

GULF RESTORATION V. JACKSON—AN AMBIGUOUS DECISION ON EPA AUTHORITY TO REFRAIN FROM SETTING FEDERAL WATER QUALITY STANDARDS

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In an ambiguous ruling that seemed simultaneously to reduce and expand U.S. Environmental Protection Agency (EPA) discretion to decide whether to set federal water quality standards, the federal district court in New Orleans on September 20, 2013, found that (1) while EPA decisions regarding whether federal water quality criteria are “necessary” under the Clean Water Act (CWA) are subject to judicial review; and (2) while EPA is required to state with clarity whether water quality criteria are or are not “necessary”; (3) EPA may rely on a wide range of factors other than the environmental need for criteria, including cost, administrative burden, and policy considerations, in exercising its discretion to set federal standards. The court also declined an invitation by environmental group plaintiffs to render an unambiguous declaration of “necessity” that the plaintiffs claimed EPA was trying to avoid in the challenged action before the court.

The case, *Gulf Restoration Network v. Jackson*, 12-677 (E.D. La. Sept. 20, 2013), stems from EPA denial of a petition filed by environmental nongovernmental organizations (ENGOS) on July 30, 2008, demanding that EPA set federal water quality criteria for nutrients for the states in the Mississippi River basin. The ENGOS requested that EPA find that numeric nutrient criteria (NNC) were “necessary” under section 303(c)(B)(4) of the CWA, which would in turn trigger a federal obligation to initiate rulemaking to set federal criteria for all waters where nutrient criteria were found to be necessary.

EPA on July 29, 2011, denied the petition, but without directly stating whether NNC were or were not necessary. EPA agreed with the ENGOS that

excessive nutrients were undermining water quality in the Mississippi River basin, but stated that the impacts of excessive nutrients could be best addressed through state efforts. EPA’s denial letter stated that the agency was “not determining that numeric nutrient criteria are not necessary to meet CWA requirements,” but the agency “is exercising its discretion to allocate its resources” to support state and local efforts to address the impact of nutrients in the Mississippi River basin.

The ENGOS filed suit March 13, 2013, making a series of claims against EPA, including that (1) EPA had violated a non-discretionary duty to make a conclusion one way or the other on the necessity of NNC; (2) EPA improperly had relied on non-scientific factors—such as cost and administrative burdens—in rejecting the ENGOS’ petition; and (3) in the face of “undisputed evidence,” EPA had failed to find NNC necessary for the waters of the Mississippi River basin. EPA, in a motion to dismiss, asserted that the agency’s decisions regarding setting federal water quality criteria are completely discretionary, and consequently unreviewable. In cross motions for summary judgment, EPA and the environmental interests disputed, inter alia, whether EPA’s rejection of the petition was arbitrary and capricious under the Administrative Procedures Act.

Louisiana Eastern District Court Judge Zainey’s September 20, 2013, decision seems to have given each side half—or at least part of—a loaf. First, Judge Zainey rejected EPA’s motion to dismiss, concluding that the issues in the ENGO complaint—EPA’s obligation to address necessity and whether EPA could rely on non-scientific factors to do so—are questions of law subject to judicial review. Second, Judge Zainey, relying on the Supreme Court decision *Massachusetts v. EPA*, 549 U.S. 497 (2007) (where the Court found that EPA was required to reach a conclusion regarding whether greenhouse gases did or did not “cause or contribute to air pollution” as part of an endangerment finding

under the Clean Air Act), concluded that EPA is required to address directly whether NNC are necessary for the Mississippi River basin. At the same time, Judge Zainey also ruled that EPA was free to rely on non-technical or non-scientific factors in reaching its decision on the petition, including “the very factors that it cited in the Denial.” Finally, Judge Zainey denied without much fanfare or explanation the petitioners’ request that the court itself find that NNC are necessary for the Mississippi River basin.

While the CWA establishes that the states have the primary role in setting water quality standards, and EPA’s role is principally to review and approve state standards, the scope of EPA’s obligation or authority to step in and set federal standards essentially usurping the primary role of the states has been largely unaddressed by prior case law. The 2011 federal court decision in the Florida NNC litigation addressed EPA’s discretion to find a necessity to set water quality standards, but did not address the issue presented in *Gulf Restoration Network v. Jackson*: When is EPA required to find necessity and what factors may it consider in doing so?

From a formalistic standpoint, Judge Zainey’s decision perhaps narrowed EPA’s unfettered discretion in making section 303(c)(4)(B) determinations. Judge Zainey concluded that EPA’s decisions regarding necessity are subject to judicial review, and that EPA may not, as a matter of law, get away with the cumbersome and ambiguous double-negative that water quality standards are “not, not-necessary”—EPA must answer the question directly. EPA may be unsatisfied with this result, and is at the time of this writing preserving its right to appeal Judge Zainey’s decision to the Fifth Circuit.

However, Judge Zainey’s conclusion that EPA may rely on non-scientific factors in making determinations of necessity may confer on EPA more discretion than his other holdings arguably constrained or removed. EPA is now free to reissue its petition denial relying on the same rationale that it used in its 2011 denial, confident that the existence of some evidence of water quality

problems in the Mississippi River Basin associated with nutrients does not alone obligate the agency to render an affirmative necessity finding. EPA can with greater confidence cite, for example, technical complexity, administrative burden and the CWA preference for state action as legitimate bases to refrain from acting federally, knowing that reliance on these non-technical factors has been affirmed by at least one federal judge.

Indeed, Judge Zainey’s decision, coupled with EPA’s recent proposed rulemaking clarifying that a section 303(c)(4)(B) determination requires a formal finding by the EPA Administrator or his designee and may not be construed from less formal communications with states, *see* Water Quality Standards Regulatory Clarifications, 78 Fed. Reg. 54,518, 54,521 (Sept. 4, 2013), should enhance the agency’s discretion to elect to work with the states to address nutrient issues, or any other water quality standards, for that matter, because this court decision renders the agency less vulnerable to a challenge for failing to set federal standards.

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Editor’s Note: EPA filed a notice of appeal contesting Judge Zainey’s order on November 18, 2013, after the authors submitted their article for publication.