No. 11–3412

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Iowa League of Cities,

Petitioner,

v.

United States Environmental Protection Agency,

Respondent.

Petition for Review of Agency Correspondence
With a Member of Congress

RESPONDENT'S PETITION FOR REHEARING EN BANC

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QUESTIONS PRESENTED FOR REHEARING EN BANC

United States Senator Charles Grassley requested that the United States Environmental Protection Agency ("EPA" or "Agency") provide its views of various Clean Water Act ("CWA" or "Act") regulatory requirements concerning wastewater treatment facilities ("publicly owned treatment works" or "POTWs"). EPA complied.[1] Seizing on the clarity of EPA's responses, which largely explained the Agency's understanding of pre-existing regulations and policies, this Court (Judges Smith, Beam, and Gruender) found that EPA had, however unintentionally, "promulgat[ed]" something immediately reviewable under CWA section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E). See Panel Decision at 14-21.[2] The panel then vacated and remanded EPA's letters on the procedural ground that they represented legislative rules not preceded by notice and an opportunity for public comment, id. at 34-39, and on the substantive ground that one aspect of EPA's policy articulated in the letters was inconsistent with the CWA. Id. 39-41.

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[1] Senator Grassley's inquiries dated May and July 2011 are Exhibits 1 and 3 respectively. EPA's responses dated June and September 2011 are Exhibits 2 and 4 respectively.

[2] The Panel Decision (or "Op.") is Exhibit 5.

In so holding, the panel badly misconstrued the jurisdictional and substantive requirements of the Act, and crafted a decision that "conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Specifically: (1) the Court's holding that the correspondence is a "promulgat[ion]" is incorrect and conflicts with *Am. Paper Inst. v. EPA*, 882 F.2d 287 (7th Cir. 1989); (2) the Court's disregard of the longstanding principle limiting judicial review to "final" agency action is incorrect and conflicts with precedent from this and other Circuits; and (3) the Court's view of EPA's statutory authority is erroneously cramped and conflicts with holdings of the D.C., Fifth, and Tenth Circuits. These are exceptionally important questions meriting en banc review.

BACKGROUND

The CWA relies on "state and federal cooperation," Op. at 5, and provides the applicable legal context of EPA's letters to Senator Grassley. Iowa and other States are "primar[ily]" responsible for issuing National Pollutant Discharge Elimination System ("NPDES") permits to POTWs and other facilities, 33 U.S.C. § 1251(b), and these permits limit pollutants which can lawfully be discharged into waters.

Id. § 1342. State permits are, however, subject to defined EPA oversight, and in some instances of disagreement EPA is authorized to take over particular permits.[3] Final permit decisions, whether rendered by a State or EPA, are subject to judicial review (in state or federal court, respectively). *See, e.g., City of Ames v. Reilly,* 986 F.2d 253, 255-56 (8th Cir. 1993); *Am. Paper*, 882 F.2d at 289.

The congressional correspondence at issue began in May 2011, when Senator Grassley sought "clarification on federal wet weather permitting . . . requirements" and "respon[ses] to . . . detailed questions." Ex. 1 at 1. The first question read, in pertinent part: "May a state approve a bacteria mixing zone for waters designated for body

[3] NPDES permits must comply with the CWA and its implementing regulations. 33 U.S.C. § 1342(b); 40 C.F.R. § 122.4(a). Before a State can issue, renew, or modify an NPDES permit, the State must submit a draft or proposed permit to EPA for review. 33 U.S.C. § 1342(d)(1); 40 C.F.R. § 123.44(j). EPA may, but is not required to, object to any NPDES permit that does not comply with the requirements of the Act or its implementing regulations. *See* 33 U.S.C. § 1342(d)(2)-(3). If EPA objects, the State may modify the permit to meet the objection or request that EPA hold a public hearing. 33 U.S.C. § 1342(d)(4). If the State does neither, authority to issue (or deny) the permit passes to EPA. *Id.; see* 40 C.F.R. § 123.44(h)(3).

contact recreation when permitting . . . discharges?" Ex. 1 at 5.[4] The next question read: "May a state approve the use of physical/chemical treatment processes, such as Actiflo (i.e., ballasted flocculation), to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of federal bypass or secondary treatment rule requirements?" *Id.*[5]

In June 2011, EPA responded, noting at the outset that these issues were in the process of further study through a regulatory proposal and public workshop. Ex. 2 at 1. EPA then explained that on the mixing-zone issue, while it is a matter of state discretion under 40 C.F.R. § 131.13, existing EPA guidance and recommendations said that "mixing zones that allow for elevated levels of bacteria in rivers and

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[4] A mixing zone is "[a] limited area or volume of water where initial dilution of a discharge takes place and where numeric water quality criteria can be exceeded." Op. at 6 (citation omitted).

