

Nutrients Litigation: Key Cases and Themes, and the Emerging Uncertainties for Point Sources

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Karen M. Hansen

Key Cases

- NRDC v. EPA – secondary treatment
- Gulf Restoration Network v. EPA –
 - Mississippi River Basin NNCs & TMDL
- American Farm Bureau Federation v. EPA
 - Chesapeake Bay TMDL
- Florida Wildlife Federation v. Jackson
 - NNCs and effect of 1998 Action Plan
- Upper Blackstone WPAD v. EPA – permit action

Key Themes

- Scope of CWA over nutrient control
 - What authorities? What tools?
 - Technology-based vs. water quality-based
- Legal and scientific bases for numeric nutrient criteria, nutrient effluent limits
- Who's on first: States v. feds
- Role of NGO suits/settlements
- Fundamentals of NPDES permitting

Natural Resources Defense Council (“NRDC”) v. EPA

- Part of national strategy
 - Coalition of environmental organizations led by NDRC filed secondary treatment and MRB/Gulf actions at same time March 2012
- Case on court’s suspension docket pending EPA action on NRDC Petition expected December 2012
- Complaint:
 - November 2007: Environmental Coalition submits petition to EPA (the “Petition”) requesting that (a) EPA publish updated information concerning current secondary treatment capability for nutrient removal, and (b) EPA update standards for secondary treatment by wastewater treatment plants
 - EPA has not responded to petition
 - Asked court to order EPA to respond to petition
- NACWA legal and technical responses to NRDC Petition

NRDC v. EPA - Background

- Plaintiffs allege that:
 - Pursuant to CWA § 304(d)(1), EPA must timely publish updated information on capability of secondary treatment technology to remove certain levels of nutrients, including nitrogen and phosphorus
 - Pursuant to CWA § 301, EPA must update standards for secondary treatment applicable to wastewater treatment plants to reflect the information published pursuant to CWA § 304;
 - EPA has not complied with above CWA obligations

NACWA Response

- Nutrient removal is not part of secondary treatment as defined by law
- Congress considered nutrient removal advanced treatment under CWA provisions later repealed
- Duty to publish information is distinct from any duty to regulate and EPA has published
- Need holistic approach including non point sources
- Technology claims by NRDC unsupported

NRDC v. EPA – Key Issues

- Scope of CWA secondary treatment requirements
- Limits of technology
- Costs vs. benefits of secondary treatment for nutrients
 - Is adoption of nutrient removal technology technically and economically feasible?
 - How effective is a measure that targets only point sources?
- EPA decision on Petition expected December 2012
- Further court proceedings contemplated in 2013

Gulf Restoration Network v. EPA

- National strategy: 2nd case filed by coalition of environmental organizations March 2012
 - Intervenor Defendants: NACWA; various agricultural organizations; States
- Complaint:
 - July 29, 2011: EPA denies (the “Denial”) Environmental Coalition’s petition (the “Petition”) to establish TMDLs and NNCs in Mississippi River Basin (“MRB”) and northern Gulf of Mexico (“GM”)
 - Complaint requests that court (a) declare Denial to be arbitrary and capricious under APA and CWA, and (b) order EPA to provide response to Petition within 90 days that is not arbitrary or capricious
- Briefing underway
- Implications of Florida and Chesapeake Bay cases

Gulf Restoration Network v. EPA

- Petition requested establishment of NNC and TMDL to address Nitrogen and Phosphorus in MRB and northern GM
- EPA Denial recognizes that N and P pollution in MRB and GM is significant water quality problem but states that EPA's approach is to work in partnership with states to reduce nutrient loadings from point and nonpoint sources
- NACWA's position:
 - No legal basis for imposition of federal NNC in MRB
 - No technical and scientific basis for imposition of NNC as requested in Petition
 - EPA approval of Petition would result in unbalanced program that would fail to achieve meaningful reductions in NNC contributions from agricultural sources

Gulf Restoration Network v. EPA

- Does record support EPA's denial of Petition?
- Will court explore merits of EPA's denial of Petition?
 - Does necessary legal basis for imposition of NNC and TMDL in MRB and GM exist?
 - Has EPA's authority to develop water quality standards or TMDLs been triggered?
 - Role of States a key issue
 - What would be the scientific basis for imposition of NNC and TMDL in MRB and GM?
- Point-source and non point source nutrient controls

