

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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Assistant Attorney General

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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.

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

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

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

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

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,

IGNACIA S. MORENO
Assistant Attorney General

Dated: May 9, 2013

/s/ Andrew J. Doyle
ANDREW J. DOYLE
USDOJ / ENRD

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

REPLY TO:

- ☐ 135 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-1501
(202) 224-3744
e-mail: grassley.senate.gov/contact.cfm
- ☐ 721 FEDERAL BUILDING
210 WALNUT STREET
DES MOINES, IA 50309-2140
(515) 288-1145
- ☐ 150 1ST AVENUE NE
SUITE 325
CEDAR RAPIDS, IA 52401
(319) 363-6832

United States Senate

CHARLES E. GRASSLEY

WASHINGTON, DC 20510-1501

May 19, 2011

REPLY TO:

- ☐ 103 FEDERAL COURTHOUSE BUILDING
320 6TH STREET
SIOUX CITY, IA 51101-1244
(712) 233-1860
- ☐ 210 WATERLOO BUILDING
531 COMMERCIAL STREET
WATERLOO, IA 50701-5487
(319) 232-6657
- ☐ 131 WEST 3RD STREET
SUITE 180
DAVENPORT, IA 52801-1419
(563) 322-4331
- ☐ 207 FEDERAL BUILDING
8 SOUTH 6TH STREET
COUNCIL BLUFFS, IA 51501-4204
(712) 322-7103

Ms. Joyce Frank
Assoc. Admin. For Cong. & Intergov. Relations
Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Room 3426 ARN
Washington, DC 20460

Dear Ms. Frank:

Enclosed please find a communication from the President of the Iowa Water Environment Association regarding the association's request for clarification on federal wet weather permitting and reporting requirements.

I would appreciate your assistance in providing the requested clarification and responding to the association's detailed questions. Please mark your return correspondence to the attention of James Rice when responding to my office.

Thank you for your attention to my request.

Sincerely,



Charles E. Grassley
United States Senator

CEG/jr

RANKING MEMBER,
JUDICIARY

Committee Assignments:

AGRICULTURE
BUDGET
FINANCE

CO-CHAIRMAN,
INTERNATIONAL NARCOTICS
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May 6, 2011

VIA FIRST CLASS MAIL

Senator Charles Grassley
135 Hart Senate Office Building
Washington, D.C. 20510-1501

RE: Request for Clarification on Federal Wet Weather Permitting and Reporting Requirements

Dear Senator Grassley:

The Iowa Water Environment Association (Association) is an organization of municipal and private professionals devoted to wastewater treatment and water quality issues throughout the State of Iowa. We provide educational and technical assistance to our members to further the development and implementation of cost-effective measures for reducing pollutant impacts on state waters. The wastewater treatment technologies recommended by our Association also need to comply with federal requirements to be approved for use at municipal facilities. Presently, our members are addressing complex wet weather treatment issues, including sewer system upgrades, the elimination of sewer overflows (where feasible), and peak wet weather flow treatment processes that could adversely impact the operations of treatment plants.

For several years, municipal and private stakeholders throughout Iowa have expressed substantial concerns regarding changing EPA regulatory positions on NPDES permitting and reporting requirements applicable to wet weather conditions. Given Iowa's history of periodic large rainfall events that can cause area-wide flooding, resolution of the wet weather regulatory mandates remains a high priority for our membership.

Historically, Iowa DNR applied a flexible approach to addressing such conditions, including the approval of treatment plant designs that use separate physical/chemical processes for treating peak wet weather flows while minimizing impact to treatment plant operation and the receiving stream. However, EPA has been informing communities for the past few years, that such approaches are no longer permissible under the applicable federal rules. The cost implications of this latest position are quite substantial in Iowa, and the ability to use various state-of-the-art peak flow treatment processes, such as ballasted flocculation, is uncertain.

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Senator Grassley
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More recently, communities have been informed that they are violating federal reporting requirements by having failed to notify EPA of basement backups. We understand that Iowa DNR did not consider such occurrences to be reportable under its NPDES program, although state rules do require corrective action, as appropriate, to address such issues.

Finally, permit objections issued by EPA imply current state sewer system design standards are inadequate. However, EPA has yet to adopt rules specifying what constitutes a sufficient sewer system design for a well-operated system.

