATES ALTERNATIVELY REQUEST THE COURT'S LEAVE FOR PERMISSIVE INTERVENTION

Should the Court elect to find that the States are not entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), the States request leave of the Court to seek permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2)(a). As noted above, the States are the authorized and obligated to adopt water quality standards, including numeric criteria where necessary. The Court should permit the States to intervene due to role in administering the CWA programs at issue in this action. Also as noted above, the States intervention will not cause delay or prejudice for the other parties to this action.

CONCLUSION

For the foregoing reasons, the Court should grant the States Motion For Leave To Intervene.

Respectfully submitted this 13th day of July 2012.

**STATE OF NEBRASKA,
JON C. BRUNING
ATTORNEY GENERAL OF NEBRASKA**

**STATE OF KENTUCKY,
JACK CONWAY
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ATTORNEY GENERAL OF NORTH DAKOTA**

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SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA**

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MARTY J. JACKLEY
ATTORNEY GENERAL OF SOUTH DAKOTA**

DEFENDANTS.

BY: /s/ Ryan Seidemann
Ryan M. Seidemann, RPA, #28991
SeidemannR@ag.state.la.us
Assistant Attorney General
Section Chief, Lands & Natural Resources
Civil Division, Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 326-6085

BY: s/ Katherine J. Spohn
Katherine J. Spohn, #22979
Special Counsel to the Attorney General
Blake E. Johnson, #24158
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Phone (402) 471-2682
katie.spohn@nebraska.gov
blake.johnson@nebraska.gov

**STATE OF ALABAMA,
LUTHER STRANGE
ATTORNEY GENERAL OF ALABAMA**

BY: Luther Strange
Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
P.O. Box 300152
Montgomery, AL 36130-0152
(334) 242-7300

**STATE OF ARKANSAS,
DUSTIN MCDANIEL
ATTORNEY GENERAL OF ARKANSAS**

BY: s/Charles L. Moulton
Pro Hac Vice Counsel
Charles L. Moulton, Ark. Bar No. 91105
Sr. Assistant Attorney General
Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201

**STATE OF IOWA,
THOMAS J. MILLER
ATTORNEY GENERAL OF THE STATE OF IOWA**

BY: s/David R. Sheridan
DAVID R. SHERIDAN
Assistant Attorney General
Environmental Law Division
Iowa Department of Justice
Lucas State Office Building
321 E. 12th Street, Ground Flr.
Des Moines, IA 50319
(515) 281-5351

**STATE OF KANSAS
DEREK SCHMIDT
ATTORNEY GENERAL OF KANSAS**

BY: s/Jeffrey A. Chanay
Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Deputy Attorney General,
Civil Litigation Division
OFFICE OF THE ATTORNEY GENERAL
Memorial Building, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1597
Tel.: (785) 296-2215
Fax: (785) 291-3767
jeff.chanay@ksag.org

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/s/ Ryan Seidemann
Ryan M. Seidemann, RPA, #28991
Assistant Attorney General

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PROTECTION AGENCY,)

Defendants.)

Civil Action
No.: 2:12-cv-00677

Hon. Jay C. Zainey
Magistrate Daniel E. Knowles, III

ORDER

Considering the States Motion for Leave to Intervene,

IT IS HEREBY ORDERED that the StatesqMotion is GRANTED.

IT IS HEREBY FURTHER ORDERED that the StatesqAnswer be filed into the record in this matter and that the States be allowed to participate in these proceedings as an intervening Defendant.

New Orleans, Louisiana, this ____ day of _____, 2012.

UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
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**THE STATES OF NEBRASKA, ALABAMA, ARKANSAS, IOWA, KANSAS,
KENTUCKY, MISSOURI, NORTH DAKOTA, OKLAHOMA, AND
SOUTH DAKOTA’S ANSWER TO PLAINTIFFS’ AMENDED COMPLAINT**

Defendant-Intervenor Statesq Nebraska, Alabama, Arkansas, Iowa, Kansas,
Kentucky, Missouri, North Dakota, Oklahoma, and South Dakota, hereby Answer
PlaintiffsqAmended Complaint as follows:

1. The first sentence of paragraph 1 of the Complaint characterizes the
Complaint and therefore requires no response. Exhibit A to Complaint is a copy of the
administrative Petition, which speaks for itself and is the best evidence of its content.
The first sentence of footnote 1 characterizes the Petition, which speaks for itself and is
the best evidence of its content. The second and third sentences of footnote 1
characterize the Complaint and therefore require no response.

2. The States do not have information sufficient to admit or deny the allegations in this paragraph and, therefore, deny the allegations in paragraph 2 of the complaint.

3. The States admit that the quoted words appear in Section 303 of the Clean Water Act, 33 U.S.C. § 1313, which statute speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations in paragraph 3.

4. The first sentence of paragraph 4 consists of conclusions of law and therefore requires no response. To the extent a response is required, the States deny these allegations. Paragraph 4.a. characterizes EPA's July 29, 2011 Letter denying the Petition, which speaks for itself and is the best evidence of its content. Paragraph 4.a. also contains conclusions of law and therefore requires no response. Paragraph 4.b. contains conclusions of law and therefore requires no response.

