No. 13-31214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GULF RESTORATION NETWORK, et al.,
Plaintiffs-Appellees,

-v.-

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
Case No. 12-cv-00677 (Hon. Jay C. Zainey)

OPENING BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants request oral argument because it will likely aid the Court in the disposition of this appeal.

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INTRODUCTION

Section 303 of the Clean Water Act, 33 U.S.C. § 1313 ("Section 1313"), directs States to establish and update water quality standards for waters within their borders. The United States Environmental Protection Agency ("EPA") ensures that States establish water quality standards, but the EPA itself may impose a water quality standard on a State only in very limited circumstances. As relevant here, the EPA has discretion to determine, for a given State, "that a revised or new standard is necessary to meet the requirements of [the Clean Water Act]." 33 U.S.C. § 1313(c)(4)(B). If the EPA chooses to make a necessity determination and that determination is positive,[1] the agency must "promptly" propose an appropriate water quality standard and then finalize it within ninety days unless the State adopts an acceptable standard in the interim. *Id.* § 1313(c)(4).

Plaintiffs-Appellees Gulf Restoration Network, *et al.* ("Gulf Restoration"), petitioned the EPA to determine that four categories of new water quality standards for nutrient pollution were necessary for every State in the country (a finding that would compel the EPA to propose and promulgate each of those water quality standards itself). The EPA declined to make necessity determinations for the

[1] In this brief, the phrase "make a necessity determination" denotes the EPA's determination of necessity *vel non* with respect to a particular water quality standard. When discussing the outcomes of the EPA's determination, we use the terms "positive necessity determination" and "negative necessity determination."

standards requested by the petitioners. The agency reasoned that it would be impractical, inefficient, and counterproductive to make those determinations given that it was cooperating with States to mitigate nutrient pollution and develop the State-promulgated water quality standards preferred under the Clean Water Act.

The district court held that Gulf Restoration's petition compelled the EPA to make a necessity determination for every water quality standard sought, and the court remanded for the agency to make those determinations. The court erred in two respects. First, it ignored the fact that Congress committed the decision to make a necessity determination entirely to the EPA's judgment. In doing so, Congress deprived the courts of jurisdiction to review the EPA's choice not to make such a determination. And not only did the district court improperly review the EPA's exercise of discretion, it also incorrectly held that the agency *does not even have the option* to decline to make a necessity determination in response to a petition.

The district court's errors have immediate and substantial consequences for the EPA, which now faces the daunting task of making necessity determinations for multiple water quality standards throughout the country. More broadly, the impact of the court's ruling—that a citizen's petition can transform a discretionary statutory function into a mandatory duty—threatens to upend orderly administrative process and undermine Congress's choice to give administrative agencies broad leeway to investigate other parties' alleged violations of the agencies' governing statutes.

STATEMENT OF JURISDICTION

Gulf Restoration petitioned the EPA to determine that four categories of new water quality standards for nutrient pollution were necessary for every State in the country that lacked such standards; to thereafter promulgate all of those standards itself; and to establish total maximum daily loads ("TMDLs") for nitrogen and phosphorus in the Mississippi River, its tributaries, and the Gulf of Mexico if any of those waters failed to meet the new standards. ROA.1454–1456; *see* 33 U.S.C. § 1313(c) and (d). The EPA denied Gulf Restoration's petition without making a necessity determination for any of the requested water quality standards. ROA.1377–1382.

Gulf Restoration sued in district court, claiming that the EPA's decision not to make necessity determinations was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); ROA.267–268. Gulf Restoration's suit depends on the waiver of federal sovereign immunity contained in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. *See* 5 U.S.C. § 702. That waiver does not apply, however, "to the extent that … agency action is committed to agency discretion by law." *Id.* § 701(a)(2). As explained further herein, *infra* at 17–30, the district court lacked jurisdiction to review the EPA's decision not to make necessity determinations because that choice is committed to the agency's discretion by law.

The district court rejected the EPA's jurisdictional argument and agreed with Gulf Restoration that the EPA must always make a necessity determination when petitioned to do so. ROA.19552–19559. On September 20, 2013, the court entered judgment and ordered the EPA to make a necessity determination within one hundred eighty days (*i.e.*, by March 19, 2014) for every water quality standard requested in Gulf Restoration's petition.[2] ROA.19563. The EPA filed a timely notice of appeal on November 18, 2013. ROA.19564; Fed. R. App. P. 4(a)(1)(B).

Although the district court remanded Gulf Restoration's petition to the EPA for further proceedings, this Court has jurisdiction to entertain the United States' appeal now under 28 U.S.C. § 1291. The district court conclusively held, over the EPA's objection, that the agency must make a necessity determination in response to any petitioner's request. ROA.19558–19559. Because the district court ordered the EPA to make a necessity determination for every water quality standard sought by Gulf Restoration, this appeal represents the only opportunity for the agency to obtain appellate review of this important legal issue. *See Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990); *Gold v. Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973); *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds* sub nom. *Richardson v. Perales*, 402 U.S. 389 (1971).

[2] As of this writing, the district court is still considering the United States' motion for a stay of the judgment pending appeal. *See* Fed. R. App. P. 8(a)(1)(A).

STATEMENT OF ISSUES

1. Whether the EPA's choice not to make a necessity determination under Section 1313(c)(4)(B) is committed to agency discretion by law and therefore unreviewable by a court.

2. Whether the EPA has discretion not to make a necessity determination in response to a petition asking the agency to promulgate a water quality standard.

3. Whether Gulf Restoration alleged an Article III injury-in-fact sufficient to justify an order requiring the EPA to determine, for navigable waters throughout the country, whether new or revised water quality standards are necessary to meet the requirements of the Clean Water Act.

