IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1150

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE ANOTHER SUPPLEMENTAL APPENDIX

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent United States Environmental Protection Agency ("EPA" or "Agency") opposes the motion by Petitioner Center for Regulatory Reasonableness ("Center" or "CRR") for leave to file another supplemental appendix. The Center's latest proposed appendix–the third of its kind to contain documents that are *not* part of the certified administrative record–contains two categories of extra-record documents: (A) an EPA-drafted "desk statement" dated November 19, 2013, regarding *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), and related documents that the Center's attorney recently obtained through a Freedom of Information Act ("FOIA") request;[1] and (B) a legal brief that EPA recently filed in an unrelated district court case.

For at least two reasons, the first category of extra-record documents should not be accepted for filing. Although the Court's Order of June 8, 2015, permitted the Center to file *some* extra-record documents so that the Court may resolve the Center's pending motions to supplement the administrative record, the desk statement and related documents exceed the permission granted by that Order. Moreover, the desk statement and related documents are largely duplicative or

[1] "Desk statements" are typically used by EPA to respond to press inquiries. For a summary of *Iowa League*, see Brief for Respondent (Feb. 3, 2016) 6-13 ("EPA Br.").

cumulative of documents that have already been filed in this case. As explained *infra* pp. 6-10, the desk statement and related documents add nothing of substance.

With respect to the EPA district court brief, there is no good cause to permit its filing. EPA has no general objection to the Court taking judicial notice of its briefs or filings in other cases. But this particular filing has no relevance to this case. Contrary to the Center's strained arguments, EPA's district court brief is entirely consistent with EPA's brief here.

Although the Court may readily deny the Center's motion, it may also pretermit a ruling until a merits panel considers the parties' briefs. As EPA has explained, "even if the Court considers all of the extra-record materials cited by the Center, the Center's petition should be dismissed or denied." EPA Br. 47. That argument also holds true for the Center's latest proposed appendix of extra-record documents.

BACKGROUND

This case commenced on August 12, 2014, when the Center filed a petition for review asserting that, after the Eighth Circuit's decision in *Iowa League*, "EPA announced that it was limiting the decision to the states in the Eighth Circuit and would continue to impose the vacated requirements elsewhere." Pet. for Rev. at 1-2. Invoking a particular subsection of the Clean Water Act's ("Act's") judicial review provision, Section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), the Center

identified two letters drafted and transmitted by EPA dated April 2 and June 18, 2014, as "unequivocally announc[ing]" these alleged decisions. Pet. for Rev. at 2. EPA timely moved to dismiss the Center's petition for lack of jurisdiction, and the Court issued an Order carrying that motion with the case. It remains pending.[2]

On January 26, 2015, EPA certified and filed an index to the administrative record (without prejudice to EPA's jurisdictional defenses). That record consists of incoming correspondence dated November 26, 2013, and May 24, 2014, and EPA's responsive (challenged) letters of April 2 and June 18, 2014.

On January 31 and March 18, 2015, the Center filed motions, opposed by EPA, seeking to supplement the administrative record with a host of documents, including press articles and a laundry list of documents that EPA had withheld as deliberative, privileged, or otherwise protected from disclosure in response to the Center's attorney's FOIA requests. *See Hall & Associates v. EPA*, 77 F. Supp. 3d 40 (D.D.C. 2014) (review of some of those FOIA responses); *see also Hall &*

[2] The grounds for dismissal are: the challenged EPA letters lack finality, *see* EPA Br. 21-30; the challenged letters do not constitute the "approv[al] or promulgat[ion]" of any limitation under 33 U.S.C. §1369(b)(1)(E), *see* EPA Br. 30-33; the Center lacks standing because of its deficient showing that the challenged letters have actually injured or imminently threatened to injure any of the Center's members, *see* EPA Br. 33-35; and the Center's claims are not ripe for review because the challenged letters are divorced from any concrete and fully developed dispute, *see* EPA Br. 35-37.

Associates v. EPA, 1:15-cv-1055-KBJ (D.D.C.) (pending case involving additional FOIA responses). On June 8, 2015, the Court issued an Order: (a) referring the Center's motions to a merits panel; (b) directing the parties "to address in their briefs the issues presented in these motions"; and (c) stating that "[t]he parties may refer to the supplemental material in their briefs, but must identify it as such."

