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

MISSOURI COALITION FOR THE ENVIRONMENT FOUNDATION, Plaintiff, v. GINA MCCARTHY, Administrator of the United States Environmental Protection Agency; and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	))))))))))))))	No. 2:16-cv-04069-NKL

CONSENT DECREE

WHEREAS on or about September 15, 2009, the State of Missouri published in its *State Register* certain revisions to the State's water quality standards and subsequently submitted these revisions to the United States Environmental Protection Agency ("EPA") for review and approval as required by the Clean Water Act ("CWA");

WHEREAS in a letter dated August 16, 2011, from EPA to the State of Missouri, EPA identified certain provisions of the State's revisions to the water quality standards that EPA formally disapproved;

WHEREAS on or about November 5, 2015, the Missouri Coalition for the Environment sent a 60-day Notice of Intent to Sue the EPA alleging violations of Section 303(c) of the CWA, 33 U.S.C. § 1313(c);

WHEREAS on February 24, 2016, Missouri Coalition for the Environment Foundation ("Plaintiff"), filed a complaint in the United States District Court for the Western District of Missouri against Gina McCarthy, Administrator of the United States Environmental Protection Agency, and United States Environmental Protection Agency (collectively "EPA" or "Defendants"). *Missouri Coalition for the Environment Foundation v. McCarthy*, Case No. 2:16-cv-04069-NKL (W.D. Mo.).

WHEREAS Plaintiff's Complaint invokes jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. §§ 2201- 02, and 33 U.S.C. § 1365(a)(2), to compel performance by EPA of a mandatory duty to promptly prepare and publish water quality standards in accordance with the requirements of the Clean Water Act after its disapproval on August 16, 2011 of the water quality standards submitted for its review by the State of Missouri;

WHEREAS it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation;

WHEREAS by entering into this Consent Decree the Plaintiff does not waive any claims and EPA does not waive any defenses, on any grounds, related to any claims that are not resolved by this Decree;

WHEREAS the Court finds and determines that it has jurisdiction to enter this Decree; and

WHEREAS the Court finds and determines that this Consent Decree represents a just, fair, adequate and equitable resolution of the claims raised in this action.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

GENERAL TERMS

1. The Parties to this Consent Decree are Plaintiff and EPA. The Parties understand that Gina McCarthy was sued in her official capacity as Administrator of the United States Environmental Protection Agency and this settlement applies to, is binding upon, and inures to the benefit of the Parties, their officers, employees, successors and assigns.

2. For purposes of entry and enforcement of the Consent Decree only, the Parties to this Consent Decree agree that the Court has jurisdiction over this case, the Parties to the Consent Decree, any disputes arising under the Consent Decree, as well as any alleged violations of this Consent Decree, and may issue such further orders or direction as may be necessary or appropriate to construe, implement, modify or enforce the terms of this Consent Decree.

3. For purposes of this Consent Decree, the following terms shall have the meanings provided below. All references in this Consent Decree to sections of the United States Code ("U.S.C."), the Code of Federal Regulations ("C.F.R.") or "implementing regulations" are to those sections in effect on the date of entry of this Consent Decree.

a. "August 16, 2011 Letter" means the letter and attachments sent by Karl Brooks, Regional Administrator, Region 7, EPA to Sara Parker Pauley, Director of Missouri Department of Natural Resources, pursuant to 33 U.S.C. § 1313 (c)(3) and 40 C.F.R. § 131.11, determining that the State of Missouri's adopted water quality standards found in 10 C.S.R. 20-7.031(3) Specific Criteria (N) Nutrients (except for the lakes listed in Table M) were not consistent with the CWA and disapproving them. By letter dated April 18, 2014, to the Missouri Department of Natural Resources, EPA noted a citation error in its August 16, 2011 letter. EPA's April 18, 2014 letter explained that references in the August 16, 2011 letter to 10 CSR 20-7.031(**3**)(N) should have been 10 CSR 20-7.031(4)(N).

b. "CWA" shall mean the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*;

c. "Complaint" shall mean the Complaint filed in this case, *Missouri Coalition for the Environment Foundation v. McCarthy and EPA*, Case No. 16-cv-04069-NKL (W.D. Mo.) by Plaintiff on February 24, 2016;

d. "Consent Decree" shall mean the decree entered by the court in this case the terms of which are defined in this document;

e. "EPA" shall mean Gina McCarthy, the Administrator of EPA, or the Administrator's duly authorized representative, and the United States Environmental Protection Agency;

g. "Parties" shall mean the Missouri Coalition for the Environment Foundation and EPA;

h. "Plaintiff" shall mean the Missouri Coalition for the Environment Foundation.

