UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GULF RESTORATION NETWORK, MISSOURI COALITION FOR THE ENVIRONMENT, IOWA ENVIRONMENTAL COUNCIL, TENNESSEE CLEAN WATER NETWORK, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, SIERRA CLUB, WATERKEEPER ALLIANCE, INC., PRAIRIE RIVERS NETWORK, KENTUCKY WATERWAYS ALLIANCE, ENVIRONMENTAL LAW & POLICY CENTER, and the NATURAL RESOURCES DEFENSE COUNCIL, INC.,	
Plaintiffs,	Civil Action No.: 2:12-cv-00677 Section "E," Division 3 Honorable J. C. Zainey Magistrate Judge Knowles
v.	
LISA P. JACKSON, Administrator of the United States Environmental Protection Agency, and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Defendants,	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's Order of July 20, 2015 (Dkt. No. 195), 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, Inc., Prairie Rivers Network, Kentucky Waterways Alliance, Environmental Law & Policy Center, and Natural Resources Defense Council, Inc. move this Court for summary judgment on their first claim for relief. This motion is accompanied by a Memorandum of Law complying with the Court's Order specifying, "The requirements of Local

Rules 56.1 and 56.2 shall not apply in this matter. Each party shall include a brief statement of pertinent facts in its opening brief, and shall attach copies of all materials cited from the administrative record to its briefs."

As grounds for their Motion, Plaintiffs state:

1. As set forth in the accompanying Memorandum, there are no genuine issues of material fact relevant to this motion, and plaintiffs are therefore entitled to judgment as a matter of law.
2. Plaintiffs have standing to bring this action, as established by the declarations appended to the Complaint.

WHEREFORE, this Court should GRANT Plaintiffs' Motion for Summary Judgment and remand the Environmental Protection Agency's response to the Petition with an order that it produce a response consistent with the Administrative Procedure Act, and the underlying requirements of the Clean Water Act, within 90 days. Specifically, the Court should order that the Environmental Protection Agency within the 90-day period respond to Plaintiffs' petition in a manner that conforms to section 304(c)(4)(B) of the Act.

Dated: September 21, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, I caused as copy of the foregoing to be served through the Court's CM/ECF system to all parties.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GULF RESTORATION NETWORK, MISSOURI COALITION FOR THE ENVIRONMENT, IOWA ENVIRONMENTAL COUNCIL, TENNESSEE CLEAN WATER NETWORK, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, SIERRA CLUB, WATERKEEPER ALLIANCE, INC., PRAIRIE RIVERS NETWORK, KENTUCKY WATERWAYS ALLIANCE, ENVIRONMENTAL LAW & POLICY CENTER, and the NATURAL RESOURCES DEFENSE COUNCIL, INC.,	
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v.	
LISA P. JACKSON, Administrator of the United States Environmental Protection Agency, and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Defendants,	

PLAINTIFFS' NOTICE OF SUBMISSION
OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 7.2, Plaintiffs respectfully provide notice of a March 23, 2016 submission date for their Motion for Summary Judgment.

Dated: September 21, 2015

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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

PLAINTIFFS' REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 78.1E, 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, Inc., Prairie Rivers Network, Kentucky Waterways Alliance, Environmental Law & Policy Center, and Natural Resources Defense Council, Inc. respectfully request oral argument on their Motion for Summary Judgment. The Plaintiffs believe that oral argument would facilitate the Court's consideration of these issues.

Dated: September 21, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, I caused as copy of the foregoing to be served through the Court's CM/ECF system to all parties.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GULF RESTORATION NETWORK, MISSOURI COALITION FOR THE ENVIRONMENT, IOWA ENVIRONMENTAL COUNCIL, TENNESSEE CLEAN WATER NETWORK, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, SIERRA CLUB, WATERKEEPER ALLIANCE, INC., PRAIRIE RIVERS NETWORK, KENTUCKY WATERWAYS ALLIANCE, ENVIRONMENTAL LAW & POLICY CENTER, and the NATURAL RESOURCES DEFENSE COUNCIL, INC.,	
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v.	
LISA P. JACKSON, Administrator of the United States Environmental Protection Agency, and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Defendants,	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT ON REMAND

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September 21, 2015

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON REMAND

Pursuant to this Court's Order of July 20, 2015 (ECF No. 195), 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, Inc., Prairie Rivers Network, Kentucky Waterways Alliance, Environmental Law & Policy Center, and Natural Resources Defense Council, Inc. respectfully submit this Memorandum in Support of their Motion for Summary Judgment on Remand.

Introduction

The Fifth Circuit's ruling in this case left a key question for this Court to resolve: whether EPA has provided an adequate explanation, grounded in the Clean Water Act, for why it refused to make a decision—one way or the other—about whether numeric nutrient criteria are necessary to meet the Act's requirements. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (*GRN v. McCarthy*). The Court of Appeals clarified that EPA could decline to make a necessity determination under Clean Water Act (CWA or Act) § 303(c)(4)(B), but made plain—consistent with the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007)—that choosing this non-answer option must be "grounded in the statute" no less than a straight-up yes or no determination must be. "The agency cannot rely on alternative policy grounds, even if reasonable, if those explanations do not find clear textual support." *GRN v. McCarthy*, 783 F.3d at 338-39. In this case, EPA's litany of reasons why it prefers not to follow the regulatory path laid out by Congress is the antithesis of reasoning grounded in the statute.

