Case No. 13-31214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs - Appellees,

v.

GINA MCCARTHY, Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants - Appellants.

On Appeal from the U.S. District Court for the Eastern District of Louisiana,
No. 12-cv-677 (Hon. Jay C. Zainey)

APPELLEES' OPENING BRIEF

Ann Alexander
Natural Resources Defense Council
20 North Wacker Drive, Ste. 1600
Chicago, IL 60606
(312) 651-7905

Machelle Lee Hall, No. 31498
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, LA 70118-6321
(504) 862-8814

Counsel for Plaintiff-Appellees *(additional counsel listed on signature page)*

Plaintiff-Appellees 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 Natural Resources Defense Council, Inc. (Gulf Restoration) respectfully submit their Opening Brief for affirmation of the District Court's order and judgment.

CERTIFICATE OF INTEREST

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate the possibility of disqualification or recusal.

Appellees and Counsel

1. Environmental Law & Policy Center (This organization has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.)

2. Gulf Restoration Network (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

3. Iowa Environmental Council (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

4. Minnesota Center for Environmental Advocacy (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

5. Missouri Coalition for the Environment (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

6. Natural Resources Defense Council (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

7. Prairie Rivers Network (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

8. Kentucky Waterways Alliance (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

9. Sierra Club (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

10. Tennessee Clean Water Network (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

11. Waterkeeper Alliance (This organization has no parent corporation and is no publicly held corporation that owns 10% or more of its stock.)

12. Ann Alexander, Natural Resources Defense Council

13. Adam Babich, Tulane Environmental Law Clinic

14. Machelle Lee Hall, Tulane Environmental Law Clinic

15. Bradley Klein, Environmental Law & Policy Center

Appellants and Counsel

16. U.S. Environmental Protection Agency

17. Gina McCarthy, Administrator, U.S. EPA

18. John E. Arbab, U.S. Department of Justice

19. Aaron P. Avila, U.S. Department of Justice

20. Robert G. Dreher, U.S. Department of Justice

21. Peter Z. Ford, U.S. EPA

22. Matthew Littleton, U.S. Department of Justice

23. Angeline Purdy, U.S. Department of Justice

District Court Defendant-Interveners and Counsel

24. Agricultural Retailers Association

25. Arkansas Farm Bureau Federation

26. Alabama Soybean and Corn Association

27. American Farm Bureau Federation

28. Colorado Corn Growers Association

29. Corn Producers Association of Texas

30. Federal Water Quality Coalition

31. Fertilizer Institute

32. Illinois Corn Growers Association

33. Illinois Farm Bureau

34. Illinois Pork Producers Association

35. Indiana Corn Growers Association

36. Indiana Farm Bureau

37. Indiana Pork Producers Association

38. Iowa Corn Growers Association

39. Iowa Farm Bureau Federation

40. Iowa Pork Producers Association

41. Kansas Corn Growers Association

42. Kansas Farm Bureau

43. Kentucky Corn Growers Association

44. Kentucky Farm Bureau

45. Louisiana Chemical Association

46. Louisiana Department of Agriculture and Forestry

47. Louisiana Department of Environmental Quality

48. Louisiana Department of Natural Resources

49. Louisiana Farm Bureau Federation; Minnesota Farm Bureau Federation

50. Minnesota Corn Growers Association

51. Minnesota Pork Producers Association

52. Mississippi Farm Bureau Federation

53. Missouri Agribusiness Association

54. Missouri Corn Growers Association

55. Missouri Farm Bureau

56. Missouri Pork Association

57. Mosaic Fertilizer, LLC

58. National Association of Clean Water Agencies

59. National Corn Growers Association

60. National Pork Producers Council

61. Nebraska Farm Bureau Federation

62. Ohio Corn and Wheat Growers Association

63. Oklahoma Farm Bureau

64. State of Alabama

65. State of Arkansas

66. State of Illinois

67. State of Iowa

68. State of Kansas

69. State of Kentucky

70. State of Louisiana

71. State of Missouri

72. State of Montana

73. State of Nebraska

74. State of North Dakota

75. State of Oklahoma

76. State of South Dakota

77. South Dakota Corn Growers Association

78. South Dakota Farm Bureau Federation

79. Tennessee Farm Bureau Federation

80. Tennessee Pork Producers Association

81. U.S. Poultry & Egg Association

82. Wisconsin Corn Growers Association

83. Wisconsin Pork Producers Association

84. Wyoming Farm Bureau; Illinois Fertilizer & Chemical Association

85. Frederic P. Andes, Attorney at Law

86. Arnold & Porter, LLP

87. Katie Deranger Bell, Kean Miller

88. Beveridge & Diamond, PC

89. Jeffrey A. Chanay, Kansas Attorney General's Office

90. David Y. Chung, Crowell & Moring, LLP

91. Crowell & Moring, LLP

92. Tabitha I. Gray, Louisiana Department of Agriculture and Forestry

93. Karen M. Hansen, Beveridge & Diamond, PC

94. Ann Beryl Hill, Louisiana Public Service Commission

95. S. Ault Hootsell, III, Phelps Dunbar, LLP

96. Donald L. Hyatt, II, Donald L. Hyatt, II, APLC

97. Isaac Jackson , Jr., Isaac Jackson, Jr. Attorney at Law

98. Marshall Dwayne Johnson, Kean Miller

99. Kendra Akin Jones, Arkansas Attorney General's Office

100. Jeremy Karpatkin, Arnold & Porter, LLP

101. Gerald T. Karr, Gerald T. Karr, Attorney at Law

102. Steven Beauregard Jones, Louisiana Department of Justice

103. Kean Miller

104. Tony G. Mendoza, Crowell & Moring, LLP

105. Charles Moulton, Arkansas Attorney General's Office

106. Bradley C. Myers, Kean Miller

107. Phelps Dunbar, LLP

108. Christopher Alan Ratcliff, Louisiana Department of Environmental Quality

109. Sarah Perkins Reid, Cotten, Schmidt & Abbott, LLP

110. Sean J. Riley, Kentucky Attorney General's Office

111. David P. Ross, Crowell & Moring, LLP

112. Richard E. Schwartz, Crowell & Moring, LLP

113. Ryan Michael Seidemann, Louisiana Department of Justice

114. David R. Sheridan, Iowa Attorney General's Office

115. Lester Sotsky, Arnold & Porter, LLP

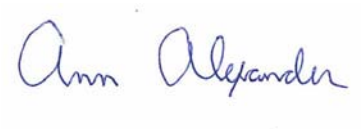
116. Katherine J. Spohn, Nebraska Attorney General's Office

117. Cory J. Swanson, Montana Department of Justice

118. Megan K. Terrell, Louisiana Department of Justice

119. Gregory Carl Weiss, Weiss & Eason, LLP

120. Weiss & Eason, LLP



Ann Alexander
Natural Resources Defense Council
20 N. Wacker Drive, Ste. 1600
Chicago, IL 60606
(312) 651-7905
aalexander@nrdc.org
Counsel for Plaintiff-Appellees Gulf Restoration Network, Missouri Coalition for the Environment, Iowa Environmental Council, Tennessee Clean Water Network, Minnesota Center for Environmental Advocacy, Sierra Club, Waterkeeper Alliance, Prairie Rivers Network, Kentucky Waterways Alliance, and Natural Resources Defense Council

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellees respectfully request oral argument on this appeal, as oral argument would likely facilitate this Court's disposition of the issues.

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INTRODUCTION

In 2008, the Appellee organizations (Gulf Restoration), petitioned the U.S. Environmental Protection Agency (EPA or Agency) for a yes or no answer to a statutorily-defined question: whether a federal rulemaking on nutrient pollution is "necessary to meet the requirements of this chapter [i.e., the Clean Water Act]" in the face of decades of state inaction repeatedly acknowledged by EPA itself. *See* 33 U.S.C. § 1313(c)(4)(B) (commanding that EPA promulgate a revised or new standard where EPA "determines that a revised or new standard is necessary"). Instead of answering the question of necessity, EPA concluded that it would not be "practical or efficient" to undertake the rulemaking that Congress mandated when "necessary to meet the [Act's] requirements." The Agency explicitly did not determine that new standards were *not* necessary, nor did it determine that they *were* necessary. It simply did not answer the question, explaining that it would rather "work cooperatively with states" on a voluntary, non-regulatory approach rather than follow the rulemaking approach that Congress directed in the Clean Water Act. In other words, the Agency has adopted a "hear no evil, see no evil" approach, attempting to avoid the Act's legislative framework by refusing to decide whether the available facts trigger its regulatory duties.

Now EPA argues that this Court has no power to review its refusal to answer the statutory question of necessity, and that the Agency thus has discretion to

indefinitely avoid deciding whether federally-promulgated water quality standards are "necessary to meet the requirements" of the Clean Water Act. The Supreme Court has made clear, however, that agency "[r]efusals to promulgate rules are … susceptible to judicial review…." *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007); and under the Administrative Procedure Act (APA), an agency's "failure to act" is reviewable as "agency action." 5 U.S.C. §§ 551(13) and 704. Thus, this Court has explained that the fact that a statute "permits, rather than compels, agency action does not alone commit that action to the agency's unreviewable discretion." *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1293 (5th Cir. 1977).

Moreover, petitions for rulemaking, like the one that Gulf Restoration submitted to EPA here, are specifically authorized by the APA. 5 U.S.C. § 553(e). The APA's "'generous review provisions' must be given a 'hospitable' interpretation," and hence there is a strong presumption in favor of reviewability, such that review may be curtailed "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (quoting other Supreme Court authority). The Supreme Court squarely addressed a very similar situation in *Massachusetts v. EPA*, holding that "there are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action," which make petition denials "susceptible to judicial review," unlike "an agency's refusal to initiate

enforcement proceedings [which] is not ordinarily subject to judicial review." 549 U.S. at 527.

The Court further held in *Massachusetts v. EPA* that where a petition for rulemaking directly requests an up-or-down decision on a statutory question that can trigger a rulemaking obligation, an EPA refusal to answer cannot rest "on reasoning divorced from the statutory text." *Id.* at 532. The Court held that the Clean Air Act's reference to an EPA "judgment"—which is similar to the Clean Water Act's use of the word "determines" in 33 U.S.C. § 1313(c)(4)(B)—is "not a roving license to ignore the statutory text [but] a direction to exercise discretion within defined statutory limits." *Id.* at 533.

