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

GULF RESTORATION NETWORK, *et al.*, Plaintiffs, v. GINA MCCARTHY, Administrator of the United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Civil Action No. 2:12-cv-00677-JCZ-DEK Section "A," Division 3 Hon. Jay C. Zainey, District Judge Hon. Daniel E. Knowles, III, Magistrate Judge

DEFENDANT EPA'S COMBINED MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [REC. DOC. 198]

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INTRODUCTION

Nitrogen and phosphorus are vital building blocks for plant and animal life. Yet when these same nutrients reach excessive levels in a water body, like a river or lake, they may cause environmental harm. Among other harms, nutrient pollution can make a water body hypoxic, meaning the water turns into an oxygen-starved dead zone where aquatic life struggles to survive. Every summer, the Gulf of Mexico suffers from an expansive dead zone caused in part by nutrient pollution from the Mississippi-Atchafalaya River Basin.

But the Gulf is far from the only water body suffering from this problem. In fact, nutrient pollution is a significant water quality problem across the United States. Reducing this pollution is a high priority for the United States Environmental Protection Agency (EPA). EPA works in partnership with the States to tackle this nationwide environmental challenge under the Clean Water Act. Despite achieving some milestones, EPA and the States still have significant work to do.

Like EPA, each Plaintiff is an organization that cares deeply about reducing nutrient pollution in the Nation's waters. In July 2008, most of the Plaintiffs and several other organizations (together Gulf Restoration)[1] petitioned EPA to address nutrient pollution by exercising its discretionary rulemaking authority to issue water quality standards under section 1313(c)(4)(B) of the Clean Water Act, 33 U.S.C. § 1313(c)(4)(B). EPA Ex. 1, Administrative Record (AR)[2] 7–81, Petition for Rulemaking Under the Clean Water Act (July 30, 2008). That provision applies only if EPA first makes a threshold "necessity determination" that a new or revised water quality standard is necessary to meet the Act's requirements. In its petition, Gulf Restoration requested that EPA make

[1] There is not a one-to-one overlap between Plaintiffs and the organizations that submitted the rulemaking petition to EPA. Because Gulf Restoration Network is the lead Plaintiff and is one of the petitioners, this brief refers to both the Plaintiffs and the organizations that submitted the rulemaking petition as Gulf Restoration.

[2] Citations to pages numbers in the Administrative Record include only the final digits of the Bates number.

necessity determinations and issue regulations setting acceptable numeric criteria for nutrients, including nitrogen and phosphorus, for all water bodies in all fifty States, or in thirty-one States, or at a minimum, in ten States.

In July 2011, EPA denied Gulf Restoration's petition. *See* EPA Ex. 2, AR 1–6, Letter from Michael H. Shapiro to Kevin Reuther (July 29, 2011) (EPA Decision). Although EPA agreed with Gulf Restoration that nutrient pollution is a significant water quality problem, the Agency disagreed about the best way to address that problem under the Clean Water Act. EPA reasoned that it would be impractical, inefficient, and counterproductive to devote its limited resources to the mammoth task of determining whether numeric nutrient criteria are required for multiple pollutants in numerous water bodies in many States, and then promulgating such criteria for the waters where EPA determined they are necessary. Instead, EPA decided to continue with the approach that it had previously adopted, which focuses on partnering with the States to mitigate nutrient pollution and to develop the State-issued water quality standards preferred under the Clean Water Act. Dissatisfied, Gulf Restoration filed this suit.

In 2013, this Court ordered EPA to respond to Gulf Restoration's petition by making all of the requested necessity determinations under Clean Water Act section 1313(c)(4)(B). *Gulf Restoration Network v. Jackson*, No. 12-677, 2013 WL 5328547 (E.D. La. Sept. 20, 2013) (*Gulf Restoration I*). In a decision earlier this year, the Fifth Circuit disagreed, holding that under *Massachusetts v. EPA*, 549 U.S. 497 (2007), "EPA may decline to make a necessity determination if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (*Gulf Restoration II*). The Fifth Circuit then remanded the case to this Court to consider EPA's explanation for declining to make a necessity determination. *Id.*

For three reasons, the Court should hold that Gulf Restoration has failed to demonstrate that EPA's explanation for declining to make necessity determinations is arbitrary or capricious.

First, the Fifth Circuit gave this Court clear guidance on how to apply *Massachusetts*' "reasonable explanation" standard to review EPA's decision: review is "'extremely limited and highly deferential,'" *Gulf Restoration II*, 783 F.3d at 243 (quoting *Massachusetts*, 549 U.S. at 527–28), and EPA's burden is "slight," *id.* at 244. Gulf Restoration distorts that guidance by attempting to hold EPA to a stricter standard not endorsed by the Fifth Circuit.

Second, *Massachusetts* and other decisions confirm that when EPA responds to a rulemaking petition, it may freely exercise its judgment within the limits that Congress set out in the governing statute. Gulf Restoration misinterprets *Massachusetts* to allow a federal agency to decline to make a threshold finding in response to a rulemaking petition for only a few specific reasons, including a lack of sufficient information. But *Massachusetts* and other decisions affirm that, when responding to a rulemaking petition, EPA has broad discretion to consider resource constraints, to balance competing statutory considerations, and to otherwise determine the "manner, timing, content, and coordination of its regulations." 549 U.S. at 533.

Third, applying the proper standard of review in this particular case, EPA gave a reasonable explanation for declining to make the necessity determinations that Gulf Restoration requested. EPA explained that it would continue to devote its limited resources to partnering with the States to reduce nutrient pollution. EPA's approach to water quality standards is grounded in the Clean Water Act and reflects a reasonable exercise of the Agency's expert judgment. Of course, EPA's approach does not mean that it will never make a necessity determination regarding numeric nutrient criteria under section 1313(c)(4)(B). In fact in 2009, EPA did precisely that for water bodies in the State of Florida. But Gulf Restoration's rulemaking petition did not require EPA to discard its national strategy for reducing nutrient pollution and instead embark on the colossal and unprecedented federal rulemaking requested by Gulf Restoration.

Gulf Restoration claims that this case is about EPA's "inaction" in addressing nitrogen and phosphorus pollution in the Gulf of Mexico. Gulf Restoration Br. at 3. But this case is really about a different, much narrower question identified by the Fifth Circuit: Did EPA give a reasonable explanation that is grounded in the Clean Water Act for its decision declining to make the necessity determinations requested in Gulf Restoration's petition? The answer is yes. This Court should affirm EPA's decision.

BACKGROUND

A. Statutory and regulatory background

1. The Clean Water Act

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251–1387, to respond to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. *Id.* § 1251(a). The Act protects "navigable waters," also known as "waters of the United States." *Id.* § 1362(7). Navigable waters may include, for example, lakes, reservoirs, rivers, streams, estuaries, wetlands, sloughs, and coastal waters. 40 C.F.R. § 230.3(s).

Although EPA generally administers the Clean Water Act, *see* 33 U.S.C. § 1251(d), the States are principally responsible for implementing much of the statute. *Id.* § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution."). Section 1313 instructs States to establish water quality standards for their intrastate and interstate waters. *Id.* § 1313(a). Water quality standards fall into three categories: (1) designated uses for a particular water body or category of water bodies (for example, protection and propagation of fish, or recreation by people in and on the water); (2) numeric or narrative water

quality criteria sufficient to protect those uses; and (3) measures to prevent degradation of water quality. *Id.* § 1313(c)(2)(A); 40 C.F.R. § 131.6.

Different types of water bodies in a State typically have different designated uses. *E.g.*, La. Admin. Code tit. 33, § 1123 (2013) (listing eight uses for Louisiana's waters). This means that States often establish several water quality standards for a single pollutant, with each standard applying to different water bodies. *E.g.*, *id.* § 1123 tbl. 3 (listing twenty-eight distinct numeric water quality criteria for sulfates).

Section 1313 also directs States to review their water quality standards every three years and adopt or revise standards as necessary to ensure compliance with the Clean Water Act. 33 U.S.C. § 1313(c)(1). A State must submit any new or revised standard to EPA for review. *Id.* § 1313(c)(2)(A). If EPA finds that the State standard is consistent with the Act's requirements, then EPA will approve it; but if EPA finds that the State standard is not consistent with the Act's requirements, then the Agency will direct the State to modify the standard accordingly. *Id.* § 1313(c)(3). If the State does not adopt a modified standard within ninety days, then EPA must propose and promulgate an appropriate water quality standard itself. *Id.* §§ 1313(c)(3) and (4).

Section 1313(c)(4)(B), the Clean Water Act provision at issue here, gives EPA discretion to establish a new or revised water quality standard for a State "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [the Act]." 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.22(b). The statute does not require EPA to make a necessity determination in any particular instance, but once the Agency makes a determination that a standard is necessary, it must "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard" for the State in question. 33 U.S.C. § 1313(c)(4). EPA must then finalize that standard within ninety days unless the State adopts an acceptable standard in the interim. *Id.*

2. The Administrative Procedure Act's petition provisions

The Administrative Procedure Act (APA) directs all federal agencies to "give an interested person the right to petition for the issuance . . . of a rule." 5 U.S.C. § 553(e). As relevant here, the term "rule" includes a water quality standard promulgated by EPA under section 1313. *See* 33 U.S.C. § 1313(c)(4) (directing EPA to "publish proposed regulations" and then to "promulgate" a water quality standard). Whenever an agency denies a petition for rulemaking, it must provide "[p]rompt notice" to the petitioner, ordinarily "accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e).

B. Factual Background

1. Gulf Restoration's July 2008 rulemaking petition

In July 2008, Gulf Restoration filed a rulemaking petition with EPA under 5 U.S.C. § 553(e).[3] The petition asked the Agency to promulgate new numeric water quality criteria for four "nutrient" categories—chlorophyll-*a*, nitrogen, phosphorus, and turbidity—for every navigable water in the country.[4] Gulf Restoration's request covered waters in all fifty States, as well as any waters subject to EPA's Clean Water Act authority but outside of any State's jurisdiction.[5]

Given EPA's limited authority under section 1313, the agency could not have granted Gulf Restoration's petition without first making positive necessity determinations for all of the requested

[3] EPA Ex. 1, AR 7–81, Petition.

[4] *Id.* at AR 78. At one point, Gulf Restoration appeared to narrow the petition to cover only certain types of water bodies (that is, lakes, reservoirs, rivers, and streams). *Id.* Elsewhere, however, the petition expressly sought water quality standards for all types of water bodies, *id.* at AR 11, and that is how EPA interpreted Gulf Restoration's request. EPA Ex. 2, AR 1–6, EPA Decision.

[5] EPA Ex. 1, AR 78, Petition. Gulf Restoration later suggested that if the EPA decided against establishing new water quality standards in every State, the agency should at least promulgate standards for chlorophyll-*a*, nitrogen, phosphorus, and turbidity in the thirty-one States spanning the Mississippi River drainage basin, or at a minimum in the main stem of the Mississippi River, and the Gulf of Mexico. *Id.* at AR 79–80.

water quality standards. At the time of the petition, many States had not adopted numeric water quality criteria for any of the four nutrient criteria in any of the water bodies covered by Gulf Restoration's request.[6] No State had established all of the water quality standards sought by the petition.[7] Thus, in effect, the petition asked EPA: (1) to make positive necessity determinations for multiple water quality standards for thousands of different water bodies of various types covering every State in the country; (2) to "promptly" propose those standards; and (3) to finalize the standards within ninety days of proposal. 33 U.S.C. § 1313(c)(4).

Gulf Restoration premised its petition on its view that "it is unreasonable to expect states to develop numeric nitrogen and phosphorus standards to protect their own waters."[8] The petition endorsed a federally-driven approach for all fifty States and the Gulf; in the alternative, for the thirty-one States in the Mississippi River basin and the Gulf; or at a minimum, for the main stem of the Mississippi River and the Gulf.[9]

2. EPA's March 2011 Framework Memo

In March 2011, EPA issued a memorandum outlining its national strategy for reducing nitrogen and phosphorus pollution in water bodies (the Framework Memo).[10] In the Framework Memo, EPA acknowledged that nitrogen and phosphorus pollution is a critical environmental

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[6] EPA Ex. 3, AR 3485–89, State Adoption of Numeric Nutrient Standards (1998-2008).

[7] *Id.*

[8] EPA Ex. 1, AR 9, Petition; *see id.* at AR 59 ("EPA is the only actor able to make the real changes needed to solve the serious problems in the Mississippi River and the Gulf of Mexico.").

[9] *Id.* at AR 79 ("[T]his is a case in which water quality standards should be established by EPA on a national basis."); *id.* at AR 18 ("[A] basin-wide approach to reducing nitrogen and phosphorus pollution is necessary . . . . The duty to coordinate and implement such a basin-wide approach should be assumed by EPA.").