The Court of Appeals further held that the factors that must guide any decision concerning necessity of federal standards—be it yes, no, or declining to decide—are readily

discernible from the text of both the Act and its regulations, incorporated by the § 303(c)(4)(B) reference to the "requirements of this chapter." As relevant here, the "requirements of this chapter" boil down to a simple framework: 1) Waters of the United States must be assigned "designated uses"; and 2) these uses must be "achieved and protected." 40 C.F.R. § 131.10(a). The designated uses must include, whenever attainable, "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). In order to achieve this mandate, the Act provides for evaluation of existing water quality; assessment of whether statutorily-defined highest and best uses of the state's waters—fishing and swimming—are attainable; identification of the particular pollutants for which protective criteria (*i.e.*, instream pollutant limits) must be set to protect those uses; and establishment of criteria to protect uses that are based upon "sound scientific rationale." 40 C.F.R. § 131.11(a)(1). *See* 40 C.F.R. §§ 131.5, 131.10-11. Water quality standards should be "numerical values." 40 C.F.R. § 131.11(b)(1); and narrative criteria[1] are appropriate only "where numerical criteria cannot be established or to supplement numerical criteria." *Id*. § 131.11(b)(2).

To be grounded in the statute, therefore, EPA's refusal to determine whether numeric criteria are "necessary" must be grounded in these specific statutory and regulatory requirements governing the attainment and protection of uses of Waters of the United States. If sufficient

[1] Narrative criteria prohibit algal growth in general terms, as opposed to setting a numeric limit on the allowable level of nitrogen or phosphorus in the water. For example, an Illinois narrative standard pertaining to algae provides that waters "shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin." 35 Ill. Admin. Code § 302.203. The difference between numeric and narrative criteria can be compared to the difference between a speed limit sign and a sign that says, "Don't drive too fast." The problem, of course, is that you don't know whether you've violated a "narrative" standard (or have been driving "too fast") until it is too late and the damage is done.

information did not exist to determine whether revised criteria were necessary to achieve these requirements of the Act, EPA would have a statutorily-based reason not to make a decision. The Supreme Court indicated in *Massachusetts v. EPA* that EPA could have avoided making a decision if it lacked "sufficient information" to make it. 549 U.S. at 534 ("The statutory question is whether sufficient information exists to make an endangerment finding.") An example would be the circumstance where "scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment." *Id.* But that is not what happened, in either *Massachusetts* or here. In both cases, EPA sought to end-run Congress's regulatory scheme based on its own preference for avoiding a rulemaking and relying instead on voluntary programs, and belief that its own approach was more "efficient" than the statutory approach. 549 U.S. at 533. Just as the Supreme Court disallowed that end run in *Massachusetts*, so this Court should continue to disallow it here.

As they were in *Massachusetts v. EPA*, 549 U.S. at 505, the stakes are high in this case. EPA's inaction comes at an extraordinarily large cost: a continuing "dead zone" in what should be a prime commercial fishing and recreational area that is bigger than the states of Connecticut and Rhode Island combined. [2]

Summary of Argument

This matter concerns EPA's obligation to respond lawfully to a rulemaking petition concerning the CWA within the bounds of the statute. Petitioners' 2008 petition urged EPA to act consistent with CWA § 303(c)(4)(B) to establish new and revised standards to protect water

[2] The Gulf of Mexico Dead Zone reached massive proportions again this year. According to information released by the Louisiana Universities Marine Consortium (LUMCON), funded by the National Oceanic and Atmospheric Administration (NOAA), the Dead Zone reached 16,760 square kilometers (=6,474 square miles) this summer, 28 percent larger than its size in 2014, and representing the size of the states of Connecticut and Rhode Island combined. Plaintiffs request that this Court take judicial notice of the LUMCON statement, available at http://www.healthygulf.org/sites/healthygulf.org/files/docs/lumcon_press_release_2015.pdf.

quality because existing standards are inadequate to meet the Act's requirements. The petition presented EPA with extensive information—much of which EPA generated itself—that pressing water pollution problems such as the massive dead zone in the Gulf of Mexico demonstrate that existing state water quality standards are inadequate to control nutrient pollution and the algae growth that results. The petition showed that revised numeric standards are necessary to meet the requirements of the Act, pursuant to § 303(c)(4)(B).

The Court of Appeals held that EPA had three options in responding to the petition. The first option was to make a positive determination that federal standards are necessary, and proceed with the requested rulemaking. The second option was to make a negative determination, and not proceed with the requested rulemaking. The third option was to decline to make a determination one way or the other "based on factors identified in the language of the statute." *GRN v. McCarthy*, 783 F.3d at 240.

In remanding this case to allow this Court to consider whether EPA properly pursued the refusal-to-decide option, the Court of Appeals made two important things clear. First, it held that a decision declining to make a necessity determination—the third option above—*must be grounded in the terms of the statute* no less than a positive or negative determination must be. *Id.* at 238-39. In reaching this conclusion, the Court of Appeals put to rest Defendants' argument that *Massachusetts v. EPA* is somehow inapplicable, finding that the statutory provisions at issue in *Massachusetts* and the instant case "have the same structure," and proceeding to apply *Massachusetts* to define EPA's obligations in responding to the Petition. *Id.* at 243.

Second, it held that the "factors identified in the language of the statute" in which EPA must ground its decision *include the statutory and regulatory "requirements" of the CWA incorporated by reference* into § 303(c)(4)(B). While § 303(c)(4)(B) provides in general terms

that EPA must make a determination whether federal standards are necessary "to meet the requirements of this chapter," the Court of Appeals noted that these referenced requirements are more specifically defined elsewhere in the Act and its regulations. *GRN v. McCarthy*, 783 F.3d at 240. The Court of Appeals further ruled that "these requirements provide guidance for the types of considerations the EPA must take into account in deciding the necessity of regulation . . . and when the EPA declines to make a necessity determination." *Id.* These more specific requirements, which include well-defined water quality goals and the steps that must be taken to meet them, thus circumscribe the scope of available statutory bases for EPA's decision.