EPA's position in this lawsuit boils down to reasons why it does not like Supreme Court precedent or the Clean Water Act's commands. The best response to the Agency's arguments is District Court Judge Zainey's clear analysis in the opinion on review. He explained:

> Th[e] import of the *Massachusetts v. EPA* decision for the instant case is clear. EPA could not simply decline to make a necessity determination in response to Plaintiffs' petition for rulemaking … Simply, just as EPA's response to the rulemaking petition in *Massachusetts v. EPA* was contrary to law because EPA did not make a "judgment," the Denial [in this case] was contrary to law because EPA did not make a necessity determination.

ROA. 19558-59.

STATEMENT OF JURISDICTION

This matter is a challenge under the APA, 5 U.S.C. § 706(2)(A), to an APA petition response from EPA that was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *See* ROA. 17577 *et seq.* (Petition); ROA. 31214 *et seq.* (Complaint). EPA's action on the Petition is reviewable under 5 U.S.C. § 704. This Court has jurisdiction to hear the appeal from the District Court's decision under 28 U.S.C. § 1291.

Gulf Restoration's response to EPA's argument concerning purported lack of subject matter jurisdiction is set forth in Point I of this brief. Gulf Restoration's response concerning EPA's concerns with the scope of the District Court's remedy, which the Agency incorrectly styled as a subject matter jurisdiction question, is set forth in Point III of this brief.

STATEMENT OF ISSUES

1. The U.S. Supreme Court has held that agency "[r]efusals to promulgate rules are … susceptible to judicial review," *Massachusetts v. EPA*, 549 U.S. at 527-28, and APA §§ 551(13) and 704 provide for judicial review of an agency's "failure to act." Is there federal subject matter jurisdiction to review EPA's refusal to answer the question raised in Gulf

Restoration's Petition for rulemaking under the Clean Water Act, 33 U.S.C. § 1313?

2. The U.S. Supreme Court has disapproved of an EPA refusal to answer a petition for rulemaking when EPA based its refusal "on reasoning divorced from the statutory text." *Massachusetts v. EPA*, 549 U.S. at 532. Did the District Court properly find that EPA could not decline to respond to the statutory question raised by the APA Petition for reasons that are "divorced from the statutory text"?
3. The law requires that at least one member of a plaintiff organization suffer actual or threatened injury to demonstrate "standing to sue" for federal courts to have Article III subject matter jurisdiction. "Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief." *Sierra Club v. Morton*, 405 U.S. 727, 740 n.15 (1972). Here, EPA concedes that some of Plaintiffs' members suffered an injury in fact. Does EPA's argument (raised for the first time on appeal) about the number of states potentially affected by a ruling on Gulf Restoration's Petition for Rulemaking limit the District Court's Article III subject-matter jurisdiction to the seven states "containing" waterbodies that the plaintiff organization member-declarants specifically averred that they use and enjoy?

4. Gulf Restoration established that their members are injured by an annual hypoxic "dead zone" in the Gulf of Mexico which is nearly the size of Connecticut; and by pollution of the Mississippi River. Pollution from at least 31 states drains into the Mississippi River basin to cause and contribute to that dead zone. Is EPA correct that this showing of injury supports a remedy in only seven states?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Clean Water Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that objective, Congress set the goal that "discharge of pollution into the navigable waters be eliminated," *id.* § 1251(a)(1), and declared, "[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . ." *Id*. § 1251(a)(2). This provision is often referred to as the Clean Water Act's "fishable and swimmable" standard. *See Mississippi Comm'n of Natural Res. v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980) (upholding EPA's disapproval of a state standard that did not meet the "fishable and swimmable" standard).

Clean Water Act § 303, 33 U.S.C. § 1313, governs adoption of standards to protect water quality consistent with the goals set forth in 33 U.S.C. § 1251(a). In keeping with the overall "cooperative federalism" structure of the Act, this section gives states an opportunity to take responsibility for setting protective standards, but requires EPA to oversee the process—and to step in to promulgate federal standards if state action is inadequate to serve the Act's purposes. 33 U.S.C. § 1313(c); *see New York v. U.S.*, 505 U.S. 144, 145 (1992) (citing the Clean Water Act as an example of "cooperative federalism," wherein Congress is authorized to "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation").

Section 1313 contemplates that states will provide the first level of defense in promulgating water quality standards that include, *inter alia*, (1) designations of uses (*i.e.*, what recreational, aquatic life, and other uses each water body should be clean enough to support); and (2) water quality criteria (*i.e.*, how clean the water needs to be in order to support those uses). *See* 40 C.F.R. § 131.2 (Water quality standards "define[ ] the water quality goals of a water body … by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses."). Criteria are generally numeric (*e.g.*, no more than 10 milligrams per liter of a particular pollutant), although states sometimes use narrative criteria (*e.g.*, "free from unnatural sludge"). 33 U.S.C. § 1313(c)(2)(A)-(B). The standards are

required to "serve the purposes" and "meet the requirements" of the Act, 33 U.S.C. §§ 1313(a) and (c), and thus must, among other things, "protect [designated] uses" of the Nation's waters. 40 C.F.R. § 131.2.

Water quality standards are subject to frequent reviews and updates. In each instance, states are given a chance to craft standards that meet the purposes of the Act, but if they fail to do so, EPA must step in and promulgate standards itself through a public rulemaking process. When the Act took effect, Congress gave states an initial opportunity to submit standards for EPA's approval, but required EPA to promulgate the standards if necessary. 33 U.S.C. §§ 1313(a)(3)(C), (b)(1). After that, the Act requires states to review their standards at least once every three years, modifying them and adopting new standards as necessary "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)(1), (c)(2)(A). States must submit any new standards to EPA for approval. If those standards are inadequate then EPA must (if the state does not fix the problem) promulgate the standards itself. 33 U.S.C. § 1313(c)(2) and (3). EPA's promulgation of water quality standards is a rulemaking process that is "subject to the same policies, procedures, analyses, and public participation requirements established for States …." 40 C.F.R. § 131.22; *see* 40 C.F.R. Part 25 (public participation requirements); *e.g.*, 75 Fed. Reg. 4173 (Notice

of Proposed Rulemaking, "Water Quality Standards for the State of Florida's Lakes and Flowing Waters").

Throughout the standard-setting process, EPA retains an independent duty to ensure that the states' water quality standards meet all of the Act's requirements. Thus, the Clean Water Act statutory provision at issue in this matter, 33 U.S.C. § 1313(c)(4), requires a federal standard-setting rulemaking whenever EPA determines that "a revised or new standard is necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(B). That section reads in pertinent part as follows:

> (4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—
>
> …
>
> (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

Id. at § 1313(c)(4).

B. Factual Background

The Petition at the heart of this matter, which Gulf Restoration sent to EPA in 2008, concerns the problem of algae-fueling pollutants such as nitrogen and phosphorus. ROA. 17577 *et seq.* (Petition) These pollutants, which are found commonly in sewage and polluted run-off from farm fields, are responsible for

mats of algae that foul lakes and rivers throughout the United States, and for the "Gulf Dead Zone," an area near the mouth of the Mississippi River roughly the size of Connecticut in the Gulf of Mexico where decomposing algae has depleted the oxygen in the bottom layer of the water column, effectively choking out other aquatic life there. ROA. 17581-614 (petition). *See Rapanos v. U.S.*, 547 U.S. 715, 777 (2006) (Kennedy, J., concurring) ("[N]utrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, 'dead zone' in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey."). The Petition highlights EPA's own statements—which the Agency has repeated for more than a decade—that the algae problem has reached crisis proportions, representing "one of the leading causes of water quality impairment in our Nation's rivers, lakes and estuaries"; and that states' failure to act would require an EPA rulemaking to alleviate the problem and bring the nation's waters into compliance with Clean Water Act standards. ROA. 17645-49 (petition); 63 Fed. Reg. 34648, 34648-49 (June 25, 1998).

EPA has expressly recognized that numeric criteria, which provide a clear basis to establish permit limits on the discharge of nutrients, are essential to a solution: "It has long been EPA's position that numeric nutrient criteria targeted at different categories of water bodies and informed by scientific understanding of the relationship between nutrient loadings and water quality impairment *are ultimately*

necessary for effective state programs." ROA. 18638-39 (EPA memorandum dated March 16, 2011) (emphasis added); *see also* ROA. 17856 (National Research Council Report) ("[Both] numerical federal quality criteria and state water quality standards for nutrients are essential precursors to reducing nutrient inputs to the river and achieving water quality objectives along the Mississippi River and in the northern Gulf of Mexico."); ROA. 18440 and 18445 (2010 EPA Inspector General report concluding, "We found EPA's nutrient criteria strategy lacked management control and an adequate system of accountability for either itself or the States," and observing, "While setting standards does not of itself improve water quality, it generally marks the beginning of serious efforts to identify impaired waters and make improvements where needed. Ineffective management control and accountability over the approach to promoting State adoption of nutrient water quality standards has resulted in an unnecessary delay to the start of the clean-up process.").

EPA in 1998 addressed the crisis-level algae and Dead Zone problem by setting a 2003 deadline for states to promulgate numeric criteria governing allowable levels of nutrients in waters within their jurisdiction, pursuant to the state-initiated standard setting process set forth in the Clean Water Act at 33 U.S.C. § 1313. ROA. 17651-761 (EPA Clean Water Action Plan). The Agency stated in its Clean Water Action Plan that if the 2003 deadline was not met, it

would invoke its authority under § 1313(c)(4)(B) to find that promulgation of federal nutrient criteria is "necessary to meet the requirements" of the Clean Water Act, and would proceed to issue such criteria accordingly. ROA. 17727-28 (EPA Clean Water Action Plan) ("EPA will establish, by the year 2000, numeric criteria for nutrients (i.e., nitrogen and phosphorus) that are tailored to reflect the different types of water bodies (e.g., lakes, rivers, and estuaries) and the different ecoregions of the country, and will assist states in adopting numeric water quality standards based on these criteria over the following three years. If a state does not adopt appropriate nutrient standards, EPA will begin the process of promulgating nutrient standards."). EPA reaffirmed these conclusions in its Notice of National Strategy for the Development of Regional Nutrient Criteria. 63 Fed. Reg. 34648, 34648-49 (June 25, 1998).

