

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

GULF RESTORATION NETWORK,  
*et al.*,

Plaintiffs,

V.

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

Defendants.

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

Section "A," Division 3

Hon. Jay C. Zainey, District Judge

Hon. Daniel E. Knowles, III, Magistrate Judge

**DEFENDANT EPA'S REPLY MEMORANDUM IN SUPPORT OF ITS  
CROSS-MOTION FOR SUMMARY JUDGMENT [REC. DOC. 201]**

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## INTRODUCTION

Nutrient pollution is a significant water quality problem for water bodies across the United States, including the Mississippi-Atchafalaya River Basin and the Gulf of Mexico. No one disputes this. But identifying an environmental problem is very different from deciding how to address it.

EPA is pursuing a long-term strategy of partnering with States to tackle the nationwide nutrient pollution problem. Gulf Restoration petitioned EPA to, instead, exercise the Agency’s discretionary rulemaking authority to promulgate federal water quality standards pursuant to section 1313(c)(4)(B) of the Clean Water Act, 33 U.S.C. § 1313(c)(4)(B). *See* EPA Ex. 1, Administrative Record (AR)<sup>1</sup> 7–81, Petition for Rulemaking Under the Clean Water Act (July 30, 2008) (Petition). EPA denied the petition in a detailed letter setting forth its reasons for declining to make a necessity determination. EPA Ex. 2, AR 1–6, Letter from Michael H. Shapiro to Kevin Reuther (July 29, 2011) (EPA Decision). The single, narrow question now before this Court is whether EPA’s explanation of that decision is “legally sufficient.” *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (*Gulf Restoration II*). For three reasons, EPA’s explanation more than satisfies this standard.

First, as EPA explained in Argument Point I of its summary judgment brief, the Fifth Circuit gave clear guidance to this Court on both the standard of review to apply to EPA’s decision and the substantive nature of EPA’s task. *See* EPA Br. at 13–17 (Rec. Doc. 201-1).<sup>2</sup> In short, the standard of review is “extremely limited” and “highly deferential,” and EPA’s burden to justify its decision under the broadly-written language of section 1313(c)(4)(B) is “slight.” *Gulf Restoration II*, 783 F.3d at 243–

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<sup>1</sup> Citations to page numbers in the Administrative Record include only the final digits of the Bates number.

<sup>2</sup> Defendant EPA’s Combined Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment [Rec. Doc. 198] (Rec. Doc. 201-1) (Nov. 20, 2015).

44. In responding to EPA’s brief, however, Gulf Restoration misreads the Fifth Circuit’s decision. *See* Gulf Restoration Reply at 5–8 (Rec. Doc. 206).<sup>3</sup> And although Gulf Restoration seeks to portray the obligation that its petition sought to impose on EPA as not “excessively burdensome,” the petition in fact sought sweeping federal regulation of water bodies across the Nation. *Id.* at 8–10.

Second, as EPA explained in Argument Point II of its summary judgment brief, *Massachusetts v. EPA*, 549 U.S. 497 (2007), and other decisions recognize EPA’s discretion to consider resource constraints, to manage competing regulatory priorities, and to otherwise decide the “manner, timing, content, and coordination of its regulations,” *id.* at 533. *See* EPA Br. at 17–21 (Rec. Doc. 201-1). In response, Gulf Restoration maintains that *Massachusetts* prohibits EPA from considering its finite resources and competing priorities when responding to a rulemaking petition. Gulf Restoration Reply at 2 (Rec. Doc. 206). The Court should reject this misreading of *Massachusetts*.

Third, as EPA explained in Argument Point III of its summary judgment brief, the Agency gave a reasonable explanation, grounded in the statute, for why it was denying Gulf Restoration’s petition. *See* EPA Br. at 21–31 (Rec. Doc. 201-1). Gulf Restoration has failed to meet its burden of demonstrating that EPA’s explanation was inadequate, and the Court therefore should uphold EPA’s decision.

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<sup>3</sup> Plaintiffs’ Combined Opposition to EPA’s Cross-Motion and Reply in Support of Plaintiffs’ Motion for Summary Judgment on Remand (Rec. Doc. 206) (Feb. 15, 2016) (Gulf Restoration Reply).