Applying these principles to this case, EPA's refusal to decide was unlawful. The Agency presented a "laundry list of reasons not to regulate" that reflected the Agency's own policy preferences rather than the "requirements" of the Act, taking an approach nearly identical to the one the U.S. Supreme Court held to be unlawful in *Massachusetts v. EPA*, 549 U.S. at 533. Although the Court of Appeals observed that the standard for reviewing denial of a rulemaking petition is "highly deferential," 783 F.3d at 244, it is no more deferential than the standard that applied in *Massachusetts v. EPA*, under which the Supreme Court held EPA's decision declining to respond to a rulemaking petition to be inadequate. Both the Supreme Court and the Court of Appeals made clear that EPA may only meet this standard by providing a response that is "grounded in the statute." *Id.* at 242-44. EPA has failed to do so, and this Court should therefore remand the petition response with a requirement that EPA respond in a manner that complies with law.

Statement of the Case

I. Facts Underlying the Lawsuit

Plaintiffs' 2008 petition showed that EPA's voluntary measures had failed to curb the nitrogen and phosphorus (a/k/a nutrient) pollution that fuels the Gulf Dead Zone, as well as algae overgrowth throughout the Mississippi River basin and elsewhere in the nation. As described in the petition and other documents in the Administrative Record, ever since the NOAA-funded Louisiana Universities Marine Consortium described the severity of the Gulf Dead Zone in 1985, EPA has acknowledged that these pollutants fuel a national environmental crisis. But EPA has declined to follow recommendations by its scientists and Inspector General to implement federal numeric nutrient criteria, to supplement or replace the non-numeric narrative criteria (general prohibitions on excess algae growth) in place in many states.[3] It has instead relied upon "collaborative" arrangements with states, which have not diminished the severity of the problem.[4] Petition (Administrative Record (AR) 7)[5] at AR 47-49, Plaintiffs' Exhibit (Pl. Ex.) 1; *see, e.g.*, EPA-Science Advisory Board, *Hypoxia in the Northern Gulf of Mexico* (2008), AR 4711 at 4746 and 4793, Pl. Ex. 2; *EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality Standards*, August 26, 2009, AR 1016, Pl. Ex. 3. In 1998 and again in 2003, EPA stated its intention to promulgate numeric federal criteria if the states did not do so, and initially set a 3-year deadline. EPA, however, never followed through, notwithstanding repeated statements over the years that numeric criteria are an essential element of a solution to the nutrient problem.

[3] *See supra* note 1.
[4] *See supra* note 2.
[5] Pages in the Administrative Record are cited by their ending digits only. The full cite for the referenced document is EPA-MARB000007.

Petition at AR 52-59, Pl. Ex. 1; 63 Fed. Reg. 34648 (June 25, 1998); 66 Fed. Reg. 1671, 1673-4 (Jan. 9, 2001).

EPA failed to respond to the petition for more than 3 years, acting only after Plaintiffs threatened to bring suit to compel a response. AR 849, Pl. Ex. 4. In July 2011, EPA sent a letter to the Plaintiff organizations denying the petition (Denial Letter), but expressly refusing to make a determination whether federal standards are "necessary to meet the requirements of this chapter" pursuant to § 303(c)(4)(B). AR1, Pl. Ex. 5. Specifically, the Denial Letter stated, "the EPA is *not* determining that NNC [numeric nutrient criteria] are *not* necessary to meet Act requirements with respect to the waters you identified." AR at 6 (emphasis added). EPA expressly concurred with the Plaintiff organizations' description of the magnitude and severity of the nutrient pollution crisis in the Dead Zone and elsewhere,[6] but chose not to make a necessity determination pursuant to § 303(c)(4)(B). The Agency provided essentially two reasons why it preferred not to engage in a federal rulemaking, which under § 303(c)(4)(B) is required to follow "promptly" from a necessity determination:

1. *Preference for collaborative voluntary strategies over § 303(c)(4)(B) procedures.* EPA explained that it preferred a non-regulatory approach over the statutory system for addressing water quality standard deficiencies set forth in § 303(c)(4)(B), *i.e.*, a necessity decision followed by rulemaking. It stated that it "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." AR 1. The Agency claimed that it was providing "technical assistance" to states, had "published a number of guidance documents" outlining different approaches to developing nutrient

[6] The letter stated, "Your Petition correctly identifies the Gulf 'dead zone' and upstream N and P pollution as issues of serious concern," and listed the various harmful public health and environmental impacts of the problem. AR 1-2.

criteria, and was "improving its tracking, accountability, and transparency tools"; and further noted that the EPA Administrator chairs a task force on Gulf Ecosystem restoration. AR at 2-4. 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." AR 4.[7]

2. *Resource concerns.* EPA stated that it preferred its own approach to a "complex set of rulemakings" to promulgate federal numeric criteria pursuant to § 303(c)(4)(B), asserting, "[t]he development of [numeric nutrient criteria] for 50, 31, or 10 states at one time would be highly resource and time intensive." AR 4. The Denial Letter did not otherwise address alternatives presented in the petition as to the scope of the actions requested. AR 80.[8]

[7] Plaintiffs' petition explained the failure of these approaches to either move states toward promulgation of numeric nutrient criteria, or to otherwise address the nutrient crisis and reduce the size of the Gulf Dead Zone. AR 47-61. At the time the petition was sent, out of the 10 states that abut the Mississippi River, none had adopted numeric nutrient criteria for rivers and streams (although Wisconsin had draft criteria for phosphorus), and only two (Illinois and Minnesota) had phosphorus (but not nitrogen) criteria for lakes. Since that time, seven years later, Wisconsin has finalized its phosphorus criteria, and only one other state in the 31-state Mississippi River basin—Minnesota—has finalized even partial nutrient criteria for rivers and streams (Minnesota's are for phosphorus but not nitrogen). Plaintiffs respectfully request that this Court take judicial notice of EPA's web page purporting to document states' progress toward numeric nutrient criteria, available at http://cfpub.epa.gov/wqsits/nnc-development/ (while noting that in some cases, even the limited progress toward criteria referenced therein is exaggerated).