STATEMENT OF THE CASE

A. Legal background

1. The Clean Water Act

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

The EPA generally administers the Clean Water Act, *see* 33 U.S.C. § 1251(d), but the States are principally responsible for implementing much of the statute. *Id.* § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution."). Section 1313 instructs States to establish water quality standards for their intrastate and interstate waters. *Id.* § 1313(a). Water quality standards consist of designated uses (*e.g.*, fishable or swimmable) for a particular water body or category of water bodies; numeric and/or narrative water quality criteria sufficient to protect those uses; and provisions to prevent degradation of water quality. *Id.* § 1313(c)(2)(A); 40 C.F.R. § 131.6. Different types of water bodies in a State typically have different designated uses. *E.g.*, La. Admin. Code tit. 33, § 1123 (2013) (listing eight uses for Louisiana's waters). That means that States often establish several water quality standards for a single pollutant, with each standard applying to different water bodies. *E.g., id.* § 1123 tbl. 3 (listing twenty-eight distinct numeric water quality criteria for sulfates).

Section 1313 also directs States to review their water quality standards triennially and adopt or revise standards as necessary to ensure compliance with the Clean Water Act. 33 U.S.C. § 1313(c)(1). A State must submit any new or

revised standard to the EPA for review. *Id.* § 1313(c)(2)(A). If the EPA finds that the proposed standard is not consistent with the Act's requirements, the agency directs the State to modify the standard accordingly. *Id.* § 1313(c)(3). If the State does not adopt a modified standard within ninety days, the EPA must propose and promulgate an appropriate water quality standard itself. *Id.* § 1313(c)(3) and (4).

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

Water quality standards are implemented principally through permits issued to individual dischargers of pollutants. All permits must contain technology-based effluent limitations that reflect the pollution reductions achievable through particular equipment or process changes, as well as any other effluent limitations

necessary to meet applicable water quality standards in the waters receiving the pollutants. 33 U.S.C. § 1311(b)(1)(A) and (C). Even those effluent limitations, however, may not ensure that certain receiving waters achieve water quality standards. In that case, the State identifies the water body as "impaired" and establishes a total maximum daily load ("TMDL") for the relevant pollutants. *Id.* § 1313(d)(1)(A) and (C). Thereafter, permits authorizing discharges into those water bodies must include water quality-based effluent limitations consistent with the assumptions and requirements of the TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B). Just as with water quality standards, States submit their proposed TMDLs to the EPA for review, and if the agency disapproves a State's TMDL, the EPA must issue a modified TMDL itself. 33 U.S.C. § 1313(d)(2).

2. The APA's petition provisions

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

B. Gulf Restoration's petition

In July 2008, Gulf Restoration filed a petition with the EPA under 5 U.S.C. § 553(e). The petition asked the agency to promulgate new numeric water quality standards for four "nutrient" categories—chlorophyll *a*, nitrogen, phosphorus, and turbidity—for every navigable water in the country.[3] ROA.1454. Gulf Restoration's request covered waters in all fifty States, as well as any waters subject to the EPA's Clean Water Act authority but outside of any State's jurisdiction.[4] *Ibid.*

Given the EPA's limited authority under Section 1313, *see supra* at 6–7, the agency could not have granted Gulf Restoration's petition without first making positive necessity determinations for all of the requested water quality standards. At the time of the petition, many States had not adopted numeric water quality standards for any of the four nutrient criteria in any of the water bodies covered by Gulf Restoration's request. ROA.4346–4350. No State had established all of the water quality standards sought by the petition. *Ibid.* Thus, in effect, the petition

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[3] At one point, Gulf Restoration appeared to narrow its petition to cover only certain types of water bodies, *i.e.*, lakes, reservoirs, rivers, and streams. ROA.1454. Elsewhere, however, the petition expressly sought water quality standards for all types of water bodies, ROA.1387, and that is how the EPA interpreted Gulf Restoration's request. ROA.1377 (letter denying petition).

[4] Gulf Restoration later suggested that if the EPA decided against establishing new water quality standards in every State, the agency should at least promulgate standards for chlorophyll-*a*, nitrogen, phosphorus, and turbidity in the thirty-one States spanning the Mississippi River drainage basin, or at a minimum in the main stem of the Mississippi River, and the Gulf of Mexico. ROA.1455–1456.

asked the EPA to make positive necessity determinations for multiple water quality standards for thousands of different water bodies of various types covering every State in the country; "promptly" propose those standards; and then finalize them within ninety days of proposal. 33 U.S.C. § 1313(c)(4).

Gulf Restoration further asked the EPA to establish federal TMDLs for nitrogen and phosphorus in the Mississippi River, its tributaries, and part of the Gulf of Mexico. ROA.1456. The petition's request for TMDLs was derivative of its request for numeric water quality standards. ROA.1388 (requesting TMDLs for water bodies "that fail[ ] to meet the numeric standards [that the EPA was asked to] set for nitrogen and phosphorus").

Gulf Restoration's petition was premised on the view that "it is unreasonable to expect states to develop numeric nitrogen and phosphorus standards to protect their own waters." ROA.1385; *see* ROA.1435 ("EPA is the only actor able to make the real changes needed to solve the serious problems in the Mississippi River and the Gulf of Mexico."). The petition endorsed a federally-driven approach for all fifty States and the Gulf of Mexico; in the alternative, for the thirty-one States in the Mississippi River basin and the Gulf of Mexico; or at a minimum, for the main stem of the Mississippi River and the Gulf of Mexico. ROA.1455 ("[T]his is a case in which water quality standards should be established by EPA on a national basis."); ROA.1394 ("[A] basin-wide approach to reducing nitrogen and

phosphorus pollution is necessary.… The duty to coordinate and implement such a basin-wide approach should be assumed by EPA.").

