

Gulf Restoration V. Jackson: A Back-Handed Win For EPA

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Law360, New York (October 23, 2013, 1:42 PM ET) -- On Sept. 20, 2013, the U.S. District Court for the Eastern District of Louisiana in *Gulf Restoration Network v. Jackson* rendered a decision that seems to have simultaneously expanded and reduced the discretion of the U.S. Environmental Protection Agency to decide when federal numeric nutrient criteria (NNC) are “necessary” for a state or group of states.[1]

The court concluded that while the Clean Water Act (CWA) requires the EPA to make a threshold determination as to “necessity,” in response to a petition by environmental plaintiffs, the EPA has broad discretion to consider nonscientific policy factors in making that necessity finding.[2] The court also flatly rejected plaintiffs’ effort to have the court itself make the necessity determination plaintiffs sought in their complaint.[3]

This decision, while partially granting the relief sought by the environmental organization plaintiffs in a limited way, may end up increasing the EPA’s discretion in setting federal water quality standards.

Background

This case was prompted by a petition filed July 30, 2008, by a coalition of environmental nongovernmental organizations (ENGOS) requesting the EPA to determine under the CWA that NNC were “necessary” for the waters of the states in the Mississippi River basin.[4] Such a “necessity determination” would compel the EPA to initiate rulemaking establishing federal NNC for all states for which the EPA found such criteria to be necessary.[5]

The petition asserted that the waters of the Mississippi River basin and the Gulf of Mexico were impaired for nutrients and that actions by the states to address nutrient pollution in those waters were inadequate to address that nutrient pollution.[6]

The EPA denied the petition July 29, 2011.[7] The agency did not dispute the ENGOS’ contention that the waters of the Mississippi River basin states suffer from nutrient pollution but instead asserted that the most effective way to address nutrient water quality issues in the Mississippi River basin was to continue to support ongoing state efforts.[8]

The EPA stated that the agency was “not determining that numeric nutrient criteria are not necessary to meet CWA requirement” but only that the agency “is exercising its discretion to allocate its resources in a manner” that supports state and local efforts to reduce nutrient-loading in the Mississippi River basin waters.[9]

The ENGOS filed a complaint on March 13, 2012, asserting that the EPA had failed to exercise its nondiscretionary duty to make a finding of necessity one way or the other; the EPA had unlawfully relied on impermissible factors — such as the cost and difficulty of issuing criteria for multiple states — in responding to the petition; and the EPA had unlawfully failed to find it necessary to issue numeric criteria in the face of “undisputed evidence” establishing that necessity.[10]

The EPA filed a motion to dismiss the ENGO claims, asserting that the EPA's discretion under 33 U.S.C. § 303(c)(4)(B) is committed to agency discretion by law and is therefore unreviewable,[11] and the parties cross-filed motions for summary judgment on whether the EPA's petition response was arbitrary and capricious.[12]

The Decision

As a threshold matter, Judge Zainey rejected the EPA's motion to dismiss, concluding that whether the EPA could refuse to reach the issue of necessity in the first instance, and whether the agency could do so based on nonscientific factors, are legal questions subject to judicial review.[13] Judge Zainey also found that the EPA is required to reach a conclusion on the issue of necessity in its response to the ENGO petition.

The court concluded that this issue is governed by the U.S. Supreme Court decision *Massachusetts v. EPA*,[14] which held that the EPA, in response to a citizen petition under Section 202 of the Clean Air Act, was required to reach a conclusion as to whether greenhouse gases did or did not "cause or contribute to air pollution," which may "endanger public health or welfare." The court found that under *Massachusetts v. EPA*, the agency is required to address the "necessity" issue directly.[15]

However, Judge Zainey also concluded that the EPA is not limited to relying solely on scientific data in addressing necessity and is free to consider "the very factors that it cited in the Denial." [16] Judge Zainey ordered the EPA to issue a revised response to the ENGO petition that directly addresses the issue of necessity within 180 days.[17]

Judge Zainey also summarily rejected Plaintiffs' "oblique" request that the court itself make a necessity determination that numeric criteria are needed for nutrients to fulfill the CWA's purposes.[18]

Implications

This case is one in a series of recent lawsuits focusing on the EPA's discretion to use its authority to establish NNC for states under Section 303(c)(4)(B) of the CWA. While the CWA makes clear that water quality standards are set in the first instance by the states,[19] and that the EPA's role is to review and approve state standards,[20] there is little case law addressing the scope of the EPA's authority to determine that federally promulgated water quality criteria are necessary, and to proceed on that basis, to establish such criteria irrespective of the state's wishes or position or plans.

