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EPA's Cooperative Federalism Approach to Nutrients in Mississippi River and Gulf of Mexico Prevails in Fifth Circuit Remand

Wednesday, December 21, 2016

In a critical decision preserving state authority in water quality management, a U.S. District Court has ruled that EPA has broad discretion to not establish federal numeric nutrient water quality standards because the *Clean Water Act (CWA)* vests primary responsibility for this function in the states. The decision in *Gulf Restoration Network v. Jackson* rebuffed efforts by a major coalition of environmental groups to compel EPA to take control of nutrient management criteria for a significant part of the country's water.

The case involved a dispute over significantly different approaches for addressing elevated levels of nitrogen and phosphorus in the Mississippi River basin waters and in the northern Gulf of Mexico. The environmental Plaintiffs, led by the Natural Resources Defense Council and the Sierra Club, first petitioned and then sued EPA to set federal numeric nutrient standards across the vast Mississippi River watershed. On December 15, 2016, Judge Jay Zainey of the U.S. District Court for the Eastern District of Louisiana found that EPA's 2011 denial of the petition seeking this unprecedented federal action was sufficiently grounded in the CWA to survive this challenge by environmental groups. *Gulf Restoration Network v. Jackson*, 2016 WL 7241473 (E.D. La., Dec. 15, 2016). Importantly, the court also rejected a narrow reading of *Massachusetts v. EPA*, 549 U.S. 497 (2007), as applied to the CWA.

Most persuasive to the court was that EPA's denial of the environmental groups' petition followed the statutory framework of CWA Section 303(c)(4) (B), which places primary responsibility on states to lead efforts to protect and improve water quality. In this regard, the court rejected the plaintiff's assertion that EPA's denial was based on the Agency's policy preferences rather than the CWA. In particular, the court noted that the CWA is "a broadly worded statutory scheme" and that the disputed statutory provision in its structure and requirements "draws upon the entire body of the CWA."

Background on *GRN v. Jackson* and Nutrient Litigation

The NRDC, the Sierra Club and others petitioned EPA in 2007 to develop numeric nutrient criteria for all 50 states, or at least those with direct tributary waters to the Mississippi River and the northern Gulf of Mexico. This request, had it been granted, would have involved a federal effort of unprecedented scope and scale under the CWA. The petition invoked studies and data regarding extensive nutrient pollution in the Mississippi basin and its links to the hypoxic zone that appears annually in the Gulf of Mexico. The environmental Plaintiffs argued that the EPA's ongoing reliance on states to address the need for reduction in nutrient pollution was misplaced because the statutory framework was not effective. When EPA denied the petition, in 2011, without deciding whether federal action to set water quality standards in lieu of states was "necessary" under Section 303(c)(4)(B), the environmental groups sued, alleging that the denial was unlawful both because EPA had not actually decided the "necessity" issue and because the evidence set forth in the petition unquestionably demonstrated that federal action was necessary under the CWA.

In the original district court opinion, the court agreed with Plaintiffs that *Massachusetts v. EPA* required EPA to

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ARTICLE BY

Karen M. Hansen

Beveridge & Diamond PC

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make a “yes/no” determination on the Section 303(c)(4) (B) “necessity” question. *Gulf Restoration Network v. Jackson*, 2013 WL 5328547 (E.D. La. Sept. 20, 2013) (*GRN I*). This determination was overturned on appeal to the Fifth Circuit, which vacated and remanded this issue to the district court. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015). The Fifth Circuit also instructed that the scope of review on remand was to be very narrow, focused only on whether EPA’s denial of the petition was legally sufficient.

District Court on Remand Agrees With State Primacy on Water Quality

Judge Zainey’s fifteen page opinion issued last week, available [here](#), concluded that EPA’s denial of the petition was sufficiently grounded in the CWA, particularly given that Section 303 explicitly provides for shared responsibilities among EPA and the states, with states having primacy over water quality within their borders. The court noted that the Plaintiffs had essentially acknowledged state primacy under Section 303 of the Act, and that their real complaint was that the choices made by Congress in Section 303 were not effective in reducing nutrient pollution, particularly in such a large and diffuse water body like the Mississippi River basin. The court explained:

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ABOUT THIS AUTHOR



Karen M. Hansen
Principal

Karen M. Hansen’s environmental law practice focuses on the Clean Water Act and state programs for regulating and permitting water discharges and water supply/use. She has extensive experience assisting industrial and municipal clients in preparing strategies for and pursuing water permits for ongoing operations, expansions and new operations, including permit challenges. Ms. Hansen also represents clients that must defend CWA and state water law enforcement actions, including claims pursued by governmental as well as third party entities. She recently led a multi...

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