

# *Gulf Restoration Network v. McCarthy:* The Necessity of the Clean Water Act's Necessity Determination Mechanism to Ensure Government Accountability

## INTRODUCTION

Since the 1970s, the Gulf of Mexico has suffered from human-produced nutrient pollution.<sup>1</sup> The ongoing pollution from the Mississippi River Basin has created a “dead zone” in the Gulf of Mexico that harms biodiversity and the fishing and tourism industries.<sup>2</sup> When the Environmental Protection Agency (EPA) rejected a petition from environmental groups for federal water quality standards and refused to make a determination about whether the pollution problem necessitated federal intervention, environmental organizations sued.<sup>3</sup> In *Gulf Restoration Network v. McCarthy*, the Fifth Circuit found jurisdiction to review EPA’s decision, but held that EPA could avoid making a necessity determination for water quality standards, so long as it provided a reasonable explanation grounded in the Clean Water Act (CWA).<sup>4</sup> *Gulf Restoration Network* prevents environmental plaintiffs from holding EPA accountable for entrenched water pollution, to the detriment of wildlife and public welfare. These troubling implications highlight the need to prioritize the purposes of the CWA over administrative deference.

## I. BACKGROUND

### A. *The Gulf “Dead Zone”*

Nutrient pollution—nitrogen and phosphorous from industrial agriculture and urban runoff—has plagued the Mississippi River Basin and the Gulf for over forty years.<sup>5</sup> This pollution deprives the water of oxygen, making it

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1. Nancy N. Rabalais et al., *Beyond Science into Policy: Gulf of Mexico Hypoxia and the Mississippi River*, 52 BIOSCIENCE 129, 130 (2002).

2. Melodi Smith & Jason Hanna, *Gulf of Mexico ‘Dead Zone’ is the Size of Connecticut*, CNN (Aug. 5, 2014, 5:08 PM), <http://www.cnn.com/2014/08/05/tech/gulf-of-mexico-dead-zone/>.

3. *Gulf Restoration Network v. Jackson*, No. 12–677, 2013 WL 5328547, at \*2–3 (E.D. La. Sept. 20, 2013), *vacated sub nom. Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015).

4. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 242–43 (5th Cir. 2015).

5. Rabalais et al., *supra* note 1, at 134–35.

virtually impossible for aquatic life to exist there, creating what has become known as a “dead zone.”<sup>6</sup> The dead zone has damaged fish populations and the multibillion dollar fishing industry in the Gulf.<sup>7</sup> The National Oceanic and Atmospheric Administration estimates that the seafood and tourism industries lose \$82 million annually to the dead zone.<sup>8</sup> Studies suggest that the dead zone also harms biodiversity and ecosystem structures by disrupting food webs and damaging habitat.<sup>9</sup> The state-level Mississippi River Gulf of Mexico Watershed Nutrient Task Force hoped to reduce the surface area of the dead zone to 1950 square miles by 2015.<sup>10</sup> However, the dead zone has continued to grow and by August 2015 it reached 6474 square miles—making it larger than Connecticut and the second-largest dead zone in the world.<sup>11</sup>

### B. Statutory Background

The CWA requires states to set water quality standards for specified regions to protect public health, recreation, industry, and fish and wildlife.<sup>12</sup> If the state standards do not satisfactorily meet the goals of the CWA, EPA must step in to establish new water quality standards.<sup>13</sup> The CWA contains a “necessity determination” provision, which requires the EPA Administrator to determine whether setting federal water quality standards in a given area is necessary to meet the statute’s goals.<sup>14</sup> A necessity determination triggers EPA’s duty to promulgate new water quality standards.<sup>15</sup>

The Administrative Procedure Act (APA) enables federal courts to judicially review the decisions of administrative agencies such as the EPA.<sup>16</sup> Under the APA, courts presume jurisdiction to review final agency actions, so long as the underlying statute does not “preclude judicial review” or commit

6. Dahr Jamail, *Environmentalists Sue EPA Over Dead Zone in Gulf of Mexico*, ALTERNET (Aug. 18, 2015), <http://www.alternet.org/environment/environmentalists-sue-epa-over-dead-zone-gulf-mexico>. EPA, *Response Letter to the Mississippi River Petition 1–2* (July 29, 2011), <http://www.epa.gov/sites/production/files/2015-01/documents/mississippi-river-petition-nutrients-letter.pdf>.

7. Matt Rota, *GRN and Mississippi River Groups Hit EPA With Legal Actions on Dead Zone Pollution*, Gulf Restoration Network (March 14, 2012, 8:40 PM), <http://healthygulf.org/blog/grn-and-mississippi-river-groups-hit-epa-legal-actions-dead-zone-pollution>.

8. See Smith & Hanna, *supra* note 2.

9. Rabalais et al., *supra* note 1, at 129.

10. See Jamail, *supra* note 6.

11. *Id.* In July 2014 the dead zone was 5052 square miles, the area of Connecticut. Mark Schleifstein, *Federal Judge to Rehear Arguments on Forcing EPA to Regulate Dead Zone-Causing Nutrients*, NOLA.COM (July 20, 2015, 6:01 PM), [http://www.nola.com/environment/index.ssf/2015/07/federal\\_judge\\_to\\_rehear\\_limite.html](http://www.nola.com/environment/index.ssf/2015/07/federal_judge_to_rehear_limite.html).

12. 33 U.S.C. § 1313(c)(2)(A) (2012); see also 40 C.F.R. § 131.2 (2015) (defining the purpose of the CWA as protecting public health and welfare, and preserving water quality for industry, recreation, fish, and wildlife).

13. § 1313(a)(3)(C).

14. § 1313(c)(4)(B) (a “necessity determination” is a finding under § 1313(c)(4)(B) that new water quality standards are necessary to meet the requirements of the CWA).

15. *Id.*

16. 5 U.S.C. § 702 (2012).

action to “agency discretion.”<sup>17</sup> A reviewing court may set aside an agency decision if it deems the decision “arbitrary,” “capricious,” or “an abuse of discretion.”<sup>18</sup>

### C. Case History

In 2008 the Gulf Restoration Network (GRN) and a coalition of other environmental nonprofits petitioned EPA to determine the need for new federal water quality standards in the Gulf.<sup>19</sup> GRN asserted that EPA’s “hands-off approach” in letting the states lead efforts to address the dead zone had been ineffective, and therefore the problem required direct federal action.<sup>20</sup> In light of these concerns, the petition requested that EPA use its rulemaking authority under the CWA to promulgate new regulations in the Gulf that would set federal, numeric water quality standards.<sup>21</sup>

In 2011 EPA denied the petition for rulemaking.<sup>22</sup> While EPA acknowledged the severity of the pollution problem, it declined to set new standards or make a necessity determination about whether such standards were required by the CWA.<sup>23</sup> First, EPA argued that disseminating standards would be “unprecedented and complex,” “highly resource and time intensive,” and that setting federal standards was not a feasible or efficient method for EPA to address nutrient pollution.<sup>24</sup> Second, EPA reasserted its policy of first allowing state efforts to address pollution, and only stepping in when state standards fail to meet CWA requirements.<sup>25</sup>

In 2012 GRN filed a complaint in the District Court for the Eastern District of Louisiana, alleging that EPA’s failure to make a necessity determination violated the APA.<sup>26</sup> EPA contested subject matter jurisdiction for judicial review of its decision.<sup>27</sup> In 2013 the district court held that it had subject matter jurisdiction to review EPA’s decision and that EPA was required to make a necessity determination.<sup>28</sup> EPA appealed to the Fifth Circuit.<sup>29</sup>

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17. §§ 701–702, 704.

18. § 706(2)(A).

19. *Gulf Restoration Network v. Jackson*, No. 12–677, 2013 WL 5328547, at \*1–2 (E.D. La. Sept. 20, 2013), *vacated sub nom. Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015).

20. *Id.* at \*1.