The recent litigation in Florida upheld the EPA's exercise of its discretion to make a necessity determination.[21] The Mississippi River litigation addressed a related question: Is the EPA required under the CWA to reach a conclusion as to the "necessity" of establishing federal NNC at all, and if so, what factors may the agency lawfully consider in deciding whether such criteria are necessary?

Some may perceive Judge Zainey's ruling as a defeat for the EPA that limits the agency's discretion. Judge Zainey rejected the agency's argument that its discretion in determining necessity is unreviewable and ordered the EPA to make a direct finding as to whether NNC are or are not necessary. This may appear potentially to put the agency in an untenable situation.

On one hand, if the EPA finds necessity, it must initiate rulemaking for a vast number of states. On the other hand, its own prior statements — including its original response to the petition — acknowledge severe water quality problems related to nutrient pollution in the Mississippi River states.

However, Judge Zainey's conclusion that the EPA can rely on nontechnical policy factors, among other factors, in determining whether NNC are necessary effectively ratifies the EPA's claim to the very discretion it was initially seeking in its posture before the court.

While the EPA must make a threshold determination that NNC either are or are not necessary, the agency is free to find that despite the existence of water quality problems and the absence of aggressive state action, it is nonetheless preferable from a policy standpoint not to set NNC, due to the complexity, cost and administrative burden of establishing criteria for multiple states and because of the EPA's longstanding policy — and the explicit statutory language of the CWA[22] — that favors granting states the primary role in setting water quality criteria.

These are precisely the factors the EPA cited in its original denial letter, and Judge Zainey stated explicitly that the EPA could still rely on these factors.[23] So, in other words, the court ordered the EPA not to revisit its thinking or rationale, merely to state more explicitly that on that basis it finds no current necessity to set federal NNC.

It thus seems most likely that the EPA will issue a revised denial, relying on many of the same policy factors it cited in its original denial, probably enhanced by additional information on the progress states have made in setting NNC since 2011. If so, the ENGOs may yet again seek to litigate the agency's decision, possibly on the grounds that this new denial is arbitrary and capricious.

However, any such lawsuit would have to overcome the considerable obstacle of Judge Zainey's holding that the EPA may properly rely on nontechnical factors in making such judgments. More broadly, where the EPA faces similar ENGO petitions in other states, it will likely feel freer to find explicitly the absence of necessity and secure in the knowledge that reliance on policy factors to reject a necessity determination is legally permissible.

This may render the EPA less likely to find necessity and less likely to settle lawsuits with ENGOs seeking a more aggressive EPA role in overtaking the primacy of the states to establish NNC or other water quality criteria.

[1] Order and Reasons, *Gulf Restoration Network et al. v. Jackson*, 12-677, (D. La. Sept. 20, 2013), available at http://www.arnoldporter.com/public_document.cfm?id=22886&key=1G2 [hereinafter Order].

[2] *Id.*

[3] *Id.* at 9, fn 8.

[4] *Id.* at 2-3.

[5] See 33 U.S.C. § 1313(c)(4)(B).

[6] Order at 2-3.

[7] Order at 4-5.

[8] EPA Denial at 3-5.

[9] EPA Denial at 6.

[10] Order at 5-6.

[11] Order at 6.

[12] Order at 6.

[13] Order at 9.

[14] Massachusetts v. EPA, 549 U.S. 497 (2007)

[15] Order at 9-13.

[16] Order at 15.

[17] Order at 15.

[18] Order at 9, fn8.

[19] 33 U.S.C. § 1251(b)

[20] See generally 33 U.S.C. § 1313(c).

[21] Florida Wildlife Federation v. Jackson, 853 F. Supp.2d 1138, 1157-1160 (N.D. Fla., 2012).

[22] 33 U.S.C. § 1251(b).

[23] Order at 15.

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