[5] POTWs "typically move incoming flows through a primary treatment process and then through a secondary treatment process." Op. at 8. Secondary treatment regulations are set forth at 40 C.F.R. Pt. 133. "Most secondary treatment processes are biologically-based," i.e., "use microorganisms to treat incoming flows." Op. at 8-9 & n.8. NPDES regulations prohibit "bypass," or the "intentional diversion of waste streams from any portion of a treatment facility," absent a showing of, *inter alia*, "no feasible alternatives." 40 C.F.R. § 122.41(m)(1)(i), (4)(i).

streams designated for primary contact recreation are inconsistent with the designated use and should not be permitted because they could result in significant human health risks." Ex. 2 at 2. Turning to the second question, EPA discussed its "draft Peak Flows Policy," which articulated how the bypass and secondary-treatment regulations could work for POTWs. Id. at 2 (citing 70 Fed. Reg. 76,013 (Dec. 22, 2005)).

In July 2011, Senator Grassley wrote EPA a follow-up letter "requesting further clarification" regarding the second question. Ex. 3 at 1. He first asked EPA to confirm its previous response, including its intent to implement its draft peak flows policy. Ex. 3 at 2-3. Senator Grassley also inquired about whether Actiflo constitutes "bypass." *Id.*

In September 2011, EPA responded to the follow-up letter, confirming its previous response and noting that consideration of these issues, especially the extent to which Actiflo could be utilized consistently with applicable regulations, was ongoing and would continue to be explored on a case-by-case basis as appropriate. Ex. 4.[6]

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[6] In particular, EPA responded that "[b]ased on the data [it] has reviewed to date," "ACTIFLO systems that do not include a biological component[] do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations . . . , and (*continued*)

ARGUMENT AND AUTHORITIES

The Panel Decision credited Petitioner Iowa League of Cities' ("League") characterization of EPA's letters as "definitive" and "unequivocal" and, largely based on that description, found them to be "binding."[7] EPA respectfully disagrees and submits that, at most, the correspondence "serve[d] as advice about how the EPA will look at things when the time comes," *Am. Paper*, 882 F.2d at 289 -- for example, in a future permit proceeding -- and therefore cannot be considered either a "promulgat[ion]" or "final" agency action.

Moreover, from a broader perspective, the Panel Decision raises serious concerns about the Judiciary's review of informal communications between the Executive and Legislative branches of

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hence are not considered secondary treatment units[.]" Ex. 4 at 2. Further, "[w]astewater flow that is diverted around secondary treatment units and that receive [sic] treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the 'no feasible alternatives' demonstration in the 'bypass' provision[.]" *Id.* EPA concluded by stating that it "supports" the use of this technology in certain circumstances, will "continue to explore" the circumstances in which its use would satisfy the no-feasible-alternatives test, and will consider "where it would be appropriate to approve [these technologies] in a permit[.]" *Id.*

[7] *See, e.g.,* Op. at 17 ("[L]etters . . . have a binding effect on regulated entities."); *id.* at 33 n.17 ("[L]etters evince binding rules[.]").

government. EPA and other agencies must have the ability to respond clearly and promptly to congressional inquiries. Although Members of Congress have no direct role in executing laws that have already been enacted, their core constitutional function is to determine whether new legislation is appropriate. To this end, Congress must have a sound understanding of the current legal framework, including the relevant agency's methods of implementing existing statutory provisions. Where EPA has a position, it makes no sense either to force the Agency to hide that position from Congress behind artificial disclaimers, or to make the Agency employ full rulemaking procedures before it answers the mail.

I. EPA DID NOT "PROMULGAT[E]" LIMITS WITH LEGAL EFFECT, AND THE PANEL'S CONTRARY DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

CWA section 509(b)(1)(E) limits direct appellate review to EPA action "promulgating any effluent or other limitation[.]" 33 U.S.C. § 1369(b)(1)(E). Here, EPA responded to inquiries from a sitting Senator. EPA did not "promulgat[e]" a limitation.