Observing that "the National Water Quality Inventory … cites nutrients (nitrogen and phosphorus) as one of the leading causes of water quality impairment in our Nation's rivers, lakes and estuaries," the Agency reiterated its expectation that all states and tribes have numeric nutrient criteria in place by the end of 2003; and stated, "If EPA determines that a new or revised nutrient standard is necessary for a State or Tribe . . . , EPA will initiate rulemaking to promulgate nutrient criteria appropriate to the region and waterbody types."). *Id.* at 34649. In 2001, EPA extended the deadline for state action to 2004, but reiterated its intention to

make a determination that a federal standard-setting rulemaking is necessary pursuant to § 1313(c)(4)(B) for states that did not meet the revised deadline. 66 Fed. Reg. 1671, 1673-74 (Jan. 9, 2001).

EPA's second deadline came and went, with little action to promulgate numeric nutrient criteria by either states or EPA. Meanwhile, experts working in conjunction with EPA continued to make multiple public pronouncements concerning the severity of the algae pollution and Gulf Dead Zone problems. *See, e.g.*, ROA. 18121 and 18168 (EPA Science Advisory Board) ("The SAB Panel finds that the Gulf of Mexico ecosystem appears to have gone through a regime shift with hypoxia such that today the system is more sensitive to inputs of nutrients than in the past, with nutrient inputs inducing a larger response in hypoxia … The management implications are that nutrients should be reduced as soon as possible before the even larger nutrient reductions are required to reduce the area of hypoxia."); ROA. 18469 (State-EPA Nutrient Innovations Task Group "Urgent Call to Action") ("[n]utrient-related pollution significantly impacts drinking water supplies, aquatic life …"; while data on economic impacts are limited, "what we *do* know paints a sobering picture and a compelling reason for more urgent and effective action," and "[c]urrent tools such as numeric nutrient criteria" are "underused and poorly coordinated").

For its part, EPA stated that it was attempting to address the nitrogen and phosphorus problem by working collaboratively with states in an effort to persuade them to issue the much-needed numeric nutrient standards. ROA. 18637-40 (EPA Memorandum dated March 16, 2011) (stating, "the amount of nitrogen and phosphorus pollution entering our waters has escalated dramatically," and proposing a "framework" "intended to initiate conversation with states, tribes, other partners, and stakeholders on how best to proceed" in reducing nutrient loads). *See* ROA. 17615-28 (summary in Petition).

Since EPA set deadlines for state action more than a decade ago, only one state along the Mississippi (Wisconsin) has issued numeric criteria for rivers and streams that EPA has approved. *See* ROA. 18420-21 (EPA approval of Wisconsin nutrient criteria); and 19607-09 (summary of states' criteria promulgation).[1]

The petition was grounded in the Clean Water Act's direction to EPA to promulgate federal criteria "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(B). Although the petition was nominally directed broadly at the nationwide nutrient problem, its primary focus was on the Mississippi River basin states and their contribution to the Gulf Dead Zone. ROA. 17645 (Petition). Accordingly, the Petition expressly presented EPA with a series of requested

[1] The Record citation is to a chart submitted by the State intervenors summarizing the status of state promulgation of criteria. Plaintiffs provided an explanation of this chart at ROA. 19469-70.

options for making a determination regarding smaller geographic areas, subsets of types of waterbodies, and fewer states. Specifically, the Petition requested "jointly and in the alternative [that standards be set] for (i) lakes and reservoirs, (ii) rivers and streams, (iii) the contiguous zone of coastal waters," and (iv) the part of the ocean inside the 3-mile state territorial boundary. ROA. 17647-48. Although referencing the national scope of the problem, the petition requested that EPA should "at least establish standards to control nitrogen and phosphorus pollution within the Mississippi Basin." ROA. 17648-49.

EPA finally responded to the 2008 Petition in July 2011, after Gulf Restoration threatened to file a lawsuit for unreasonable delay. *See* ROA. 18644-47 (Letter to EPA). The response acknowledged, once again, the severity of the nation's nutrient-fueled algae problem. However, it declined to make a finding one way or the other under § 1313(c)(4)(B) as to whether federal nutrient standards are necessary to meet the requirements of the Clean Water Act for any one of the alternative geographic areas or types of waterbodies presented in the petition. ROA. 18649-54 (EPA denial letter). The Agency stated, "EPA is *not* determining that NNC [numeric nutrient criteria] are *not* necessary to meet [the Act's] requirements with respect to the waters you identified." ROA.18654 (emphasis added). Nor did EPA make a determination that numeric nutrient criteria are necessary. Instead, EPA left the bottom-line statutory question of § 1313(c)(4)(B)

open. EPA's explanation for its failure to provide a responsive answer was that the Agency "do[es] not believe that the comprehensive use of federal rulemaking authority is the most effective or practical means of addressing these concerns at this time." ROA. 18649. The denial letter stated, "EPA is exercising its discretion to allocate its resources in a manner that supports targeted regional and state activities to accomplish our mutual goals of reducing N[itrogen] and P[hosphorus] pollution and accelerating the development and adoption of state approaches to controlling N[itgrogen] and P[hosphorus]." ROA. 18654. The Agency concluded that it "believes that the most effective and sustainable way to address widespread and pervasive nutrient pollution … is to build on these efforts and work cooperatively with states and tribes to strengthen nutrient management programs." ROA. 18652.

C. Gulf Restoration's Lawsuit

Gulf Restoration filed suit in March 2012 alleging that EPA's refusal to directly respond, either affirmatively or negatively, to the § 1313(c)(4)(B) "necessity" question violates the APA. The District Court held that under *Massachusetts v. EPA*, "EPA could not simply decline to make a necessity determination in response to Plaintiffs' petition" where the reasons for its non-decision were "not statutorily based." ROA. 19558-59. The District Court ruled that, "[t]he discretion surrounding a threshold determination like the one in § 202

of the Clean Air Act, and by implication like the necessity determination required by § [1313(c)(4)(B)] of the CWA, is not necessarily unlimited; it is in fact bounded by the text of the authorizing statute. *See Massachusetts v. EPA*, 549 U.S. at 533." ROA. 19558. The Court emphasized the pivotal fact that, in both *Massachusetts v. EPA* and this case, the plaintiffs had requested a decision on a statutory threshold rulemaking question in a petition for rulemaking; and that such a petition triggers the Agency's obligation to respond in a manner that is not "divorced from the statutory text." ROA. 19556. The District Court explained, "perhaps the most important aspect of *Massachusetts v. EPA* for the case at bar is the Court's implicit conclusion that EPA lacks the discretion to simply decline to make the threshold determination in response to a rulemaking petition even where the statutory text does not explicitly require it to do so." ROA. 19558. Consequently, the Court ordered EPA to provide Gulf Restoration with a determination of necessity pursuant to § 1313(c)(4)(B) within 180 days. ROA. 19561.

In response to the Plaintiffs' Motion, the Court included a discussion in its opinion about the factors that EPA may consider when "actually making the necessity determination" under 33 U.S.C. § 1313(c)(4)(B). ROA. 19559-61 (noting that "[n]othing in the authorizing statutory text of the CWA expressly precludes EPA from considering the very factors that it cited in the Denial"). Because EPA has not made a necessity determination here, however, this discussion is dicta and

not an issue in this appeal. A future challenge to the substance of an EPA necessity determination, if any, would occur in the specific context of the administrative record supporting the decision—a record that does not currently exist. Further, as the administrative agency that implements the Clean Water Act, EPA will have the first crack at determining the appropriate considerations to inform a necessity determination. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 983 (2005) (holding that "whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.").

In order to demonstrate standing in this lawsuit, Gulf Restoration filed affidavits from at least one member of each plaintiff organization describing the injury in fact sustained by each as a result of EPA's failure to adequately address nutrient pollution. ROA 18655-730 (affidavits).

SUMMARY OF ARGUMENT

1. Subject Matter Jurisdiction in Rulemaking Cases

There is a strong presumption in favor of judicial review under the APA, requiring clear and convincing evidence of congressional intent to preclude it. No such evidence exists here. The District Court's decision below and the closely-analogous U.S. Supreme Court decision in *Massachusetts v. EPA* are grounded in the principle that federal agencies cannot dodge a rulemaking petition by refusing

to answer a threshold statutory question based on extra-statutory reasons. Thus, a rulemaking petition gives rise to an obligation to respond with reasoning consistent with the statutory text, and a court has subject matter jurisdiction to review compliance with that obligation. This Court's decision in *Save the Bay, Inc. v. EPA* affirms that judicial review must be available to challenge an agency's reliance upon extra-statutory criteria.

The Supreme Court has specifically held that a response to a rulemaking petition is reviewable, in circumstances closely akin to those at issue here. In *Massachusetts v. EPA*, the Court reaffirmed that federal courts have subject matter jurisdiction to review agency refusals to promulgate rules in response to a petition for rulemaking. 549 U.S. at 527. The Court distinguished *Heckler v. Chaney*, 470 U.S. 821 (1985), and its progeny because those cases concern adjudicative enforcement decisions, not rulemaking. *Id.* (describing the "key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action"). The Court also noted that affected parties "have an undoubted procedural right" to file rulemaking petitions, a circumstance that does not exist in agency enforcement actions. *Id.*

Furthermore, the text and structure of the Clean Water Act clearly provide sufficient "law to apply," and evince an intent to allow judicial review. The § 1313 standard-setting process provides considerable substantive detail concerning states'

obligations and EPA's federal oversight responsibilities; and shielding EPA from judicial review would be inconsistent with the nature, purpose, and language of the Clean Water Act. The Clean Water Act is in no way comparable to the statutes at issue in such cases as *Webster v. Doe*, 486 U.S. 592 (1988), which provide very little in the way of decisionmaking standards, and exude deference in their language and structure.

