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Gulf Restoration Network v. McCarthy, 783 F.3d 227 (5th Cir. 2015)

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For step two under *Chevron*, the Court contemplated both the legislative history and whether the EPA made a “reasonable policy choice” in its interpretation of the phrase “total maximum daily load.” In these considerations, the Court concluded that because Congress used some of the language from the EPA’s rule, the EPA had a strong argument that Congress both agreed with the EPA’s TMDL definition and also affirmatively incorporated the EPA’s rule into statute. In addition, the Court determined that the EPA’s requirements concerning TMDLs, including allocating among different kinds of sources, establishing a timetable, and getting “reasonable assurance” from states that the TMDLs would actually be implemented, were all reasonable. Therefore, the Court held that the EPA made a reasonable and legitimate policy choice in having these requirements.

Accordingly, the Court affirmed the district court’s opinion that the EPA did not exceed its authority to regulate through the Chesapeake Bay TMDL requirements.

Lanna Giauque

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gulf Restoration Network v. McCarthy, 783 F.3d 227 (5th Cir. 2015) (holding that: (i) the EPA’s refusal to regulate pollution resembled a rejection of a rulemaking petition, which is presumptively reviewable by the courts; (ii) the Clean Water Act possesses sufficiently specific language to allow for judicial review; and (iii) the EPA may refrain from making a necessity determination if it uses the language of the Clean Water Act to explain its decision).

In July 2008, a group of nonprofit environmental organizations, led by the Gulf Restoration Network (“Network”), petitioned the Environmental Protection Agency (“EPA”) to regulate the high levels of nitrogen and phosphorous pollution that have entered waters in the Mississippi River Basin and created what the petition called a “dead zone” in the northern Gulf of Mexico. The EPA denied this petition, deciding that it could create more efficient regulations by working cooperatively with the states. Network then filed suit in the United States District Court, Eastern District of Louisiana, alleging that the EPA violated both the Administrative Procedure Act (“APA”) and the Clean Water Act (“CWA”). The relevant section of the CWA stipulates that the EPA can directly create water standards if: (i) the state-created standards do not satisfy the requirements of the CWA; or (ii) the administrator decides that a new or improved standard is necessary. The district court ruled that the Supreme Court’s decision in *Massachusetts v. EPA* required the EPA to make the requested necessity determination before denying the petition, and the court remanded the matter to the EPA to conduct such a determination. The EPA appealed the decision to the United States Court of Appeals, Fifth Circuit (“Court”).

The Court began its inquiry by reviewing the district court’s holding that it possessed subject matter jurisdiction to review the EPA’s action. Generally, the United States government and its agencies possess sovereign immunity and are not subject to civil actions unless they consent to suit. Congress waived this immunity in the APA, which created a general presumption that the courts have

the requisite jurisdiction to review final actions of an agency. The Court recognized two circumstances in which sovereign immunity remains: (i) when a statute prohibits judicial review; and (ii) when the agency action falls within the agency's legal discretion. The Court found that the first circumstance did not apply in this case, and that the second circumstance could only apply to agency actions for which the applicable statute provides no "meaningful standard" of review.

Before considering whether the CWA provided a meaningful standard of review, the Court considered whether this type of agency action was categorically reviewable, presumptively reviewable, or presumptively unreviewable. When an agency acts affirmatively, the courts apply a presumption of reviewability. Because the EPA decided *not* to act, the presumption depends on the activity in question. If the EPA refused to perform a *rulemaking function*, then the Court would consider the action presumptively *reviewable*; if the EPA refused to engage in an *enforcement action*, then the Court would consider the action presumptively *unreviewable*. The Court declined to define the EPA's action as categorically reviewable, as Network argued, and instead the Court found that judicial review should only occur after careful review of the statute.