5. The allegations in paragraph 5 are conclusions of law and, therefore, require no response; to the extent a response is required, these allegations are denied.

JURISDICTION AND VENUE

6. The allegations in paragraph 6 are conclusions of law and, therefore, require no response; to the extent a response is required, these allegations are denied.

7. The allegations in paragraph 7 are conclusions of law and, therefore, require no response; to the extent a response is required, these allegations are denied. The States do not have information sufficient regarding where Plaintiff Gulf Restoration Network resides or does business and, therefore, deny these allegations.

PARTIES

8. The States do not have information sufficient to admit or deny the allegations related to Plaintiff Gulf Restoration Network and, therefore, deny the allegations in paragraph 8.

9. The States do not have information sufficient to admit or deny the allegations related to Plaintiff Missouri Coalition for the Environment and, therefore, deny the allegations in paragraph 9.

10. The States do not have information sufficient to admit or deny the allegations related to Plaintiff Iowa Environmental Council and, therefore, deny the allegations in paragraph 10.

11. The States do not have information sufficient to admit or deny the allegations related to Plaintiff Tennessee Clean Water Network and, therefore, deny the allegations in paragraph 11.

12. The States do not have information sufficient to admit or deny the allegations related to Plaintiff Minnesota Center for Environmental Advocacy and, therefore, deny the allegations in paragraph 12.

13. The States do not have information sufficient to admit or deny allegations related to Plaintiff Sierra Club and, therefore, deny the allegations in paragraph 13.

14. The States do not have information sufficient to admit or deny allegations related to Plaintiff Waterkeeper Alliance and, therefore, deny the allegations in paragraph 14.

15. The States do not have information sufficient to admit or deny allegations related to Plaintiff Prairie Rivers Network and, therefore, deny the allegations in paragraph 15.

16. The States do not have information sufficient to admit or deny allegations related to Plaintiff Kentucky Waterways Alliance and, therefore, deny the allegations in paragraph 16.

17. The States do not have information sufficient to admit or deny allegations related to Plaintiff Environmental Law & Policy Center and, therefore, deny the allegations in paragraph 17.

18. The States do not have information sufficient to admit or deny allegations related to Plaintiff Natural Resources Defense Council and, therefore, deny the allegations in paragraph 18.

19. The first sentence of paragraph 19 characterizes the Complaint and therefore requires no response. States do not have information sufficient to admit or deny the factual allegations in this paragraph and, therefore, deny the allegations. This paragraph also consists of conclusions of law that require no response; to the extent a response is required, these allegations are denied.

20. The States admit that Lisa P. Jackson is the Administrator of the EPA. The remainder of the first sentence of paragraph 20 consists of conclusions of law that require no response. The second sentence characterizes the Complaint and therefore requires no response.

21. The States admit that the U.S. EPA is an agency of the federal government. The remainder of paragraph 21 consists of conclusions of law that require no response. To the extent a response is required, the States deny the allegations.

STATUTORY FRAMEWORK

22. The States admit that the quoted words in paragraph 22 appear in the Clean Water Act, 33 U.S.C. § 1251, which statute speaks for itself and is the best evidence of its content. The remainder of paragraph 22 characterizes the CWA and therefore requires no response. To the extent a response is required, the States deny the allegations.

23. Paragraph 23 characterizes the CWA, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

24. The States admit that the quoted words in paragraph 24 appear in the referenced opinion of the U.S. Supreme Court, which opinion speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

25. The States admit that the quoted words in paragraph 25 appear in the referenced opinion of the U.S. Supreme Court, which opinion speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

26. The States admit that the quoted words in paragraph 26 appear in Section 303 of the Clean Water Act, 33 U.S.C. § 1313, which statute speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

27. The States admit that the quoted words in paragraph 27 appear in Section 303 of the Clean Water Act. See 33 U.S.C. § 1313. To the extent that Plaintiffs have characterized the meaning of Section 303, the statute speaks for itself and is the best evidence of its contents. To the extent a response is required, the States deny the allegations.

28. The States admit that the quoted words in paragraph 28 appear in Section 303 of the Clean Water Act, 33 U.S.C. § 1313, which statute speaks for itself and is the best evidence of its content. Paragraph 28 also characterizes § 1313(c)(2)(A),(3), which speaks for itself and is the best evidence of its contents. To the extent a response is required, the States deny the allegations.

29. The States admit that the quoted words in paragraph 29 appear in Section 303 of the Clean Water Act. See 33 U.S.C. § 1313. To the extent that Plaintiffs have characterized the meaning of Section 303, the statute speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

30. The States admit that the quoted words in paragraph 30 appear in Section 303 of the Clean Water Act. See 33 U.S.C. § 1313. To the extent that Plaintiffs have characterized the meaning of Section 303, the statute speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

STATEMENT OF FACTS

31. The States admit that on or about July 30, 2008, certain parties submitted the Petition to EPA. The remainder of paragraph 31 characterizes the Petition, which speaks for itself and is the best of evidence of its content. To the extent a response is required, the States deny the allegations.