[8] The petition requested that EPA take action under § 303(c)(4)(B) to promulgate numeric criteria for nitrogen and phosphorus, as well as for turbidity and chlorophyll A, which are indicators of nutrient impairment. Petitioners made their request "jointly and in the alternative" for (i) lakes and reservoirs, (ii) rivers and streams, (iii) the contiguous zone of coastal waters, and (iv) the part of the ocean subject to jurisdiction under the Act but outside the jurisdiction of any state (*i.e.*, the 3-mile state territorial boundary). AR 78. Although pointing out that criteria should be established by EPA on a national basis, the petition stated that, due to the scope of the problems in the River and the Gulf Dead Zone, EPA should "at least establish standards to control nitrogen and phosphorus pollution within the Mississippi Basin." AR 79-80.

II. Plaintiffs' Lawsuit

Plaintiffs' Complaint stated two claims for relief, the one relevant here alleging that EPA's Denial Letter fails to provide a basis for the petition denial that conforms to the relevant statutory factors set forth in the Act. Complaint ¶¶ 43-46 (Dkt. 1). Following cross-motions for summary judgment, this Court granted Plaintiffs' motion, and denied Defendants' motion, concerning the claim for relief regarding the sufficiency of the Denial Letter. *Gulf Restoration Network v. Jackson*, 2013 WL 5328547 (September 30, 2013) (*GRN v. Jackson*).

After EPA appealed this Court's ruling, the Court of Appeals issued an order affirming this Court's finding of federal jurisdiction to review EPA's denial of Plaintiffs' petition, but remanding this Court's ruling that the Agency could not refuse to make a necessity determination. The Court of Appeals concluded that EPA could opt not to make the determination, if that choice was grounded in the text of the CWA. *GRN v. McCarthy*, 783 F.3d at 243-44. Specifically, the Court of Appeals held that statutory standards that guide a necessity determination are "related" with "close and specific linkage" to the standards guiding a decision not to make a necessity determination at all, such that declining to decide must still be grounded in the types of decision criteria that would guide a decision. *Id.* at 238-39. The Court of Appeals referenced language in *Massachusetts v. EPA* allowing EPA to decline to make the requested finding "if it provides some reasonable explanation as to why it cannot or will not exercise its discretion" to do so, but further quoted language in *Massachusetts* requiring that a decision not to decide be grounded in the statutory language. The Court also identified statutory standards that must inform EPA's denial of a rulemaking petition. In particular, the Court of Appeals noted that the "requirements of this chapter" referred to in CWA § 303(c)(4)(B) are "further defined in

the statute," including the section of the Act that "defines the necessary features of a water quality standard." *GRN v. McCarthy*, 783 F.3d at 240 (citing 42 U.S.C. § 1313(c)(2)(A)).

The Court of Appeals did not reach the substantive question regarding the adequacy of EPA's response, because it determined that this Court should "decide in the first instance whether the EPA's explanation for why it declined to make a necessity determination was legally sufficient." *Id.* at 243. It stated, "In deciding whether the EPA appropriately declined to make a necessity decision, the district court's review is limited to determining whether the EPA has 'provide[d] some reasonable explanation as to why it cannot or will not exercise its discretion' to make a necessity determination"; and further ordered, "That explanation must be grounded in the statute." *Id.* at 243-44.

Standard of Review

A motion for summary judgment may be granted where the Court determines that there is no genuine issue of material fact to be tried, and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56, *Celotex Corp. v. Catrett*, 477 U.S. 317, 22-23 (1986); *Firman v. Life Ins. Co. of North America*, 684 F.3d 533 (5th Cir. 2012).

A court reviews a final agency action under 5 U.S.C. § 706(2)(A) to determine whether the agency's failure to act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *GRN v. McCarthy*, 738 F.3d at 243. *See Massachusetts v. EPA*, 549 U.S. at 534. A decision is arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies ….

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The standard of review for denial of a rulemaking petition articulated in *Massachusetts v. EPA* and followed by the Court of Appeals in this matter is deferential, but still requires a determination whether the agency's reasons "conform to the authorizing statute," and do not rest "on reasoning divorced from the statutory text." *Massachusetts v. EPA*, 549 U.S. at 533. Thus, in *Massachusetts*, while the court characterized the Agency's burden as limited and "highly deferential," it nonetheless found that EPA refused to engage in rulemaking unlawfully, as its refusal was not grounded in the text of the statute. *See Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 5, 7 (D.C. Cir. 1987) (denial of a rulemaking petition overturned under APA where denial demonstrates "plain errors of law," suggesting that the agency has been "blind to the nature of [its] mandate from Congress"). *See also Natural Resources Defense Council v. EPA*, 777 F.3d 456 (D.C. Cir. 2014) (citing *Massachusetts*, court holds that air quality standards implementation schedule "exceeds EPA's authority under the statute" where "EPA identifies no statutory provision giving it free-form discretion to set . . . compliance deadlines based on its own policy assessment").