Neither the CWA nor its regulations define "promulgating." Black's Law Dictionary generally defines it as the carrying out of a rulemaking through notice and public comment. *See* Op. at 14. Courts

have similarly accorded "'promulgation' . . . its 'ordinary meaning' – i.e., publication in the *Federal Register*." *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997) (citations omitted).[8]

With the lone exception of the Panel Decision, this Court has reviewed only codified CWA regulations as "promulgat[ions]."[9] Indeed, as then-Judge Scalia observed, "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents 'having general applicability *and legal effect*[.]'" *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (quoting 44 U.S.C. § 1510 (1982)).

The Seventh Circuit in *Am. Paper* provided a cogent definition and application of the term "promulgating." In dismissing a petition for review for lack of jurisdiction under CWA section 509(b)(1)(E) -- the same subsection at issue here -- Judge Easterbrook explained that "[p]romulgation means issuing a document with legal effect." 882 F.2d

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[8] *Accord* 33 U.S.C. § 1314(b) ("[T]he Administrator shall . . . publish . . . regulations . . . for effluent limitations[.]").

[9] *See, e.g., Ark. Poultry Fed'n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988); *Nat'l Indep. Meat Packers Ass'n v. EPA*, 566 F.2d 41, 42 (8th Cir. 1977).

at 288. The court acknowledged that the challenged document, an "approach to regulation," at least remotely resembled a codified rule. *Id.* Nevertheless, the court found that the document, standing alone, had no legal effect. As the Seventh Circuit explained, if and when EPA's position as set forth in the document ever leads to the denial or modification of a permit, then judicial review may occur. *Id.* at 289. But until the completion of a proceeding with legal effect, the document is not reviewable; as Judge Easterbrook aptly reasoned, "telegraphing your punches is not the same thing as delivering them." *Id.*[10]

The Panel Decision conflicts with *Am. Paper*. Legal effect is what counts for purposes of CWA section 509(b)(1)(E), not whether, as the panel focused on, a regulated entity or a state permitting authority has subjectively perceived EPA's responses to Senator Grassley as binding directives. EPA's statements will not have any legal effect on any facility until they are actually applied in a permit proceeding, and if that occurs, as noted above, the affected POTW would have full rights to

[10] *Accord Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980) (EPA's veto of NPDES permit reviewable), *discussed* Op. at 15.

judicial review. The legality of the permit will be tested based on its fidelity to the CWA and applicable regulations, not EPA's letters.

II. THE CORRESPONDENCE IS NOT "FINAL," AND THE PANEL DECISION PRESENTS BOTH AN INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICT

Underscoring the importance of legal effect is the longstanding principle of administrative law that, to be reviewable in *any* federal court, agency action must be "final," i.e., determine "rights or obligations" or lead to "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted). The correspondence at issue adjudicates nothing and lacks finality under this key part of the *Bennett* test. League members' rights and obligations will be determined, for example, in a permit proceeding, and League members cannot be prosecuted for failing to abide by the correspondence as they could for violating permits. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593-94 (9th Cir. 2008) (no finality if "rights and obligations remain unchanged").

Moreover, even if the letters could be characterized as announcing positions EPA would take if it decides, for example, to object to a State-issued permit allowing bypass or effluent limits that do not protect

human health, it does not follow that EPA would elect to participate in the permit proceeding in the first place. As a matter of law, EPA retains discretion on a case-by-case basis to review any particular permit. *See* 33 U.S.C. § 1342(d)(2)-(3); *supra* p.3 n.3. *See also Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final[.]").[11]

The panel incorrectly held that finality is irrelevant to the question of whether the letters may be reviewed under CWA section 509(b)(1)(E). *See* Op. at 16-17 n.12. This stands in direct conflict with other Circuits that have dismissed CWA review petitions for lack of finality. *See, e.g.*, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 754-56 (5th Cir. 2011); *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004).[12] The reason for this is straightforward; as the panel itself noted but failed to fully appreciate, the key focus of whether EPA has promulgated a limitation is functionally the same as the principal

[11] Indeed, EPA has not, to date, objected to any relevant Iowa-issued NPDES permit even in the face of, in the panel's words, "widespread use by POTWs of blending peak wet weather flows." Op. at 37.

[12] The panel cited additional conflicting case law. *See* Op. at 17 n.12.

component of the finality test -- i.e., whether or not the challenged action has legal effect.

Furthermore, finality has been recognized by *this* Circuit as a precondition for ripeness, which is another limitation on judicial review. *Lane v. U.S. Dep't of Agric.*, 187 F.3d 793, 795 (8th Cir. 1999). Thus, rehearing en banc is also warranted "to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A).

III. THE CWA AUTHORIZES EPA TO REGULATE INTERNAL WASTE STREAMS, AND THE PANEL'S CONTRARY READING CREATES INTER-CIRCUIT CONFLICT

Assuming, arguendo, that the correspondence is reviewable, EPA urges the Court to reconsider the Panel Decision that EPA's answers to Senator Grassley's questions about Actiflo and blending "clearly exceed[] the EPA's statutory authority" "insofar as [EPA's position] imposes secondary treatment regulations on flows within facilities[.]" Op. at 40-41.[13] The Panel Decision is incorrect and conflicts, *inter alia*,

[13] Blending is "channeling a portion of 'peak wet weather flows' around biological secondary treatment units and through non-biological units, recombining that flow with its counterpart that traveled through the biological units, and then discharging the combined stream." Op. at 9.

with *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) – precedent that the panel itself acknowledged at the outset of its decision. *See* Op. at 10.

In *NRDC*, industry petitioners challenged the validity of a CWA regulation that generally prohibits "bypass," defined as "the intentional diversion of waste streams from any portion of a treatment facility." 40 C.F.R. § 122.41(m)(1)(i). On a number of grounds, the D.C. Circuit rejected arguments that "requiring the treatment system . . . to be operated without bypass, even where the effluent limitations are not exceeded, is barred under a faithful discernment of Congress' intent." 822 F.2d at 123. The court held, for example, that "permits may include conditions other than effluent limitations." 822 F.2d at 124 (citing 33 U.S.C. § 1342(a)(2)). The court also concluded that "the statute's goals are hardly fostered by allowing dischargers to shut off their systems at will whenever they are in compliance with the requirements represented by the effluent limitations." 822 F.2d at 124.

The stated basis of the Panel Decision – that EPA lacks statutory authority to "apply effluent limitations to the discharge of flows from one internal treatment unit to another," Op. at 41 – is squarely at odds with *NRDC*. As *NRDC* held, EPA may, consistent with the CWA,

regulate bypass and prohibit the diversion of waste streams from secondary and other treatment units even if a POTW is discharging in compliance with end-of-pipe effluent limitations. It follows *a fortiori* that EPA may also regulate blending when it constitutes bypass, i.e., the intentional diversion of waste streams from secondary treatment, even when end-of-pipe limits are met.

The panel's conclusion that the CWA does not authorize EPA to regulate internal waste streams also conflicts with at least two other appellate decisions. In *Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482 (5th Cir. 1988), the Fifth Circuit upheld the validity of a CWA regulation, 40 C.F.R. § 122.45(h), which expressly addresses the imposition of effluent limitations and standards to internal waste streams. The court rejected the petitioner's "principal contention . . . that the internal waste stream rule exceeds EPA's authority." 836 F.2d at 1487. The court agreed with EPA that, consistent with the CWA, "it is sometimes necessary to regulate discharges within the treatment process to control discharges at the end." *Id.* at 1488.

Similarly, in *Pub. Serv. Co. v. EPA*, 949 F.2d 1063, 1065 (10th Cir. 1991), the Tenth Circuit rejected a permittee's "unpersuasive"

contention that the CWA "restrict[s] EPA's authority to impose effluent limitations to the physical point of discharge into . . . waters[.]"[14]

These authoritative decisions establish that EPA's statements regarding Actiflo and blending are not "obviously preclude[d]" by the CWA. Op. at 40. Thus, while the panel should not have reached the merits at all, at the very least this aspect of the correspondence should be treated no differently than the mixing zone aspect, which the panel vacated and remanded only for want of notice and comment. *See id.*[15]

CONCLUSION

The Court should rehear this case en banc.

Respectfully submitted,

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Dated: May 9, 2013

/s/ Andrew J. Doyle
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[14] *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997), is not to the contrary. It dealt only with water quality-based effluent limitations, not in-plant, technology-based effluent limitations. Secondary treatment requirements for POTWs are technology-based. *See* 33 U.S.C. §§ 1311(b)(1)(B), 1314(d); 40 C.F.R. § 125.3(a)(1)(i).

[15] Alternatively, the Court should allow the parties to submit supplemental briefing on this exceptionally important question.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2013, I electronically filed the Foregoing Respondent's Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

May 9, 2013

/s/ Andrew J. Doyle
Attorney for the United States