2. Obligation to Base a Decision on the Statute

The District Court correctly held, pursuant to *Massachusetts v. EPA*, that EPA failed in its obligation to provide a statutorily-grounded answer to the § 1313(c)(4)(B) threshold question posed in the Gulf Restoration petition: whether a federal rulemaking promulgating numeric nutrient criteria is necessary to meet the requirements of the Clean Water Act, which in turn set a "fishable and swimmable" goal for waters of the United States. EPA did not rely on statutory factors to support its non-response to the Gulf Restoration petition, but rather relied on reasoning wholly divorced from the Clean Water Act's text and goals—providing a long list of extra-statutory reasons why it preferred not to decide, similar to the "laundry list of reasons not to regulate" that the U.S. Supreme Court rejected in *Massachusetts v. EPA*. 549 U.S. at 533.

3. Scope of Remedy

EPA has styled its concern with the scope of Gulf Restoration's Petition (which it failed to raise below) as a question of subject matter jurisdiction, but it is not. The Agency concedes that Gulf Restoration has alleged sufficient injury in fact to support standing with respect to seven states, which provides jurisdiction for review of the case as a whole. In any event, since Gulf Restoration submitted multiple affidavits alleging injury to members who use and enjoy the Mississippi River and the Gulf of Mexico, upstream nutrient pollution in the 31 Mississippi River basin states flowing into the River and the Gulf undeniably contributes to such injury.

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION UNDER THE APA TO REVIEW EPA'S DENIAL OF THE PETITION

EPA's contention that this Court lacks jurisdiction under APA § 701(a)(2) to review the Agency's petition response is without merit. *Massachusetts v. EPA* and other courts have clearly held to the contrary; and confirmed that the narrowly-framed *Heckler v. Chaney* and its progeny apply only to enforcement actions, not to responses to rulemaking petitions. The Agency's attempt to cram what is clearly a legislative rulemaking determination into the frame of an adjudicative enforcement determination, in order to avail itself of precedent applicable only to enforcement, is unavailing. EPA has failed to provide "clear and convincing

evidence" of legislative intent to curtail judicial review. *See Abbott Laboratories v. Gardner*, 387 U.S. at 141.

In arguing that judicial review is unavailable, EPA is claiming freedom from judicial oversight in implementing § 1313(c)(4)(B) , even though Congress unambiguously mandated a course of action when necessary to meet the Act's requirements. EPA asserts that it can exercise unreviewable discretion to side-step Congress' plan—regardless of whether new or revised standards are necessary to implement the Act—by simply withholding recognition of this necessity. The Agency takes this position even in the face of a citizen petition properly submitted under 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."), and despite the fact that Congress specifically provided for such petitions, *id*., required an agency response, *id.* at § 555(e), and mandated review of agency's "failure to act." *Id*. at § 551(13) (defining "agency action"; *id*. at § 704 ("final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."). Nothing in the Clean Water Act suggests that Congress intended to grant EPA such a sweeping exemption from judicial oversight. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 135-136 (2000) (holding that the Food, Drug and Cosmetic Act "admits no remedial discretion" broad enough to allow the

FDA to side-step Congress' regulatory scheme to remove misbranded drugs from the marketplace).

A. EPA's Refusal to Render a "Necessity Determination" is Judicially Reviewable

There is a strong presumption that federal agency action is reviewable, and "the burden of proving nonreviewability [under APA § 701(a)(2)] is that of the agency involved." *Bullard v. Webster*, 623 F.2d 1042, 1045 (5th Cir. 1980) (citing *Dunlop v. Bachowski*, 421 U.S. 560 (1975)). "A long-standing and strong presumption exists that action taken by a federal agency is reviewable in federal court." *Save the Bay, Inc. v. EPA*, 556 F.2d at 1292-1293. The Eleventh Circuit has noted that cases in which § 701(a)(2) precludes APA review are "uncommon," and that the exception to judicial review applies only in "rare instances." *Conservancy of Southwest Florida v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1085 (11th Cir. 2012).

This presumption is particularly strong under the APA. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."); *id*. at 671 (citing APA legislative history, "It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy

could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board") (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The APA specifically provides for petitions for rulemaking and requires an agency response, 5 U.S.C. §§ 553(e) and 555(e); and provides that "failure to act" is reviewable as "agency action." 5 U.S.C. §§ 551(13) and 704. The exemption under 5 U.S.C. § 701(a)(2) for action committed to agency discretion "is a very narrow exception." *Save the Bay, Inc.*, 556 F.2d at 1293 (internal quotation marks and citations omitted). The APA's "generous review provisions must be given a hospitable interpretation," and "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. at 141 (internal quotation marks and citations omitted). *See Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) ("The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.").

The fact that a statute "permits, rather than compels, agency action does not alone commit that action to the agency's unreviewable discretion" under the APA. *Save the Bay, Inc.*, 556 F.2d at 1293. Moreover, as discussed in depth in Subpoint B, the Supreme Court has drawn a clear distinction between an agency's denial of a rulemaking petition, which is reviewable, and an agency's refusal to take enforcement action, which is generally not. *See Heckler v. Chaney*, 470 U.S. at 825

n.2 (differentiating "enforcement discretion" precedent from rulemaking petition responses, noting that the case before it "does not involve the question of agency discretion not to invoke rulemaking proceedings"); *Massachusetts v. EPA*, 549 U.S. at 527 ("There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action," and "[r]efusals to promulgate rules are thus susceptible to judicial review… .").

The District Court correctly concluded that EPA's heavy burden of proving immunity from judicial review has not been met here, holding EPA's argument concerning subject matter jurisdiction to be "unpersuasive." ROA. 19554 (District Court decision). In so holding, the District Court below intentionally framed its decision so to address only the narrow question of whether EPA's refusal to make a yes or no "determination"—the statutorily contemplated determination under § 1313(c)(4)(B)—was judicially reviewable. ROA. 19554-55. The District Court agreed with Plaintiffs that "the issues before the Court at this juncture—whether EPA could refuse to make a necessity determination and do so based on non-statutory factors—are legal questions that this Court can decide without eroding any of the deference owed to EPA." ROA. 19555.

The District Court was clearly correct. In *Massachusetts v. EPA*, the Supreme Court observed that an agency "must ground its reasons for action or inaction in the statute" even though it may enjoy considerable discretion in

applying the relevant statutory factors. 549 U.S. at 535. Accordingly, notwithstanding an agency's substantive discretion on a threshold rulemaking question, that discretion is not a shield against judicial review of an unlawful decision to sidestep the threshold question altogether. 549 U.S. at 527, 533. The Court acknowledged that it lacked "the expertise [and] authority to evaluate EPA's policy judgments," but concluded that EPA's "judgment" must be grounded in the statute—in other words, EPA must "exercise discretion within defined statutory limits." *Id.* at 533. This Court similarly held in *Save the Bay* that, even where EPA's permit veto decisionmaking was generally unreviewable, review must nonetheless be available where the Agency grounds its refusal to veto in extra-statutory criteria. 556 F.2d at 1296 ("There is no suggestion anywhere in the [Clean Water Act] Amendments' history that EPA may base a decision not to veto on factors other than a specific permit's consistency with the [statutory] guidelines or the insignificance of any departures. There must accordingly be room for claims that unlawful factors have tainted the agency's exercise of its discretion.").

Massachusetts v. EPA is squarely on point here. Both statutes require a threshold decision in order to trigger a rulemaking—a "judgment" under the Clean Air Act and a "determination" under Clean Water Act § 1313(c)(4)(B). Both the case at bar and *Massachusetts v. EPA* turn on whether or not the Agency had refused on unlawful grounds to make that threshold decision when asked directly

to do so in a rulemaking petition. In both cases, EPA failed to "ground its reasons for action or inaction in the statute." *Compare* 549 U.S. 533 ("[T]he use of the word 'judgment' is not a roving license to ignore the statutory text,") *with* ROA. 19554 (District Court decision) (a § 1313(c)(4)(B) threshold rulemaking determination is "bounded by the text of the authorizing statute"). As discussed in Subsection B, *infra,* the *Massachusetts v. EPA* court confirmed that it is the rulemaking petition process itself—and the straight answer that process requires—that provides a reviewing court with the requisite "law to apply." 549 U.S. at 527.

B. Cases About "Enforcement Discretion" Do Not Apply to Agency Decisions on APA Rulemaking Petitions

The U.S. Supreme Court has explained, "There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action." *Massachusetts v. EPA*, 549 U.S. at 527. Yet EPA bases much of its case on *Heckler v. Chaney* and its progeny, arguing that the "enforcement discretion" doctrine should shield from judicial review its refusal to answer the bottom-line question that Gulf Restoration raised in its rulemaking petition. By its own terms, however, *Heckler v. Chaney* does not apply to denial of a rulemaking petition: the Supreme Court clearly explained that its decision was about demands for enforcement and "does not involve the question of agency discretion not to invoke rulemaking proceedings." 470 U.S. at 825 n.2. The Supreme Court in *Massachusetts v. EPA* expressly considered the matter and reaffirmed *Heckler's*

distinction between rulemaking and enforcement. The *Massachusetts* court categorically rejected the applicability of *Heckler v. Chaney* to a challenge to a denial of a rulemaking petition under the APA, and held such denials to be reviewable even where other types of agency inaction may not be. 549 U.S. at 527.

The Supreme Court followed the D.C. Circuit's decision in *American Horse Protection Ass'n v. Lyng* to explain the underlying reasons for this distinction between rulemaking proceedings from agency enforcement cases for the purposes of judicial review. *See* 549 U.S. at 527 (quoting *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987)). In *American Horse*, the D.C. Circuit explained:

> [R]efusals to institute rulemaking proceedings are distinguishable from other sorts of nonenforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation. *Chaney* therefore does not appear to overrule our prior decisions allowing review of agency refusals to institute rulemakings.