TERMS OF AGREEMENT

4. Except as provided in paragraphs 5 and 7 below, EPA shall sign a notice of proposed rulemaking by December 15, 2017, that proposes new or revised water quality standards addressing EPA's August 16, 2011 disapproval of 10 CSR 20-7.031(3) Specific Criteria (N) Nutrients and Chlorophyll (except for the lakes listed on Table M), as set forth in section 4.B found on pages 27-29 of the attachment to the August 16, 2011 Letter.

5. The requirements of Paragraph 4 shall not apply if on or before December 15, 2017, the State of Missouri has submitted new or revised water quality standards addressing EPA's August 16, 2011 disapproval of 10 CSR 20-7.031(3) Specific Criteria (N) Nutrients and

Chlorophyll (except for the lakes listed on Table M), and EPA has approved such standards. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approval.

6. Except as provided in paragraph 7, EPA shall sign a notice of final rulemaking on or before December 15, 2018 regarding the water quality standards for which EPA signed a notice of proposed rulemaking pursuant to Paragraph 4 of this Decree. EPA agrees to forward such notice(s) of final rulemaking to the Federal Register for publication within five (5) days after signing it.

7. The requirements of Paragraph 6 shall not apply if on or before December 15, 2018 the State of Missouri has submitted new or revised water quality standards addressing EPA's August 16, 2011 disapproval of 10 CSR 20-7.031(3) Specific Criteria (N) Nutrients and Chlorophyll (except for the lakes listed on Table M) and EPA has approved such standards. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approvals.

8. If the State submits any new or revised standards as described in Paragraph 5 or otherwise to EPA, then EPA shall send signed written notice via email to Plaintiff's counsel, Elizabeth J. Hubertz, at ejhubertz@wustl.edu, within five (5) business days after the State's submission of such new or revised standards to EPA.

9. Not later than five (5) business days after each of the actions identified in Paragraphs 4 through 7, except the actions of forwarding the notice(s) of proposed and final rulemakings to the Federal Register, EPA shall send signed notice via overnight mail as provided below in Paragraph 21.

EFFECTIVE DATE

10. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Consent Decree are null and void.

REMEDY, SCOPE OF JUDICIAL REVIEW AND CONTINUING JURISDICTION

11. The Court shall retain jurisdiction to effectuate compliance with this Consent Decree. Nothing in this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Consent Decree, except for the purpose of determining EPA's compliance with the terms of this Consent Decree.

12. Nothing in this Decree shall be construed to confer upon the district court jurisdiction to review any final decision made by EPA pursuant to this Decree. Plaintiff's sole judicial remedy to address the merits of any final agency action by EPA (a) to approve new or revised water quality standards submitted by the State of Missouri as described in Paragraphs 5 and 7, or (b) to promulgate new or revised water quality standards for the State of Missouri under Paragraph 6, is to file a new lawsuit to challenge such final agency action under the Clean Water Act and/or the Administrative Procedure Act taken by EPA, and Plaintiff reserves its rights to bring any such challenge. EPA reserves all of its defenses to any such suits. Nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action.

RELEASE BY PLAINTIFF

13. Upon approval and entry of this Consent Decree by the Court, this Decree shall constitute a complete and final settlement of all claims that were asserted, or that could have

been asserted, by Plaintiff against Defendants relating to the allegations in Plaintiff's Complaint. Except for claims that may arise under the provisions of this Consent Decree, Plaintiff hereby releases, discharges, and covenants not to assert (by way of the commencement of an action, the joinder of EPA in an existing action or in any other fashion) any and all claims, against the United States based upon claims that have been asserted or could have been asserted in the Complaint in *Missouri Coalition for the Environment Foundation v. Gina McCarthy and U.S. Environmental Protection Agency*, 2:16-cv-04069-NKL (W.D. Mo.).

TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

14. This Consent Decree shall terminate after fulfillment of all of the obligations of EPA under Paragraphs 4-7 of this Consent Decree. EPA shall file the appropriate notice with the Court so that the Clerk of the Court may close this case. Plaintiff may oppose the filing by EPA if Plaintiff objects to the termination of the Consent Decree.

15. Plaintiff's sole judicial remedy to address the merits of any alleged final agency action is to file a new lawsuit to challenge such final action under the Clean Water Act and/or the Administrative Procedure Act, and Plaintiff reserves its rights to bring any such challenge. EPA reserves all of its defenses to any such suits. Nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action.

DISPUTE RESOLUTION AND REMEDY FOR NON-COMPLIANCE

16. In the event of a disagreement between the Parties concerning the interpretation of any provision of this Consent Decree, or if EPA does not take the actions described in Paragraphs 4 and 6 by the dates specified in those Paragraphs, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall

confer in order to attempt to resolve the dispute within thirty (30) days of the written notice, or such time thereafter as is mutually agreed to in writing. If the Parties are unable to resolve the dispute within thirty (30) days of such notice, or such time thereafter as is mutually agreed, then either Party may petition the Court to resolve the dispute.

COSTS OF LITIGATION

17. EPA agrees to pay a total of $23,150.00 to fully and finally resolve the issue of the Plaintiff's entitlement to costs and attorney's fees, and Plaintiff agrees to release any claim that has been or could be asserted against the United States relating to any such claim for costs and attorneys' fees accrued as of the date of this Consent Decree.

18. Plaintiff reserves the right to seek an award for reasonable attorneys' fees and costs incurred after entry of this Consent Decree in connection with any disagreement between the Parties concerning the interpretation or performance of any aspect of this Consent Decree. In the event that Plaintiff seeks such fees and costs, the Parties shall attempt to reach agreement as to the appropriate amount of recovery. If the Parties are unable to reach agreement, Plaintiff may file an application with the Court for such recovery, and, if EPA wishes to contest the application, EPA shall file a response within thirty (30) days from receipt of Plaintiff's application. EPA reserves all defenses to any claim for attorneys' fees in excess of the precise amount stated in paragraph 17 above.

19. Any payment made by EPA to Plaintiff for reasonable attorneys' fees and costs shall be made by electronic funds transfer to an account designated by Plaintiff's counsel.

a. For the costs and attorneys' fees referred to in Paragraph 17, the United States shall make payment to Plaintiff by electronic funds transfer as soon as reasonably practicable pursuant to instructions to be provided by Plaintiff via email to counsel of record

within five business days after this Consent Decree has been executed by both Parties. The instructions shall include the following information:

Bank name, address and telephone number;

Name and number of account;

Type of account (savings or checking);

Bank routing number; and

Federal taxpayer identification number for account holder.

b. For any costs and attorneys' fees referred to in Paragraph 18, the United States shall make payment to Plaintiff by electronic funds transfer as soon as reasonably practicable after the amount of costs and attorneys' fees is determined. The electronic funds transfer shall be made according to the same instructions that Plaintiff has provided under Subparagraph 19(a) unless Plaintiff gives timely notice to EPA that the payment instructions have changed.

AGENCY DISCRETION

20. Except as expressly provided herein, nothing in this Consent Decree shall be construed to limit or modify the discretion accorded to EPA by law.

NOTICE AND CORRESPONDENCE

21. Any notice required or made with respect to this Consent Decree shall be in writing and shall be effective upon receipt by any one of the contact persons for the receiving party below. For any matter relating to this Consent Decree, the contact persons are:

For Plaintiff
Elizabeth J. Hubertz
Clinic Attorney
Interdisciplinary Environmental Clinic
Washington University School of Law
One Brookings Drive
Campus Box 1120

St. Louis, MO 63130-4899

For Defendants
Chief, Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, DC 20044

Associate General Counsel
Water Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2355A
Washington, DC 20004

Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Blvd.
Mail Code: CNSLWATR
Lenexa, KS 66219

Upon written notice to the other party, any party may designate a successor contact person for any matter relating to this Consent Decree.

REPRESENTATIVE AUTHORITY

22. Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Consent Decree. By signature below, all parties consent to entry of this Consent Decree.