Argument

EPA'S BASIS FOR REFUSING TO MAKE A NECESSITY DETERMINATION DOES NOT CONFORM TO THE APPLICABLE REQUIREMENTS OF THE CLEAN WATER ACT.

Applying the Court of Appeals' analysis to EPA's denial of the petition, it is clear that the Agency acted unlawfully. The Court of Appeals held that refusal to respond to the question of whether federal standards are "necessary" under § 303(c)(4)(B) is governed by the same types of statutory criteria that govern a necessity determination itself, and it explained that the

"requirements of the Act" that are referenced in § 303(c)(4)(B) include the provisions in the statute and implementing regulations that govern the setting of water quality standards. Since the Denial Letter was grounded not in these statutory criteria, but rather in EPA's unrelated policy preferences, it was arbitrary, capricious, an abuse of discretion and not in accordance with law for purposes of the APA. *GRN v. McCarthy*, 738 F.3d at 243 n. 88; 5 U.S.C. § 706(2)(A).

A. The CWA Articulates Defined and Limited Bases for a Decision Not to Render a Necessity Determination.

A central holding in the Court of Appeals' decision is that the permissible statutory bases for a response to a request for a necessity determination—be it a yes, no, or declining to decide—are not unlimited. To the contrary, the Court of Appeals found explicitly that the statutory provision at issue, CWA § 303(c)(4)(B), contains sufficient "law to apply" for purposes of 5 U.S.C. § 701(a)(2) so as to enable judicial review and thus to assess the legality of the Agency's actions.[9] *GRN v. McCarthy*, 738 F.3d at 233 n. 26, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). In the first instance, the court rejected EPA's attempt to draw a distinction between the "law to apply" governing a yes or no decision on the necessity question as opposed to an Agency decision not to decide the necessity question at all. The court made clear, based on *Massachusetts v. EPA*, that *all* of these types of decisions must be grounded in the statute. It held that the substantive statutory criteria governing a necessity determination under § 303(c)(4)(B) are "related" with "close and specific linkage" to the statutory standards that guide a decision not to make such a determination, such that a decision

[9] Although this determination was rendered in the context of the court's decision on the jurisdictional question, it is inextricably tied to the substantive question of whether EPA's response was statutorily permissible. Because the statute contains sufficient limits on EPA's discretion to permit judicial review, those limits on the Agency's discretion necessarily apply to govern the decision itself. The Court of Appeals said as much in ruling that the CWA "requirements provide guidance for the types of considerations the EPA must take into account in deciding the necessity of regulation," and that "these are the same factors *that must be considered when the EPA declines to make a necessity determination*." 738 F.3d at 240.

not to decide must still be grounded in the types of decision criteria that would apply to answering it. *Id.* at 238-39. It stated in this regard:

> [T]he [Supreme] Court recognized that scientific uncertainty could be an acceptable explanation for refusing to make a threshold judgment. If the agency wanted to rely on this explanation, however, it had to be explicit about why it lacked "sufficient information ... to make an endangerment finding"—it could not merely "not[e] the uncertainty surrounding various features of climate change." These examples suggest that the court was looking for a ***close and specific linkage*** between the decision not to make a threshold determination and the statutory provision setting out the underlying choice. ***The agency cannot rely on alternative policy grounds, even if reasonable, if those explanations do not find clear textual support. Nor can it resort to general claims of scientific uncertainty—if it justifies its refusal to make a threshold determination on that basis, it must be explicit about what uncertainty is present.***

GRN v. McCarthy, 783 F.3d at 238-39, quoting *Massachusetts v. EPA*, 549 U.S. at 534 (emphasis added). The Court of Appeals observed that "Justice Scalia's dissent comports with this understanding," as "[h]e criticized the majority for its narrow definition of an acceptable 'reasonable explanation'" for declining to respond to the statutory question. *GRN v. McCarthy*, 783 F.3d at 239, quoting *Massachusetts v. EPA*, 549 U.S. at 552.

The Court of Appeals then went on to define the types of statutory criteria that apply to necessity determinations and, per its reasoning, also to decisions not to make them. It started with the text of § 303(c)(4)(B), under which, the court observed, "The EPA is required to publish new water quality standards 'in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [chapter 26 of title 33 of the United States Code.].'" *GRN v. McCarthy*, 783 F.3d at 240. Importantly, however, the court did not stop there. It stated, "[t]hose statutory requirements are further defined in the statute," thus holding that the "requirements of this chapter" in § 303(c)(4)(B) are those sections of the CWA establishing more specifically the requirements governing the setting of water quality standards.

Id. As one example, it quoted CWA § 303(c)(2)(A), which "defines the necessary features of a water quality standard":

> Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

Id. It further observed that "[t]he EPA expanded upon these requirements in regulations issued pursuant to the CWA," and quoted as an example 40 C.F.R. § 131.2:

> A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). 'Serve the purposes of the Act' (as defined 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.

Id., 783 F.3d at 241 n. 73. Thus, the Court held, the criteria governing the Agency's discretion under § 303(c)(4)(B) are not boundless, since "these requirements provide guidance" circumscribing the exercise of such discretion. *Id.*, 783 F.3d at 341.