32. Paragraph 32 characterizes the Petition, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

33. The first sentence of paragraph 33 characterizes the Petition, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations. The States lack sufficient information to admit or deny the remaining allegations.

34. Paragraph 34 characterizes the Petition, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

35. Paragraph 35 characterizes the Petition, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

36. Paragraph 36 characterizes the Petition, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

37. Paragraph 37 characterizes the Petition, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

EPA's DENIAL OF PLAINTIFFS' PETITION

38. The States admit that EPA denied the Petition. Exhibit B to the Complaint is a copy of the Denial, which speaks for itself and is the best evidence of its content.

39. Paragraph 39 characterizes the Denial, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

40. Paragraph 40 characterizes the Denial, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

41. Paragraph 41 characterizes the Denial, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

42. Paragraph 42 characterizes the Denial, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

FIRST CLAIM FOR RELIEF

43. Paragraph 43 consists of conclusions of law and, therefore, requires no response. To the extent a response is required, the States deny the allegations.

44. Paragraph 44 characterizes the CWA, which speaks for itself and is the best evidence of its content. To the extent a response is required, the States deny the allegations.

45. Paragraph 45 characterizes the Denial, which speaks for itself and is the best evidence of its content. The paragraph also contains conclusions of law which require no response. To the extent a response is required, the States deny the allegations.

46. Paragraph 46 characterizes the Denial, which speaks for itself and is the best evidence of its content. The paragraph also contains conclusions of law which require no response. To the extent a response is required, the States deny the allegations.

SECOND CLAIM FOR RELIEF

47. Paragraph 47 consists of a legal conclusion and, therefore, requires no response. To the extent a response is required, the States deny the allegations.

48. Paragraph 48 characterizes the Petition which speaks for itself and is the best evidence of its content. The paragraph also contains conclusions of law and therefore requires no response. To the extent a response is required, the States deny the allegations.

49. Paragraph 49 characterizes the Denial, which speaks for itself and is the best evidence of its content. The paragraph also contains legal conclusion, which requires no response. To the extent a response is required, the States deny the allegations.

50. Paragraph 50 consists of conclusions of law, which requires no response. To the extent a response is required, the States deny the allegations.

Respectfully submitted this 13th day of July, 2012.

**STATE OF NEBRASKA,
JON C. BRUNING
ATTORNEY GENERAL OF NEBRASKA**

**STATE OF KENTUCKY,
JACK CONWAY
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**STATE OF MISSOURI,
CHRIS KOSTER
ATTORNEY GENERAL OF MISSOURI**

**STATE OF NORTH DAKOTA,
WAYNE STENEHJEM
ATTORNEY GENERAL OF NORTH DAKOTA**

**STATE OF OKLAHOMA,
SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA**

**STATE OF SOUTH DAKOTA,
MARTY J. JACKLEY
ATTORNEY GENERAL OF SOUTH DAKOTA**

DEFENDANTS.

BY: /s/ Ryan Seidemann
Ryan M. Seidemann, RPA, #28991
SeidemannR@ag.state.la.us
Assistant Attorney General
Section Chief, Lands & Natural Resources
Civil Division, Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804-9005
Telephone: (225) 326-6085

BY: s/ Katherine J. Spohn
Katherine J. Spohn, #22979
Special Counsel to the Attorney General
Blake E. Johnson, #24158
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Phone (402) 471-2682
katie.spohn@nebraska.gov
blake.johnson@nebraska.gov

**STATE OF ALABAMA,
LUTHER STRANGE
ATTORNEY GENERAL OF ALABAMA**

BY: Luther Strange
Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
P.O. Box 300152
Montgomery, AL 36130-0152
(334) 242-7300

**STATE OF ARKANSAS,
DUSTIN MCDANIEL
ATTORNEY GENERAL OF ARKANSAS**

BY: s/Charles L. Moulton
Pro Hac Vice Counsel
Charles L. Moulton, Ark. Bar No. 91105
Sr. Assistant Attorney General
Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201

**STATE OF IOWA,
THOMAS J. MILLER
ATTORNEY GENERAL OF THE STATE OF IOWA**

BY: s/David R. Sheridan
DAVID R. SHERIDAN
Assistant Attorney General
Environmental Law Division
Iowa Department of Justice

Lucas State Office Building
321 E. 12th Street, Ground Flr.
Des Moines, IA 50319
(515) 281-5351

**STATE OF KANSAS
DEREK SCHMIDT
ATTORNEY GENERAL OF KANSAS**

BY: s/Jeffrey A. Chanay
Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Deputy Attorney General,
Civil Litigation Division
OFFICE OF THE ATTORNEY GENERAL
Memorial Building, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1597
Tel.: (785) 296-2215
Fax: (785) 291-3767
jeff.chanay@ksag.org

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I, Ryan Seidemann, hereby certify that on July 13, 2012, a copy of the States Answer to Plaintiffs Amended Complaint was served on all parties or their counsel via the United States District Court for the Eastern District of Louisiana's CM/ECF system.

/s/ Ryan Seidemann
Ryan M. Seidemann, RPA, #28991
Assistant Attorney General