Briefing ensued. On October 26, 2015, the Center filed its opening brief and a nearly 400-page appendix. That appendix ("Pet'r Appx.") included EPA's certified administrative record. But the bulk of that appendix consisted of extra-record materials that had been the subject of the Center's earlier (and carried) motions to supplement the administrative record.

On February 3, 2016, EPA filed its answering brief (and lodged a short supplemental appendix that was later filed without objection).

On March 21, 2016, the Center filed its reply brief and–in addition–moved for leave to file a 138-page supplemental appendix containing additional extra-record documents. On March 23, 2016, EPA opposed that motion, explaining that the Court's Order of June 8, 2015, required the Center to file and address, in conjunction with its opening brief, any and all extra-record materials that were the subject of its motions to supplement the administrative record. To date, that motion remains pending.

The Center's present motion to file another supplemental appendix followed.

ARGUMENT

The Center's motion is baseless and the Court should deny it–either now or in conjunction with a merits panel's consideration of the parties' briefs.

I. THE DESK STATEMENT AND RELATED DOCUMENTS ARE BEYOND THE SCOPE OF THE COURT'S ORDER OF JUNE 8, 2015, AND CUMULATIVE.

The first set of documents the Center now seeks to file pertains to an EPA "desk statement" dated November 19, 2013, that EPA provided to Bloomberg BNA and then to EPA's regional offices. The desk statement, in full, provides:

> The Eighth Circuit's interpretation in Iowa League of Cities v EPA of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Lodged Suppl. Appx. 529.

There is no dispute that EPA did not include the desk statement or related documents in the certified administrative record. Although the desk statement existed at the relevant time,[3] it was not among the non-deliberative documents that

[3] The Center alleges that it only recently (in conjunction with a FOIA response) learned of the desk statement. EPA does not understand that allegation, given that the Center's counsel (the FOIA requester) was quoted in a November 19, 2013 article that also quotes the desk statement. *See* http://www.bna.com/epa-wet-weather-n17179880233/ (last visited June 29, 2016). Regardless, the timing of the *Cont'd . . .*

the author of the challenged EPA letters of April 2 and June 18, 2014, considered, directly or indirectly (*e.g.*, through staff), in drafting these letters. *See* EPA Br. 47-49 (explaining EPA's practices for compiling and certifying administrative records). The extra-record status of the desk statement and related documents alone warrants denying this part of the Center's motion. *See* Fed. R. App. P. 30; D.C. Cir. Rules 25(c)(5), 30, 32.

Further, this part of the Center's motion is contrary to the Court's Order of June 8, 2015, the plain meaning of which required the Center to file and address, in conjunction with its opening brief, any and all extra-record materials that were subject to the Center's motions to supplement the administrative record. Indeed, the Center had filed its motions to supplement before that Order issued and before briefing commenced. Significantly, the Order referenced "*the* supplemental material" and directed the parties to "to address in their briefs the issues presented in *these* motions." (Emphasis added.)

Moreover, the extra-record desk statement and related documents are properly omitted from the record for the additional reason that they are largely duplicative or cumulative. From the beginning of this case, the Center has asserted

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Center's discovery is irrelevant to whether the desk statement is properly considered part of the administrative record.

that, as "memorialized in letters signed on April 2, 2014, and June 18, 2014," EPA made an "unequivocal decision" "to limit the [*Iowa League*] ruling to Eighth Circuit states and, thereby, approve and/or re-promulgate the rule modifications that were vacated by the Eighth Circuit." Pet'r Br. 1, 4, 9. *See also, e.g., id.* at 40 ("EPA (in consultation with DOJ) purposefully decided to continue imposition of the vacated regulatory prohibitions on all permittees outside of the Eighth Circuit."); Pet. for Rev. at 2, discussed *supra* pp.2-3. According to the Center, the desk statement and related documents allegedly establish that "in November 2013, EPA rendered and disseminated a decision to treat the [*Iowa League*] as binding only inside the Eighth Circuit, and to continue implementing the vacated rule amendments outside the Eighth Circuit." Center's Mot. 7. Although EPA rejects that characterization,[4] the point is that under the Center's own theory of the case, the desk statement and related documents stand for the same or substantially the same proposition as the challenged letters of April 2 and June 18, 2014.

[4] The desk statement does *not* mean, as the Center argues, that EPA has decided to implement any rule interpretation that the Center contends was vacated in *Iowa League*. At most, the desk statement–like the challenged letters and other parts of the record–can be read to mean that, outside the Eighth Circuit, EPA *reserves the right* to decide whether to implement any such rule interpretation on a case-by-case basis.