21. *Id.* at \*2.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at \*3.

26. *Id.*

27. *Id.*

28. *Id.* at \*4, \*7.

29. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 232 (5th Cir. 2015).

## II. DISCUSSION

The Fifth Circuit affirmed that the district court had subject matter jurisdiction to review EPA's decision, but held that EPA could decline to make a necessity determination, if its explanation for doing so was adequately grounded in the CWA.<sup>30</sup> It vacated the district court's order requiring EPA to make a necessity determination and remanded for consideration of whether EPA used "legally sufficient" reasoning to forego a necessity determination.<sup>31</sup>

In analyzing the issue of subject matter jurisdiction, the Fifth Circuit held that it could judicially review EPA's decision. The CWA did not preclude judicial review or commit action to EPA discretion.<sup>32</sup> Additionally, Supreme Court precedent established that denials of rulemaking petitions, such as EPA's rejection of the water quality standards petition, are judicially reviewable.<sup>33</sup> Furthermore, the Fifth Circuit held that the CWA provided a meaningful standard against which to assess EPA's use of discretion.<sup>34</sup> Specifically, the Fifth Circuit found that the CWA's goals and considerations of protecting fish, wildlife, recreation, and industry provided sufficient guidelines for judging the validity of EPA's decision to decline to make a necessity determination.<sup>35</sup>

Continuing its analysis of judicial review, the Fifth Circuit found that Congress intended a major federal role in implementation of the CWA—an intent favoring judicial review.<sup>36</sup> By establishing a "backstop role" for the federal government to intervene when states fell short of their regulatory duties, the drafters of the CWA invited judicial review of CWA decisions.<sup>37</sup> The Fifth Circuit also analogized provisions of the CWA to portions of the Clean Air Act—both trigger obligations for EPA to take action if it finds regulation necessary to preserve water or air quality.<sup>38</sup> The court reasoned that if the Clean Air Act allowed for judicial review of EPA decisions, the CWA should as well.<sup>39</sup>

In analyzing whether EPA was required to make a necessity determination, the Fifth Circuit rejected the district court's holding that *Massachusetts v. EPA* required EPA to make such a determination.<sup>40</sup> According to *Massachusetts v. EPA*, EPA could refuse to engage in rulemaking as long as it provided "some reasonable explanation" grounded in the statute.<sup>41</sup>

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30. *Id.* at 243–44.

31. *Id.*

32. *Id.* at 233, 242.

33. *See Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007); *McCarthy*, 783 F.3d at 237.

34. *McCarthy*, 783 F.3d at 238, 240–41.

35. *Id.* at 240 (analyzing the standards laid out by 33 U.S.C. § 1313(c)(2)(A) (2012) and 40 C.F.R. § 131.2 (2015)).

36. *Id.*

37. *Id.* at 241.

38. *Id.* at 238–39; *see also* 33 U.S.C. § 1313(e)(4)(B) (2012); 42 U.S.C. § 7521(a)(1) (2012).

39. *McCarthy*, 783 F.3d at 240–41.

40. *Id.* at 242–43.

41. *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007).

While the APA does allow for judicial review of refusals to initiate rulemakings, such review is limited and “highly deferential” to EPA decisions.<sup>42</sup> Consequently, the Fifth Circuit reasoned that *Massachusetts v. EPA* placed only a “slight” burden on EPA to provide a reasonable statutory explanation for refusing to make the necessity determination.<sup>43</sup>