[10] EPA Ex. 4, AR 680–685, Memorandum from Nancy K. Stoner, EPA Acting Assistant Administrator, Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions (March 16, 2011).

problem.[11] Responding to that problem, EPA outlined its coordinated and comprehensive approach to reducing nitrogen and phosphorus pollution.[12]

In particular, EPA reaffirmed its goal of partnering with the States to achieve near-term reductions in nutrient loadings to water bodies.[13] EPA explained that, although it had "a number of regulatory tools at its disposal," the Agency's "resources can best be employed by catalyzing and supporting action by states that want to protect their waters from nitrogen and phosphorus pollution."[14] To accomplish this goal, EPA identified eight key elements that State programs should include "to maximize progress."[15] The eighth and final element that EPA identified was for States to develop numeric nutrient criteria for nitrogen and phosphorus for classes of waters.[16] EPA concluded that "[a] reasonable timetable" for a State to develop criteria for nitrogen and phosphorus for at least one class of waters within the State, such as lakes and reservoirs, was three to five years.[17]

3. EPA's July 2011 denial of the rulemaking petition

In July 2011, EPA denied Gulf Restoration's petition. In a six-page letter explaining the denial, the Agency acknowledged that nutrient pollution "presents a significant water quality problem facing our nation."[18] But EPA also explained that it was working closely with the States "to achieve near-term reduction in nutrient loadings" in waters throughout the country.[19] Citing the

[11] *Id.* at AR 680.

[12] *Id.*

[13] *Id.*

[14] *Id.* at AR 681.

[15] *Id.*

[16] *Id.* at AR 685.

[17] *Id.*

[18] EPA Ex. 2, AR 1, EPA Decision.

[19] *Id.* at AR 2.

Framework Memo issued a few months earlier, EPA described how it was helping individual States to address nutrient pollution and to develop their own numeric water quality standards, just as the Clean Water Act envisions.[20] *See* 33 U.S.C. § 1251(b).

After discussing a number of statutory factors that it had considered, EPA explained that "the most effective and sustainable way to address widespread and pervasive nutrient pollution . . . is to build on these [State-driven] efforts and work cooperatively with states and tribes to strengthen nutrient management programs."[21] In the Agency's judgment, that approach was "preferable to undertaking an unprecedented and complex set of rulemakings to promulgate federal [water quality standards] for a large region (or even the entire country)."[22]

Next, EPA addressed its "authority to promulgate federal [numeric nutrient criteria]."[23] EPA noted that, in January 2009, it had exercised its authority under section 1313(c)(4)(B) to develop federal numeric nutrient criteria in the State of Florida.[24] But EPA then reiterated its "long-standing policy, consistent with the [Clean Water Act], . . . 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 [the Act's] requirements."[25] And with respect to coastal waters, including the Gulf, EPA explained that it "lacks clear legal authority" under section 1313 of the Clean Water Act to set

[20] *Id.* at AR 2–3.

[21] *Id.* at AR 4.

[22] *Id.*

[23] *Id.* at AR 5.

[24] *Id.*

[25] *Id.*

water quality standards for waters beyond the three-mile boundary for territorial seas identified in section 1362 of the Act.[26]

In denying the petition, EPA stressed that it was not making a negative necessity determination for any of the water quality standards requested by Gulf Restoration (that is, EPA did not determine that the requested standards are not necessary to meet the Clean Water Act's requirements).[27] Rather, the Agency "exercis[ed] its discretion to allocate its resources in a manner that supports targeted regional and state activities to accomplish our mutual goals of reducing [nutrient] pollution and accelerating the development and adoption of state approaches to controlling [nutrients]."[28]

C. Procedural Background

In 2012, Gulf Restoration filed this suit, claiming that EPA had violated the APA by declining to make any necessity determinations in response to the rulemaking petition. *See* Rec. Doc. 22, Amended Compl. ¶¶ 43–46 (Apr. 3, 2012). The parties cross-moved for summary judgment, and EPA also moved to dismiss the suit for lack of jurisdiction.

In *Gulf Restoration I*, this Court denied EPA's motions and granted partial summary judgment to Gulf Restoration. Concluding that it had jurisdiction to review EPA's response to Gulf Restoration's petition, the Court remanded the petition to EPA and ordered the Agency to make a necessity determination for each of the requested water quality standards within one hundred eighty days . *Gulf Restoration I*, 2013 WL 5328547, at *7.

EPA appealed. In *Gulf Restoration II*, the Fifth Circuit affirmed this Court's holding that EPA's response to the rulemaking petition is subject to judicial review. 783 F.3d at 232–42. In

[26] *Id.* at AR 6 n.16.

[27] *Id.* at AR 6.

[28] *Id.*

reaching this conclusion, the Fifth Circuit reviewed section 1313(c)(4)(B) and the "reasonable explanation" standard in *Massachusetts*. 783 F.3d at 238–42. But the Fifth Circuit also held that under *Massachusetts*, the Agency "may decline to make a necessity determination if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so." *Id.* at 243. After providing guidance on how to evaluate EPA's decision, the Fifth Circuit remanded the case for this Court to "decide in the first instance whether the EPA's explanation for why it declined to make a necessity determination was legally sufficient." *Id.* at 243.

On remand, this Court entered a Case Management Order, Rec. Doc. 195 (July 20, 2015), requiring the parties to file cross-motions for summary judgment "focused on the issues identified for remand by the Court of Appeals."

STANDARD OF REVIEW

In record-review cases under the APA, a summary judgment motion "stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court's review." *Texas Comm. on Natural Res. v. Van Winkle*, 197 F. Supp. 2d 586, 595 (N.D. Tex. 2002) (citation omitted). In such cases, the Court's function "is to determine whether as a matter of law, evidence in the administrative record permitted the agency to make the decision it did." *Id.* (citation omitted).[29]

[29] In its summary judgment brief, Gulf Restoration seeks to introduce evidence outside of the administrative record. For instance, Gulf Restoration asks this Court to take judicial notice of the *current* status of States' "progress toward numeric nutrient criteria." Gulf Restoration Br. at 8 n.7. That is not the relevant question for the Court to answer. The relevant question is whether EPA's decision in July 2011 to deny Gulf Restoration's petition is supported by the administrative record before the Agency when it responded to the petition in 2011. Therefore, the Court should not consider Gulf Restoration's extra-record material in evaluating EPA's decision. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 754–55 (E.D. La. 2014) (holding that, with limited exceptions, APA review is restricted to the administrative record); see also Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

Under the APA, the Court should "hold unlawful and set aside" EPA's action only if that action is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). In reviewing EPA's decision, "there is a presumption that the agency's decision is valid," *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010), and Gulf Restoration has "the burden to overcome that presumption by showing that the decision was erroneous," *id.* This "highly deferential" standard does not permit a court to "substitute [its] own judgment for the agency's." *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)); *see also Massachusetts*, 549 U.S. at 527–28.

This Court's review of EPA's denial of Gulf Restoration's petition is also informed by the Fifth Circuit's guidance in *Gulf Restoration II* and by the Supreme Court's decision in *Massachusetts*. In its brief, Gulf Restoration concedes that under those precedents, the Court's review is "deferential." Gulf Restoration Br. at 11. But as we explain below in Argument Point I, despite the Fifth Circuit's explicit remand instructions, Gulf Restoration proposes an unduly stringent standard that EPA must satisfy. And as we explain below in Argument Point II, Gulf Restoration also misapplies *Massachusetts*, which preserves EPA's broad discretion to decide how best to implement the Clean Water Act with the limited resources the Agency has at its disposal. Thus, Gulf Restoration's flawed reading of *Gulf Restoration II* and *Massachusetts* should be rejected, and the Court should apply the highly deferential standard of review endorsed by those cases.