Next, to determine which presumption applied, the Court considered whether the EPA's actions resembled denial of a rulemaking petition or an enforcement action. Due to the breadth of Network's request to regulate pollution, the Court held that the EPA's refusal to conduct such regulation aligned with a denial of a rulemaking petition. The Court rejected the EPA's comparison to an issuance of a Notice of Deficiency ("NOD"), a mechanism of the Clean Air Act that the Court held to be an enforcement action in its prior decision in *Public Citizen, Inc. v. EPA*. The Court distinguished the NOD as a punitive measure to correct inadequate state measures. The Court turned to the language of the CWA, which uses the word "or" to separate the EPA's power to correct state inadequacies from its power to conduct a necessity determination. The Court found that this disjunctive indicates that the necessity determination does not require any finding of state inadequacies. The Court noted that an action to correct state inadequacies would reflect an enforcement action, but the necessity determination more closely resembles a rulemaking feature. The Court also considered the consequences of noncompliance with each measure: the EPA may sanction states for failure to correct inefficiencies after the agency issues an NOD, but the CWA does not authorize the EPA to impose any sanctions for noncompliance. Finally, the Court described the CWA's general notification process, during which the EPA must prepare and publish its proposed regulations. Unlike the sanctions following an NOD, this general notification does not entail any direct notification to affected states. The Court thus concluded that the EPA's refusal to make a necessity determination resembled denial of a petition for rulemaking, not an enforcement action. Therefore, the action warrants a presumption of reviewability.

With this presumption in place, the Court then considered whether the language of the CWA provided a "meaningful standard" to apply when reviewing a denial of a rulemaking petition. The Court turned to *Massachusetts*, in which the Supreme Court ruled that the EPA may decline to exercise its rulemaking power by providing a reasonable explanation "grounded in" the language of the controlling statute, not merely a self-directed policy explanation.

The Court then answered two questions: (i) whether the “necessity determination” section of the CWA contains sufficiently specific language to allow judicial review; and (ii) whether the EPA did, in fact, have the discretion to decide against making a necessity determination.

First, the Court found the CWA to possess sufficiently specific language; the CWA dictated that water quality standards “shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and . . . use and value for navigation.” The specificity of these considerations provides the EPA with a basis for explanation, thereby allowing for judicial review. The Court further concluded that the “mandatory language” of these sections of the CWA suggests reviewability. Courts have found provisions with discretionary and suggestive language, such as the agency “may” regulate, to be unreviewable. However, the relevant sections of the CWA dictate that the Administrator “shall” create new standards when necessary. Thus, the Court held that it possessed subject matter jurisdiction to review the EPA’s action.

Second, the Court disagreed with the trial court’s finding that the EPA lacked discretionary authority to decline a necessity determination. The Court revisited the ruling in *Massachusetts*, holding that the case’s “reasonable explanation” standard also applies to this section of the CWA. *Massachusetts’* holding requires the district court to analyze the EPA’s explanation and determine whether the explanation reflects the language of the CWA. Noting the highly deferential nature of this standard, the Court described the EPA’s burden as “slight”. Nevertheless, the Court ruled that the EPA must provide such an explanation to the district court to justify the agency’s refusal.

Accordingly, the Court vacated the order of the district court and remanded the case for proceedings consistent with its ruling.

Stephen Klein

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Sierra Club, Inc. v. Bostick, 787 F.3d 1043 (10th Cir. 2015) (holding that by issuing Nationwide Permit 12 and verifying that the construction of the TransCanada pipeline was covered under the permit, the United States Army Corps of Engineers did not violate the National Environmental Policy Act, the Clean Water Act, or its own nationwide permit).

The U.S. Army Corps of Engineers (“Corps”) has the authority, under Section 404(e) of the Clean Water Act, to issue nationwide permits authorizing activities that involve the discharge of dredged material into waters and wetlands. The Corps issued a nationwide permit, Nationwide Permit 12 (“Permit”), which permitted anyone to build utility lines in waters as long as the construction did not result in a loss of greater than one-half acre of water for each single and complete project.

TransCanada Corporation (“TransCanada”), sought to build the Gulf Coast Pipeline (“Pipeline”), an oil pipeline which would cross 2,000 waterways and expand across 485 miles. The Corps verified, in several letters, that the Permit permitted construction of TransCanada’s pipeline. Based off the Corp’s