## ARGUMENT

### I. The Fifth Circuit provided clear remand guidance to this Court.

As demonstrated in EPA’s opening brief, the Fifth Circuit was clear: “EPA may decline to make a necessity determination [under section 1313(c)(4)(B)] if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so.” *Gulf Restoration II*, 783 F.3d at 242–43 (citing *Massachusetts*). The court further clarified that the standard of review for determining whether EPA has provided such an explanation is “extremely limited” and “highly deferential.” 783 F.3d at 243 (citations and quotations omitted). There is nothing novel about the Fifth Circuit’s statement, which reiterates the standard of review typically used in judicial review of agency decisions not to conduct rulemaking. *See* EPA Br. At 13-14. This Court should reject Gulf Restoration’s misreading of *Gulf Restoration II* and apply the Fifth Circuit’s guidance to review EPA’s decision.

#### A. Gulf Restoration has failed to rebut EPA’s demonstration that the Agency bears only a slight burden when denying a rulemaking petition.

As noted above, in *Gulf Restoration II*, the Fifth Circuit held that EPA may decline to make a necessity determination as long as the Agency provides an adequate, statutorily-grounded explanation for doing so. *See* 783 F.3d at 242–43. In remanding the single, limited question of whether EPA did so in this case, the Fifth Circuit identified “several principles” that this Court should “bear in mind” when reviewing EPA’s decision. *Id.* at 243.

First, the Fifth Circuit stressed the deferential standard of review for EPA’s decision not to make a necessity determination. 783 F.3d at 243. The court confirmed that (as all parties agree) that decision must be grounded in section 1313(c)(4)(B) of the Clean Water Act; however, the court went on to explain that because that provision is “broadly written,” *id.* at 244, EPA bears only a slight burden to demonstrate that its decision is in fact based in the statute. The Fifth Circuit further observed that where a broadly-written statutory provision like section 1313(c)(4)(B) “sets out competing considerations,” agencies like EPA are “generally given discretion to choose how to best

give effect to those mandates.” *Id.* The Fifth Circuit also cited approvingly to the D.C. Circuit’s decision in *WildEarth Guardians v. EPA*, 751 F.3d 649 (D.C. Cir. 2014), which interpreted a Clean Air Act provision to “afford[] agency officials discretion to prioritize sources that are the most significant threats to public health to ensure effective administration of the agency’s regulatory agenda.” *Gulf Restoration II*, 783 F.3d at 244 n.93 (quoting *WildEarth Guardians*, 751 F.3d at 654–55).

As we noted in EPA’s opening brief, the Fifth Circuit also offered guidance on the types of errors that could require the Court to reject EPA’s decision. EPA Br. at 30 (Rec. Doc. 201-1). In a footnote, the Fifth Circuit quoted approvingly from *National Customs Brokers & Forwarders Ass’n of America v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989), a decision “favorably cited by *Massachusetts v. EPA*.” *Gulf Restoration II*, 783 F.3d at 243 n.90. As the Fifth Circuit noted, *National Customs Brokers* held that a court “will overturn an agency’s decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.” *Id.* (quoting *Nat’l Customs Brokers*, 883 F.2d at 96–97).

Gulf Restoration’s characterization of the Fifth Circuit’s careful analysis and detailed discussion of these issues as nothing more than a “statement of the applicable standard of review,” Gulf Restoration Reply at 6–7 (Rec. Doc. 206), fails to come to grips with the principles set forth in the court’s opinion. Perhaps most critically, Gulf Restoration offers no response to the Fifth Circuit’s interpretation of section 1313(c)(4)(B) as a broadly-written provision that gives the Agency “discretion to choose how to best give effect” to “competing considerations” when responding to a rulemaking petition. *Gulf Restoration II*, 783 F.3d at 244; *see* Gulf Restoration Reply at 6–7. Nor, conversely, has Gulf Restoration identified a plain error of law or fundamental change in facts that might, under *National Customs Brokers*, warrant overturning the Agency’s decision. Instead, as discussed next, Gulf Restoration has based its substantive criticism of EPA’s decision on a misreading of the Fifth Circuit’s decision.