ARGUMENT

I. Gulf Restoration's arguments are inconsistent with the Fifth Circuit's clear guidance on how to review EPA's denial of the rulemaking petition.

In remanding this case, the Fifth Circuit gave clear instructions to this Court on how to review EPA's "decision not to make a decision," stressing that "the agency's burden [to provide a reasonable explanation for that decision] is slight." *Gulf Restoration II*, 783 F.3d at 238 n.61, 244. Rather than following that guidance, Gulf Restoration proposes that EPA's action be judged by a much stricter standard. Gulf Restoration's misreading of *Gulf Restoration II* should be rejected.

A. The Fifth Circuit instructed this Court to apply a highly deferential standard of review to EPA's decision.

The Fifth Circuit held in *Gulf Restoration II* that "EPA may decline to make a necessity determination [under section 1313(c)(4)(B)] if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so." *Gulf Restoration II*, 783 F.3d at 242–43 (citing *Massachusetts*). The Fifth Circuit remanded that issue to this Court "to decide in the first instance whether the EPA's explanation for why it declined to make a necessity determination was legally sufficient." *Id.* at 243. Immediately thereafter, the Fifth Circuit stated that "[i]n doing so, the district court must bear in mind several principles." *Id.*

First, this Court should apply the APA's standard of review, which "[a]s applied to refusals to initiate rulemakings . . . is at the high end of the range of deference." *Id.* (citations and quotations omitted). The Fifth Circuit emphasized *Massachusetts*' admonition that review of an agency's decision not to conduct a rulemaking "is extremely limited and highly deferential.'" *Id.* (quoting *Massachusetts*, 549 U.S. at 527–28). In a footnote elaborating on this standard, the Fifth Circuit quoted approvingly from a D.C. Circuit decision "written by then-Judge Ginsburg," which held that "the court 'will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.'"

Gulf Restoration II, 783 F.3d at 243 n.90 (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 883 F.2d 93, 96–97 (D.C. Cir. 1989)).

Second, "the district court's review is limited to determining whether the EPA has 'provide[d] some reasonable explanation as to why it cannot or will not exercise its discretion to make a necessity determination." 783 F.3d at 243–44 (quoting *Massachusetts*, 549 U.S. at 533). Again relying on *Massachusetts*, the court stated that EPA's "explanation must be grounded in the statute." *Id.* at 244 (citing *Massachusetts*, 549 U.S. at 535).

Finally, "[i]n light of this highly deferential standard of review, [EPA's] burden is slight." *Gulf Restoration II*, 783 F.3d at 244. "That is particularly true," the court noted, "when the statute is as broadly written as section 1313(c)(4)(B)." *Id.* The court added that "when a statute sets out competing considerations, agencies are generally given discretion to choose how to best give effect to those mandates." *Id.* In a footnote, the court cited approvingly to *WildEarth Guardians v. EPA*, 751 F.3d 649, 654–55 (D.C. Cir. 2014). *See Gulf Restoration II*, 783 F.3d at 478 n.93. In *WildEarth Guardians*, the D.C. Circuit upheld EPA's denial of a rulemaking petition requesting that EPA add coal mines to the list of source categories regulated under a particular provision of the Clean Air Act. 751 F.3d at 653. EPA denied the petition not because it had determined that coal mines should not be listed, but because the Agency was devoting its resources to other priorities under the relevant provision of the Clean Air Act. The D.C. Circuit concluded that, given the "principles enunciated in *Massachusetts v. EPA*," the Agency had satisfied its obligation to provide a "reasonable explanation" for its denial of the petition. *Id.* at 654-55. The D.C. Circuit further explained that EPA's denial was consistent with the Agency's discretion to exercise judgment when implementing its delegated authority. *Id.* at 653–56.

B. Gulf Restoration misinterprets the Fifth Circuit's decision.

Seeking to minimize the Fifth Circuit's detailed discussion of the standards applicable to reviewing EPA's decision, Gulf Restoration asserts that EPA can decline to make such a determination only if the Agency first conducts a detailed analysis of the "substantive statutory criteria governing a necessity determination." Gulf Restoration Br. at 12. Based on this heavy burden, Gulf Restoration criticizes EPA for failing to provide a detailed scientific and technical analysis of the statutory requirements that the Agency would consider when making a positive or negative necessity determination. *Id.* at 20. Gulf Restoration's argument is incorrect for two reasons.

First, Gulf Restoration's argument rests on a misreading of *Gulf Restoration II*. Rather than focusing on the Fifth Circuit's remand instructions, Gulf Restoration focuses on the preceding section of the opinion, in which the court resolved the threshold question of whether EPA's denial of the petition is subject to judicial review at all. *See* Gulf Restoration Br. at 12–15. There, the Fifth Circuit held that "Congress has given sufficient guidance for judicial review of the agency's actions under the statute." *Gulf Restoration II*, 783 F.3d at 238. But the court did not hold that EPA's decision to decline to make a necessity determination in response to a rulemaking petition is unlawful unless the Agency provides the same detailed scientific and technical analysis that EPA would give when making such a determination. In other words, the Fifth Circuit's answer to the jurisdictional question only established the basic outlines of what EPA should consider when denying a petition seeking a necessity determination under section 1313 of the Clean Water Act.

Granted, the Fifth Circuit's analysis of the jurisdictional question does include observations about the text of section 1313(c)(4)(B) of the Clean Water Act. *See Gulf Restoration II*, 783 F.3d at 240. But the court analyzed the text "to decide whether the statute is sufficiently specific to allow judicial review," *id.*, not to establish all of what EPA can, or must, consider if it declines to make a necessity determination. In addition, the court tempered its analysis of section 1313(c)(4)(B) with

notable qualifications—that the statutory requirements in the Clean Water Act are "broadly drawn" and that they "provide *guidance* for the *types* of considerations the EPA must take into account in deciding the necessity of regulation." *Id.* (emphasis added).

Without question, the Fifth Circuit further held that "by *Massachusetts v. EPA*, these [broadly-drawn requirements] are the same factors that must be considered when the EPA declines to make a necessity determination." *Gulf Restoration II*, 783 F.3d at 240. Yet this single sentence should be read in the context of the preceding sentence, with its many qualifications about "broadly[-]drawn" requirements providing "guidance" about the "types of considerations" that EPA "must take into account." *Id.* And the Fifth Circuit concluded its analysis of section 1313(c)(4)(B)'s text with the muted observation that "[a]s general factors are still reviewable factors, we cannot conclude that there are *no* standards to judge the EPA's decision to elect no to make a necessity determination." *Id.* In short, there is nothing in the Fifth Circuit's decision to suggest that the court thought it was establishing an exhaustive list of factors that EPA *must* consider—or an exclusive list of the only factors that it *may* consider—in deciding whether to make a necessity determination under section 1313(c)(4)(B). Thus, the court's discussion of section 1313(c)(4)(B) for purposes of deciding whether EPA's decision is judicially reviewable cannot be converted into the demanding standard that Gulf Restoration seeks to impose for this Court's review on the merits.