### III. ANALYSIS AND IMPLICATIONS

While the Fifth Circuit strongly suggested that EPA had provided a reasonable means of avoiding a necessity determination, EPA’s reasoning in this case clashes with *Massachusetts v. EPA* and the purpose of the CWA.<sup>44</sup> Although EPA insisted that states’ spearheading of water regulation at the regional level is in keeping with the cooperative federalism structure of the CWA,<sup>45</sup> this is merely a policy rationale for administrative efficiency, not a statutorily grounded justification entitled to deference. The Fifth Circuit stated that *Massachusetts v. EPA* requires “a close and specific linkage between the decision not to make a threshold determination and the statutory provision setting out the underlying choice.”<sup>46</sup> This strict standard is inconsistent with the level of deference the Fifth Circuit gave EPA by calling its burden to provide a reasonable explanation only “slight.”<sup>47</sup> Moreover, in *Massachusetts v. EPA*, the determinative factor for the Court in holding that EPA had a duty to regulate was the causal link between air pollution and a danger to the public welfare, rather than EPA’s concerns about the efficiency of federal regulation.<sup>48</sup> Likewise, on remand in *Gulf Restoration Network*, EPA’s policy of continuing to rely on the states to address the dead zone should yield to the determination of whether the Gulf needs numeric water quality standards.<sup>49</sup> If the dead zone problem conflicts with the goals of the CWA, it triggers EPA’s duty to regulate, just as air pollution did in *Massachusetts v. EPA*.<sup>50</sup>

While scientific uncertainty can sometimes be a reasonable explanation to avoid a decision, such a rationale does not apply here.<sup>51</sup> In its petition and brief, GRN emphasized the dramatic impact of nutrient pollution in creating the

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42. *McCarthy*, 783 F.3d at 243.

43. *Id.* at 244.

44. *Id.*; see *Massachusetts*, 549 U.S. at 533; 33 U.S.C. § 1313(c)(2)(A) (2012); 40 C.F.R. § 131.2 (2015).

45. Opening Brief of Defendants-Appellants at 29, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015) (No. 13-31214).

46. *McCarthy*, 783 F.3d at 239.

47. *Id.* at 244.

48. 549 U.S. at 523, 533–34 (holding that the causal connection between greenhouse gas emissions and climate change triggered EPA’s duty to regulate, irrespective of policy considerations regarding the efficiency of federal regulation).

49. See *id.*

50. 33 U.S.C. § 1313(c)(4)(B) (2012); see *Massachusetts*, 549 U.S. at 533.

51. *Massachusetts*, 549 U.S. at 534.

Gulf dead zone—a problem whose severity EPA has acknowledged.<sup>52</sup> Although EPA recognized its authority to interfere—as it did through a necessity determination in Florida—it deemed it more prudent to continue to rely on state-driven efforts with regard to the Gulf’s nutrient pollution.<sup>53</sup> However, EPA’s adherence to a states-first cooperative federalism regulatory approach is dubious in light of EPA’s inability to get states to adopt acceptable water quality standards since 1998.<sup>54</sup> Despite state efforts to rein in the pollution problem, the Gulf dead zone has continued to grow beyond the size of the state of Connecticut.<sup>55</sup> As the second largest dead zone of its kind in the world and a problem that has persisted for over forty years, EPA should have taken a more active role in promulgating water quality standards.<sup>56</sup>

In fact, EPA’s decision to avoid a necessity determination with regard to the Gulf seems irreconcilable with its decision to find a need for federal water quality standards in Florida.<sup>57</sup> Evaluating EPA’s decision to implement federal water quality standards in Florida, the District Court for the Northern District of Florida criticized the Florida state agency’s sluggish pace in developing water quality standards.<sup>58</sup> The Florida district court said that there was “no end in sight” as the state agency started its implementation of its water quality standards in 2001 and had not completed the job when the EPA Administrator made a necessity determination in 2009.<sup>59</sup> The Florida district court deferred to EPA’s new water quality standards because of EPA’s scientific expertise and evidence of unsatisfactory efforts by Florida.<sup>60</sup> By contrast, the Fifth Circuit’s deference to EPA in *Gulf Restoration Network* avoided the necessity determination altogether rather than requiring EPA to make a scientific judgment.<sup>61</sup> In both cases, states exhibited delay in developing water quality standards to the detriment of the environment; therefore, *Gulf Restoration Network* on remand should require EPA to make a necessity determination about the nutrient pollution in the Gulf as EPA did in Florida.<sup>62</sup> Any

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52. Appellees’ Opening Brief at 9–10, 49, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015) (No. 13-31214) (describing the negative impacts of the Gulf “dead zone” and citing EPA’s petition denial which acknowledged that nutrient pollution “presents a significant water quality problem facing our nation”).

53. EPA, *supra* note 6, at 5; *Fla. Wildlife Fed’n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1143, 1148 (N.D. Fla. 2012) (holding that EPA’s creation of nutrient water quality criteria in Florida was not “arbitrary or capricious”).

54. See Appellees’ Opening Brief at 11–14, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015) (No. 13-31214).

55. Jamail, *supra* note 6.

56. *Id.*; Rabalais et al., *supra* note 1, at 130.

57. See *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 240 (5th Cir. 2015); *Fla. Wildlife Fed’n*, 853 F. Supp. 2d at 1157–58.

58. *Fla. Wildlife Fed’n*, 853 F. Supp. 2d at 1158.

59. *Id.*

60. *Id.* at 1156–57, 1176.

61. *McCarthy*, 783 F.3d at 242–43.

62. See Appellees’ Opening Brief at 11–14, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015) (No. 13-31214); *Fla. Wildlife Fed’n*, 853 F. Supp. 2d at 1158.

administrative deference by the court should be to EPA's scientifically based necessity determination.<sup>63</sup> Although the Florida water quality standards were only for one state, the statutory need to address nutrient pollution applies in both cases.<sup>64</sup> EPA still has a duty under the CWA to assess the need for federal water quality standards for the Gulf, even if the task requires considerable time and resources.<sup>65</sup>

Given that EPA's strategy for addressing the Gulf dead zone is not accomplishing the goals of the CWA, the wisdom of administrative deference to this decision becomes questionable.<sup>66</sup> The CWA demands at least a determination of the need for water quality standards for the Gulf dead zone.<sup>67</sup> The Fifth Circuit's interpretation of administrative law provides EPA with a way to escape its responsibilities imposed by the CWA to protect public health and the "propagation of fish and wildlife" by giving EPA the option of not even assessing whether the goals of the CWA are being met.<sup>68</sup> By allowing EPA to abdicate its duty as an environmental regulator, the Fifth Circuit has enabled EPA to stand in direct conflict with the statutory mandate of the CWA.<sup>69</sup>

#### CONCLUSION

Judicial review is an essential element of administering environmental laws because it bolsters accountability of agencies like EPA, making sure they are endeavoring to fulfill their statutory duties. Administrative deference can improve judicial efficiency and allow specialized knowledge to prevail. However, the Fifth Circuit's deference to EPA on its refusal to make a necessity determination gives EPA the option to avoid its statutory duty under the CWA to assess and improve water quality in the Gulf. A less deferential standard would heighten government accountability by requiring EPA to mitigate pollution problems that states have been unable or unwilling to address. The dead zone has been wreaking havoc on aquatic life and Gulf communities for over forty years and it demands a response from the nation's top environmental administrative agency. Even if EPA only takes gradual steps toward a necessity determination, the CWA requires due consideration of the

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63. *Fla. Wildlife Fed'n*, 853 F. Supp. 2d at 1156-57.

64. *See id.* at 1143; 33 U.S.C. § 1313(c)(2)(A) (2012); 40 C.F.R. § 131.2 (2015).

65. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2; *Gulf Restoration Network v. Jackson*, No. 12-677, 2013 WL 5328547, at \*2 (E.D. La. Sept. 20, 2013), *vacated sub nom.* *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015).

66. The goals of the CWA's water quality standards are "to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter . . . taking into consideration [the standards'] use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes . . ." § 1313(c)(2)(A).

67. *See* Appellees' Opening Brief at 44-47, *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015) (No. 13-31214).

68. *See* *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243-44 (5th Cir. 2015); 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2.

69. *See McCarthy*, 783 F.3d at 243-44; 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2.

problem. In conclusion, a federally imposed standard is both necessary and more likely to achieve results than the current state-led regulatory scheme.

*William C. Mumby*

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