**B. Gulf Restoration’s proposed substantive analysis misreads the Fifth Circuit’s decision.**

In discussing the factors that allegedly govern the court’s review on the merits of EPA’s decision not to make a necessity determination, Gulf Restoration focuses on the Fifth Circuit’s discussion of the threshold jurisdictional question of whether that decision is judicially reviewable at all. *Id.* Based on its interpretation of that jurisdictional analysis, Gulf Restoration then argues that EPA can only decline to conduct a necessity determination if it considers the precise statutory and regulatory factors that the Fifth Circuit identified in its jurisdictional analysis. *Id.* at 6.

The Fifth Circuit has already decided that EPA’s decision not to make a necessity determination is judicially reviewable; thus, by definition, that question is not before the court on remand. To the extent that the Fifth Circuit’s jurisdictional analysis is at all relevant on remand, moreover, Gulf Restoration misinterprets what the Fifth Circuit said. Gulf Restoration appears to believe that the Fifth Circuit concluded that EPA’s decision can only be upheld if the Agency precisely tracks the statutory and regulatory factors that the court discussed in its jurisdictional analysis. *See* Gulf Restoration Reply Br. at 8 (Rec. Doc. 206). Yet that reading is at odds with the Fifth Circuit’s open-ended discussion of the statute. As EPA pointed out, the Fifth Circuit’s jurisdictional analysis does include observations about section 1313(c)(4)(B)’s text. *See* EPA Br. at 15–17 (Rec. Doc. 201-1) (discussing *Gulf Restoration II*, 783 F.3d at 237–42). But as EPA also explained, the Fifth Circuit did not purport to offer a definitive interpretation of section 1313(c)(4)(B). *Id.* Nor did the court claim to be identifying an exclusive list of statutory and regulatory factors that EPA must consider when evaluating a rulemaking petition under section 1313(c)(4)(B). 783 F.3d at 240 (“While broadly drawn, these requirements provide guidance for the types of considerations the EPA must take into account in deciding the necessity of regulation.”).

Nor did the Fifth Circuit say precisely *how* EPA must evaluate the statutory and regulatory factors that the Agency ultimately does consider.

Gulf Restoration also errs by seeking to equate EPA's decision to make a positive or negative necessity determination with the Agency's decision to decline to make a necessity determination in response to a rulemaking petition. As EPA explained, if both the decision not to make a determination and the determination itself require the same level of Agency analysis and are reviewed by precisely the same standards, there is no meaningful difference between the two options. EPA Br. at 16–17 (Rec. Doc. 201-1). That cannot be the end result of the Fifth Circuit's decision, where the court emphasized that EPA has “discretion to decide not to make a necessity determination.” *Gulf Restoration II*, 783 F.3d at 242.

**C. Gulf Restoration's petition requested sweeping federal regulation of numerous water bodies across the country.**

Gulf Restoration argues that applying the substantive standard that it seeks to impose on EPA would not be “excessively burdensome” to the Agency. Gulf Restoration Reply at 8–10 (Rec. Do. 206). As already demonstrated, Gulf Restoration's substantive standard is legally incorrect. *See above* Argument Point I.B. Aside from this legal flaw, there is a factual problem with Gulf Restoration's argument. In its petition, Gulf Restoration *did* seek to impose a burdensome, resource-intensive task on EPA.

In its petition, Gulf Restoration requested that EPA make necessity determinations and promulgate federal water quality standards for multiple pollutants in numerous classes of water bodies in all fifty States. *See* EPA Ex. 1, AR 11, Petition (“EPA should adopt numeric water quality standards for the portion of the ocean protected by the Clean Water Act but outside the jurisdiction of any state and for all water bodies in all states for which numeric water quality standards controlling nitrogen and phosphorus pollution have not yet been established.”). True, Gulf

Restoration also requested, in the alternative, narrower action from EPA. *Id.* at AR 11–12. But even these alternative requests sought extensive federal water quality standards for thirty-one States, or, at a minimum, ten States. *Id.* (requesting EPA promulgate numeric water quality standards “for the Northern Gulf of Mexico and for all waters of the United States within the Mississippi River Basin,” or, “[a]t a minimum, . . . to control nitrogen and phosphorus pollution in the mainstem of the Mississippi River and the Northern Gulf of Mexico”). In other words, Gulf Restoration’s petition asked EPA to undertake what the Agency deemed to be “an unprecedented and complex set of rulemakings to promulgate federal [Numeric Nutrient Criteria] for a large region (or even the entire country).” EPA Ex. 2, AR 4, EPA Decision. EPA reasonably concluded that Gulf Restoration’s approach “would be highly resource and time intensive and involve the EPA staff across the entire Agency, as well as support from technical experts outside the Agency.” *Id.*