C. The EPA's petition denial

The EPA denied Gulf Restoration's petition in July 2011. In a six-page letter explaining the denial, the agency acknowledged that nutrient pollution "presents a significant water quality problem facing our nation." ROA.1377. But the EPA also explained that it was working closely with the States "to achieve near-term reduction in nutrient loadings" in waters throughout the country. ROA.1378. Citing an agency memorandum issued a few months earlier, the EPA described how it was helping individual States to address nutrient pollution and develop their own numeric water quality standards, just as the Clean Water Act envisions. ROA.1378–1379; *see* 33 U.S.C. § 1251(b).

The EPA denied Gulf Restoration's petition because "the most effective and sustainable way to address widespread and pervasive nutrient pollution … is to build on these [State-driven] efforts and work cooperatively with states and tribes to strengthen nutrient management programs." ROA.1380. In the agency's judgment, that approach was "preferable to undertaking an unprecedented and complex set of rulemakings to promulgate federal [water quality standards] for a large region (or even the entire country)." *Ibid.* The EPA reiterated its "long-standing policy, consistent with the [Clean Water Act], … that states should

develop and adopt standards in the first instance, with the EPA using its own rulemaking authority only in cases where it disapproves a new or revised standard, or affirmatively determines that new or revised standards are needed to meet [the Act's] requirements." ROA.1381. And with respect to coastal waters, including the Gulf of Mexico, the EPA explained that it "lacks clear legal authority" under Section 1313 to establish water quality standards for those waters. ROA.1382 n.16.

The EPA also denied Gulf Restoration's request for federal TMDLs for the Mississippi River drainage basin and the Gulf of Mexico. ROA.1381. The agency explained that, "[a]s is the case with water quality standards, the EPA has broad discretion regarding coordination and oversight of state development of … TMDLs." *Ibid.* And just as with water quality standards, "the EPA believes that collaborative national technical and policy support …, along with targeted state and regional efforts, is a more sustainable and likely successful approach in achieving nutrient reductions in the near and longer term than the EPA unilaterally developing … TMDLs for multiple states at one time." *Ibid.*

In denying Gulf Restoration's petition, the EPA "exercis[ed] its discretion to allocate its resources in a manner that supports targeted regional and state activities to accomplish our mutual goals of reducing [nutrient] pollution and accelerating the development and adoption of state approaches to controlling [nutrients]." ROA.1382. But the agency stressed that, in denying the petition, it was not making

a negative necessity determination for any of the water quality standards requested by the petitioners. *Ibid.*

D. District court proceedings

Gulf Restoration filed suit in district court, claiming that the EPA had violated the APA by declining to make any necessity determinations in response to the petition. ROA.267–268. Thirteen States, the National Association of Clean Water Agencies, and several private parties intervened as defendants to support the agency's decision. The EPA moved to dismiss the suit for lack of subject matter jurisdiction, and the parties cross-moved for summary judgment.

The district court partially granted Gulf Restoration's motion for summary judgment and remanded the petition to the EPA for further consideration. ROA.19547–19562. The court first addressed whether the EPA's decision not to make a necessity determination is committed to agency discretion by law and therefore not subject to judicial review. In holding that it had jurisdiction to review the EPA's petition denial, the court reasoned 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 then held that the EPA "could not simply decline to make a necessity determination in response to [Gulf Restoration's] petition." ROA.19558.

While acknowledging that the Clean Water Act "does not expressly limit EPA's discretion to pretermit the 'necessity' question," ROA.19555, the district court nevertheless discerned an "implicit conclusion" in the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), "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 district court remanded Gulf Restoration's petition to the EPA and ordered the agency to make a necessity determination for each of the requested water quality standards within one hundred eighty days (*i.e.*, by March 19, 2014). ROA.19561. Gulf Restoration had also argued that the EPA could only consider scientific or technical factors in making a necessity determination, but the court identified no such restriction in the statute and refused to impose that limitation on the agency. ROA.19559–19561.

STANDARD OF REVIEW

This Court reviews de novo a district court's legal conclusions regarding jurisdiction. *Filer v. Donley*, 690 F.3d 643, 646 (5th Cir. 2012). This Court also reviews a district court's grant of summary judgment de novo. *Bell v. Thornburg*, 738 F.3d 696, 698–699 (5th Cir. 2013).

SUMMARY OF ARGUMENT

The district court lacked jurisdiction to review the EPA's decision not to make a Section 1313(c)(4)(B) necessity determination. The United States and its agencies are immune to suits that challenge actions committed to agency discretion by law. The text and structure of the Clean Water Act reveal that the EPA's choice not to make a necessity determination parallels, in every relevant respect, a decision not to investigate an alleged violation of existing law. Such enforcement decisions are presumptively committed to agency discretion by law, and this Court has previously held the EPA's actions unreviewable in circumstances strikingly similar to those here. The disruptive practical consequences of judicial review also weigh against jurisdiction in this case.

Even if the district court had jurisdiction to review the EPA's decision not to make a necessity determination, it erred in holding that Gulf Restoration's petition transformed that discretionary decision into a mandatory duty. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court recognized that the EPA can deny a petition for rulemaking by refusing to make a threshold statutory determination that could trigger a rulemaking obligation. The district court incorrectly relied on *Massachusetts* for the exact opposite conclusion.

That legal error has substantial implications for the EPA in the instant case, for the balance between State and federal authority under the Clean Water Act, and

for administrative agencies generally. Congress typically authorizes agencies to investigate and respond to violations of their governing statutes, but agencies ordinarily have broad discretion to choose if, when, and how to undertake those investigations. If private parties could use the APA's petition provisions to force agencies to make otherwise discretionary decisions, the enforcement policies and priorities of the Executive Branch could be held hostage by a cadre of active petitioners. This Court should reverse the district court's judgment and hold that the EPA always has discretion to decline to make a Section 1313(c)(4)(B) necessity determination, even in response to a petition. On remand, the district court (assuming that it has jurisdiction) should consider in the first instance the EPA's reasons for denying Gulf Restoration's petition.