In so holding, the Court of Appeals rejected EPA's argument that differences between the Clean Air Act (CAA), at issue in *Massachusetts v. EPA*, and the CWA either render *Massachusetts* inapplicable to this case, or weaken its requirement that a response to a rulemaking petition be grounded in the statute. The Court of Appeals observed that the CAA and CWA provisions at issue "are structured the same way: the agency has a mandatory obligation to take regulatory action if it makes a judgment (or determination) that regulation is required"; and held that the "overall structure" of the respective statutes "does not call this

conclusion into question." *GRN v. McCarthy*, 783 F.3d at 241. The court further noted that, while the federal role may be more prominent in the relevant CAA section, the CWA is similarly "defined by federal action: as Justice White noted in a different context, even though the CWA is a state-federal partnership, 'the Federal Government maintains an extraordinary level of involvement" in administering the [Clean Water] act." *Id*., quoting *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 634. (1992) (White, J., concurring).

B. EPA Based its Refusal to Decide the Necessity Question on Factors Unrelated to the Relevant Statutory Criteria

In light of the Court of Appeals' explanation of the statutory criteria defining and circumscribing EPA's discretion in the context of a § 303(c)(4)(B) determination, EPA's refusal to make a determination falls far outside the bounds of those criteria. Instead of explaining why, under the relevant statutory criteria rationally applied, it was declining to make a necessity determination, EPA flatly explained in the Denial Letter that it was substituting its own policy preference for a non-regulatory approach for the rulemaking process established by Congress in the statute. This approach is exactly what the Supreme Court rejected in *Massachusetts v. EPA*, what the Court of Appeals declared unlawful above, and what this Court should reject on remand. While appropriately deferential, the standard of review for denial of a rulemaking petition still requires that decisions rendered without basis in the statute be deemed arbitrary and capricious. *See Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 5, 7 (D.C. Cir. 1987) (denial of a rulemaking petition overturned under APA where denial demonstrates "plain errors of law," suggesting that the agency has been "blind to the nature of [its] mandate from Congress"). Citing *Massachusetts*, the Court of Appeals for the D.C. Circuit similarly rejected a decision by EPA in a regulatory arena where the Agency has intrinsically broad latitude, on the ground that the Agency may not substitute its policy preferences for the terms of the statute. The court held

as follows in rejecting the Agency's Clean Air Act air quality standards implementation schedule:

> EPA suggests that allowing an additional ozone season for compliance serves an interest in establishing achievable attainment deadlines. **It is not our role to question the agency's policy judgment in that regard. It is our role, however, to determine whether the statute authorizes EPA to base Subpart 2 attainment deadlines on that policy judgment.** As the Supreme Court recently explained, "EPA must 'ground its reasons for action or inaction in the statute,' rather than on 'reasoning divorced from the statutory text.' " *Util. Air Regulatory Grp*., 134 S.Ct. at 2441 (emphasis and citation omitted) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 532, 535, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007)). **EPA identifies no statutory provision giving it free-form discretion to set Subpart 2 compliance deadlines based on its own policy assessment** concerning the number of ozone seasons within which a nonattainment area should be expected to achieve compliance. To the contrary, the "attainment deadlines ... leave no room for claims of technological or economic infeasibility." *Sierra Club-delay*, 294 F.3d at 161 (internal quotation marks and brackets omitted).

Natural Resources Defense Council v. EPA, 777 F.3d at 468 (citations omitted) (emphasis added).

1. The Denial Letter Ignores the Statute.

Perhaps the strongest evidence that EPA's Denial Letter is not "grounded in the statute" is that the Letter barely mentions the law at all. The 6-page Denial Letter mentions the requirements concerning water quality standards just once, in passing (reciting that, "The CWA and the EPA's implementing regulations at 40 CFR Part 131 require states and authorized tribes to designate the use(s) for waters within their jurisdiction, and to adopt water quality criteria to support and protect those uses"). AR 3,Pl. Ex. 1.[10] The Denial Letter nowhere identifies the "requirements of this chapter" that govern the referenced water quality standards decision making, much less evaluates Plaintiffs' Petition or explains the Agency's response pursuant to those factors. The Agency is simply silent on the legal issues governing water quality standards,

[10] The Denial Letter also contains a passing reference to the related subject of states' responsibility to list impaired waters. AR 5,Pl. Ex. 1.

devoting the entire letter to justifying its preference to "work with the states" on voluntary, non-regulatory approaches.

This omission is fatal. As observed by the Court of Appeals and described in the next section, the statute and regulations set forth in considerable detail the "requirements of this chapter" governing water quality standard-setting, defining the goals of the process and the means by which to achieve them. Simply put, it is not possible to make a determination (or decline to make a determination) whether such requirements have been met, and whether federal action is necessary to ensure that they are met, without ever identifying in the first instance what those requirements are.

2. The Denial Letter Fails to Define and Apply the "Requirements of this Chapter" Relevant to a Necessity Determination.

Even leaving aside EPA's wholesale failure to identify and discuss the "requirements of this chapter" that provide parameters for a decision under § 303(c)(4)(B), the Agency's reasoning in the Denial Letter bears little relationship to the substance of any of those requirements. Comparing the Agency's stated bases for denying the Petition with the "requirements of this chapter" reveals essentially no overlap.

a. <u>The "Requirements of this Chapter" Governing Water Quality Standards are Readily Identifiable.</u>

The Court of Appeals, in citing a statutory provision (CWA § 303(c)(2)(A)) and a regulatory provision (40 C.F.R. § 131.2) governing CWA water quality standard-setting, made clear that these are merely examples of the provisions that constitute the "requirements of this chapter" relevant to a necessity determination. *GRN v. McCarthy*, 783 F.3d at 240-41. Additional requirements can be found throughout the statutory and regulatory provisions governing water quality standard-setting, for instance, at 33 U.S.C. § 1251(a)(2) (defining the

"fishable and swimmable" goals that water quality standards must obtain) and 40 C.F.R. §§ 131.5, 131.10, and 131.11 (further defining the goals and process to meet them).

