United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5164 **September Term, 2019**

FILED ON: APRIL 28, 2020

POTOMAC RIVERKEEPER, INC., DOING BUSINESS AS POTOMAC RIVER NETWORK, ET AL.,
APPELLANTS

v.

ANDREW WHEELER, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR FOR U.S. EPA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-01023)

Before: SRINIVASAN, *Chief Judge*, and GARLAND and MILLETT, *Circuit Judges*

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the district court be **AFFIRMED**.

Under the Clean Water Act (CWA), "each State, subject to federal approval, [must] institute comprehensive water quality standards . . . for all intrastate waters." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). Those standards "consist of the designated uses of the navigable waters involved" – for example, fishing or recreation – "and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). The implementing criteria, in turn, may take the form of either numerical measures or narrative (qualitative) descriptions. *See PUD No. 1*, 511 U.S. at 715-16. Every two years, states must submit to the Environmental Protection Agency (EPA) a list of waters failing to attain the state standards, which EPA must review and approve or not. *See* 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7.

In this case, plaintiffs Potomac Riverkeeper, Shenandoah Riverkeeper, and Potomac River Smallmouth Club (the "River Groups") first challenged EPA's approval of Virginia's list for

2014; when EPA went on to approve Virginia's list for 2016, the River Groups amended their complaint to challenge that approval. *See* Second Am. Compl. ¶ 66 (J.A. 138). In particular, the plaintiffs contend that EPA allowed Virginia's Department of Environmental Quality (DEQ) to ignore existing evidence that the Shenandoah River is impaired by excess algae, in favor of waiting on a numeric translation of Virginia's narrative standard for recreational use. In a thorough opinion, the district court rejected that characterization of the administrative process, explaining that "DEQ and EPA did not ignore Virginia's narrative criteria or fail to consider recreational use. They simply weighed the available data 'in light of' the relevant standards and found it wanting." *Potomac Riverkeeper, Inc. v. Wheeler*, 381 F. Supp. 3d 1, 21 (D.D.C. 2019) (quoting 2014 EPA Approval Rationale at 7 (J.A. 3968)). We agree and affirm.[1]

The standard at issue asks whether "substances which nourish undesirable or nuisance aquatic life," or "substances that produce color, tastes, turbidity [or] odors," are present in sufficient quantities to "interfere directly or indirectly" with recreational use. 9 VA. ADMIN. CODE § 25-260-20.A. To prove impairment during the 2014 listing process, the River Groups submitted a report collecting citizen observations of unsightly, foul-smelling, or otherwise excessive algae. *See* 2014 EPA Approval Rationale at 5-6. As EPA noted, citizen data of this kind is undeniably "useful," but working with it can present challenges. *Id.* at 7. For one, "the quantity of photographs, citizen testimonials, and algal data submitted by the commenter varied by segment, spatially and temporally[,] throughout the Shenandoah River basin." *Id.* DEQ observed, too, that it can be "difficult for even the well-trained eye to readily differentiate [undesirable] algae from native macrophytes," which are "associated with healthy waters." DEQ Response to River Groups' Technical Report (J.A. 4041).

Having first reviewed the submissions for the 2014 cycle, Virginia was ultimately left with doubts about their reliability and "uncertainty about the attainment status of the recreation designated use" for certain stretches of the Shenandoah. 2014 Virginia Integrated Report at 61 (J.A. 4089). The state resolved, however, that "[t]hese waters will be prioritized for monitoring so that their attainment status can be resolved with additional data." *Id.* EPA found that conclusion "reasonable," explaining that "Virginia's record is clear that it evaluated the relevant information submitted in light of the water quality criterion language [and] determined that there was insufficient quality data and information" to justify a finding of impairment. 2014 EPA Approval Rationale at 8.

On this record, we cannot agree with the plaintiffs' contention that EPA and the Virginia DEQ failed to measure the existing evidence against the prevailing standard. Rather, the agencies

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[1] We reject the suggestion of the Virginia Association of Municipal Wastewater Agencies that EPA's intervening approval of the state's 2018 list moots this case. As EPA concedes – and as happened here – the agency sometimes repeats its justifications from cycle to cycle, over the same parties' objections, but the window between listings is too brief to fully litigate EPA's thinking. This is plainly a dispute, then, that is capable of repetition yet threatens to evade review. *See Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322-23 (D.C. Cir. 2009).

found that the River Groups' testimony was probative enough to justify collecting more evidence, but not persuasive enough to justify a conclusion that the Shenandoah was impaired at that time. Nor can we agree with the contention that EPA's 2016 approval was arbitrary or capricious for failing to recapitulate this thinking in more detail. "Even when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Here, it is readily discernible from EPA's 2016 Approval Rationale that the agency came to the same conclusion again because the River Groups resubmitted substantially the same evidence. *See* 2016 EPA Approval Rationale at 9 (J.A. 9621).

It bears emphasizing the narrowness of EPA's conclusion (and our own), based as it was on a judgment about the particular evidence assembled here. To the extent that Virginia suggested that citizen data is *never* sufficient to support an impairment finding, EPA rejected that claim – and rightly so. *See* 2014 EPA Approval Rationale at 9 (emphasizing that a state may not "summarily reject data [collected by other parties] or assume that data is of low quality regardless of the actual quality controls that were employed"); *Sierra Club v. Leavitt*, 488 F.3d 904, 913 (11th Cir. 2007) (remanding EPA's approval decision where Florida had refused to consider any data more than 7.5 years old without inquiring into its actual reliability). Similarly, to the extent that Virginia suggested that qualitative observations cannot amount to a "scientifically valid assessment method," EPA stressed that "lack of a formalized methodology by itself is not a basis for a state to avoid evaluating data or information when developing its section 303(d) list." 2014 EPA Approval Rationale at 8.

To be clear, all this case decides is that the River Groups' particular challenges to EPA's approval of Virginia's 2016 list – the only decision presented for our review – lack merit. Nothing in this decision addresses the viability (or not) of challenges to other decisions by EPA that have approved or might approve Virginia's determinations going forward regarding the listing of the Shenandoah River as impaired. *See* 2016 EPA Approval Rationale at 10 (stating EPA's expectation that Virginia would finalize its "field methodology and impairment threshold" and would "make attainment decisions" in the 2018 cycle).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk