

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

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

**NON-STATE INTERVENOR-DEFENDANTS' JOINT REPLY MEMORANDUM IN
SUPPORT OF EPA'S CROSS MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Pursuant to the Court’s Case Management Order, Rec. Doc. 195 (July 20, 2015), the Non-State Intervenor-Defendants respectfully submit this brief in support of Defendant EPA’s Cross-Motion for Summary Judgment filed with this Court on November 20, 2015, on the issues identified for remand by the United States Court of Appeals for the Fifth Circuit in *Gulf Restoration Network v. McCarthy*, 783 F.2d 227 (5th Cir. 2015) (*Gulf Restoration II*). Non-State Intervenor-Defendants support EPA’s Cross-Motion and oppose Plaintiffs’ Motion for Summary Judgment because the government has amply met its “slight” burden to provide the requisite “reasonable explanation” for declining to make a necessity determination under Section 1313(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c)(4)(B). *See Gulf Restoration II*, 783 F.2d at 244. EPA’s decision should therefore be upheld under the “highly deferential” standard of review that applies to this remand. *Id.*

ARGUMENT

I. EPA Provided a Reasonable Explanation, Grounded in the Statute, for Declining to Make a Necessity Determination Under Section 1313(c) of the Clean Water Act.

The question this Court must address on remand is straightforward and narrow - namely, whether EPA provided a “reasonable explanation” that is “grounded in the statute” for its decision not to make a necessity determination under Section 1313(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c)(4)(B) (Section 303(c)(4)(B)). This Court must decide that question consistent with the Fifth Circuit’s application of *Massachusetts v. EPA*, 549 U.S. 497 (2007), to this section of the CWA.

Specifically, the Fifth Circuit stated plainly 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” and instructed this Court to “decide in the first instance whether the EPA’s

explanation for why it declined to make a necessity determination was legally sufficient.” *Gulf Restoration II*, 783 F.3d at 243. Contrary to Plaintiffs’ mistakenly expansive reading of the issues remanded by the Fifth Circuit, the only issue before this Court is whether EPA provided a reasonable explanation that is consistent with the Fifth Circuit’s crisp directions, applying the “highly deferential” standard of review articulated by that Court. *Id.* at 244.

On this narrow question, EPA is entitled to summary judgment because it provided a legally sufficient explanation for declining to make a necessity determination. EPA “had the option of declining to make a necessity determination,” and in doing so, the Agency manifestly adhered to the guidance provided by the Fifth Circuit: that EPA considered the “broadly written” nature of Section 303(c)(4)(B), while appropriately using its discretion to “choose how best to give effect to [the statutory] mandates” where there are “competing considerations.” *Gulf Restoration II*, 783 F.3d at 244, n.93 (citing favorably *WildEarth Guardians v. U.S. EPA*, 751 F.3d 649, 654-55 (D.C. Cir. 2014) for the proposition that EPA has discretion to prioritize implementation of its statutory authorities in part “to ensure effective administration of the agency’s regulatory agenda.”). Indeed, this Court has observed that “[n]othing in the authorizing statutory text of the CWA expressly precludes EPA from considering the very factors that it cited in the Denial.” *Gulf Restoration Network v. Jackson*, No. 12-677, 2013 WL 5328547, slip. op. at 24-25 (E.D. La. Sept. 20, 2013) (*Gulf Restoration I*). It follows that the Denial presented reasoning “grounded in the statute.”

EPA’s brief demonstrates how its reasoning was grounded in the “broadly written” statutory factors relevant to Section 303(c)(4)(B). As the Fifth Circuit noted, the Agency faces a “slight” burden of demonstrating that its explanation is reasonable. *Gulf Restoration II*, 783 F.3d at 244 (citations omitted). EPA has unquestionably met that burden in this case.

In particular, the Agency considered “at least six relevant statutory factors” in declining to make a necessity determination. EPA Br. at 22. These considerations included: uses of navigable waters and the States’ primary role in protecting those uses through adoption of water quality standards; the important, but non-exclusive, use of numeric nutrient criteria to achieve the goals of the CWA; EPA’s primary role in providing technical guidance and support to the States; the varied reasons for nutrient pollution and the importance of “sound watershed management practices” that cannot be either fully addressed nor solely accomplished by actions available to EPA under the authorities granted by Section 303(c)(4)(B); the respective and complementary roles assigned to EPA and the States under the overall structure of the CWA in general and Section 303(c)(4)(B) in particular; and the resources that would be required from the Agency not only to make a necessity determination of the breadth and magnitude requested by Plaintiffs, but thereafter to implement the mandatory federal tasks that would follow. EPA Br. at 21-27. Each of these considerations is firmly rooted in the CWA and in particular Section 303(c)(4)(B).

Furthermore, as explicitly recognized by the Fifth Circuit, it was appropriate for EPA to exercise discretion to sort out the “competing considerations” presented by the statute. *Id.* EPA expressly recognized its responsibilities under Section 303(c)(4)(B) when it declined to make a necessity determination, but also took into account practical considerations tied to the statutory structure and the considerable resources invested in the cooperative federalism mandated specifically by the CWA’s water quality provisions. EPA Br. at 28-30. This balancing was expressly endorsed as proper and reasonable by the Fifth Circuit. *Id.* n. 93. EPA’s approach was also consistent with this Court’s September 20, 2013 Order, in which the Court recognized the broad range of relevant factors, grounded in the CWA, that EPA may consider in evaluating a

necessity determination. *Gulf Restoration I*, slip op. at 14-15 (rejecting Plaintiffs’ argument that EPA is limited to evaluating scientific factors when making a necessity determination under Section 303(c)(4)(B)).

Finally, the Non-State Intervenors observe that Plaintiffs’ motion erroneously conflates the Fifth Circuit’s discussion of the reasons it found sufficient law under CWA Section 303(c)(4)(B) to trigger reviewability with the scope of analysis EPA must undertake when evaluating whether to make a necessity determination. Ignoring the “reasonable explanation, grounded in statute”, “highly deferential review” and “slight” burden language emphasized in *Gulf Restoration II*, Plaintiffs contend to the contrary that the Fifth Circuit nevertheless established that EPA must engage in a burdensome review entailing a detailed analysis of specific statutory provisions when it exercises its option to decline making a necessity determination. *Gulf Restoration Br.* at 12 -15. No fair reading of the Court’s opinion supports that contention. Indeed, Plaintiffs themselves appear to recognize that this represents a contorted argument that essentially merges two different portions of the Fifth Circuit’s decision, each of which addresses and decides distinctly different legal issues. *Id.* at 12, n. 9. Not only is this construction of *Gulf Restoration II* contorted, it directly contradicts the Fifth Circuit’s instruction that EPA’s burden to demonstrate that it provided a reasonable explanation for not making a necessity determination is “slight.” *Gulf Restoration II*, 783 F.3d at 244.¹

¹ Plaintiffs’ argument is not only structurally unsupported by the Fifth Circuit’s opinion, it does not make sense, as a practical matter, for the reasons provided by EPA. *EPA Br.* at 15-17. Plaintiffs essentially ask this Court to rule that EPA must effectively go through the process of setting federal water quality standards so that it can decide whether it is necessary to do so. *Gulf Restoration Br.* at 15-16. Plaintiffs’ position – that EPA must conduct a detailed technical and scientific evaluation when declining to make a necessity determination to the same extent as if it were making a positive or negative necessity determination – is utterly at odds with *Gulf Restoration II* and common sense.

CONCLUSION

For the reasons summarized above, this Court should deny Plaintiffs' Motion for Summary Judgment and grant EPA's cross-motion for summary judgment.

Dated: January 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Non-State Intervenor-Defendants' Joint Reply Memorandum In Support of EPA's Cross Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Summary Judgment was filed electronically using the Court's CM/ECF system this 14th day of January, which sent notification of such filing to the attorneys of record for each party who have registered with the Court's CM/ECF system.

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