The following "requirements of this chapter" with respect to water quality standards and how to assess their sufficiency can be readily identified from the provisions cited by the Court of Appeals and others like them:

- *What water quality uses should be protected.* Water quality standards must, "wherever attainable," protect fishing and swimming uses.[11] 33 U.S.C. § 1313(c)(2)(A) (standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter," and must consider waters' "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."); 40 C.F.R. § 131.2 ("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….").
- *How attainability of uses should be determined.* Uses should be deemed attainable "if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act." 40 C.F.R. § 131.10(d). States may establish less protective subcategories of a designated use only if one of six specific factors

[11] Water quality standards include both designation of uses for a waterbody (*e.g.*, fishing and swimming), and establishment of criteria—*i.e.*, pollutant or pollutant indicator limits—that are sufficiently stringent to protect those uses. Water quality criteria "serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies." 40 C.F.R. § 131.2. For example, regulators use them to calculate permit limits for particular sources, 40 C.F.R. § 122.44(d)(1)(i), and to develop regulations to reduce loadings to impaired waters. 33 U.S.C. § 1313(d).

preventing attainment of the designated use can be established. 40 C.F.R. § 131.10(g).

- *How criteria protecting those uses should be derived.* A state's water quality criteria—the instream pollution limits established to protect a designated use—must be adequate to "protect the designated water uses." 40 C.F.R. § 131.5(a)(2). The criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." *Id.* § 131.11(a)(1).
- *Which waters must be considered.* Criteria must take into consideration not only the quality of the regulating state's waters, but also the quality of downstream waters. 40 C.F.R. § 131.10(b) ("the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters").
- *Preference for numeric criteria.* Criteria should generally be numerical where possible, based on EPA guidance (including such guidance "modified to reflect site-specific conditions," or based on "[o]ther scientifically defensible methods," 40 C.F.R. § 131.11(b)(1), although non-numerical narrative criteria[12] can be used "where numerical criteria cannot be established or to supplement numerical criteria." *Id.* § 131.11(b)(2).

The regulations furthermore spell out the factors EPA must consider in deciding whether to approve state standards, which essentially mirror the requirements listed above: "(1) Whether

[12] *See supra* note 1.

the State has adopted water uses which are consistent with the requirements of the Clean Water Act; (2) Whether the State has adopted criteria that protect the designated water uses; (3) Whether the State has followed its legal procedures for revising or adopting standards; (4) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses…." 40 C.F.R. § 131.5(a)(1-4).

b. The Denial Letter Fails to Address the "Requirements of this Chapter" Governing Water Quality Standards.

EPA completely omits any analysis of how the above-listed statutory requirements inform its decision to deny the petition. EPA does not suggest, much less offer facts concerning the designated uses of the waters affected by excess algal growth, whether those uses were properly established, whether algal growth is preventing attainment of those uses, whether the numeric criteria protecting those uses have been properly derived (or are in a sufficient state of development that they will soon be derived), whether sufficient data exists to develop a "sound scientific rationale" for numeric criteria, or whether state standards are adequately protecting downstream waters (such as the Gulf Dead Zone).

As alluded to in *Massachusetts*, the Agency could have refused to make a necessity determination that was based on the statute if it lacked critical information about one of the "requirements of this chapter." For instance, it might have been acceptable in principle for EPA to rely upon uncertainty in the available facts and data as to the magnitude of the nutrient problem, or lack of information as to whether state efforts were, in fact, on track to reasonably promptly establish criteria meeting the statutory requirements. But the Agency did not do so. Indeed, EPA went out of its way in the Denial Letter to state unambiguously that available evidence shows that nutrient pollution "presents a significant water quality problem facing our

nation," and that "[y]our Petition correctly identifies the Gulf 'dead zone' and upstream [nitrogen and phosphorus pollution] as issues of serious concern." AR 1-2. In so doing, it effectively acknowledged as well that its "collaborative" efforts to get the states moving on their own have not made a dent in the problem.[13]

EPA pointed to no other "requirement of this chapter," or circumstance of its implementation, about which it lacked sufficient information to render a necessity determination. *A fortiori*, nothing in the Denial Letter comes close to the requirement articulated in *Massachusetts v. EPA*, that the basis for any claimed lack of sufficient knowledge to make a decision be spelled out with specificity. 549 U.S. at 534 ("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. The statutory question is whether sufficient information exists to make an endangerment finding.") The Court underscored the rigor of this requirement by expressly rejecting Justice Scalia's argument in dissent that EPA's citation to scientific papers concerning climate change uncertainty should have been deemed sufficient. *Id.*, citing 549 U.S. at 553.

3. The Denial Letter Unlawfully Relies on EPA Preferences Unrelated to the Statutory Requirements

Having omitted the essential step of identifying the relevant "requirements of this chapter" that pertain to a necessity determination and applying them, EPA applied instead exactly the type of extra-statutory policy criteria that the Supreme Court prohibited in *Massachusetts v. EPA*. The Court of Appeals observed that the *Massachusetts* Court had

[13] *See supra* note 3, explaining that the Gulf Dead Zone has reached massive proportions this year; and note 7, providing information on the nearly nonexistent progress of states toward developing numeric nutrient criteria.

rejected EPA's refusal to decide because it was based on overarching policy considerations having nothing to do with the threshold statutory question, and everything to do with the Agency's dislike of the question and the consequences of answering it:

> First, the Court rejected the EPA's arguments that it could decline to make a determination based on certain "policy judgments," which included (1) the presence of "voluntary Executive Branch programs [that] already provide an effective response to the threat of global warming," (2) the potential impact of a determination on the President's negotiations with foreign powers, and (3) the fact that regulating automobiles would be "an inefficient, piecemeal approach" to climate change. Whatever the merits of these arguments, the Court concluded, "they ha[d] nothing to do with whether greenhouse gas emissions contribute to climate change."

GRN v. McCarthy, 783 F.3d at 238-39, quoting *Massachusetts v. EPA*, 549 U.S. at 533. The *Massachusetts* court had rejected EPA's "laundry list of reasons not to regulate" proffered in lieu of reasoning based on the substance of the relevant statutory question. *Massachusetts v. EPA*, 549 U.S. at 533. The same is true in this case.

EPA's Petition Denial articulates a "laundry list of reasons not to regulate" that is strikingly similar to the reasons rejected by the Supreme Court in *Massachusetts,* and outside the bounds of the statute in the same manner. Just as in the *Massachusetts* denial EPA argued that it preferred voluntary executive branch programs over the rulemaking procedure defined in the statute, here the Agency expressed its preference for dealing with the acknowledged nutrient problem by "working cooperatively with states" and publishing guidance documents for them. AR 4, Pl. Ex. 4. It stated, "This approach, in the Agency's judgment, **is preferable** to undertaking an unprecedented and complex set of rulemakings to promulgate federal NNC for a large region (or even the entire country)." *Id (*emphasis added). Just as EPA had argued in the *Massachusetts* denial that federal regulation would be "ineffective," here the Agency argued that it "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." AR 1, Pl. Ex. 1. Just as the Agency had argued in the *Massachusetts* denial that the consequences of a rulemaking might be deleterious (in that case, to foreign policy), here it argued that a rulemaking would be "highly resource and time intensive." AR 4, Pl. Ex. 1. Accordingly, just as the *Massachusetts* Court rejected EPA's reasons as having "nothing to do with whether greenhouse gas emissions contribute to climate change," this Court should reject those same reasons as having nothing to do with whether federally promulgated standards are necessary to meet the requirements of the CWA.

EPA's approach throughout the Denial Letter was to simply cite to the existence of "cooperative" efforts to assist the states and express a preference for these methods, without any mention of whether these efforts are actually working, much any less data or analysis of whether they are working,[14] or explanation of an uncertainty that might meet the *Massachusetts* court's requirement to explicitly describe any claimed technical basis for declining to decide a statutory question. 549 U.S. at 533. This approach is not only "divorced from the statutory text," *Massachusetts v. EPA*, 549 U.S. at 533, but directly antithetical to it. The Denial Letter amounts to a bold statement that, regardless of the acknowledged severity of the Gulf Dead Zone and other nutrient problems throughout the Mississippi River basin, EPA is choosing nonetheless not to follow the prescribed statutory course of action to address those problems, and would rather handle things a different way—despite effectively acknowledging that way is not working.

[14] The statute at issue in *Massachusetts v. EPA*, CAA § 202, left no room for considering state efforts to address climate change at all. As discussed *supra,* the state-led structure of the CWA § 303 standard-setting process in principle leaves open the door for EPA to consider, as part of the "necessity" inquiry, whether states' efforts are on track to addressing identified failure to meet "the requirements of this chapter," so as to obviate the need for federal action. However, as also discussed *supra*, the "requirements of this chapter" that must be considered in the first instance are well defined; and EPA's bare references in the Denial Letter to the existence of state efforts in no way reflects evaluation of whether those efforts are, in fact, leading to prompt achievement of CWA requirements (which they are clearly not, *see supra* n. 2 and 7).

Simply put, EPA has declined to respond to the statutory necessity question without any actual reference to necessity, much less any of the statutory or regulatory criteria identified by the Court of Appeals as relevant to determining it. As a simple matter of language and reason, responding to the question, "Are criteria necessary?" with, "We prefer to handle things differently from what Congress contemplated," is a *non sequitur*, and unlawful under *Massachusetts* and the decision of the Court of Appeals.[15]

While the Court of Appeals reiterated the deferential standard of review applicable to an agency decision denying a rulemaking petition (a standard on which the parties did not fundamentally disagree), it is the same standard that the Supreme Court applied in holding EPA's denial of the *Massachusetts* petition to be arbitrary and capricious and not in compliance with law. *GRN v. McCarthy*, 783 F.3d at 243, quoting *Massachusetts v. EPA*, 549 U.S. at 527-28. In other words, the Agency's burden may be "slight" but it is not non-existent, and may not be overcome without an explanation that is "grounded in the statute." *GRN v. McCarthy*, 783 F.3d at 244, quoting *Massachusetts v. EPA*, 549 U.S. at 535. Since EPA's reasons for declining to respond to the § 303(c)(4)(B) necessity question are plainly grounded in reasoning "divorced from the statutory text," that burden has not been met.

Conclusion

This case does not present merely an abstract legal issue. The Gulf Dead Zone "forms each summer threatening the ecosystem that supports valuable commercial and recreational Gulf fisheries."[16] This year's Dead Zone "—an area about the size of Connecticut and Rhode Island combined—is larger than the 5,052 square miles measured last year." *Id*. Forty years after

[15] EPA also never provided any rational explanation 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.").

[16] http://www.noaanews.noaa.gov/stories2015/080415-gulf-of-mexico-dead-zone-above-average.html.

Congress adopted a national goal to provide for "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," 33 U.S.C. § 1251(a)(2), it is time for EPA to implement the requirements that Congress established to achieve this goal.

For all of the foregoing reasons, this Court should once again remand the Denial Letter with an order that EPA provide a lawful response to the petition.

Dated: September 21, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, I caused as copy of the foregoing to be served through the Court's CM/ECF system to all parties.