Gulf Restoration claims that EPA has already done much of the work that would be required to make a necessity determination by “tracking and overseeing states’ Clean Water Act standard-setting process for decades.” Gulf Restoration Reply at 10 (Rec. Doc. 206). But tracking and overseeing the States’ work is a vastly different and far less resource-intensive task than actually making necessity determinations and promulgating a comprehensive and far-reaching collection of federal water quality standards for the numerous water bodies covered by Gulf Restoration’s petition. *See* EPA Ex. 1, AR 78, Petition (requesting that EPA issue federal water quality standards for nitrogen, phosphorus, chlorophyll *a*, and turbidity “for every ‘navigable water’ . . . for which a numeric water quality standard . . . has not been submitted to EPA . . . and found by EPA to be consistent with the [Clean Water Act]” with respect to “(i) lakes and reservoirs, (ii) rivers and streams, (iii) the contiguous zone of coastal waters and (iv) the part of the ocean subject to [Clean Water Act] jurisdiction outside of the jurisdiction of any state.”); *see also* EPA Ex. 2, AR 4, EPA Decision (detailing the steps the Agency would need to take to promulgate the federal water quality

standards requested by Gulf Restoration). Gulf Restoration’s attempt to downplay the burden its petition sought to impose on EPA should be rejected.

**II. *Massachusetts v. EPA* preserves EPA’s discretion to consider resource constraints and competing regulatory priorities in deciding the manner, content, timing, and coordination of regulatory action.**

Gulf Restoration argues that EPA’s decision denying the petition conflicts with the Supreme Court’s decision in *Massachusetts*. A proper reading of *Massachusetts* and other decisions, however, confirms that EPA maintains discretion to manage its finite resources and balance competing priorities when responding to a rulemaking petition.

Gulf Restoration appears to interpret *Massachusetts* to allow EPA to decline to make the threshold necessity determinations requested in the petition if the Agency had “asserted that scientific uncertainty or some other impediment ‘is so profound’ that it precludes EPA from making a reasoned judgment based on the statutory factors.” Gulf Restoration Reply at 2 & n.4 (Rec. Doc. 206) (citing *Massachusetts*, 549 U.S. at 501). *Massachusetts* does not, however, establish a “profoundness” test.

The rule that *Massachusetts* established is that EPA could decline to make a threshold endangerment finding under the Clean Air Act “*if it provides some reasonable explanation as to why it cannot or will not exercise its discretion,*” provided the “reasons for action or inaction must conform to the authorizing statute.” *Massachusetts*, 549 U.S. at 533 (emphasis added). As the Fifth Circuit applied that rule to section 1313(c)(4)(B) of the Clean Water Act, *Massachusetts* means that “EPA may decline to make a necessity determination if it provides an adequate explanation, grounded in the statute, for why it has elected not to do so.” *Gulf Restoration II*, 783 F.3d at 243. Scientific uncertainty is one possible “adequate explanation,” but nothing in *Massachusetts* or the Fifth Circuit’s opinion precludes the existence of other such explanations—provided, of course, that any such explanation is grounded in the statute.

Equally important for purposes of this case, *Massachusetts* does not preclude EPA from considering its resource constraints and competing regulatory priorities. In fact, the *Massachusetts* court stressed that it has “repeated time and again” that “an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.” 549 U.S. at 527 (citation omitted). This principle is further confirmed by other decisions, including *WildEarth Guardians* (which was cited favorably by the Fifth Circuit) and *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008). See EPA Br. at 20–21 (Rec. Doc. 201-1). Gulf Restoration attempts to distinguish those decisions on the grounds that the agencies were already engaged in rulemaking, Gulf Restoration Reply at 12–13 (Rec. Doc. 206). But that distinction does not address the central holding in both cases that when an agency is responding to a rulemaking petition, it has discretion to consider its limited resources and competing regulatory priorities. See *WildEarth Guardians*, 751 F.3d at 654–55; *Defenders of Wildlife*, 532 F.3d at 920–21. And as noted above in Argument Point I.A., the Fifth Circuit itself confirmed that “when a statute sets out competing considerations, agencies are generally given discretion to choose how to best give effect to those mandates.” 783 F.3d at 244 (citation omitted).