Second, under Gulf Restoration's theory, EPA's decision not to make necessity determinations at all in the context of denying a rulemaking petition would be held to the same standard as actually making a positive or negative necessity determination. That cannot be right. If EPA must do the same legal, scientific, and technical analysis for both, then the option to decline to make a necessity determination would be meaningless. Stated differently, if the level of detail of EPA's explanation must be the same, regardless of whether it is declining to make a necessity determination, or making such a determination one way or the other, then the Agency's option to

decline to make a necessity determination is really no option at all. The Fifth Circuit's decision should not be read that way. In fact, the court began its analysis of the jurisdictional question with the "important qualification" that the two inquiries that EPA performs—that is, whether to make a necessity determination at all, and, if it makes a determination, what that determination should be—are "related," but not identical. *Id.* at 238.

For these two reasons, Gulf Restoration's proposed standard for reviewing EPA's decision declining to make necessity determinations should be rejected as a misreading of *Gulf Restoration II*. This Court should follow the Fifth Circuit's clear guidance.

II. EPA may consider resource constraints and competing regulatory considerations in deciding the timing of regulatory action.

There is a second, equally significant flaw in Gulf Restoration's argument. Gulf Restoration argues that this case is analogous to *Massachusetts* because EPA has identified a "laundry list of reasons not to regulate" that are "outside the bounds of the statute." Gulf Restoration Br. at 22. In particular, Gulf Restoration argues that EPA lacked discretion to consider agency resources and competing priorities in deciding whether to make a necessity determination—what Gulf Restoration calls EPA's "preferences." *Id.* at 21–24. Although it is less clear, Gulf Restoration also appears to argue that under *Massachusetts*, a federal agency may decline to make a threshold finding in response to a rulemaking petition for only a few specific reasons, including a lack of the information necessary to make the finding. *Id.* at 20–21.

As discussed below in Argument Point II.A., Gulf Restoration's arguments are an unfounded extension of *Massachusetts*. And as discussed below in Argument Point II.B., both before and after *Massachusetts*, courts have held that a federal agency may consider resource constraints and balance competing priorities in deciding when and how to regulate. Those same considerations are fully within an agency's discretion when responding to a rulemaking petition.

A. *Massachusetts v. EPA* does not require an agency to ignore resource constraints and competing regulatory priorities in responding to a rulemaking petition.

Gulf Restoration stretches *Massachusetts* far beyond its holding. That is, Gulf Restoration interprets *Massachusetts* to prohibit EPA from considering its finite resources and its competing priorities when deciding whether to make a necessity determination under section 1313 of the Clean Water Act. Gulf Restoration Br. at 22–23. But EPA's decision not to make such a determination is distinctly different from the issue considered in *Massachusetts*, where the Agency declined to act for reasons beyond its delegated authority under the Clean Air Act.

When Congress enacts a statute, such as the Clean Air Act or Clean Water Act, it delegates rulemaking authority to the federal agency that will implement the statute. And when the agency acts outside the bounds of that delegated authority, the agency's action is unlawful. *See* 5 U.S.C. § 706(2)(C) (requiring the court to "hold unlawful and set aside" any "agency action" that is, among other things, "in excess of statutory jurisdiction"). As the Supreme Court confirmed in *Massachusetts*, like all other agency actions, an agency's decision not to conduct a rulemaking (which could include, as it did here, a decision not to make the threshold finding that could lead to a rulemaking) must stay within the contours of the agency's delegated authority. *Massachusetts*, 549 U.S. at 533 (holding that an agency's "reasons for action or inaction must conform to the authorizing statute"); *see also WildEarth Guardians*, 751 F.3d at 655 ("In *Massachusetts v. EPA*, the agency's reasons for declining to regulate new vehicle emissions were beyond the scope of its delegated authority.").

At the same time, however, *Massachusetts* acknowledged an agency's broad discretion, often recognized by courts, to direct "the manner, timing, content, and coordination of its regulation." 549 U.S. at 533; *see also infra* Argument Point II.B. Put differently, *Massachusetts* simply did not address the circumstances where EPA has acknowledged its authority to act, and then has considered its diverse obligations under the relevant statutory provision and decided to devote its limited resources toward

certain activities, rather than others. Indeed, in *Massachusetts*, the Court prefaced its analysis of EPA's decision with the forceful statement that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." 549 U.S. at 527 (citation omitted).

Two other cases that Gulf Restoration relies on, *Natural Resources Defense Council v. EPA* ("*NRDC*"), 777 F.3d 456 (D.C. Cir. 2014), and *American Horse Protection Association v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987), are distinguishable on similar grounds. In *NRDC*, the court concluded that EPA's action exceeded its authority under the Clean Air Act by extending a deadline for States to achieve attainment of air quality standards based on "ozone seasons." *NRDC*, 777 F.3d at 468. But there, the statute itself established the timing for attainment deadlines and "gave [EPA] no authority to extend the attainment deadlines." *Id.* at 468. The *NRDC* opinion does not stand for the novel proposition that agency consideration of competing priorities or budget constraints in determining when to exercise its statutory authority is barred; rather, it stands for the uncontroversial rule that a court cannot uphold an agency's refusal to obey a statutorily-prescribed deadline. Likewise, *American Horse* held that EPA's denial of a rulemaking petition reflected "plain errors of law," suggesting that EPA was "blind to the nature of [its] mandate from Congress." 812 F.2d at 5, 7.

Massachusetts, *NRDC*, and *American Horse* thus each addressed situations where the agency acted (in *NRDC*) or refused to act (in *Massachusetts* and *American Horse*) based on the agency's erroneous interpretation of its delegated authority. Unlike in those three cases, EPA's decision here was not a blanket refusal to ever make a necessity determination. There is no dispute that EPA recognized its authority to make necessity determinations under section 1313(c)(4)(B) of the Clean Water Act. Indeed, as EPA noted in its decision, the Agency had exercised its rulemaking authority under section 1313(c)(4)(B) "in one recent instance (Florida) to develop federal [numeric nutrient criteria]." EPA Ex. 2, AR 5, EPA Decision. And EPA stressed that it "retains its discretion to use

[that same authority] elsewhere, as appropriate." *Id.* What is more, EPA expressly identified where it had concluded that it lacked delegated authority—over "U.S. coastal waters . . . beyond the territorial sea," which "are not considered navigable waters or Waters of the U.S. under CWA sections 303(c) and 502." *Id.* at AR 6 n.16. Thus, in contrast to *Massachusetts*, *NRDC*, and *American Horse*, here, EPA firmly grasped its statutory authority but decided that it was not the appropriate time and circumstances to exercise that authority. As discussed in the next section, EPA has broad discretion to make that judgment.

B. An agency may permissibly consider resource limitations and competing regulatory priorities in deciding the timing of regulatory action.

Before and after *Massachusetts*, courts have confirmed that an agency may take into account its available resources and competing regulatory priorities in deciding to delay or defer regulatory action.

To give an example before *Massachusetts*, in *Defenders of Wildlife v. Gutierrez*, the D.C. Circuit upheld the National Marine Fisheries Service's denial of an emergency petition for rulemaking that sought the agency's expedited action under the Endangered Species Act and Marine Mammal Protection Act to protect right whales from ship strikes. 532 F.3d 913 (D.C. Cir. 2008). Among other reasons, the agency denied the petition because initiating an emergency rulemaking would "duplicate agency efforts and reduce agency resources for a more comprehensive strategy, as well as risk delaying implementation of the draft Strategy." *Id.* at 920. The court found that the agency's "policy decision to focus its resources on a comprehensive strategy" was reasonable, further noting that the agency appeared "well aware" of its statutory mandate to protect the right whales, and thus denied the challenge to the agency's decision. *Id.* at 921; *see also Nat'l Congress of Hispanic Am. Citizens v. Marshall*, 626 F.2d 882, 889 (D.C. Cir. 1979) ("[T]he agency has a better capacity than the court to make the comparative judgments involved in determining priorities and allocating resources . . . .").

After *Massachusetts*, the D.C. Circuit held in *WildEarth Guardians* that, under the relevant Clean Air Act provision, EPA had "discretion to prioritize sources that are the most significant threats to public health to ensure effective administration of the agency's regulatory agenda." 751 F.3d at 655. Indeed, in *Gulf Restoration II*, the Fifth Circuit quoted this very language when it observed that where agencies are interpreting a "broadly written" provision that "sets out competing considerations," such as section 1313(c)(4)(B) of the Clean Water Act, "[the agencies] are generally given discretion to choose how to best give effect to those mandates." 783 F.3d at 244.

In summary, this Court should reject Gulf Restoration's overbroad reading of *Massachusetts* and, consistent with decisions such as *WildEarth Guardians* and *Gulf Restoration II*, recognize that it is appropriate for EPA to consider resource constraints and competing priorities in deciding whether to exercise its statutory authority to make a necessity determination.

III. EPA's decision declining to make necessity determinations under section 1313(c)(4)(B) of the Clean Water Act is reasonable and supported by the administrative record.

In light of the Fifth Circuit's clear remand instructions and a proper interpretation of *Massachusetts*, this Court should uphold EPA's decision to decline to make necessity determinations. First, EPA's explanation is properly grounded in the broad language of section 1313(c)(4)(B) of the Clean Water Act. Second, EPA's explanation reflects a reasonable exercise of the Agency's judgment in balancing competing considerations under the statute. Finally, Gulf Restoration has not identified the sort of plain legal error or evidence in the administrative record of fundamentally changed circumstances that would warrant judicial intervention. This Court should affirm EPA's decision.

A. EPA's decision declining to make necessity determinations is grounded in the text of section 1313(c)(4)(B) of the Clean Water Act.

Gulf Restoration argues that EPA's petition denial "barely mentions the law at all," which it contends is "[p]erhaps the strongest evidence that EPA's Denial Letter is not 'grounded in the

statute.'" Gulf Restoration Br. at 16. Returning to this argument later in its brief, Gulf Restoration asserts that EPA "articulate[d] a 'laundry list of reasons not to regulate'" that is "outside the bounds of the statute." Gulf Restoration Br. at 22. Gulf Restoration is wrong.

Section 1313(c)(4)(B) of the Clean Water Act provides that EPA "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 [EPA] determines that a revised or new standard is necessary to meet the requirements of" the Clean Water Act. 33 U.S.C. § 1313(c)(4)(B). Under this "broadly-written" text, *Gulf Restoration II*, 783 F.3d at 244, EPA considered at least six relevant statutory factors before reaching its decision to deny Gulf Restoration's petition.

1. EPA considered the uses of navigable waters under the Clean Water Act, 33 U.S.C. § 1313(c)(2)(A), 40 C.F.R. § 131.2, as well as the requirement that States adopt water quality standards to protect those uses, 33 U.S.C. § 1313(c)(2)(A), 40 C.F.R. §§ 131.11(a)(1), 131.2.

The Clean Water Act requires that States enact water quality standards that "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). This requirement is spelled out in further detail in EPA's regulations. *See also* 40 C.F.R. § 131.11(a)(1) ("States must adopt those water quality criteria that protect the designated use."); 40 C.F.R. § 131.2 ("A water quality standard defines the water quality goals of a water body, or portion thereof . . . . States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act."). EPA's decision shows that it considered this requirement. *See* EPA Ex. 2, AR 3, EPA Decision (observing that "[t]he [Clean Water Act] and the EPA's implementing regulations at 40 CFR Part 131 require states and authorized tribes to designate the use(s) for waters within their jurisdiction, and to adopt water quality criteria to support and protect those uses.").

More specifically, as Gulf Restoration argues in its brief (at 18), water quality standards "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation" (often referred to as "fishable-swimmable" uses). 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.2. EPA summarized its analysis of those fishable-swimmable uses when it stated that "EPA agrees that [nitrogen] and [phosphorus] pollution presents a significant water quality problem facing our nation." *Id.* at AR 1. Then EPA proceeded to discuss how nutrient pollution threatens fishable-swimmable uses, including "aquatic life and long-term ecosystem health," *id.* at AR 1, "impaired surface and groundwater drinking water," *id.* at AR 2, "increased exposure of swimmers to toxic microbes," *id.*, and "economic consequences such as increased costs for drinking water treatment, reduced property values for stream and lakefront areas, commercial fishery losses, and lost revenue from recreational fishing, boating trips, and other tourism-related business," *id.*

2. EPA considered the importance of numeric nutrient criteria in developing water quality standards, 33 U.S.C. § 1313(c), 40 C.F.R. § 131.11(b).

In the Framework Memo, EPA reaffirmed its longstanding position that numeric nutrient criteria "are ultimately necessary for effective state programs." EPA Ex. 4, AR 681–82, Framework Memo. EPA's emphasis on numeric nutrient criteria is consistent with section 1313 of the Clean Water Act and with the Agency's regulations, which prioritize numeric criteria over narrative criteria (where numeric criteria can be established). 40 C.F.R. § 131.11(b).