Finally, if this Court agrees with the district court that the EPA must make a necessity determination when petitioned, the Court should still direct the district court to narrow the scope of its remand order. The EPA should not be forced to make necessity determinations for waters with respect to which Gulf Restoration has not even attempted to establish an Article III injury.

ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION TO REVIEW THE EPA'S DECISION NOT TO MAKE A SECTION 1313(c)(4)(B) NECESSITY DETERMINATION.

The United States and its agencies are immune from suit, save to the extent that Congress waives that immunity. The terms of a statute's sovereign immunity waiver define a court's jurisdiction to entertain a suit, and the APA's sovereign immunity waiver does not extend to claims challenging agency action committed to agency discretion by law. The Clean Water Act's text and structure, as well as binding precedent, indicate that the EPA's choice not to make a Section 1313(c)(4)(B) necessity determination is committed to agency discretion by law. Therefore, the district court should have dismissed this case for lack of subject matter jurisdiction.

A. The APA's sovereign immunity waiver does not extend to claims challenging agency action committed to agency discretion by law.

The federal government cannot be sued absent the "unequivocally expressed" consent of Congress. *Koehler v. United States*, 153 F.3d 263, 265 (5th Cir. 1998). Absent a sovereign immunity waiver, courts lack subject matter jurisdiction over claims against the United States and federal agencies. *Danos v. Jones*, 652 F.3d 577, 581 (5th Cir. 2011).

Gulf Restoration's suit depends on the Administrative Procedure Act not only for a cause of action, *see* 5 U.S.C. § 704, but also for a waiver of sovereign

immunity, *see id.* § 702. The APA does not apply, however, "to the extent that … agency action is committed to agency discretion by law." *Id.* § 701(a)(2). When agency action is committed to agency discretion by law, federal sovereign immunity has not been waived, and courts lack jurisdiction to hear claims contesting that agency action. *See Webster v. Doe*, 486 U.S. 592, 597 (1988) ("[J]udicial review under § 702 … is predicated on satisfying the requirements of § 701."); *see also Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002).

B. The EPA's decision not to make a necessity determination is committed to agency discretion by law.

"[A]n agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed." *Bullard v. Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980) (citation omitted). The Clean Water Act's text and structure commit the decision not to make a Section 1313(c)(4)(B) necessity determination to the EPA's unreviewable discretion.[5] The disruptive practical consequences of judicial review also weigh against jurisdiction.

[5] This case "does not implicate the question of whether the necessity determination itself is guided by sufficient law to render it subject to judicial review." ROA.19554 (district court opinion). We do not contend in this appeal that a positive or negative necessity determination made by the EPA would be unreviewable, and this Court need not address that issue here.

1. The decision not to investigate a regulated party's compliance with existing law is presumptively committed to agency discretion.

The Supreme Court's first sustained examination of the APA's "committed to agency discretion by law" exception occurred in *Heckler v. Chaney*, 470 U.S. 821 (1985). Inmates petitioned the Food and Drug Administration to take action against certain drug manufacturers in response to alleged violations of federal law. 470 U.S. at 823. The agency refused, citing its "inherent discretion to decline to pursue certain enforcement matters." *Id.* at 824 (quoting petition denial letter).

The Supreme Court held the agency's decision unreviewable because "refusals to institute investigative or enforcement proceedings" are presumptively committed to agency discretion by law. *Heckler*, 470 U.S. at 838. The Court explained that decisions to investigate or enforce "often involve[ ] a complicated balancing of a number of factors which are particularly within [the agency's] expertise," including "not only … whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831; *see also id.* at 831–832 ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."). "Review of agency nonenforcement decisions is permissible only where statutory language sets

constraints on the agency's discretion." *Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990).

Three years after *Heckler*, the Supreme Court held in *Webster v. Doe*, 486 U.S. 592 (1988), that the dismissal of an employee by the Director of Central Intelligence was committed to agency discretion by law. The relevant statute allowed the Director to terminate an employee "whenever he shall deem such termination necessary or advisable in the interest of the United States." 50 U.S.C. § 403(c) (1988). The Court held that the statute—which authorized action "whenever the Director 'shall *deem* such termination necessary or advisable …,' not simply when the dismissal *is* necessary or advisable"—"fairly exudes deference to the Director, and … foreclose[s] the application of any meaningful judicial standard of review." *Webster*, 486 U.S. at 600 (citation omitted).

Heckler and *Webster* set the stage for this Court's decision in *Public Citizen, Inc. v. EPA*, 343 F.3d 449 (5th Cir. 2003). That case concerned the EPA's decision not to send the State of Texas a notice of deficiency ("NOD") regarding certain aspects of the State's Clean Air Act Title V permitting program. Like the water quality standards program under the Clean Water Act, the Title V program is administered by the States, with the EPA ensuring that every State establishes a program. 42 U.S.C. § 7661a(d). And similar to Section 1313(c)(4)(B) here, the Clean Air Act also grants the EPA authority to step in and enforce Title V's

requirements "[w]henever the Administrator makes a determination that a [State] permitting authority is not adequately administering and enforcing a program." *Id.* § 7661a(i)(1). The EPA's discretionary determination triggers an obligation to issue an NOD to the relevant State. *Ibid.* If the State fails to remedy the identified deficiencies in a timely fashion, the EPA must sanction the State, *id.* § 7661a(i)(2), and ultimately "promulgate, administer, and enforce a [Title V] program … for that State." *Id.* § 7661a(i)(4).

In *Public Citizen*, the petitioners urged the EPA to issue NODs to Texas for alleged program deficiencies—NODs that could trigger further statutory duties for EPA, including a duty to promulgate a new Title V program for the State. 343 F.3d at 454. The EPA agreed with the petitioners about some of the program's deficiencies, but the agency explained that it "was working with Texas to ensure its program was being implemented consistent with Title V." *Id.* at 455. The EPA therefore exercised its discretion not to issue Texas an NOD. *Ibid.*

This Court held that the EPA's decision not to issue an NOD was committed agency discretion by law and therefore unreviewable. The Court explained that Title V of the Clean Air Act "clearly grants [investigative] discretion" to the EPA by authorizing issuance of an NOD only "*whenever the Administrator makes a determination* that a program is not being adequately administered." *Public Citizen*, 343 F.3d at 464 (emphasis added) (internal quotation marks, brackets, and

citation omitted); *see Webster*, 486 U.S. at 600. In light of the respective statutory roles that Congress assigned to the States and the EPA, the Court characterized the EPA's choice not to issue an NOD as the "agency's decision not to invoke an enforcement mechanism" against the State of Texas. *Public Citizen*, 343 F.3d at 464. Relying on *Heckler*, this Court reasoned that the Clean Air Act imposed no meaningful standard on the EPA's discretionary authority to investigate and remedy deficiencies in a State's Title V program. *Ibid.*

In short, *Public Citizen* held that "Congress left the decision whether, and when, to issue an NOD to the institutional actor best equipped to make it," and "the EPA's decision not to issue an NOD … is not subject to [judicial] review." 343 F.3d at 465 (internal quotation marks and citation omitted).

2. The Clean Water Act's text and structure commit the decision not to make a necessity determination to the EPA's unreviewable discretion.

Like the statute in *Public Citizen*, Section 1313(c)(4)(B) gives the EPA open-ended discretion to decide if and when to investigate whether a State program requires revisions to bring it into compliance with federal law. The Clean Water Act provides no "meaningful standards for defining the limits of [the EPA's] discretion" not to make a necessity determination as to any particular water quality standard. *Heckler*, 470 U.S. at 834 (internal quotation marks omitted). Here, just as in *Public Citizen*, the "agency's decision not to invoke an enforcement mechanism

provided by statute" is committed to agency discretion by law and consequently not subject to judicial review. *Public Citizen*, 343 F.3d at 464.

The Clean Water Act assigns the States the principal task of developing and updating water quality standards. 33 U.S.C. § 1313(a) and (c). By contrast, the EPA plays an oversight and enforcement role that diminishes over time. When Section 1313 was enacted in 1972, some States had not yet established standards for water quality within their borders. *See* 33 U.S.C. § 1160(c)(1) and (2) (1970) (earlier statute making water quality standards optional). Because Congress wanted to ensure that every State had water quality standards in place, it required any State that had not yet submitted standards for the EPA's review to do so promptly. 33 U.S.C. § 1313(a)(2) and (3). The EPA was then charged with evaluating the States' submissions based on preexisting law and promulgating adequate water quality standards if a State refused to do so. *Id.* § 1313(a) and (b).

Once baseline water quality standards were in place, Congress directed the States (and the States alone) to periodically hold hearings "for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." 33 U.S.C. § 1313(c)(1). Any newly adopted or modified standards are subject to additional requirements and must be reviewed by the EPA. *Id.* § 1313(c)(2). When a State submits a new standard, the EPA can either approve it or notify the State of any changes needed to meet the requirements of the Clean

Water Act. *Id.* § 1313(c)(3). If the State fails to modify its proposed standard in response to the EPA's comments, the EPA must promulgate the standard itself on behalf of the State. *Ibid.*

Absent a State's submission of a new or modified water quality standard, however, Section 1313 imposes no continuing obligation on the EPA to police State standards. The EPA does have backstop authority to promulgate a water quality standard for a State "in any case where the Administrator determines that a revised or new standard is necessary." 33 U.S.C. § 1313(c)(4)(B). But the Clean Water Act is silent as to whether, and when, the EPA Administrator should embark on making a necessity determination for a particular water quality standard. Section 1313(c)(4)(B)'s sparse legislative history suggests only that Congress intended the provision to be used sparingly. H.R. Rep. No. 92-911, at 105 (1972) ("The [House] Committee [on Public Works, which reported the provision that was ultimately enacted,] expects the Administrator to work closely with the State to obtain approved standards before he promulgates standards for any waters.").[6]

[6] Consistent with Congressional intent, the EPA has historically been reticent to use its Section 1313(c)(4)(B) authority to impose new water quality standards on States. *See* U.S. Envtl. Prot. Agency, "Federal Clean Water Act Determinations that New or Revised Standards are Necessary," *available at* http://water.epa.gov/scitech/swguidance/standards/wqsregs.cfm#standards2 (last visited February 27, 2014) (listing all positive necessity determinations made by the EPA since 1972).

The absence of any statutory standard for assessing the EPA's decision whether to make a necessity determination, coupled with Section 1313(c)(4)(B)'s express lodging of discretion with the agency, means that the EPA's choice not to make such a determination is committed to agency discretion by law. This Court's precedent therefore mandates that this case be dismissed for lack of jurisdiction. *See Public Citizen*, 343 F.3d at 463–465; *see also Texas v. United States*, 951 F.2d 645, 648–649 (5th Cir. 1992), *rev'd on other grounds*, 507 U.S. 529 (1993) (holding a decision not to waive a claim unreviewable where the statute authorized waiver "if the Secretary determines that to do so would serve the purposes of this chapter," 7 U.S.C. § 2022(a)(1) (1988)); *Fed. Deposit Ins. Co. v. Bank of Coushatta*, 930 F.2d 1122, 1129 (5th Cir. 1991) (holding a decision to issue a bank directive unreviewable where the statute, 12 U.S.C. § 3907 (1988), gave the agency express discretion to issue such directives); *Suntex Dairy v. Block*, 666 F.2d 158, 164–165 (5th Cir. 1982) (holding unreviewable a decision to effectuate an order where the statute provided that "[a]ny order … shall become effective in the event that … the Secretary of Agriculture determines … [t]hat the issuance of such order is the only practical means of advancing the interests of the producers of such commodity," 7 U.S.C. § 608c(9) (1982)).

Massachusetts v. EPA, 549 U.S. 497 (2007), did not abrogate that precedent. There, the Supreme Court reviewed the EPA's denial of a petition for rulemaking

under 42 U.S.C. § 7521(a)(1), a Clean Air Act provision requiring the agency to regulate emissions of certain air pollutants from motor vehicles. 549 U.S. at 527–528. The EPA considered more than 50,000 public comments before denying the petition in a twelve-page Federal Register notice. 68 Fed. Reg. 52,922 (Sept. 8, 2003). The petitioners challenged the agency's decision under a statute authorizing judicial review of any "final action taken[ ] by the Administrator" under the Clean Air Act. 42 U.S.C. § 7607(b)(1); *see also Massachusetts*, 549 U.S. at 520 (citing that statute as evidence of a petitioner's "procedural right to challenge the rejection of its rulemaking petition"). In holding that it could review the EPA's decision, the Supreme Court generally distinguished between a "decision not to initiate an enforcement action" and "a denial of a petition for rulemaking" because the latter tends to be "less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." 549 U.S. at 527 (internal quotation marks and citation omitted).

Massachusetts did not categorically hold, however, that the denial of *any* petition styled as a request for rulemaking is automatically subject to judicial review. Such a *per se* rule would conflict with the Court's repeated admonition that application of "§ 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based." *Webster*, 486 U.S. at 600; *see also Morris v. Gressette*, 432 U.S. 491, 505 n.20 (1977) ("[E]very judicial holding with respect to

implied preclusion of judicial review is unique; 'the context of the entire legislative scheme' differs from statute to statute.") (citation omitted). The abbreviated reviewability discussion in *Massachusetts* did not impliedly discard the Court's longstanding, statute-by-statute approach to 5 U.S.C. § 701(a). *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (warning lower courts not to "conclude our more recent cases have, by implication, overruled an earlier precedent").

Heckler, *Webster*, and *Public Citizen* remain good law in the wake of *Massachusetts* and dictate that this case be dismissed for lack of jurisdiction, notwithstanding the fact that Gulf Restoration's petition, if granted, could have prompted a series of EPA rulemakings.[7] The Clean Water Act charges the States with developing water quality standards and assigns the EPA an oversight and enforcement role. *Cf. Massachusetts*, 549 U.S. at 506 (addressing a statute that vests the EPA with sole regulatory responsibility). Here, as in *Heckler* and *Public Citizen* (but not *Massachusetts*), the petitioners asked the agency to exercise its discretion to investigate whether a particular actor was complying with existing law. In assessing whether the agency's decision not to investigate is judicially reviewable, any formal distinction between "enforcement" and "rulemaking" takes

[7] *See Texas Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. App'x 406, 2010 U.S. App. LEXIS 9401 (5th Cir. May 7, 2010) (unpublished) (post-*Massachusetts* decision relying on *Heckler* and *Public Citizen* to hold unreviewable the EPA's refusal to withdraw authorization of a State program under 42 U.S.C. § 6926(e), an action that could have required the EPA to later promulgate a program for the State).

a backseat to the fundamental question whether "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. The Clean Water Act offers no such standard: Section 1313 provides no condition precedent for making a necessity determination, it sets no regular timeline on which the EPA (as opposed to the States) must revisit water quality standards, and it offers no principle on which the EPA should prioritize investigating certain water quality standards as opposed to others.

3. Practical considerations weigh against reviewability.

The practical implications of judicial review also disfavor the exercise of jurisdiction. Under Section 1313(c)(4)(B), the EPA has authority 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. But such investigations burden limited agency resources, to say nothing of the potential burden of promulgating water quality standards for States. *See Southern Ry. Co. v. Seaboard Allied Mining Corp.*, 442 U.S. 444, 457 (1979) (describing how "[t]he disruptive practical consequences" of forcing an agency to investigate one of thousands of possible statutory violations weighed against reviewability).

Furthermore, "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government," *Arkansas v. Oklahoma*, 503 U.S. 91, 101

(1992), and any federal efforts to establish water quality standards for a State *sua sponte* are likely to "add acrimony" to that partnership, thereby threatening the larger goals of the statute. *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1390 (5th Cir. 1979) (quoting *Morris*, 432 U.S. at 504 n.19); *cf. Massachusetts*, 549 U.S. at 519 (stressing that, under Title II of the Clean Air Act, "Congress has ordered EPA to *protect* Massachusetts … by prescribing [federal] standards" for motor vehicle emissions) (emphasis added). Were the courts to second-guess every EPA decision not to interfere with duly promulgated State water quality standards, Congress's carefully crafted scheme of cooperative federalism would be placed at risk.

Petitions like Gulf Restoration's serve an important function: they bring specific issues to the EPA's attention and may prompt the agency to investigate and compile sufficient information to make one or more necessity determinations. As with any enforcement decision, however, the EPA must weigh "not only … whether a violation has occurred, but whether agency resources are best spent on this violation or another, … whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831. Moreover, the EPA may be faced with numerous petitions to investigate different water quality problems across the country, and the Clean Water Act does not instruct the agency on how to prioritize among various alleged statutory violations. In the absence of

Congressional direction, the EPA (rather than a court) is "the institutional actor best equipped" to determine whether and when to make a necessity determination under Section 1313(c)(4)(B). *Public Citizen*, 343 F.3d at 465 (quoting *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 332 (2d Cir. 2003)).

Before turning to the merits, we briefly address an issue left open by the district court: whether the EPA's reliance on "non-statutory factors" in declining to make a necessity determination would render that decision judicially reviewable. ROA.19555. It is sufficient to state, in this regard, that the Supreme Court has squarely rejected the suggestion "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987); *contra Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1295–1296 (5th Cir. 1977). The EPA's reasons for denying Gulf Restoration's petition were rational and grounded in the statute, but even if not, the district court lacked jurisdiction to consider them.

II. THE EPA HAS DISCRETION NOT TO MAKE A NECESSITY DETERMINATION IN RESPONSE TO A PETITION.

Even if the district court had jurisdiction to review the EPA's decision not to make a necessity determination in response to Gulf Restoration's petition, the court still erred by holding that the petition *compelled* the agency to make necessity determinations. The court based that holding entirely on an erroneous reading of

Massachusetts v. EPA. In fact, *Massachusetts* expressly recognized that an agency may decline to make a threshold statutory determination in response to a petition. Thus, in the event that this Court holds that the district court had jurisdiction over this matter, it should reverse and remand for the district court to review the EPA's denial of Gulf Restoration's petition under the extraordinarily deferential standard of review prescribed by *Massachusetts*.

A. *Massachusetts v. EPA* recognizes that an agency may decline to make a threshold statutory determination in response to a petition.

Nothing in the Clean Water Act requires the EPA to make a necessity determination with respect to any particular water quality standard. The district court recognized as much, ROA.19555, but it still held that the EPA must make a necessity determination in response to a citizen's petition. ROA.19558–19559. That holding cannot be reconciled with *Massachusetts v. EPA*.

In *Massachusetts*, the Supreme Court addressed whether the EPA improperly denied a petition asking the agency to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. The relevant statute requires the EPA to establish "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the agency's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

The EPA denied the petition on two grounds. The agency first concluded that it had no authority to institute the requested standards because greenhouse gases were not "air pollutants." *Massachusetts*, 549 U.S. at 528. In the alternative, the EPA concluded that regulating greenhouse gas emissions under the Clean Air Act "would be unwise" and "would conflict with the President's 'comprehensive approach' to the problem" of global warming. *Id.* at 513. For those reasons, the EPA declined to make a judgment as to whether vehicular emissions of greenhouse gases caused or contributed to air pollution that could reasonably be anticipated to endanger public health or welfare.

The Supreme Court rejected both of the EPA's rationales for denying the petition. In Part VI of its opinion, the Court held that greenhouse gases are air pollutants that the agency may regulate under the Clean Air Act. *Massachusetts*, 549 U.S. at 528–532. And in Part VII of its opinion, the Court held that the EPA's rationale for not regulating greenhouse gases did not constitute "a reasoned justification for declining to form a scientific judgment" as to whether vehicular emissions of those pollutants caused or contributed to air pollution that could reasonably be anticipated to endanger public health or welfare. *Id.* at 533–534.

The pertinent lesson of *Massachusetts* for this Clean Water Act case is not the Supreme Court's rejection of the EPA's particular rationale for declining to make a scientific judgment under 42 U.S.C. § 7521(a)(1). ROA.19559 (district court

opinion) ("*Massachusetts v. EPA* does not stand for the broad proposition that every discretionary EPA determination that serves as a restraint or hurdle to federal action must be based on scientific data as opposed to policy judgments, and it does not stand for the proposition that EPA is precluded from relying on factors not expressly mentioned in the authorizing statute."). The salient point here is the Court's acknowledgment that the agency *had the option* to explain "why it cannot or will not exercise its discretion" to make the judgment set forth in the statute. *Massachusetts*, 549 U.S. at 533; *accord Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2533 (2011) ("Because EPA had authority to set greenhouse gas emission standards *and had offered no reasoned explanation for failing to do so*, [*Massachusetts*] concluded that the agency had not acted in accordance with law when it denied the requested rulemaking.") (emphasis added) (internal quotation marks and citation omitted).

The district court thus erred by failing to recognize that an agency may have legitimate reasons for refusing to make a discretionary statutory determination in response to a petition. *Compare Massachusetts*, 549 U.S. at 534 ("EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change."), *with* ROA.19558 (district court opinion) ("EPA lacks the discretion to simply decline to make the threshold determination"). If the EPA lacked discretion to decline to make the threshold statutory determination, the

discussion in Part VII of *Massachusetts* would be superfluous. A careful reading of *Massachusetts* therefore dictates reversal in this case.

B. The district court's error significantly harms the EPA.

The district court's misreading of *Massachusetts* has immediate and substantial consequences for the EPA. The court gave the agency six months to determine whether four distinct categories of water quality standards are necessary to meet the requirements of the Clean Water Act in navigable water bodies throughout the United States. ROA.19561. Moreover, if this Court were to affirm the district court's ruling, many other parties would undoubtedly begin petitioning the EPA to make necessity determinations regarding site-specific water quality standards throughout the country. Even if most of those petitions ultimately resulted in negative necessity determinations, the resource drain on the EPA from simply undertaking all of those investigations would be substantial.[8]

[8] Section 1313(c)(4)(B) does not preclude the EPA from considering a broad range of factors when determining whether a new or revised water quality standard is necessary to meet the requirements of the Clean Water Act. Plainly, though, the range of permissible grounds for a negative necessity determination is distinct from (and narrower than) the range of factors that come into play when the EPA decides not to make a necessity determination in the first instance. *Cf. Heckler*, 470 U.S. at 831 (explaining that, when making an enforcement decision, "the agency must not only assess whether a violation has occurred" but also other factors like "whether the agency has enough resources to undertake the action at all"). If the EPA could only decline to make a necessity determination for reasons that would also justify a negative necessity determination, the agency's option to pretermit the necessity inquiry would be meaningless in practice.