Id. The *American Horse* court further explained that the APA itself "serves to distinguish between *Chaney* nonenforcement decisions and refusals to institute rulemakings," citing to the *Heckler v. Chaney* court's express distinction between reviewable decisions to enforce—which provide a "focus for judicial review"—and unreviewable decisions not to enforce. 812 F.2d at 4. The court held that an APA § 555(e) petition denial provides a similar "focal point" for judicial review:

> The *Chaney* Court noted that, "when an agency *does* act to enforce, that action itself provides a focus for judicial review" since a court can "at least … determine whether the agency exceeded its statutory powers." 470 U.S. at 832, 105 S. Ct. at 1656 (emphasis in original). *APA provisions governing agency refusals to initiate rulemakings give a similar focal point.* The APA requires agencies to allow interested persons to "petition for the issuance, amendment, or repeal of a rule," 5 U.S.C. § 553(e) (1982), and when such petitions are denied, to give "a brief statement of the grounds for denial," *Id.* § 555(e). *These two provisions suggest that Congress expected that agencies denying rulemaking petitions must explain their actions.*

Id. (emphasis added).

The *American Horse* court also referenced other key exceptions to non-reviewability articulated in *Chaney* that apply to a rulemaking petition denial. The *Chaney* court analogized agency non-enforcement and prosecutorial discretion, 470 U.S. at 832, and the *American Horse* court observed that both such types of non-reviewable decisions are "typically based mainly on close consideration of the facts of the case at hand, rather than on legal analysis." 812 F.2d at 4. However, the *American Horse* court also observed that "[r]efusals to institute rulemakings, by contrast, are likely to be relatively infrequent and more likely to turn on issues of law." *Id.* The court further stated that the reviewability of APA petition denials finds support in *Chaney's* express distinguishing of cases where an agency "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 4 (quoting *Heckler v. Chaney*, 470 U.S. at 833 n.4). It observed that, "[s]uch abdications are likely

both to be infrequent and to turn on matters remote from the specific facts of individual cases." *Id*.[2]

EPA asserts, without basis, that the Supreme Court's plainly categorical holding that responses to APA rulemaking petitions are reviewable somehow does not apply here due to differences between the Clean Air Act and the Clean Water Act; and that *Heckler, Public Citizen, Inc. v. EPA*, 343 F.3d 449 (5th Cir. 2003), and *Webster v. Doe* "remain good law." EPA Br. at 27. Of course, those cases do remain good law—just not law that applies here, especially after *Massachusetts v. EPA. See* 549 U.S. at 527 (courts have jurisdiction to review denials of rulemaking petitions despite EPA's "broad discretion" to make substantive decisions under the Clean Air Act).

In view of the categorical nature of the Supreme Court's determination that responses to APA petitions are reviewable and not subject to *Heckler v. Chaney*, the precedent from this Court relied upon by EPA—all of which preceded *Massachusetts v. EPA*—is not on point. None of these cases involved a rulemaking

[2] A district court considering reviewability of EPA decisions under § 1313(c)(4)(B) expressly relied on this distinction between a direct challenge to Agency failure to act and a challenge to a denial of a rulemaking petition under the APA, holding that the latter but not the former would be justiciable under the EPA. *See Nat'l Wildlife Fed'n v. Browner*, No. 95-1811 (JHG), 1996 WL 601451 (D.D.C. Oct. 11, 1996), *aff'd* 127 F.3d 1126 (D.C. Cir. 1997) ("Should the agency reject such a petition on the merits or adopt the position that it lacks the authority under Section [1313](c)(4)(B) [to act], … the petitioners could institute a new suit challenging these decisions. At that point, final agency action would have occurred, and the Court would presumably have an administrative record upon which to review that final action.").

petition, and certainly not an agency's refusal to decide a key statutory question posed by one. These cases concern enforcement, and reflect the "key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action" referenced by the Court in *Massachusetts v. EPA*. 549 U.S. at 527. *Public Citizen, Inc. v. EPA* was a challenge to EPA's decision not to issue a Clean Air Act "Notice of Deficiency," putting the case squarely on the other side of the sharp divide the Supreme Court has drawn between reviewable petition denials and generally unreviewable enforcement determinations. 343 F.3d 449. EPA issuance of a Notice of Deficiency is a precursor to punitive action, including "stiff sanctions," such as the loss of state highway funds. *Id.* at 453-54. *Texas v. United States* concerned a decision by the U.S. Department of Agriculture declining to grant a waiver to Texas from the other-wise applicable regulation holding the state "strictly liable" for the cost of mailed food stamps stolen by Postal Service employees. The court addressed reviewability of that determination under the *Heckler v. Chaney* enforcement discretion framework. 951 F.2d 645, 647–49 (5th Cir. 1992), *rev'd on other grounds*, 507 U.S. 529 (1993). Similarly, in *Fed. Deposit Ins. Co. v. Bank of Coushatta*, the plaintiff bank objected to a decision by the Federal Deposit Insurance Corporation to issue and enforce a "capital directive," which is "one of its regulatory tools for dealing with troubled banks." 930 F.2d 1122, 1124 (5th Cir.

1991). The regulations at issue "allow enforcement … in the same manner as for a final cease-and-desist order," and "the FDIC may seek … penalties for violation of the directive against any bank, any officer, director, employee, agent, or other person participating in the conduct of the affairs of the bank." *Id.* at 1125-27. *Suntex Dairy v. Block* likewise involved adjudicatory rather than rulemaking action; and in any event concerned a completely unrelated statutory structure. 666 F.2d 158, 164–65 (5th Cir. 1982). There was no question in that case that the underlying substantive decision by the Department of Agriculture concerning the need for a milk marketing agreement, made based on an evidentiary hearing, was reviewable. The court found unreviewable only the Department's evaluation that followed as to whether voluntary sign-on to that agreement was likely, holding that judicial review of this secondary determination "could add nothing to the judicial review of the hearing … and such review would be duplicative and inefficient." *Id.* at 164.

EPA's brief repeatedly but mistakenly describes a determination under § 1313(c)(4)(B) as an "investigation," as though a determination of necessity would require sending a cadre of badge-wearing inspectors to scrutinize each stream in each state and submit a report to headquarters as to whether a state is violating the Clean Water Act and needs to be sanctioned. *See* EPA Br. at 28-29. However, a decision under § 1313(c)(4)(B), and hence the rulemaking action requested by Gulf

Restoration, is plainly not of this nature. A determination that federal standards are "necessary to meet the requirements" of the Clean Water Act is a quasi-legislative determination, nothing resembling an adjudicatory finding of a Clean Water Act violation. The text of § 1313(c)(4)(B) requires EPA to "prepare and publish *proposed regulations*" when necessary to meet Clean Water Act requirements (emphasis added). The proposed regulations apply generally to categories and classes of waters throughout the state, not just to one waterbody or one discharger. *See, e.g.*, 75 Fed. Reg. 4174 (Jan. 26, 2010) (emphasis added) ("Water Quality Standards for the State of Florida's Lakes and Flowing Waters; *Proposed Rule*"). Rules adopted under a § 1313(c)(4)(B) process are subject to an extensive public notice-and-comment procedure, whereas agency enforcement proceedings are not. *See* 75 Fed. Reg. 11079 (March 10, 2010) ("Extension of Public Comment Period for Water Quality Standards for the State of Florida's Lakes and Flowing Waters"). All federally-promulgated water quality standards appear in the Code of Federal Regulations alongside other EPA rules. *See* 40 C.F.R. Part 131, Subpart D ("Federally Promulgated Water Quality Standards"). Section 1313(c)(4)(B) is merely a step in a long rulemaking process established by the cooperative federalism framework of § 1313 to ensure that the requirements of the Act—in basic substance, the statutory goal that waters be rendered "fishable and

swimmable"—are being achieved through state or federal regulation. 33 U.S.C. § 1251(a)(2).

EPA implies that the requested rulemaking would require it to commence an "investigation" from scratch. EPA Br. at 28-30. In the first instance, any need (or lack thereof) for EPA to take further steps to assess the necessity of numeric nutrient criteria does not transform what is unquestionably a rulemaking proceeding under § 1313 into an "enforcement" case for the purposes of judicial review. Additionally, however, EPA has been tracking and overseeing states' Clean Water Act standard-setting process for decades, in its legislative capacity, in keeping with the requirements of § 1313. EPA has been assessing this issue since at least 1998, when the Agency evidently knew enough about the problem to declare that promulgation of federal standards was necessary absent prompt state action. 63 Fed. Reg. at 34648-49. EPA's failure to follow through on its announced deadline does not require it to now start from square one and re-investigate the matter. The Agency has no need here to "investigate whether any of the thousands of water quality standards throughout the country are sufficient at any given time to meet the requirements of the Clean Water Act," because it has already acknowledged that lack of *one* set of standards pertinent to Gulf Restoration's petition—numeric nutrient criteria—is an obstacle to attainment of the Clean Water Act's "fishable and swimmable" standard. *Id.*; EPA Br. at 28.

C. The Clean Water Act's Structure Supports the Availability of Judicial Review

EPA asserts unconvincingly that the "text and structure" of the Clean Water Act somehow militate against reviewability. EPA Br. at 22-28. But the "text and structure" of the Clean Water Act clearly bolster the case for review, and heighten the distinction between this case and cases such as *Webster v. Doe* that EPA relies heavily upon.

1. The Mandatory Language of the Clean Water Act Sets it Apart From the Narrowly Defined Categories that Courts Have Deemed Generally Exempt from Judicial Review

Although courts can and do look at the nature and structure of a statute as a whole in assessing judicial reviewability, *see Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984), this review frequently centers on whether such a scheme falls into the narrowly defined categories that the court has held to be inherently discretionary and unreviewable. The Supreme Court summarized in *Franklin v. Massachusetts*, as follows:

> [T]he Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security, such as *Webster v. Doe* and *Department of Navy v. Egan*, or those seeking review of refusal to pursue enforcement actions, see *Heckler v. Chaney*, 470 U.S. 821 … These are areas in which courts have long been hesitant to intrude.