In additional respects, the desk statement and related documents add nothing substantively new to the claims or defenses presented here. Like the challenged letters, the desk statement, correctly read, does not state or reasonably imply that EPA has made an across-the-board or generally applicable decision concerning "blending" and "bypass" (issues address in *Iowa League*) outside the Eighth Circuit. The desk statement instead indicates that, outside the Eighth Circuit, EPA expects to consider a variety of factors (*e.g.*, public health and the environment, economic constraints, feasibility concerns, EPA's interpretation of its regulations) on a case-by-case basis in deciding what, if anything, to do with respect to any given facility. The main takeaway from the desk statement is that EPA is pursuing a "goal of finding solutions." Lodged Suppl. Appx. 529.

Furthermore, neither the challenged letters nor the desk statement and related documents on their face forecloses EPA from actually or effectively following *Iowa League* outside the Eighth Circuit–regardless of where *Iowa League* may be regarded as "legally binding." On that subject, both the challenged letters and the desk statement relay an unremarkable statement of law that *Iowa League* "is legally binding within the Eighth Circuit." Lodged Suppl. Appx. 529. *Compare with* Pet'r Appx. 1, 3; Challenged Letter of Apr. 2014 (*Iowa League* "applies as binding precedent in the Eighth Circuit"); Challenged Letter of June 2014 (same).

The largely redundant nature of the desk statement is reflected in another document in the certified administrative record. On November 26, 2013, shortly after the desk statement, municipal and industrial organizations sent a letter to EPA in which they shared their understanding (and consternation) that the Agency "believes the decision to have binding legal effect only in the 8th circuit and that it will be applied to permittees elsewhere in the country on a case-by-case basis." Pet'r Appx. 5. As that correspondence and the desk statement show, any legal assessment about whether EPA has the authority not to follow *Iowa League* outside the Eighth Circuit does not answer the question whether EPA will actually, with respect to any given facility outside the Eighth Circuit, act with finality and choose to implement any rule interpretation that the facility may contend was vacated in *Iowa League*.[5]

The desk statement and related documents are also cumulative of extra-record documents that the Center has filed in this case. For example, on the heels of receiving the desk statement, a Bloomberg BNA article characterized EPA's post-*Iowa League* approach outside the Eighth Circuit as "case-by-case." Pet'r Appx. 310. Although that article reports that an EPA official said at a seminar that

[5] Indeed, to date, as EPA has explained, relevant "permit proceedings remain pending or, if concluded, did not aggrieve the permittee." EPA Br. 30.

Iowa League is not binding outside the Eighth Circuit,[6] it also quotes that official as having said, consistent with the desk statement: "Outside the Eighth Circuit, we will be looking on a case-by-case [basis] at situations in particular communities to see what makes sense[.]" Pet'r Appx. 310.

Thus, while the desk statement and related documents might be new to the Center, they should not be added to the already voluminous collection of intra- and extra-administrative record documents.

II. THE BRIEF EPA RECENTLY FILED IN AN UNRELATED DISTRICT COURT CASE IS IRRELEVANT.

The Center devotes the last half of its motion to sharing its view as to the significance of a recent brief filed by EPA in an unrelated case in the United States District Court for the District of North Dakota. *See* Center Mot. 5-6, 12-20. There, several states challenge the "Clean Water Rule," a Clean Water Act regulation promulgated by EPA and the United States Army Corps of Engineers amending the regulatory definition of "waters of the United States." In the brief in question, the agencies seek dismissal of the district court action in light of the judgment of the United States Court of Appeals for the Sixth Circuit that, pursuant to the Act's judicial review provision, it has original and exclusive jurisdiction to

[6] The subsequent (challenged) letter of April 2, 2014, does not state that *Iowa League* is not binding outside the Eighth Circuit. EPA Br. 24-25; Pet'r Appx. 1.

resolve parallel challenges raised by multiple petitions for review of the Clean Water Rule. *See In re U.S. Dep't of Defense and U.S. Envtl. Protection Agency Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, 817 F.3d 261 (6th Cir. 2016).

As noted at the outset of this opposition, while EPA does not, as a general proposition, object to the Court taking judicial notice of EPA's filings in other cases, there is no need or good cause for the Court to do so here, since the proffered filing is entirely consistent with EPA's arguments here. According to the Center, EPA has argued to the district court that "Congress had altered the judicial review scheme to ensure Section 509(b)(1)(E) decisions are binding nationwide." Center Mot. 5. The Center mischaracterizes both the issues involved in the cited aspect of the Clean Water Rule litigation as well as the arguments made in the proffered brief from that litigation.