MUTUAL DRAFTING

23. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be

inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

COUNTERPARTS

24. This Consent Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any party shall have the same force and effect as if that party has signed all other counterparts.

EFFECT OF CONSENT DECREE

25. The Consent Decree shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any party.

COMPLIANCE WITH OTHER LAWS

26. The Parties recognize and acknowledge that the obligations imposed upon EPA under this Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall be interpreted so as to constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the APA, 5 U.S.C. §§ 551-559, 701-706, the CWA, or any other law or regulation, either substantive or procedural.

APPLICABLE LAW

27. This Consent Decree shall be governed and construed under the laws of the United States.

THIRD-PARTY BENEFICIARIES

28. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.

FORCE MAJEURE

29. The parties recognize that the performance of this Consent Decree is subject to fiscal and procurement laws and regulations of the United States, which include but are not limited to the Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq*. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance. Such situations may include, but are not limited, to a government shutdown such as occurred in 1995 and 1996, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should delay occur due to such circumstances, any deadlines so affected shall be extended one day for each day of the circumstances or situation that causes delay, and any resulting failure to meet the timetable set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, provided that EPA meets the extended deadlines. EPA will provide Plaintiff with notice as soon as is reasonably possible in the event EPA invokes this provision of the Consent Decree and will provide Plaintiff with an explanation of EPA's basis for invoking this provision. EPA shall also provide Plaintiff with reasonable notice of the termination of the *force majeure* event upon which the EPA invoked such relief. Any dispute regarding this provision shall be resolved in accordance with Paragraph 16.

MODIFICATION

30. The Parties may extend the deadlines established in Paragraphs 4 through 7 by written stipulation executed by counsel for the Parties and filed with the Court. In addition, any provision of this Consent Decree may be modified by the Court upon motion by either Party to this Consent Decree demonstrating that such modification is consistent with the law and in the public interest, after consideration of the response by the non-moving party.

31. Consistent with Paragraph 30, EPA may request modification of a date established in Paragraphs 4 through 7 of this Decree in accordance with the following procedures:

(a) If EPA seeks to modify a date established in Paragraphs 4 through 7 of this Decree and provides notice to Plaintiff at least sixty (60) days prior to the date sought to be modified and files the motion at least thirty (30) days prior to the date sought to be modified, then the filing of such motion shall, upon request by the EPA, stay the date for which modification is sought. Such stay shall remain in effect until the earlier of (i) a dispositive ruling by this court on such motion, or (ii) the date thirty (30) days after the date sought to be modified. Only one (1) such automatic stay shall be allowed per deadline in Paragraphs 4 through 7.

(b) If EPA seeks a modification of a date established in Paragraphs 4 through 7 of this Decree and does not provide notice to Plaintiff pursuant to Subparagraph (a) above, then any such request for modification shall demonstrate why EPA could not have utilized the notification procedures set forth in Subparagraph (a) above. The automatic stay described in Subparagraph (a) shall not be available for any requested modification for which EPA does not provide notice to Plaintiff pursuant to Subparagraph (a).

(c) Any motion to modify any date established in this Decree shall be accompanied by a motion for expedited consideration. Plaintiff shall not oppose the request for expedited consideration, but reserves all rights to oppose any requested modification.

32. The parties consent to the form, substance and entry of the foregoing Consent Decree.

ORDER

UPON CONSIDERATION OF THE FOREGOING, the Court hereby finds that this Consent Decree is fair and reasonable, both procedurally and substantively, consistent with applicable law, in good faith, and in the public interest. THE FOREGOING Consent Decree is hereby APPROVED AND ENTERED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: December 7, 2016
Jefferson City, Missouri

The undersigned parties enter into this Consent Decree in the matter of *Missouri Coalition for the Environment Foundation v. Gina McCarthy, Administrator of the United States Environmental Protection Agency; and The United States Environmental Protection Agency,* No. 2:16-04069-CV-C-NKL (W.D. Mo.).

FOR THE DEFENDANTS:

JOHN C. CRUDEN
Assistant Attorney General

Dated: Dec. 1, 2016

By: /s/ *Perry M. Rosen*
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FOR THE PLAINTIFF:

Dated: November 1, 2016

By: /s/ *Elizabeth J. Hubertz*
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Dated: November 9, 2016

By: /s/ *Heather B. Navarro*
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