505 U.S. 788, 818-19 (1992). *See Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (finding judicial review available under a statute that "does not fall into one of the

narrow categories that usually satisfies the strictures of subsection 701(a)(2)," which include "second-guessing executive branch decision[s] involving complicated foreign policy matters," enforcement action, or a "determination about how to spend a lump-sum appropriation") (internal citations omitted). In *Webster v. Doe*, cited in *Franklin*, the court declined to review the termination of a Central Intelligence Agency (CIA) agent on the ground that "the overall structure" of the National Security Act governing CIA employment confirms that such employment "entails a high degree of trust" by the director "perhaps unmatched in Government service." 486 U.S. at 601. The Court held that the provision at issue, allowing termination whenever the director "shall deem such termination necessary or advisable in the interests of the United States," was framed so that it "fairly exudes deference." *Id.* at 600. The Court stated , "Short of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to those interests, we see no basis on which a reviewing court could properly assess an Agency termination decision." *Id.*

The Clean Water Act not only fails to fit into any of these identified categories of statutory schemes deemed inherently unreviewable by courts, but contains strong indicia that review is appropriate and intended. The statute as a whole is grounded in a "cooperative federalism" approach in which state regulation is bounded by federal standards and agency oversight. *See New York v. United*

States, 505 U.S. at 145 (in a "cooperative federalism" statute such as the Clean Water Act, Congress offers states the choice "of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation"). Although, as the Court below recognized (ROA. 19559-61), states are charged with initiating and leading the standard-setting process under the Clean Water Act, it is clear throughout the Act—and in particular in § 1313—that EPA has an independent duty to set new or revised standards when necessary to implement the Act's requirements.

Accordingly, as one federal district court stated in holding inaction under § 1313(c)(4)(B) to be judicially reviewable:

> This conclusion is consistent with the administrative scheme established by the [Act] and the APA. If defendants' contention that EPA's inaction is entirely unreviewable were taken to its logical end, the agency could thwart the legislative scheme by failing to act in any number of circumstances without judicial review. In the process, the [Act's] goal of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters" could be completely undermined. 33 U.S.C. § 1251(a). In order to fulfill the [Act's] goal of having EPA oversee state water quality standards and to enhance that oversight with judicial review, the court will consider EPA's failure to exercise its § [1313](c)(4)(B) discretion under an "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A).

Northwest Envtl. Advocates v. EPA, 268 F. Supp. 2d 1255, 1264 (D. Or. 2003). Similarly, albeit on different facts, the district court in *Am. Canoe Ass'n, Inc. v. EPA* observed that judicial oversight of EPA inaction was appropriate in order to

avoid "allow[ing] recalcitrant states to short-circuit the Clean Water Act and render it a dead letter," since "[t]he structure and purpose of the [Clean Water Act], coupled with the mandatory tone Congress adopted throughout § [1313], counsel against such a reading." 30 F. Supp. 2d 908, 920 (E.D. Va. 1998).

This "mandatory tone" of § 1313 undercuts EPA's misguided reliance on *Webster v. Doe*'s analysis of a national security statute that "fairly exudes deference." 486 U.S. at 600. The Supreme Court and numerous others have distinguished *Webster* and cases like it, and held it to be narrowly applicable to regulatory areas requiring a high degree of deference. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. at 819 (listing *Webster* as representing one of the limited areas "in which the courts have been hesitant to intrude," and holding APA § 701(a)(2) inapplicable in view of the fact that "[t]he taking of the census is not such an area of traditional deference"); *Beno v. Shalala*, 30 F.3d 1057, 1067 (9th Cir. 1994) ("The statute does not give the Secretary unlimited discretion … *Cf. Webster*, 486 U.S. at 600 (emphasizing that the statute 'allows termination of an Agency employee whenever the Director "shall deem such termination necessary or advisable in the interest of the United States"')"); *C.K. v. Shalala*, 883 F. Supp. 991, 1003 (D.N.J. 1995) ("This is not a case where an agency's employee termination implicates national security concerns (*Webster v. Doe*, *supra*) … Rather, in this case the Court is confronted with an AFDC program circumscribed

by comprehensive regulations with no intimation from Congress that the Secretary's discretion is immune from judicial scrutiny."). It is clear from the Clean Water Act itself that, unlike the CIA director making employment decisions, the EPA Administrator making decisions regarding water quality can and should be held accountable by courts under provisions designed to ensure that the statute's goals cannot be thwarted.

Likewise, courts evaluating a statute for overall indicia of non-reviewability will look to whether the statutory scheme as a whole is framed in deferential language such as "deem … advisable" and "discretion"—and the Clean Water Act is clearly not. In *Fed. Deposit Ins. Corp. v. Bank of Coushatta*, cited by EPA, the court relied in finding non-reviewability on the fact that the relevant statutory section as a whole "uses the terms 'deem' or 'discretion' in almost every provision." 930 F.2d at 1129; EPA Br. at 25. *See Gifford v. Small Bus. Admin.*, 626 F.2d 85, 86 (9th Cir. 1980) (finding that the relevant provision is "couched in permissive rather than mandatory language" in the context of a "broad discretion" given the agency administrator to effectuate policy). *Cf. Franklin v. Massachusetts*, 505 U.S. at 817 (holding that a challenge was reviewable because "[n]o language equivalent to 'deem … advisable' exists in the census statute"). As explained in *American Canoe*, *supra*, the language of the Clean Water Act is not deferential but strongly mandatory. *See* 33 U.S.C. §§ 1251 (Declaration of Goals and Policy);

1313(c)(2)(A) (revised standards "shall" be submitted to Administrator, "shall" consist of designated uses and water quality criteria, "shall" be such to protect public health and welfare, "shall" take into consideration their use and value for public water supplies, aquatic life, recreation, navigation, *etc.*). The fact that the statute directs the Administrator to discretionarily "determine" whether a revised or new standard is necessary to meet "the requirements of the Act" does not mean that the substantive "requirements of the Act" are themselves discretionary rather than mandatory.

2. The Clean Water Act Statutory and Regulatory Context Provides Robust Law to Apply for Purposes of Judicial Review

EPA further complains that the language of § 1313(c)(4)(B)—authorizing a federal rulemaking "in any case where the Administrator determines that a revised or new standard is necessary"—provides no standard for assessing "whether and when" EPA should render a necessity determination. EPA Br. at 18. As to the "whether," EPA has acknowledged, citing the District Court's decision, that this appeal "does not implicate the question of whether *the necessity determination itself* is guided by sufficient law to render it subject to judicial review." *Id.* at n. 5 (emphasis added).[3] As to the "when," the CAA provision at issue in *Massachusetts v. EPA* likewise did not specify a timeframe for rendering the "judgment" that

[3] As discussed *infra*, however, the strong likelihood that a necessity determination is reviewable is persuasive on the question whether refusal to make such a determination is reviewable as well.

triggers a rulemaking—hence the Court's holding that EPA generally has "significant latitude as to the manner, timing, content, and coordination" of a rulemaking, but still must respond within the bounds of a statute when asked by citizen petitioners to render the statutory judgment. 549 U.S. at 533. *See also* 5 U.S.C. § 706(1) (APA specifically grants courts authority to compel agency action that is "unreasonably delayed."). Further, this is not a situation where EPA indicated an intention to adhere to the statutory criteria in making a determination of necessity, and argued only with the specific timing of that determination; or suggested a staggered approach to making necessity determinations over time in various states. EPA's petition denial was a refusal, regardless of timing, to make a decision concerning necessity on the ground that it believes extra-statutory means of working "cooperatively with states" are a better option than what Congress provided. ROA. 18652 (EPA petition denial).

In any event, EPA's Clean Water Act standard-setting authority is grounded overall in the type of specific parameters that give rise to reviewability. Although the language of § 1313(c)(4)(B) is broadly drawn, referencing federal standards necessary to meet "the requirements of this chapter," the statute as a whole and EPA's regulations provide robust law to apply. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. at 345; *see CC Distrib., Inc. v United States*, 883 F.2d 146, 154 (D.C. Cir. 1989) (finding agency action reviewable under § 701(a)(2) based upon agency

regulations, and holding that "regulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review of agency action"); *Davis Enterprises v. U.S. EPA*, 877 F.2d 1181, 1185 (3d Cir. 1989) ("[W]hen agency regulations or internal policies provide sufficient guidance to make possible federal review under an abuse of discretion standard, agency decisions are not unreviewable, even absent express statutory limits on agency discretion.").

Specifically, § 1313 as a whole clearly identifies the "requirements of this chapter" with respect to water quality standards, and provides extensive definition of those requirements. It specifies that those standards "shall … protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter"; and "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." 33 U.S.C. § 1313(c)(2)(A). EPA's regulations clarify that the "purposes of the Act" (referred to in sections 101(a)(2) and 303(c) of the Act) "means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife,

recreation in and on the water, and agricultural, industrial, and other purposes including navigation." 33 U.S.C. §§ 1251(a)(2) and 1313(c). EPA has implemented these goals by requiring that water quality criteria be sufficient to "protect [designated] uses" of the Nation's waters. 40 C.F.R. § 131.2. The regulations also require that water quality criteria to "protect the designated use" be based on "sound scientific rationale," "scientifically defensible" methods, and "appropriate technical and scientific data and analyses." 40 C.F.R. §§ 131.11(a)(1), (b)(1)(iii); and 131.5(a)(4).