The Sixth Circuit determination at issue in the Clean Water Rule litigation cited by the Center dealt only with the question whether that regulation was subject to the Act's judicial review provision in Section 509(b)(1), 33 U.S.C. § 1369(b)(1), a determination that, in turn, would govern whether judicial review would occur in the courts of appeals or the district courts. In the brief cited by the Center, EPA argued to the district court that the Sixth Circuit's determination as to Section

509(b)(1) jurisdiction should be binding nationwide for a variety of reasons, including:

- "The Sixth Circuit's decision that it has jurisdiction to review the Clean Water Rule is binding on this Court because the Sixth Circuit is the court designated by statute to hear the consolidated petitions for review of the Rule, including the petition filed by the States in the Eighth Circuit and transferred to the Sixth Circuit by order of the Judicial Panel for Multidistrict Litigation [pursuant to 28 U.S.C. § 2112(a)]."
- "By operation of Section 2112(a), one court is authorized to decide all petitions for review of the same agency action."
- "To be sure, a decision of a single United States court of appeals normally is binding only within that circuit."
- "However, Congress alters that traditional approach when it enacts a judicial-review provision that specifies a single court to decide multiple challenges to the same agency action."
- "The Agencies are bound nationwide by the Sixth Circuit's decisions [in the Clean Water Rule case], win or lose, absent reversal by the Supreme Court."

Federal Defendants' Memorandum in Support of Motion to Dissolve Preliminary Injunction and Dismiss Amended Complaint, *State of North Dakota v. EPA*, No.

3:15-cv-00059-RRE-ARS (D.N.D. Mar. 3, 2016) at 10-12 (Lodged Suppl. Appx. 592-95). The overriding point of EPA's district court brief was that where there are multiple challenges to *the same final agency action* filed in various district courts and courts of appeals nationwide, it was most consistent with congressional intent under 28 U.S.C. § 2112(a) and 33 U.S.C. § 1369(b)(1) to give dispositive effect to the ruling made by the court of appeals chosen to hear the consolidated challenges.

The present case, by contrast, does not involve a dispute about the proper court to conduct judicial review of the same agency action. Instead, this case involves the weight a court of appeals reviewing (an allegedly final) agency action under Section 509(b)(1) must give *to the merits* of an earlier decision by a different circuit court review reviewing a different agency action.

As is evident, EPA did *not* take the blanket position in the cited Clean Water Rule district court filing that the Center attributes to EPA, *i.e.*, that all aspects of judicial decisions reviewing any type of agency action under Section 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1), are binding, on the merits, beyond the circuit in which they were issued. All that was at issue in the cited district court case was the much narrower question of which is the right court to decide where judicial review of multiple challenges to the Clean Water Rule should occur (the Sixth Circuit or the District of North Dakota).

To the extent the proffered district court brief made any more general statements about the effect of a judicial decision under Section 509(b)(1), those statements are entirely consistent with those made by EPA here. EPA argued to the district court that (a) the default rule is that a decision of a single United States court of appeals normally is binding only within that circuit, but that (b) Congress has altered the default rule in certain circumstances, including in the context of the Clean Water Rule.

EPA's arguments here are strikingly similar. EPA asserts that (a) the default rule is that a decision of a single United States court of appeals normally is binding only within that circuit, but that (b) "there are circumstances in which Congress has made alterations" such as when "[v]arious parties . . . challenge nationally applicable regulations promulgated by EPA that fall within the scope of 33 U.S.C. § 1369(b)(1) by filing petitions in more than one circuit." EPA Br. 39-40. "In that scenario," EPA explained, "28 U.S.C. § 2112(a) allows only the lottery-winning circuit to adjudicate all petitions" and "the relief granted by the reviewing court as to the particular agency action before it is binding nationwide." EPA Br. 40.

Moreover, the Sixth Circuit case addressed in the district court brief has at least three material features that *Iowa League* lacks. *See* EPA Br. 40 ("*Iowa League* . . . shares little in common with the foregoing examples."). *First*, while the Sixth Circuit became the sole court of appeals to adjudicate challenges to the

Clean Water Rule pursuant to 28 U.S.C. § 2112(a), that statute "was never invoked and had no application in *Iowa League*." EPA Br. 40. *Second*, while the Clean Water Rule is a "broadly published regulation following a public notice-and-comment process and with unquestionable nationwide reach[,]" "the EPA actions reviewed in *Iowa League* did not take [that] form[.]" *Id.* at 41. *See also id.* ("They were instead letters to a United States Senator . . . . [and] were merely intended to provide the lawmaker . . . with a summary of what the Agency believed to be the present status of certain regulatory issues."). *Third*, whereas EPA did not contest that petitions for review of the Clean Water Rule fell within the scope of 33 U.S.C. § 1369(b)(1), *see* Lodged Suppl. Appx. 589, 600-17, "throughout the *Iowa League* litigation, EPA contested the invocation of the Eighth Circuit's jurisdiction." EPA Br. 41.

In short, as explained in EPA's brief in this case, given all the circumstances of *Iowa League*, there simply is no indication that Congress intended to (or did) alter the default rule, whereas, as explained in EPA's district court brief, the exception to the default rule applies with respect to the Sixth Circuit's adjudication of the jurisdictional question associated with petitions for review of the Clean Water Rule. These are entirely consistent, complementary, and lawful conclusions.

The Center also contends, misleadingly and bizarrely, that "EPA's filing to the D.N.D. repeatedly cited to [*Iowa League*] favorably." Center Mot. 19. This contention ignores the legal fact that the Eighth Circuit encompasses North Dakota and thus *Iowa League* is binding precedent there. Even the Center would have to concede that EPA regards *Iowa League* to be binding precedent in North Dakota and other states within the Eighth Circuit. Moreover, in its D.N.D. brief, EPA confined its discussion of *Iowa League* to either summarizing that decision or citing that decision's unremarkable propositions of law that reflect EPA's own position. *Compare* Federal Defendants' Memorandum in Support of Motion to Dissolve Preliminary Injunction and Dismiss Amended Complaint, *State of North Dakota v. EPA*, No. 3:15-cv-00059-RRE-ARS (D.N.D. Mar. 3, 2016) at 20, 21, 24, 27, 28 (Lodged Suppl. Appx. 603, 604, 607, 610, 611) *with* EPA Br. 42-47.

Thus, nothing about EPA's arguments to the district court changes EPA's arguments here that "[t]here are ample grounds for EPA or this Court to disagree with *Iowa League* and reach opposite conclusions." EPA Br. 43.

III. THE CENTER'S MOTION HAS NO BEARING ON GROUNDS TO DISMISS OR DENY THE CENTER'S PETITION FOR REVIEW.

As with all of the Center's prior attempts to file extra-record documents, the Court may elect to pretermit ruling on the present motion until a merits panel

reviews the parties' briefs. Simply put, it may never be necessary for the Court to resolve these record questions. *See* EPA Br. 47; *supra* p. 2.

For example, the merits panel could assume, purely for the sake of argument, that the challenged letters (with or without consideration of the desk statement and related documents) reflect a decision on the part of at least some EPA officials not to follow any aspect of *Iowa League* outside the Eighth Circuit, and/or that the Agency would apply the Clean Water Act or its implementing regulations in future cases outside the Eighth Circuit in a manner that the Center would contend is contrary to *Iowa League*. Even applying that (disputed) assumption, a panel could conclude that the Center still fails to challenge any "final" and reviewable EPA action and therefore the Center fails to properly invoke this Court's limited jurisdiction. *See, e.g.*, EPA Br. 22-23 (discussing the import of *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014), where this Court dismissed a challenge to an Act guidance document, "applying the principle that finality is lacking where the agency 'merely explains how [it] will enforce a statute or regulation – in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule'" and explaining the Court's reasoning that "although 'the Final Guidance may signal likely future permit denials by EPA,' 'those permit denials can be challenged at that time, and EPA will not be able to rely on the Final Guidance in

defending a permit denial'"); *Am. Paper Institute v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) ("[T]elegraphing your punches is not the same as delivering them."). In that scenario, the Center's motion could simply be denied or deemed moot upon the merits panel's judgment of dismissal.

CONCLUSION

The Court should deny the Center's motion for leave to file another supplemental appendix.

Respectfully submitted,

Dated: June 30, 2016

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CERTIFICATE OF SERVICE

Undersigned counsel for Respondent United States Environmental Protection Agency hereby certifies that, on this date, a true and correct copy of the foregoing opposition was served electronically through the Court's ECF system on all registered counsel.

Dated: June 30, 2016

___/s/ Andrew J. Doyle_____
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