Finally, Gulf Restoration disputes EPA’s characterization of two cases—*Massachusetts* and *American Horse Protection Association v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987)—as addressing an agency’s erroneous interpretation of its delegated authority. Compare Gulf Restoration Reply at 11–12 (Rec. Doc. 206) with EPA Br. at 19–20 (Rec. Doc. 201-1).<sup>4</sup> There is nothing novel about EPA’s view of *Massachusetts*, which is consistent with that of the D.C. Circuit. See *WildEarth*, 751 F.3d at 655 (“In *Massachusetts v. EPA*, the agency’s reasons for declining to regulate new vehicle emissions were

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<sup>4</sup> Gulf Restoration apparently agrees with EPA that another case cited in Gulf Restoration’s opening brief, *Natural Resources Defense Council v. EPA*, 777 F.3d 456 (D.C. Cir. 2014), is a case addressing EPA’s delegated authority. See EPA Br. at 19–20 (Rec. Doc. 201-1).

beyond the scope of its delegated authority.”). And in *American Horse Protection Association*, the court directly stated its fear that “the agency ‘has been blind to the source of its delegated power,’” 812 F.2d at 6. Here, by contrast, Gulf Restoration apparently concedes that EPA has demonstrated a firm grasp of its delegated authority under section 1313(c)(4)(B). *Compare* EPA Br. At 19–20 (Rec. Doc. 201-1) *with* Gulf Restoration Reply at 10–13. The only question is whether EPA gave a reasonable explanation grounded in the statute for denying Gulf Restoration’s petition under that provision. As discussed next, EPA did precisely that in its decision.

### **III. EPA gave a reasonable explanation grounded in the Clean Water Act for why it denied Gulf Restoration’s petition.**

When it denied Gulf Restoration’s petition, EPA gave a reasonable explanation that is solidly grounded in the broad language of section 1313(c)(4)(B) of the Clean Water Act. In its reply brief, Gulf Restoration asks this Court to require EPA to do more than it already has. Gulf Restoration Reply at 13–16. But EPA has done all that is required by *Massachusetts* and *Gulf Restoration II*. The Court should uphold EPA’s decision.

#### **A. EPA adequately explained the factors that led to its decision.**

As we explained in Argument Point III.A of EPA’s opening brief, the Agency considered at least six factors in deciding to deny Gulf Restoration’s petition, all of which are sourced in the Clean Water Act and its implementing regulations. In brief summary, the six factors that EPA considered are:

- Factor 1: The uses of navigable waters under the Clean Water Act, 33 U.S.C. § 1313(c)(2)(A), 40 C.F.R. § 131.2, and the requirement that States adopt water quality standards to protect those uses, 33 U.S.C. § 1313(c)(2)(A), 40 C.F.R. §§ 131.11(a)(1), 131.2. *See* EPA Ex. 2, AR 1–3, EPA Decision;

- Factor 2: The importance of numeric nutrient criteria in developing water quality standards, 33 U.S.C. § 1313(c), 40 C.F.R. § 131.11(b). *See* EPA Ex. 2, AR 2–3; *see also* EPA Ex. 4, AR 681–82, Framework Memo;<sup>5</sup>
- Factor 3: The technical guidance and support EPA provides to States under the Clean Water Act, 33 U.S.C. § 1314(a). *See* EPA Ex. 2–3, AR 2, EPA Decision;
- Factor 4: The impact of other measures to reduce nutrient loading to the Gulf, 33 U.S.C. §§ 1329, 1313(c)(4)(B). *See* EPA Ex. 2, AR 4, EPA Decision; EPA Ex. 4, AR 681–82, Framework Memo;
- Factor 5: The limited resources available to the Agency to develop and implement federal water quality standards, 33 U.S.C. § 1313. *See* EPA Ex. 2, AR 1, 4, 5, EPA Decision; and
- Factor 6: The structure of the Clean Water Act as a whole, and the structure of section 1313 in particular, 33 U.S.C. § 1251(b), *id.* § 1313. *See* EPA Ex. 2, AR 5, EPA Decision.

Based on its consideration of these six factors grounded in the statute, EPA reasonably exercised its judgment to decline to make the necessity determinations requested by Gulf Restoration. EPA acknowledged that nitrogen and phosphorus pollution posed a “significant water quality problem” in the Mississippi River basin and the Gulf, EPA Ex. 2, AR 6, EPA Decision. But EPA concluded that the best path forward was to continue to pursue the Agency’s plan for addressing the national nutrient pollution problem, laid out months earlier in the Framework Memo. *See* EPA Ex. 4, AR 680, Framework Memo. EPA’s decision fully satisfies its obligation under *Massachusetts* to give a reasonable explanation grounded in the statute.

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<sup>5</sup> EPA Ex. 4, AR 680–85, Memorandum from Nancy K. Stoner, EPA Acting Assistant Administrator, Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions (March 16, 2011) (the Framework Memo).

**B. Gulf Restoration has not demonstrated that EPA’s decision was arbitrary or capricious.**

Invoking “fundamental” administrative law principles, Gulf Restoration claims that EPA’s brief improperly offers counsel’s post hoc rationalizations to defend the Agency’s decision. Gulf Restoration Reply at 13–14 (Rec. Do. 206). The “post hoc rationalizations” that Gulf Restoration objects to are citations in EPA’s opening brief to some of the Clean Water Act provisions and regulations that EPA considered in reaching its decision. *See* EPA Br. at 22–28 (Rec. Doc. 201-1). While it is true that not every statute or regulation cited in EPA’s brief has a parallel, explicit cite in EPA’s decision document, it is equally true that a court “should uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009) (citations and quotations omitted).

In its decision, EPA cited to Clean Water Act provisions six times and to Clean Water Act regulations four times, making it clear that the agency considered multiple statutory and regulatory factors in deciding not to make the necessity determinations requested in Gulf Restoration’s petition. What is more, even when EPA did not cite a specific provision of the Clean Water Act or the regulations, the Agency used language that references those provisions and regulations.

To illustrate, when it considered the second factor identified above, EPA discussed how nitrogen and phosphorus pollution presented “a significant water quality problem facing our nation.” EPA Ex. 2, AR 1. Then the Agency discussed specific ways in which nitrogen and phosphorus harmed fish, impaired drinking water, increased exposure of swimmers to harmful microbes, and diminished the recreational uses of water bodies. *See id.*, AR 1–2. Admittedly, EPA did not cite the Clean Water Act’s regulations in this discussion. Yet the Agency used language that unmistakably tied its analysis to 40 C.F.R. § 131.2, the Clean Water Act regulation that discusses how 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 . . . .” Thus, the path that the Agency followed to reach its decision is reasonably discernible from the Agency’s letter.

Gulf Restoration also protests that EPA’s decision should have included more details about how the Agency was applying the first three factors that it considered. Gulf Restoration Reply at 14–15 (Rec. Doc. 206). But neither *Massachusetts* nor *Gulf Restoration II* requires EPA to give a lengthy explanation of each factor that contributes to the Agency’s decision. Indeed, all the Administrative Procedure Act (APA) requires when an agency denies a petition for rulemaking is “[p]rompt notice” to the petitioner, ordinarily “accompanied by a brief statement of the grounds for denial.” 5 U.S.C. § 555(e); *see also Fox Television*, 556 U.S. at 513–14. EPA’s decision denying Gulf Restoration’s petition—a detailed letter with footnotes referencing other key documents, including the Agency’s Framework Memo—satisfies this standard. *See* EPA Ex. 2, AR 1–6, EPA Decision.