American Farm Bureau Federation ("AFBF") v. EPA

- AFBF, NAHB and 8 agricultural associations 2011 challenge to Chesapeake Bay TMDL signed by EPA on 12/29/10
- TMDL characteristics:
 - Identifies maximum annual and daily loads of nitrogen, phosphorus and sediment the Chesapeake Bay may receive
 - Consists of 478 waste load allocations to significant wastewater point sources and aggregate load allocations to nonpoint sectors, including agriculture and forestry
 - Regulates entities throughout District of Columbia and six states whose waters feed Chesapeake Bay: Delaware, Maryland, New York, Pennsylvania Virginia and West Virginia
- Long history and unique legal framework in Ches. Bay

AFB v. EPA - Background

- Key arguments:
 - EPA TMDL implementation plans with detailed allocations usurp States' role and exceed EPA's limited role under CWA to write a "total" limit
 - EPA ignored upstream water quality considerations
 - TMDL is technically flawed
 - TMDL is procedurally flawed
- EPA arguing that TMDL is product of years of collaboration with states, has legitimate legal and technical bases
- NACWA intervened on select issues
 - Holistic TMDL necessary and legal
 - Proper balance of federal and state roles
- Oral argument on MSJ October 4, 2012
- Judge Rambo (MD PA) sought briefing on issue of judicial deference to EPA's interpretation of CWA and TMDL regulations

AFB v. EPA – Key Issues

- Did EPA exceed its authority under CWA by:
 - Allocating pollutant loads among sources?
 - Assigning pollutant load allocations to upstream water segments outside Chesapeake Bay?
 - Process used for TMDL development?
- Were assigned pollutant loadings in TMDL based on proper assumptions?
- Was there a meaningful opportunity to comment on draft TMDL?
- Implications if case decided on deference grounds?

Trading Challenge

- Latest wrinkle: challenge to water quality trading under the Ches. Bay TMDL
- Food & Water Watch DCDC Oct. 3, 2012
 - EPA exceeded CWA authority in authorizing WQT and offset programs in TMDL
 - Arbitrary and capricious
 - Procedural flaws if no public notice/comment
- Does the Ches. Bay TMDL provide a basis for this challenge? Broader implications?

Florida Wildlife Federation, Inc. et al. ("FWF") v. Jackson et al.

- Massive effort: 25 state and industry parties, 7 environmental organizations, 5 state and utility parties from Destin, FL area; NACWA filed amicus brief
- U.S. District Court for the Northern District of Florida; U.S. Court of Appeals for Eleventh Circuit
- Merits: Court consolidated 13 separately filed cases that challenged the validity of EPA's January 14, 2009 determination that numeric nutrient criteria (NNC) were necessary for Florida and the requirements of subsequent NNC rule signed by EPA Administrator on November 14, 2010
- Role of EPA 1998 Action Plan in necessity determination

FWF v. Jackson

- 2/18/12: District Court issued decision on February 18, 2012
 - Largely upheld EPA's rule and the underlying necessity determination
- 4/16/12: State and industry parties, environmental organizations, Destin parties, power and utility associations appealed decision
- EPA MTD and opposing motions pending at 11th Circuit
- Issues:
 - Scope of district court's order (what can be appealed?)
 - Validity of necessity determination
 - Validity of portions of EPA's rule that were upheld
 - Interference of 2009 necessity determination and EPA rule with approved TMDLs being implemented
- Status of Florida's effort on State NNCs to replace EPA rule

FWF v. Jackson - Holding

- Lake criteria upheld
 - Color and alkalinity classification scheme valid; combined numeric criteria for chlorophyll-a, nitrogen and phosphorus valid; duration and frequency criteria valid (i.e., lake impaired only if parameter exceeds limit in more than 1 year out of consecutive 3 years)
- Spring criteria upheld
 - Nitrate+nitrite threshold was validly based on lab and field studies
- DPVs upheld in part
 - DPVs for impaired lakes are same as lake criteria - upheld
 - DPVs for unimpaired lakes are ambient conditions of lake – invalidated because no basis for disapproving *any* nutrient increase
- Site Specific Alternative Criteria upheld
- Stream criteria invalidated
 - Court found stream thresholds arbitrary because intended to prevent *any* change in stream flora and fauna, not *harmful* change

Upper Blackstone Water Pollution Abatement District (“Blackstone District”) v. EPA

- Permit appeal to First Circuit
- Complaint:
 - On April 29, 2011, the District appealed a May 28, 2010 decision by EPA’s Environmental Appeals Board to uphold the requirements in EPA’s August 2008 renewal of Blackstone’s NPDES permit (the “2008 Permit”)
- Key developments:
 - 8/3/12: First Circuit issued opinion finding no error in EPA’s final permit decision, lifting stay on permit and denying Blackstone’s petitions
 - Petitions for rehearing followed, including NACWA
 - Petitions for rehearing denied Sept. 25, 2012

Upper Blackstone District v. EPA

- Did 2008 Permit prematurely tighten nitrogen and phosphorus limits?
 - A 2002 administrative consent order required Blackstone District construction upgrades to achieve compliance with 2001 NPDES permit
 - Blackstone District claims EPA should have waited to assess upgrades' water quality gains before tightening regulations
- Should EPA have delayed 2008 Permit issuance until completion of new Blackstone River computer model?
- Was there a sound scientific basis for nutrient limits set in 2008 Permit?