To be sure, any petition requires some response by an agency: either a grant of the petition or a "[p]rompt notice … accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e). But preparing a "simple" statement that explains "the general basis for den[ying]" a rulemaking petition is quite different from making a formal judgment as to whether a particular water quality standard is necessary to meet the requirements of a complex federal statute. U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act, at 70 (1947) (explaining what is meant by "a brief statement of the grounds for denial"); *see Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978) (deferring to the Attorney General's Manual "because of the role played by the Department of Justice in drafting the [APA]").

The district court's ruling is certainly not what Congress envisioned when it recognized the right of citizens to petition federal agencies to promulgate rules. *See* 5 U.S.C. § 553(e); S. Rep. No. 79-952, at 15 (1945) ("[T]he mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings."). Discretionary findings and rulemakings remain discretionary even after a petition is filed, and agencies retain broad latitude "to choose how best to marshal [their] limited resources and personnel to carry out [their] delegated responsibilities." *Massachusetts*, 549 U.S. at 527. This Court should therefore reverse and hold that a private party cannot use

an APA petition to transform an expressly discretionary function—a Section 1313(c)(4)(B) necessity determination—into a mandatory statutory duty.

If the EPA's denial of Gulf Restoration's petition is judicially reviewable at all, this Court should remand for the district court to conduct that "extremely limited and highly deferential" review in the first instance. *Massachusetts*, 549 U.S. at 527–528 (internal quotation marks and citation omitted). The administrative record supporting the EPA's decision exceeds 17,000 pages. ROA.1362–1376 (index to record). Even if this Court is ultimately asked to review the merits of the agency's petition denial, the district court's review of that record would "shape[ ] and sharpen[ ] the issues" in any subsequent appeal. *Jot-Em-Down Store Inc. v. Cotter & Co.*, 651 F.2d 245, 247 (5th Cir. Unit A 1981); *see also Boire v. Miami Herald Publ'g Co.*, 343 F.2d 17, 25 (5th Cir. 1965) (recognizing "the general principle that a reviewing court should remand a case to the district court for consideration of a question not previously considered there").

III. THE EPA SHOULD NOT BE FORCED TO MAKE NECESSITY DETERMINATIONS FOR WATERS WITH RESPECT TO WHICH GULF RESTORATION HAS NOT DEMONSTRATED AN INJURY.

If this Court disagrees with both our jurisdictional and merits arguments and upholds the district court's ruling that the EPA must make necessity determinations in response to Gulf Restoration's petition, it should still direct the district court to

narrow its remand order to cover only those water bodies in which Gulf Restoration has established an injury-in-fact sufficient to confer Article III standing.

A party invoking federal jurisdiction bears the burden of establishing the three elements of constitutional standing: (1) "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent"; (2) "a causal connection between the injury and the conduct complained of"; and (3) "that the injury will [likely] be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (internal quotation marks and citations omitted). The first element—injury-in-fact—"is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). In order to claim injury from environmental damage, a plaintiff must demonstrate a specific interest in the area affected by the challenged activity. *Lujan*, 504 U.S. at 566.

Gulf Restoration submitted declarations from fifteen individuals along with its summary judgment motion. ROA.18655–18730. Collectively, those individuals averred that they lived near, worked on, or visited water bodies affected by nutrient pollution in a total of seven states: Illinois, Iowa, Kentucky, Louisiana, Minnesota, Missouri, and Ohio.[9] While some declarants did not clarify precisely which water

[9] Two declarants briefly mentioned waters in Tennessee, West Virginia, and Wisconsin, but those individuals did not address any effect of nutrient (*cont'd*)

bodies they were discussing, all of those water bodies appear to lie within the Mississippi River drainage basin. ROA.18128 (map of basin).

Gulf Restoration made no effort to establish any interest in any waters in any of the nineteen States that lie outside the Mississippi River drainage basin. Nor did its declarants demonstrate a concrete or particularized injury from harm to waters in twenty-four of the thirty-one States spanning that basin. *Cf. Lujan*, 504 U.S. at 565 (rejecting the "ecosystem nexus" theory of standing, whereby "any person who uses any part of a contiguous ecosystem adversely affected by [the challenged agency action] has standing even if the activity is located a great distance away"). Thus, Gulf Restoration has not alleged any Article III injury caused by the EPA's failure to impose new water quality standards in at least forty-three of the fifty States that were the subject of the petition here.

Based on its misreading of *Massachusetts*, the district court remanded for the EPA to make a necessity determination for every water quality standard sought by the petitioners. ROA.19561; *see* ROA.1454 (Gulf Restoration's petition requesting standards "for every 'navigable water'" in the country). Given the limited scope of the injuries asserted by Gulf Restoration, however, the court's remand order was impermissibly overbroad. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83,

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pollution on those waters, nor did they evince any intent to visit or use those States' waters in the future. ROA.18681 (Sigford Declaration ¶5); ROA.18709 (Petersen Declaration ¶3).

107 (1998) (explaining that a remedy cannot be "an acceptable Article III remedy" if "it does not redress a cognizable Article III injury"). At a minimum, therefore, this Court should direct the district court to narrow the scope of its remand order to the EPA.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed, and this case should be dismissed for want of jurisdiction. In the alternative, this Court should remand for the district court to review in the first instance the EPA's reasons for declining to make necessity determinations in response to Gulf Restoration's petition. Barring that, this Court should still instruct the district court to narrow its remand order to match the injuries asserted by Gulf Restoration.

Respectfully submitted,

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February 27, 2014
90-5-1-4-19385

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 9,249 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 2007 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2014, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All registered case participants are CM/ECF users and will be served by the appellate CM/ECF system.

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