In denying Gulf Restoration's petition, EPA acknowledged the importance of States including numeric nutrient criteria in their water quality standards. EPA Ex. 2, AR 2–3, EPA Decision. EPA further noted, however, that developing numeric nutrient criteria is just "one aspect" of the Agency's "coordinated and comprehensive approach" to "reducing [nutrient] pollution." *Id.* at

AR 2. In fact, EPA observed that in the Framework Memo it had identified eight separate elements that States should pursue, in collaboration with EPA and other partners, "to make progress on reducing [nitrogen] and [phosphorus] pollution." *Id.*; *see also* EPA Ex. 4, AR 684–85, Framework Memo (describing eight elements). Those elements included recommended steps that States should take to address nutrient pollution from various sectors, including agricultural areas. EPA Ex. 4, AR 684, Framework Memo. Only one of the eight elements—indeed, the very last one—recommended that States develop numeric nutrient criteria. *Id.* at AR 685.

Moreover, in recommending how States should proceed to develop numeric nutrient criteria, EPA accepted that it would take States considerable time to do so. According to EPA, "[a] reasonable timetable would include developing numeric [nitrogen] and [phosphorus] criteria for at least one class of waters within the state (e.g., lakes and reservoirs, or rivers and streams) within 3-5 years . . . ." *Id.* Thus, while acknowledging the importance of numeric nutrient criteria, EPA also recognized that such criteria alone will not solve the national nutrient pollution problem and that States will not be able to develop those criteria overnight.

3. EPA considered the provision of technical guidance and support to the States, 33 U.S.C. § 1314(a).

Under section 1314 of the Clean Water Act, Congress directed EPA to develop technical information and guidance to assist the States in developing water quality standards and numeric nutrient criteria. *See* 33 U.S.C. § 1314(a). In denying Gulf Restoration's petition, EPA discussed specific actions that it was already taking "to provide technical assistance" to States "for the development of numeric nutrient criteria." EPA Ex. 2, AR 2, EPA Decision. These steps included providing States with scientific "guidance, technical assistance, and publications" for developing numeric nutrient criteria, *id.* at AR 3, and "improving [EPA's] tracking, accountability and transparency tools to measure state progress towards developing and adopting [nitrogen] and

[phosphorus] criteria," *id.* And EPA confirmed that it remained "committed to providing the most current scientific information to strengthen the underlying rationale and defensibility of the criteria development process" for the States. *Id.* In fact, EPA identified five specific efforts that it had undertaken to provide this technical guidance and assistance to the States. *Id.*

Moreover, EPA highlighted examples where its approach of supporting State development of numeric nutrient criteria has been successful. EPA noted two specific instances where the Agency had "worked closely" with States—Minnesota and Wisconsin—to help them adopt numeric nutrient criteria to address nutrient loading. EPA Ex. 2, AR 2, EPA Decision.

4. EPA considered the impact of other measures to reduce nutrient loading to the Gulf, 33 U.S.C. § 1329, *id.* § 1313(c)(4)(B).

As EPA explained in greater detail in the Framework Memo, the nutrient pollution problem in the Mississippi Basin is not simply a matter of reducing point source pollution—the type of pollution that is regulated under the Clean Water Act. EPA Ex. 4, AR 681–82, Framework Memo. A substantial percentage of nitrogen and phosphorus pollution to the Mississippi Basin and the Gulf comes from nonpoint sources, such as agricultural runoff. EPA Ex. 5, AR 4745–46, 4839 Science Advisory Board Report (2007). Although the Clean Water Act does not authorize EPA to directly regulate nonpoint sources of pollution, Congress expressly contemplated that EPA would play a significant role in promoting sound watershed management practices. In section 1329 of the Clean Water Act, Congress granted EPA authority to promote States' nonpoint source management programs. *See* 33 U.S.C. § 1329. EPA thus works cooperatively with the United States Department of Agriculture and with the States to promote implementation of best management practices to control nonpoint source pollution across watersheds. EPA Ex. 4, AR 682, Framework Memo.

EPA highlighted this work in its decision, pointing out its partnerships with other federal agencies, States, and other stakeholders to address the problem of hypoxia in the Gulf and observing

that it was working with the Department of Agriculture on "[s]tewardship initiatives." EPA Ex. 2, AR 4, EPA Decision. Because nonpoint sources contribute to the nutrient loading problem facing the Gulf, EPA's and the States' efforts to reduce nutrient loading from nonpoint sources are relevant to whether and when numeric nutrient criteria are necessary to meet the requirements of the Clean Water Act. 33 § 1313(c)(4)(B).

5. EPA considered the limited resources available to the Agency to develop and implement federal water quality standards, 33 U.S.C. § 1313.

In evaluating Gulf Restoration's petition, EPA also considered the limited resources available to the Agency to undertake the "unprecedented and complex set of rulemakings to promulgate federal [numeric nutrient criteria] for a large region (or even the entire country)," as requested by Gulf Restoration. EPA Ex. 2, AR 4, EPA Decision. As EPA recognized, if it made the necessity determinations requested by Gulf Restoration, then under section 1313(c), the Agency would need to "promptly" promulgate corresponding federal numeric nutrient criteria. Indeed, as discussed above in Background Section B.2., Gulf Restoration's petition focused on its request that EPA promulgate numeric nutrient criteria across the country, not on the threshold necessity determinations that would precede those regulations. *See* EPA Ex. 1, AR 4, Petition (requesting that EPA "use its powers to control nitrogen and phosphorus pollution"); *id.* at AR 78. Thus, EPA considered not just the resources required to make the necessity determinations themselves, but also the intensive resources that would be required for the Agency to complete the regulatory task under section 1313(c)(4)(B).

After developing numeric nutrient criteria for waters in a single State (Florida), *id.* at AR 5, EPA was well-positioned to assess the enormous resources that would be required to develop such criteria for "all navigable waters in all 50 states" where such criteria did not already exist. *Id.* at AR 1. As EPA explained, if it made the requested necessity determinations, '[t]he development of [numeric

nutrient criteria] for 50, 31, or 10 states at one time would be highly resource and time intensive." *Id.* at AR 4. EPA anticipated that such an effort would "involve the EPA staff across the entire Agency, as well as support from technical experts outside the Agency." *Id.*

EPA then detailed the many steps that it would need to take to conduct a federal rulemaking for each State. *Id.* This included "develop[ing] a technical record for each affected state"—what EPA described as "a task of substantial magnitude in light of the need for thorough review and analysis of state water quality data and the frequency and severity of nutrient-related impacts." *Id.* at AR 4. EPA also predicted that to complete the rulemaking, it would face "a daunting management challenge" because of (1) "the complexity of the technical issues," (2) the "large volume of comments from stakeholders and local governments" that EPA expected to receive, and (3) "the need for the Agency to respond to the array of comments filed." *Id.*

As discussed above in Argument Point II.B., EPA may consider its resources when responding to a rulemaking petition. And here, EPA concluded that those finite resources would not be put to their best use by exercising its rulemaking authority under section 1313(c)(4)(B).

6. EPA considered the structure of the Clean Water Act as a whole, and the structure of section 1313 in particular, 33 U.S.C. § 1251(b), *id.* § 1313.

Congress explicitly stated that one overarching policy of the Clean Water Act is "to recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b); *see Natural Res. Def. Council v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) (concluding that the States have primary responsibility for establishing water quality standards, while EPA "sits in a reviewing capacity of the state-implemented standards"). Likewise, the structure of section 1313 anticipates State-led regulation. *See* 33 U.S.C. § 1313. The provision's legislative history confirms this point. *See* H.R. Rep. No. 92-211, at 105 (1972), *reprinted in 1 A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 792 (1973) ("The Committee

expects the Administrator to work closely with the State to obtain approved standards before he promulgates standards for any waters."); *see also Environmental Def. Fund v. Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981) (holding that EPA intervention under section 1313(c)(4)(B) prior to completion of state review process would "disserve" Congressional policy of placing primary responsibility with the States "to prevent, reduce, and eliminate" water pollution (citing 33 U.S.C. § 1251(b)). Put differently by the Fifth Circuit, in section 1313, "[t]he states are the primary player in this process" of setting and administering water quality standards, while "[t]he federal government plays a secondary role, with important backstop responsibilities." *Gulf Restoration II*, 783 F.3d at 230–31.

As EPA explained, consistent with these provisions, its "long-standing policy, . . . 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 [Clean Water Act] requirements." EPA Ex. 2, AR 5, EPA Decision. In contrast to section 1313's division of labor between the States and the federal government, however, Gulf Restoration's petition sought sweeping federal regulation of all water bodies in every State in the Union. In rejecting that request, EPA decided to maintain its "current approach" to the nutrient pollution problem, which emphasizes "state adoption of numeric nutrient criteria." EPA Ex. 2, AR 5, EPA Decision. That "cooperative federalism" approach is rooted in the structure of the Clean Water Act and solidly grounded in the structure of section 1313.

B. EPA reasonably exercised its judgment on how to best give effect to the competing considerations under section 1313(c)(4)(B).

Based on its consideration of the statutory factors discussed above, and in consideration of competing Agency priorities, EPA reasonably exercised its judgment to decline to make the necessity determinations requested by Gulf Restoration. EPA's explanation more than satisfies this

Court's "extremely limited" and "highly deferential" review. *Gulf Restoration II*, 783 F.3d at 243 (citations and quotations omitted).

First, EPA's explanation reflects a solid grasp of its authority under section 1313(c)(4)(B). For instance, EPA pointed out that it had previously exercised that authority in Florida. EPA Ex. 2, AR 5, EPA Decision. Nevertheless, EPA determined that here, "the use of its rulemaking authority, especially in light of the sweeping scope of [Gulf Restoration's petition], is not a practical or efficient way to address nutrients at a national or regional scale." *Id.* at AR 4. Instead, EPA concluded that "the most effective and sustainable way to address widespread and pervasive nutrient pollution in the [Mississippi Basin] and elsewhere is to build on these [previously-described regulatory] efforts and work cooperatively with states and tribes to strengthen nutrient management programs." *Id.*

To be sure, EPA did not rule out its use of section 1313(c)(4)(B) authority "at some future time" and "in response to specific circumstances" not presented by Gulf Restoration's petition. *Id.* On the contrary, EPA indicated that it planned to "periodically assess progress" and acknowledged that "there may be circumstances" in the future where it could exercise its authority. *Id.* at AR 6. That said, the Agency concluded that now is not the time for it to do so. *Id.* at AR 5–6. EPA's "not now" decision is within its authority under section 1313(c)(4)(B). *See Massachusetts*, 549 U.S. at 527 ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."); *id.* at 533 (affirming that EPA may decide the "manner, timing, content, and coordination of its regulations").

Second, EPA's explanation is a rational exercise of the Agency's discretion to allocate its limited resources. In denying Gulf Restoration's petition, EPA wholeheartedly agreed that nitrogen and phosphorus pollution is a "significant water quality problem" in the Mississippi Basin and the Gulf. EPA Ex. 2, AR 6, EPA Decision. Yet EPA viewed the issue from an even broader perspective than Gulf Restoration's petition did: nutrient loading "is a national problem." *Id.* And that problem

will not be solved solely by promulgating water quality standards. EPA Ex. 4, AR 682, Framework Memo. Months earlier, in the Framework Memo, EPA had reaffirmed its judgment that the national nutrient pollution problem called for the Agency to pursue a comprehensive approach, in partnership with the States, the Department of Agriculture, and other stakeholders, to address nutrient pollution from point and nonpoint sources across the Nation. *Id.* at AR 680. After choosing a path forward and directing its employees to take action, EPA was not required to abandon its approach because Gulf Restoration believed a different approach was a better use of the Agency's resources. *See WildEarth Guardians*, 751 F.3d at 655 (holding that EPA may prioritize its regulatory agenda based on its limited resources).

Only in the "rarest and most compelling" of circumstances will a court overturn an agency's decision not to initiate rulemaking proceedings. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008). In *Gulf Restoration II*, the Fifth Circuit identified narrow circumstances where such judicial intervention is warranted, explaining that a court "'will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.'" 783 F.3d at 243 n.90 (quoting *Nat'l Customs Brokers*, 883 F.2d at 96–97); *see also WildEarth Guardians*, 751 F.3d at 653 (quoting *Nat'l Customs Brokers*, 883 F.2d at 96–97). But Gulf Restoration has identified no such compelling cause. EPA's analysis of the Clean Water Act is sound, and Gulf Restoration has not identified a plain error of law in the Agency's decision. And Gulf Restoration's petition identified no fundamental changes in the facts that would have required EPA to revise the approach that it had adopted just months earlier in the Framework Memo. *See* EPA Ex. 1, Petition.

To conclude, EPA's explanation for its decision declining to make necessity determinations reflects the Agency's careful weighing of numerous statutory factors within the "broadly written" language of section 1313(c)(4)(B), and reflects the Agency's thoughtful exercise of its expert

judgment as to "how to best give effect to those mandates," *Gulf Restoration II*, 783 F.3d at 244, in light of limited agency resources and competing priorities and considerations under the Clean Water Act. Viewed in light of the deferential standard of review laid out by the Fifth Circuit, EPA has more than satisfied its obligation to give a reasonable explanation for its decision.

CONCLUSION

For all of the foregoing reasons, this Court should resolve the limited issue remanded by the Fifth Circuit by denying summary judgment to Gulf Restoration and granting summary judgment to EPA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2015, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Justin D. Heminger