Additionally, Gulf Restoration argues that EPA should have considered other parts of the statute that are, in Gulf Restoration’s view, more relevant than those considered by the Agency. In particular, Gulf Restoration asserts that the fourth, fifth, and sixth factors that EPA considered “bear essentially no connection to the Act’s statutory and regulatory provisions that govern water quality standard-setting.” Gulf Restoration Reply at 15–16 (Rec. Doc. 206). This argument is another take on Gulf Restoration’s previous argument that EPA relied on an impermissible “laundry list of reasons not to regulate” that represent the Agency’s policy preferences. Gulf Restoration Br. at 21–24 (Rec. Doc. 197). The best answer to this argument is the Fifth Circuit’s own description of section 1313(c)(4)(B) as a broadly-written provision setting out “competing considerations” pursuant to which “agencies are generally given discretion to choose how to best give effect to those mandates.” *Gulf Restoration II*, 783 F.3d at 244.

Moreover, as EPA previously explained (EPA Br. at 25–28), the final three factors that EPA considered in reaching its decision are relevant because they address the Agency’s careful efforts to

balance competing priorities under section 1313(c) while exercising its discretion and judgment on how best to give effect to Congress' mandates. Thus, in addressing the fourth factor, EPA considered the efforts that the Agency and others were already making to address a significant aspect of the nutrient pollution problem. *See* EPA Ex. 2, AR 4, EPA Decision. Recognizing that nonpoint source pollution is a significant contributor to the pollution problem in the Mississippi River Basin and the Gulf of Mexico, the Agency considered what it and others were doing to address that problem. *See id.*; *see also* EPA Ex. 4, AR 681–82, Framework Memo.

In addressing the fifth factor, EPA recognized and considered the limited resources available to the Agency to undertake the mammoth rulemaking task requested by Gulf Restoration's petition. EPA Ex. 2, AR 4, EPA Decision. EPA explained in detail the numerous steps it would need to take to conduct a significant federal rulemaking for each State—an effort the Agency predicted would “involve the EPA staff across the entire Agency, as well as support from technical experts outside the Agency.” *Id.* EPA concluded this was a “task of substantial magnitude” and a “daunting management challenge.” *Id.* As discussed above in Argument Point II, the Agency may consider its resources when responding to a rulemaking petition. *See also* EPA Br. at 20–21 (Rec. Doc. 201-1).

Finally, in addressing the sixth factor, EPA considered Congress' intent to incorporate cooperative federalism into the Clean Water Act generally, and into section 1313(c) specifically. *See* EPA Ex. 2, AR 5, EPA Decision. Gulf Restoration claims that the Fifth Circuit rejected EPA's reliance on this factor, Gulf Restoration Reply at 15 (Rec. Doc. 206), but that is incorrect. What the Fifth Circuit actually held is that the Clean Water Act's cooperative federalism structure did not overcome the presumption that EPA's decision was subject to judicial review because the Act's “statutory scheme is defined by federal action.” *Gulf Restoration II*, 783 F.3d at 241. The Fifth Circuit also recognized, however, that under section 1313, “[t]he states are the primary player in this process [of setting and administration of water quality standards].” *Id.* at 230. Thus, pursuant to section

1313, the states “are ‘responsible for reviewing, establishing, and revising water quality standards,” while EPA “plays a secondary role, with important backstop responsibilities.” *Id.* 230–31. EPA’s consideration of federalism concerns in declining to make the requested necessity determinations is thus firmly grounded in the statute.

To sum up, when EPA denied Gulf Restoration’s petition, the Agency gave “an adequate explanation, grounded in the statute, for why it has elected not to do” what Gulf Restoration had requested. *Gulf Restoration II*, 783 F.3d at 243. Although Gulf Restoration strongly disagrees with specific statutory factors that EPA chose to consider, the Agency has discretion to decide how best to pursue the competing mandates in section 1313(c). *Id.* at 244. And although Gulf Restoration challenges the manner in which EPA considered those statutory factors, EPA bears only a “slight” burden when denying a rulemaking petition. *Id.* All in all, none of Gulf Restoration’s criticisms rise to the level of a “compelling cause” that should lead this Court to overturn EPA’s decision. *See id.* at 243 n.90 (quoting *Nat’l Customs Brokers*, 883 F.2d at 96–97) (court “will overturn an agency’s decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.”).

## CONCLUSION

For the foregoing reasons and those stated in EPA's summary judgment brief (Rec. Doc. 201-1), this Court should resolve the limited issue remanded by the Fifth Circuit by denying summary judgment to Gulf Restoration and granting summary judgment to EPA.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2016, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

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