

Louisiana District Court Upholds EPA's Denial of Numeric Nutrient Criteria Rulemaking Petition

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A view of the Gulf of Mexico; courtesy of Michael McCarthy.

In December 2016, a Louisiana district court upheld the Environmental Protection Agency's (EPA) decision not to engage in a rulemaking process to establish numeric water quality standards for phosphorus and nitrogen in the Mississippi River Basin. This decision brings to a close, for the time being at least, the Gulf Restoration Network's efforts to force federal action under the Clean Water Act to address the dead zone in the Gulf of Mexico.

Background

In 2008, the Gulf Restoration Network and several other environmental organizations (collectively "GRN") filed a rulemaking petition with the EPA requesting the agency establish numeric water quality standards for nutrients, specifically nitrogen and phosphorous, and Total Maximum Daily Loads (TMDL) for any waters not meeting such standards. The petitioners argued that numeric water quality

standards are necessary to address the high levels of nitrogen and phosphorous pollution in the Gulf of Mexico that contribute to the annual “dead zone” and are harmful to marine life. Although states have primary responsibility under the Clean Water Act (CWA) to address nutrient pollution, the petitioners claimed they have not done enough to address the problem. To address the perceived lack of action on the state level, the petition called on the EPA to set federal standards that the states would be required to follow.

The CWA permits EPA to establish water quality standards through federal regulations in two circumstances: (1) if the EPA determines a state-submitted standard is not consistent with the CWA or (2) “in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements” of the CWA.¹ When exercising its authority in the second instance, the EPA must make what is known as a “necessity determination.”

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In 2011, the EPA denied GRN’s petition. Although the EPA agreed with GRN that nitrogen and phosphorous pollution “is a significant water quality problem,” the agency did not believe a federal rulemaking would be “the most effective or practical means of addressing these concerns at this time.”² In its formal response to the GRN’s petition, the EPA was silent with respect to whether a new or revised standard was or was not necessary. In other words, the agency declined to make a necessity determination.

GRN challenged the EPA’s denial of its rulemaking petition in 2012. In 2013, the U.S. District Court for the Eastern District of Louisiana ruled that the EPA had to make a “necessity determination.”³ The district court based this decision on the U.S. Supreme Court’s opinion in *Massachusetts v. EPA*. In that case, the Supreme Court held that the EPA had to give a reasoned explanation of its action or inaction in a rulemaking petition denial that

complied with the statutory text. The district court interpreted this holding as requiring the EPA to make a necessity determination, even when the statute does not explicitly require the EPA to do so.⁴

The EPA appealed the district court’s ruling. On appeal, the Fifth Circuit Court of Appeals disagreed with the district court. The Fifth Circuit interpreted the holding in *Massachusetts v. EPA* to mean that a necessity determination is not required, so long as the agency provided a “reasonable explanation” grounded in the statute for why it elected not to make the determination.⁵ The Fifth Circuit remanded the case to the district court for a determination of whether the EPA’s stated reasons for the petition denial were legally sufficient.

“Reasonable Explanation”

On remand, the district court held that the EPA’s explanation for its refusal to make a necessity determination was legally sufficient. In its denial, the EPA expressed its desire “to continue to work cooperatively with the states and tribes to strengthen nutrient management programs.”⁶ In addition, the EPA explained that the development of federal numeric nutrient criteria would require extensive staff time and impose significant regulatory and oversight burdens on the agency.

The plaintiffs claimed this explanation was simply “a laundry list of reasons not to regulate,” which the Supreme Court in *Massachusetts* found insufficient.⁷ Furthermore, the plaintiffs argued that the Fifth Circuit’s directive to provide a reasonable explanation “grounded in statute” required the EPA to reference specific requirements of the CWA.⁸ They argued the EPA’s explanation was deficient because it did not include any analysis of how the EPA reached its decision based on the statutory language.⁹

The district court disagreed, holding that a verbatim citation of the statute is not required for an explanation to be “grounded in statute.” The court stated that “the CWA is by design a states-in-the-first-instance regulatory scheme.”¹⁰ Under the CWA, states are required to establish water quality standards for their waters, with the EPA serving in an oversight role. Only when states demonstrate that they either cannot or will not adopt or enforce standards, may the EPA take more direct action. Because the CWA



A view of the Mississippi River; courtesy of Ken Lund.

establishes a preference for federal-state cooperation and EPA's refusal to make a necessity determination was based on its desire to continue working cooperatively with the states, the court held that the EPA had provided a reasonable explanation grounded in the CWA.

Conclusion

After years of litigation, the EPA has successfully defended its decision not to make a necessity determination regarding the need for numeric nutrient criteria to address water quality problems in the Gulf of Mexico. The district court, however, hinted at the possibility of future litigation if the EPA continues to rely on a states-first approach. The court concluded its opinion with this final thought: "Presumably, there is a point in time at which the agency will have abused its great discretion by refusing to concede that the current approach – albeit the one of first choice under the CWA – is simply not going to work."¹¹ 🐦

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Endnotes

1. 33 U.S.C. § 1313(c)(4).
2. *Gulf Restoration Network v. Jackson*, 783 F.3d 227, 231 (5th Cir. 2015).
3. *See Gulf Restoration Network v. McCarthy*, No. 12-677, 2013 WL 5328547 (E.D. La. Sept. 20, 2013).
4. *Gulf Restoration Network v. Jackson*, 2016 WL 7241473 at *4 (E.D. La. Dec. 15, 2016).
5. *Id.* at *4.
6. *Id.*
7. *Id.* at *5.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *6.