EPA expressly does not contest in this appeal that in the reverse situation, where the Agency has made a necessity determination, there is sufficient "law to apply" in the text and structure of the Clean Water Act to review that determination (EPA Br. at 18 n. 5), and there clearly is. In *Florida Wildlife Fed'n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1156 (N.D. Fla. 2012), the court upholding EPA's necessity determination expressly identified the "requirements of this Chapter" referenced in that provision as including the remainder of § 1313 as well as the regulations associated with that section:

> The question for the Administrator thus was whether a revised or new standard—specifically a numeric nutrient standard—was necessary to meet the Act's requirements, or whether, instead, the existing narrative criterion was adequate. The Act's "requirements" include water-quality criteria that are "such as to protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]." *Id.* § 1313(c)(2)(A). The Administrator has explained that to "serve the purposes of the Act,"

> water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value [for] public water supplies, propagation of fish, shellfish and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

Id. at 1156-57. If there is abundant law to apply to a necessity determination itself, it does not stand to reason that there is no law to apply to a refusal to make one at all.[4]

II. EPA'S REFUSAL TO RENDER A NECESSITY DETERMINATION WAS IMPERMISSIBLY GROUNDED IN EXTRA-STATUTORY FACTORS

Massachusetts v. EPA, the underpinning of the District Court's determination that EPA may not ignore the § 1313(c)(4)(B) statutory question, centered on the principle that the statute circumscribes the reasoning and bases the Agency may proffer in responding to a rulemaking petition. 549 U.S. at 533-34. As the District Court explained, "The discretion surrounding a threshold

[4] EPA asserts that the permissible range of factors for declining to decide at all on necessity is broader than the permissible range of factors for rendering a negative necessity determination. EPA Br. at 34 n. 8. However, it offers no support in the CWA, *Massachusetts v. EPA*, or any other applicable source of authority for this proposition, citing only the inapplicable *Heckler v. Chaney* decision (*see supra* Point I.B.). The Agency's sole basis for this argument is that, if the permissible range of factors for a negative decision and decision avoidance of a decision were the same, "the agency's option to pretermit the necessity inquiry would be meaningless in practice." That logic is circular. It is a problem to foreclose the option of avoiding a necessity inquiry on grounds broader than the statutory grounds considered in that inquiry only if EPA *has* such an option in the first place. It does not, for the reasons explained in Point II.

determination like the one in § 202 of the Clean Air Act, and by implication like the necessity determination required by § 303(c)(4)(B) of the Clean Water Act, is not necessarily unlimited; *it is in fact bounded by the text of the authorizing statute. See Massachusetts v. EPA*, 549 U. S. at 533." ROA. 19558 (emphasis added).

EPA argues that *Massachusetts v. EPA* somehow provides the agency with an "option" to refuse to make a determination in response to a petition. EPA Br. at 31. The Supreme Court held as follows concerning the Agency's latitude in responding to a petition:

> EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

547 U.S. at 533. It further stated that EPA could not avoid making a judgment simply by referencing the existence of uncertainty surrounding climate change issues, but must expressly find that this factor precludes a judgment using the allowable statutory factors:

> If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty … is irrelevant.

Id. at 534.

Granted, *Massachusetts v. EPA* did not foreclose the possibility that EPA could offer "reasoned justification for declining to form a scientific judgment"; but the Court quickly explained that "EPA must ground its reasons for action or inaction in the statute." 549 U.S. at 534-35. Nothing in EPA's Petition response constitutes a "reasoned justification," grounded in the statute, for the Agency's non-answer to the statutory question whether new or revised standards are necessary. Instead, EPA relied on reasoning divorced from the statutory text and refused to address a question that the text poses—thus running afoul of both the APA and Supreme Court precedent. The Agency expressed its preference for dealing with the acknowledged nutrient problem by "working cooperatively with states" instead of facing the possibility of following Congress's mandate to "promptly prepare and publish proposed regulations." ROA. 18652-53. Arguing that its preferred approach would be more "effective and sustainable" than the procedure that Congress enacted into law, EPA denied the petition based on its plans to "improve[e] its tracking, accountability and transparency tools," and engage in "ongoing collaboration," rather than simply making a determination whether new or revised standards are necessary as called for in the Act. ROA. 18650-53.

EPA never explained why its preferred "collaborative" approach could not coexist comfortably with its duty to ensure that federal water quality standards are

sufficient to meet the "fishable and swimmable" goals of the Act. *See Massachusetts v. EPA*, 549 U.S. at 530 ("Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it."). Even more importantly, EPA made no effort to explain how issues concerning agency resources and a preference for cooperation, relied upon to support its refusal to respond, could possibly have anything to do with the question whether federally-promulgated numeric nutrient criteria are necessary to achieve the purposes of the Clean Water Act. The question of whether federal standards are "necessary" cannot logically turn on whether the agency would prefer an alternative approach. Responding to the question, "Are criteria necessary?" with, "We desire to handle things differently" is a *non sequitur*.

The strict limits that the Supreme Court placed in *Massachusetts v. EPA* on the option of declining to respond are clear. The plaintiffs in that case had petitioned the Agency under the CAA to make an "endangerment finding" concerning greenhouse gases, which would in turn trigger a requirement to promulgate regulations governing those pollutants. 549 U.S. at 501. In denying the petition, EPA stated that even if it had authority to regulate greenhouse gases, "it would be unwise to do so at this time." *Id.* The reasons provided by EPA to support this conclusion are strongly reminiscent of those it provided in response to the Gulf Restoration Petition. The Agency asserted that regulating motor vehicle

emissions pursuant to CAA § 202 would amount to a "piecemeal approach" to climate change, which would conflict with the President's "comprehensive approach" to the problem through support for technological innovation, the creation of non-regulatory voluntary programs, and further research—but not, as the Court noted, "actual regulation." *Id.* at 513.

The Court held, concerning EPA's proffered "laundry list" of policy reasons not to regulate, that "[a]lthough we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment." 549 U.S. at 533-34. It stated:

> The alternative basis for EPA's decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA's authority on its formation of a "judgment," … that judgment must relate to whether an air pollutant "cause[s], or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

Id. at 532-33.

The "laundry list" of policy reasons not to regulate that EPA proffered in response to the Gulf Restoration Petition is strikingly similar to the reasons it unsuccessfully proffered in response to the petition at issue in *Massachusetts v.*

EPA. ROA. 18652-54 (Petition denial letter). If EPA has permissible reasons grounded in the statute for declining to make a necessity determination, then as the Supreme Court held, "EPA must say so." 549 U.S. at 534. That did not happen here.

In this case, EPA did not even make the vague assertion of scientific uncertainty it had put forth in response to the *Massachusetts v. EPA* petition—indeed, it acknowledged in the Petition denial letter that, as a scientific matter, nutrient pollution is a serious national problem, in the Gulf Dead Zone and elsewhere. ROA. 18649-50 (Petition denial letter) ("EPA agrees that N[itrogen] and P[hosphorus] pollution presents a significant water quality problem facing our nation."); ROA. 18650 (High nutrient loadings "result in the increasing prevalence of harmful algal blooms, reduced spawning grounds and nursery habitats, fish kills, and oxygen-starved hypoxic or 'dead' zones; and "raise public health concerns, including "impaired surface and groundwater drinking water sources" and "increased exposure of swimmers to toxic microbes"). Clearly there is no significant disagreement about the science. Especially after consideration of the Gulf "dead zone," which "at times approaches the size of Massachusetts and New Jersey,"[5] it is beyond dispute that excessive nutrient loadings are responsible for an ongoing environmental disaster. EPA agrees that this "should be a high priority for

[5] *Rapanos v. U.S.*, 547 U.S. at 777 (Kennedy, J., concurring).

EPA's water programs," ROA. 18650, and that "that nutrient over-enrichment and eutrophication is a national problem." ROA. 18654. EPA also acknowledges the importance of "[d]evelopment of nutrient criteria." ROA. 18650.

In this context, therefore, it is clear that EPA's complaint that the District Court's ruling "hurts the EPA" is really a complaint against the Clean Water Act itself, and the Supreme Court's injunction in *Massachusetts v. EPA* that the law be adhered to in an APA petition response. EPA Br. at 34. To the extent that providing a reasoned answer to the necessity question "constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design." *See* 549 U.S. at 533. EPA's only real grievance is that it is being asked to make a decision that Congress gave it to make.

III. EPA'S CLAIMED LIMIT ON THE PERMISSIBLE SCOPE OF THE COURTS REMEDY HAS BEEN WAIVED; AND IN ANY EVENT HAS NO MERIT

EPA requests that to the extent this Court affirms the judgment of the District Court, it should limit the scope of the District Court's remedy. Ignoring the undisputed fact that 31 states drain into the Mississippi River, helping to create a "dead zone" in the Gulf of Mexico,[6] EPA asserts it should only rule on the Petition

[6] http://water.epa.gov/type/watersheds/named/msbasin/marb.cfm. *See Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (explaining, "we fail to see any merit to an objection to the panel taking judicial notice of the state agency's own website.").

with respect to seven states "containing" waterbodies that the plaintiff organization member-declarants specifically averred that they use and enjoy. EPA Br. at 36-39. *But see* ROA. 18656-63 (Kohl declaration); ROA. 18690-93 (Malek-Wiley declaration) (showing injury due to the "dead zone," which drainage from 31 states creates). Multiple declarants also provided detailed descriptions of their activities on the Mississippi River, near the Gulf of Mexico, and on waterbodies at the mouth of the Mississippi such as the Atchafalaya Basin. *See, e.g.*, ROA. 18656-63 (Kohl declaration); 18690-93 (Malek-Wiley declaration); 18695-97 (Wilson declaration).

The District Court's order did not specify the number of states for which EPA must provide a necessity determination, instead requiring the Agency to "respond to Plaintiffs' rulemaking petition in a manner consistent with the requirements of Massachusetts v. EPA." ROA. 19561. EPA complains nonetheless that this order is somehow "impermissibly overbroad." EPA Br. at 38.

However, this concern with the remedy is not a question of subject matter jurisdiction, and hence is improperly raised for the first time on appeal. In any event, the argument has no substantive merit. Indeed, it is beyond dispute that the "judgment" in *Massachusetts v. EPA* implicated more states than Massachusetts only—the only party to prove an injury. 549 U.S. at 518 ("Only one of the petitioners needs to have standing to permit us to consider the petition for

review.").

A. Issues Concerning Scope of Remedy Do Not Concern Subject Matter Jurisdiction and Have Therefore Been Waived

EPA did not make its argument concerning the scope of the Petition as it relates to possible remedies concerning it in the proceeding below. However, the Agency now styles the argument as a question of subject matter jurisdiction that it may raise on appeal. EPA Br. at 37-39, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (reiterating the Article III "injury in fact" requirement as an element of standing).

This argument does not implicate subject matter jurisdiction because EPA concedes that Gulf Restoration has alleged sufficient injury in fact to afford standing—it states that individual members of Gulf Restoration organizations "averred that they lived near, worked on, or visited water bodies affected by nutrient pollution in a total of seven states." *Id.* at 37. Since one or more of the plaintiff organizations had standing, the District Court and this Court plainly have jurisdiction over this matter. The Court held in *Massachusetts v. EPA*, "Only one of the petitioners needs to have standing to permit us to consider the petition for review," and found that injury to the State of Massachusetts was by itself sufficient to afford subject matter jurisdiction over the matter as a whole, which had been brought by ten states. 549 U.S. at 518. *See Sierra Club v. Morton*, 405 U.S. at 740 n.15 ("Once this standing is established, the party may assert the interests of the

general public in support of his claims for equitable relief.").

EPA's argument concerns only the scope of the Petition and the District Court's remedy, not the jurisdiction of the District Court to order a remedy. Indeed, the U.S. Supreme Court has specifically disapproved "attempt[s] to convert the merits issue in [a] case into a jurisdictional one." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). In *Alaska Ctr. for the Env't v. Browner*, the Ninth Circuit Court rejected a similar argument by EPA that a district court remedy requiring promulgation of total maximum daily loads for all Alaska waters was overbroad, and should be limited to only the subset of specific waterbodies that plaintiffs' members actually use. 20 F.3d 981 (9th Cir. 1994). The court held that "the appropriate scope of the remedy *goes to the merits of plaintiffs' claims* and is ultimately limited by the statutory authority for judicial action," and that the plaintiffs had "demonstrated 'actual injury' sufficient to present the legal questions at issue in a 'concrete factual context' of water pollution in Alaska" as the standing requirement is meant to ensure." 20 F.3d at 985 (citations omitted) (emphasis added).

Since EPA failed to raise the issue of the appropriate scope of remedy below, that issue has been waived. EPA knew the scope of the Petition, and knew also what Gulf Restoration sought as a remedy, which is more or less what the Court below ordered. ROA. 69 (Complaint); ROA. 17523-264 (Gulf Restoration

Motion for Summary Judgment); ROA. 17534-264 (Gulf Restoration Memorandum of Law). Indeed, EPA raised issues regarding some aspects of the remedy requested by Gulf Restoration, just not this one. ROA. 18901-02 (EPA Memorandum of Law). This Court has repeatedly explained that "arguments not raised before the district court are waived and cannot be raised for the first time on appeal." *See, e.g., LeMaire v. Louisiana Dept. of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007).

B. The Scope of the District Court's Order was Appropriate

District court remedial orders are generally reviewed under an "abuse of discretion" standard. *See, e.g., U.S. v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996) ("[W]e will review the lower court's imposition of an equitable remedy for abuse of discretion."); *SEC v. Halek*, 537 Fed. Appx. 576, 580 (5th Cir. 2013) (ruling that "we review disgorgement orders for abuse of discretion"); *U.S. v. Brown*, 561 F.3d 420, 436 (5th Cir. 2009) (holding, in a voting rights case, that "we cannot say that the court abused its discretion in fashioning the remedial order."); *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. E-Systems, Inc.*, 257 F.3d 461, 469 (5th Cir. 2001) ("Because a constructive trust is an equitable remedy, the decision whether to impose it is entrusted to the discretion of the district court, and we review the district court's decision only for an abuse of discretion.").

Leaving aside the issue of waiver, EPA's argument that the scope of the Gulf Restoration Petition represents an abuse of discretion lacks merit. The Court below issued a straightforward order that EPA comply with the law, *i.e.*, "respond to Plaintiffs' rulemaking petition in a manner consistent with the requirements of *Massachusetts v. EPA* within 180 days from entry of this Order." ROA. 19561. As discussed in the Factual Background subsection of the Statement of the Case, *supra*, while the Petition nominally referenced the nutrient problem and the need for rulemaking with respect to all 50 states, it left room for leeway in EPA's response, requesting "jointly and in the alternative" that the Agency take action with respect to various types of waterbodies and geographic areas, and stating that EPA should "at least establish standards to control nitrogen and phosphorus pollution within the Mississippi Basin."[7] ROA. 17648-49 (Petition). The District Court did not specify for EPA the scope of the required response, but required the Agency to provide a response that complies with law.

EPA's assertion that this remedy must be limited to only seven states—based on the location of Gulf Restoration organization's declarants—has neither factual nor legal merit. Multiple standing declarants testified about their use and enjoyment of the Mississippi River. ROA. 18656-63 (Kohl declaration); 18665-69

[7] EPA asserts that it "interpreted" the Gulf Restoration petition to unequivocally require a response with respect to all 50 states, but that interpretation is at odds with the petition itself. EPA Br. at 9 n. 3.

(Lobbig declaration); 18680-81 (Sigford declaration); 18683-85 (Clark declaration); 18690-93 (Malek-Wiley declaration); 18695-97 (Wilson declaration); , 18726-28 (French declaration). Three declarants also provided detailed descriptions of their activities on and near the Gulf of Mexico and waterbodies in the lower Mississippi basin, such as the Atchafalaya Basin. ROA. 18656-63 (Kohl declaration); 18690-93 (Malek-Wiley declaration), 18695-97 (Wilson declaration). All 15 of the standing declarants reported use and enjoyment of waters somewhere in the Mississippi River basin.

By definition, the waters in the 31 Mississippi River basin states drain into the River and the Gulf, affecting their water quality. Nutrient pollution does not respect state boundaries, but flows downstream. EPA acknowledged in its denial of the Gulf Restoration Petition that such pollution flows into the Mississippi River and is responsible for the Gulf Dead Zone. ROA. 18649-50 (Petition denial letter) ("These concerns [with nutrient pollution] are nationwide in scope but have particular relevance to the Mississippi Basin, where nutrient loadings to the Mississippi River and its tributaries are both harming upstream water quality and contributing significantly to hypoxia (or the 'dead zone') in the Gulf of Mexico."). Thus, polluting activities in all 31 Mississippi River basin states at the very least have a direct impact on the Gulf Restoration declarants who alleged use of

downstream waters in the Mississippi River, the Atchafalaya Basin, and the Gulf of Mexico.

EPA nonetheless claims that this connection between upstream and downstream waters cannot be brought to bear in determining the scope of Gulf Restoration's injury because it represents the "ecosystem nexus" approach found insufficient in *Lujan v. Defenders of Wildlife*; EPA Br. at 38. However, *Lujan* is inapplicable on this point. First *Lujan* concerned standing, not scope of remedy. The Court found that the *Lujan* plaintiffs had not demonstrated any cognizable injury in fact via their nexus theory at all, whereas here the connection between upstream and downstream waters is raised only in connection with the proper scope of remedy. Second, the "ecosystem nexus" alleged in *Lujan* was much broader than the direct upstream-downstream connection alleged here. The Court found that plaintiffs had not shown any injury in the foreign locations where the alleged injurious activity was taking place, and rejected the alternative theory that the U.S.-based plaintiffs could nonetheless allege injury on the ground that "any person who uses *any part* of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away," by alleging merely that they "use portions of an ecosystem not perceptibly affected by the unlawful action in question." 504 U.S. at 565-66 (emphasis in original). Here, the Gulf Restoration Declarants have stated that they use portions of

connected waterbodies that are directly "affected by the unlawful action in question," even if a portion of that action takes place upstream.

Alaska Ctr. for the Env't v. Browner, *supra*, is more directly applicable here. The court there found it sufficient to warrant a statewide remedy that "[p]laintiffs established that they were adversely affected by the inadequate water quality of a representative number of waters" in the state. 20 F.3d at 985. The multiple upstream and downstream waters throughout the Mississippi River basin used and enjoyed by Gulf Restoration's members are directly connected hydrologically, and constitute a "representative number" of waters in the basin to support the District Court's remedy.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be affirmed.

Dated: April 8, 2014

Respectfully submitted,

/s/ Machelle Lee Hall (with consent)
Machelle Lee Hall, No. 31498
Adam Babich, No. 27177
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, LA 70118-6321
(504) 862-8814 or (504) 862-8800

Fax: (504) 862-8721
Counsel for All Plaintiffs

Ann Alexander
Natural Resources Defense Council
20 N. Wacker Drive, Ste. 1600
Chicago, IL 60606
(312) 651-7905
Fax: (312) 332-1908
aalexander@nrdc.org
Counsel for Plaintiffs Gulf Restoration Network, Missouri Coalition for the Environment, Iowa Environmental Council, Tennessee Clean Water Network, Minnesota Center for Environmental Advocacy, Sierra Club, Waterkeeper Alliance, Prairie Rivers Network, Kentucky Waterways Alliance, and Natural Resources Defense Council

Bradley Klein
Environmental Law & Policy Center
35 East Wacker Drive, Ste. 1600
Chicago, IL 60601
(312) 673-6500
bklein@elpc.org
Counsel for Plaintiff Environmental Law and Policy Center

CERTIFICATE OF COMPLIANCE

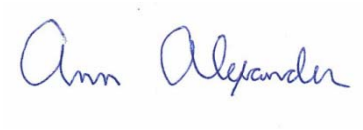
This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 13,878 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Ann Alexander
Natural Resources Defense Council
20 North Wacker Drive, Ste. 1600
Chicago, IL 60606
(312) 651-7905
aalexander@nrdc.org
Counsel for Plaintiffs Gulf Restoration Network, Missouri Coalition for the Environment, Iowa Environmental Council, Tennessee Clean Water Network, Minnesota Center for Environmental Advocacy, Sierra Club, Waterkeeper Alliance, Prairie Rivers Network, Kentucky Waterways Alliance, and Natural Resources Defense Council

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2014, I caused a copy of the foregoing to be served through the Court's CM/ECF system to all parties.



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April 08, 2014

Ms. Ann Alexander
Natural Resources Defense Council
20 N. Wacker Drive
Suite 1600
Chicago, IL 60606

No. 13-31214 Gulf Restoration Network, et al v. Gina McCarthy, et al
USDC No. 2:12-CV-677

Dear Ms. Alexander,

The following pertains to your brief electronically filed on April 8, 2014.

You must submit the seven (7) paper copies of your brief required by 5TH CIR. R. 31.1 within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Shawn D. Henderson, Deputy Clerk
504-310-7668

cc:
Mr. John Emad Arbab
Mr. Adam Babich
Ms. Machelle Rae Lee Hall
Mr. Bradley David Klein
Mr. Matthew Littleton
Ms. Angeline Purdy