

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

APR 21 2022

TAMMY H. DOWNS, CLERK

By:  DEP CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

ARKANSAS DEPARTMENT OF ENERGY)
AND ENVIRONMENT, DIVISION OF)
ENVIRONMENTAL QUALITY,)

Plaintiff,)

v.)

U.S. ENVIRONMENTAL PROTECTION)
AGENCY; MICHAEL REGAN, IN HIS)
OFFICIAL CAPACITY AS)
ADMINISTRATOR OF THE UNITED)
STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendants.)

Case No. 4:22-cv-359-BSM

This case assigned to District Judge Miller
and to Magistrate Judge Ray

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Arkansas Department of Energy and Environment, Division of Environmental Quality (“DEQ”), by counsel, hereby states the following as its Complaint for Declaratory and Injunctive Relief against the Defendant United States Environmental Protection Agency (“EPA”) and Defendant Michael Regan in his official capacity as EPA Administrator:

INTRODUCTION

1. Plaintiff DEQ seeks declaratory and injunctive relief against Defendants EPA and Administrator Regan for violating federal law and infringing on DEQ’s legal authority to implement the National Pollutant Discharge Elimination System (“NPDES”) permit program under Section 402(b) of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1342(b).

2. As described in more detail herein, Congress authorized States, like Arkansas, to assume responsibility for implementing the NPDES permit program within their borders. Once authorized, the States become the lead regulatory authority for NPDES permitting and EPA

assumes an oversight role to ensure that the State programs comply with the CWA. When a State with an authorized program is preparing to issue an NPDES permit, the CWA requires the State to provide notice to EPA so that the agency can review and comment on the permit prior to issuance. EPA may also object to the permit, and if the State fails to address EPA's concerns, EPA can assume permitting authority for that permit. That power, however, must be exercised by EPA within a prescribed timeframe to preserve the cooperative federalism framework enshrined in the CWA.

3. This case is about EPA's failure to timely exercise its oversight responsibilities, EPA ignoring those failures, and attempting to insert itself into a completed permitting process for two communities that rely on transparent, fair, and timely administration of federal and state regulatory authority. In doing so, EPA is infringing on the sovereign authority of Arkansas and depriving DEQ of its right to implement its authorized NPDES program.

PARTIES

4. Plaintiff DEQ is the Arkansas State agency that is responsible for administering and enforcing the State's environmental protection statutes and regulations, including the NPDES permit program.

5. Defendant EPA is the federal agency charged with the supervision, administration, and enforcement of many federal environmental laws, pursuant to specific delegations of authority from Congress, including the CWA.

6. Defendant Michael Regan is the Administrator of EPA and is sued in his official capacity. Administrator Regan has ultimate responsibility for EPA's actions pursuant to the CWA. The Administrator's office is located within EPA's headquarters in Washington, D.C.

JURISDICTION AND VENUE

7. This is a case “in law and equity arising under [the] Constitution [and] laws of the United States....” U.S. Constitution Article III, Section 2. This Court has further jurisdiction under 5 U.S.C. §§ 702 and 705-706 and 28 U.S.C. § 1331, 1346, and 1361.

8. The Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. § 702 and 705-706, 28 U.S.C. §§ 2201 and 2202, and Federal Rules of Civil Procedure 57 and 65.

9. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because (1) Plaintiff resides in Arkansas and (2) “a substantial part of the events or omissions giving rise to the claims[s] occurred” in this District.

LEGAL FRAMEWORK

10. EPA is charged with administering the federal NPDES permit program pursuant to 33 U.S.C § 1342.

11. The Governors of each State are authorized to seek authority to administer the NPDES permit program within their borders by applying to EPA and complying with certain statutory conditions. *Id.* § 1342(b). EPA “shall” approve such applications if the minimum statutory requirements are met. *Id.*

12. Once authorized, the authority to issue NPDES permits transfers exclusively to the State, subject to certain limited oversight responsibilities retained by EPA. *Id.* § 1342(c)(1).

13. That oversight is exercised, in part, through EPA’s review of NPDES permit applications submitted to the State permitting authority and the State providing notice to EPA of “each permit to be issued by such State.” *Id.* § 1342(d)(1).

14. A State permit may not be issued if EPA objects to the issuance of the permit “as being outside the guidelines and requirements of” the CWA; that objection must be conveyed in writing within 90 days of EPA receiving a copy of the proposed permit. *Id.* § 1342(d)(2).

15. If a State fails to resubmit a permit that meets the stated objection within 90 days of receiving the objection, EPA “may issue the permit....” *Id.* § 1342(d)(4).

16. The notification requirements of 33 U.S.C. § 1342(d) may be waived by EPA at the time it approves a State NPDES program. *Id.* § 1342(e).

17. In order to approve a State NPDES program application, EPA requires each State to enter into a memorandum of agreement that will facilitate coordination between EPA and the authorized State permitting authority. 40 C.F.R. § 123.24(a).

18. That memorandum of agreement must “specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits....” 40 C.F.R. § 123.24(d).

19. The memorandum of agreement may also specify EPA’s agreement to review draft permits instead of proposed permits, in which case a State need not submit a proposed permit to EPA for review in accordance with 33 U.S.C. § 1342(d) unless the State issues a permit that differs from the draft permit reviewed by EPA, EPA has objected to the draft permit, or there is significant public comment. 40 C.F.R. § 123.44(j).

20. A “draft permit” is the document prepared by the NPDES permitting authority indicating the authority’s tentative permitting decision, and is the version used to convey that tentative decision to the public during the required public comment period. *See* 40 C.F.R. § 122.2.

21. A “proposed permit” is the document prepared by the NPDES permitting authority following the close of the public comment period, taking into account information received during that process, and is the version submitted to EPA for review, unless that procedural step is waived, prior to final issuance. *See id.*

22. “Significant” is not defined in applicable federal law.

23. EPA authorized DEQ to administer and enforce Arkansas’s NPDES permit program on November 1, 1986.

24. DEQ and EPA entered into the required memorandum of agreement for the NPDES permit program on October 31, 1986 (“NPDES MOA”). That agreement was amended on January 30, 1995.

25. When approving Arkansas’s NPDES permit program, EPA agreed to review draft NPDES permits instead of proposed NPDES permits. NPDES MOA § III.B.7.

26. EPA also agreed that DEQ could revise draft permits “as it considers appropriate” following the close of the required public comment period, taking into account comments received from the public and EPA on the draft permit. *Id.* § III.B.11.

27. EPA also agreed that DEQ may issue a final NPDES permit “without further review by EPA” if “(a) the proposed final permit is the same as or more stringent than the draft permit submitted to EPA[,] (b) EPA has not objected to such draft permit, and (c) valid and significant public comments have not been made....” *Id.*

28. Finally, EPA agreed that if the agency “fails to provide a written objection to a draft permit within the initial time period or fails to provide timely written notice of the specific grounds for objection to a draft permit after making a general objection, EPA shall be deemed to have waived its right to object to permit terms and conditions.” *Id.* § III.B.9.

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