Blackstone District v. EPA - Holding

- EPA did not prematurely issue 2008 Permit
 - 2002 Consent Order did not alter EPA's CWA duties to reissue permits every five years
 - Neither CWA nor EPA regulations allow EPA to indefinitely delay issuance of new permit pending scientific developments
 - Even after facility upgrades, Blackstone District's discharge would have reasonable potential of contributing to water quality standards violation
- Nitrogen limits in 2008 Permit were not arbitrary
 - EPA's decision-making process was proper;
 - EPA gets substantial deference in its interpretation of scientific models
 - Court will not overturn EPA choice of limits where figure is reasonable
- Phosphorus limits in 2008 Permit were not arbitrary
 - EPA did not act irrationally by considering national phosphorus criteria in addition to site-specific data

Points of Interest

- Tension between EPA and state authority over water quality issues – legal and technical bases, what tools are appropriate?
- Holistic, multi-source pollutant regulation v. solely point source regulation;
- Scope of EPA authority under CWA to tackle complex nutrient pollution issues
- Quality of science and data

Uncertainty for point sources is increasing

EPA vs. States

- FWF v. Jackson Decision – Adoption of water quality standards:
 - Court finds that EPA must act in the face of state inaction
 - Court: “[State] had been working on numeric criteria since 2001 and had repeatedly moved back the schedule.... There was no end in sight.... The Administrator needed to step up.”
- AFB v. EPA – Adoption of watershed TMDL
 - Complaint: “Through this Watershed Implementation Plan revision process, EPA has effectively overridden state implementation decisions.”
 - NACWA: “In consenting to EPA’s establishment of a watershed-wide TMDL, states imbued EPA with their ... TMDL authority.”

EPA vs. States

- Gulf Restoration Network v. EPA – Establishment of TMDL in MRB and GM
 - Petition: EPA must establish NNC where absent from state water quality standards
 - EPA Denial: EPA will work towards state adoption of NNCs by working in partnership with states to reduce nutrient loadings from point and non-point sources.

Multi-Source Contributions

- AFB v. EPA
 - Chesapeake Bay TMDL holistic watershed approach allocates pollutant loads to point and nonpoint sources
- Gulf Restoration Network v. EPA
 - EPA imposition of NNC as requested by Petition would place disproportionate share of regulatory burden on point sources, as runoff from non-point sources is typically not regulated by NPDES permits

Multi-Source Contributions

- NRDC v. EPA
 - Wastewater treatment plants are the only sector subject to CWA secondary treatment requirements and would be uniquely affected by grant of NRDC Petition

Scope of EPA Authority

- **Blackstone District v. EPA**
 - First Circuit affirms EPA's significant discretion in setting permit limits: "[w]here a complex administrative statute, like those the EPA is charged with administering, requires an agency to set a numerical standard, courts will not overturn the agency's choice of a precise figure where it falls within a zone of reasonableness"
- **AFB v. EPA**
 - Complaint: EPA exceeded scope of authority by, among other things, (a) allocating pollutant loads among sources in TMDL, (b) assigning allocations to states outside of Chesapeake Bay
 - EPA alleges that (a) its pollutant load allocation is acceptable under CWA, as it sets goals, not requirements, and was done in cooperation with states, (b) upstream allocations are valid under CWA, as upstream sources contribute pollutants to the impaired "receiving waters" for which the TMDL was established

Scope of EPA Authority

- FWF v. Jackson
 - Complaint: EPA's determination that new water quality standard was necessary for Florida (a) was issued solely to settle a 2009 lawsuit brought by Environmental organizations, and (b) violated Equal Protection clause by singling out Florida
 - In addressing issues above, the court held that (a) a court's mission is not to decipher an agency's "true purpose" but to decide whether agency's actions were arbitrary or capricious, and (b) in taking on establishment of NNC, EPA was not obligated to address the issue in every state or none



Thank You!

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