In contrast, other recent actions by EPA (court filings and "listening session" notices of a possible wet weather rulemaking) have indicated that EPA is not presently enforcing these positions and is still considering the best way to address these complex issues. Needless to say, these shifting positions and mixed signals have created great uncertainty and confusion with respect to municipal compliance responsibilities and the allowable sewer system design objectives.

Communities need to be reasonably apprised of federal regulatory requirements and need an opportunity to comment on substantive regulatory changes before they are imposed. Our organization has identified four critical areas of regulatory confusion that greatly affect whether and how municipal wet weather programs are designed and implemented:

- (1) the ability for the state to approve *E. coli* mixing zones for CSO and stormwater discharges;
- (2) the ability to use non-biological treatment processes, such as ballasted flocculation, to process peak wet weather flow;
- (3) the acceptable "design storm" for collection systems above which system overflows may not be considered Clean Water Act violations; and
- (4) the status of basement backups under the Clean Water Act and associated reporting requirements as unpermitted overflows or O&M violations.

EPA's clarification of its position on each of these issues and associated legal basis is necessary to ensure that our membership knows what is required to achieve compliance and is able to construct and operate its facilities in accordance with federal law.

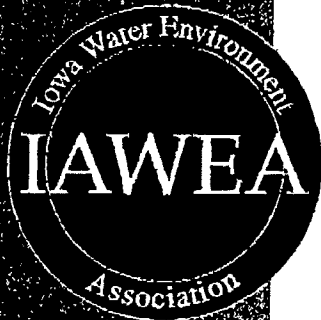
Accordingly, we respectfully request that you ask EPA to identify its existing settled position on each of the enclosed questions. We also request that, if a settled position exists, EPA identify the regulatory notice(s) that informed the public of the adoption of the requirement. This information is important

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Senator Grassley
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because our municipal members need to justify recommended facility improvements to their rate base. An adopted federal restriction would serve this purpose. To be clear, our request is not intended to evaluate or debate the merits of any of the Agency interpretations at issue. Our Association is simply requesting that EPA inform the public of its current working law so appropriate solutions can be designed to meet applicable federal rules. Given the billions of dollars in Iowa fiscal resources at stake, a clear response to this request is essential. Thank you for your assistance in obtaining answers to these important questions.

Respectfully,

Jay Brady

2010-2011 IAWEA President

Enclosure -IAWEA Questions on Existing NPDES Requirements for Wet
Weather Compliance

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**IAWEA Questions on Existing NPDES Requirements
for Wet Weather Compliance**

As referenced in the accompanying letter, it is requested that EPA provide a clear statement of its current settled position (or acknowledgement that no such position exists) regarding each of the issues below. Please also identify the federal register or other form of public notice that informed the regulated community of the requirement.

- (1) May a state approve a bacteria mixing zone for waters designated for body contact recreation when permitting CSO or stormwater discharges? If so, under what circumstances? If not, what type of discharges and settings does this permitting prohibition apply to, and how are effluent limits determined in these circumstances?
- (2) 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? If not, what requirements must be demonstrated to allow use of such facilities to assist in processing peak wet weather flows without violating either the secondary treatment or bypass regulations?
- (3) Under what circumstances must a community report basement backups as violations of an NPDES permit or as unauthorized discharges? How are these events classified – as unpermitted discharges or another form of violation? Does this reporting requirement apply even if the basement backup cannot possibly reach waters of the United States?
- (4) Are all sewer system overflows, regardless of cause or ability to control, considered violations of federal law? Where state rules establish “design conditions” for the proper sizing of a sewer system, may a state permit discharges that occur due to a greater storm event, so long as the system is being properly operated and maintained? If not, what sewer system design is considered acceptable to EPA?

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 30 2011

OFFICE OF
WATER

The Honorable Charles E. Grassley
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for your May 19, 2011, letter to Joyce K. Frank, Principal Deputy Associate Administrator for Congressional and Intergovernmental Relations, requesting clarification from the U.S. Environmental Protection Agency (EPA) on issues related to federal wet weather permitting and reporting requirements. Attached to your letter were four questions posed by the Iowa Water Environment Association (IWEA). You will find responses to these questions in an enclosure to this letter.

On June 1, 2010, the EPA announced, in the *Federal Register*, that it is considering whether to propose modifications to the National Pollutant Discharge Elimination System (NPDES) regulations, including establishing standard permit conditions that specifically address sanitary sewer collection systems and sanitary sewer overflows (SSOs). The Agency also indicated that it is considering whether and how it should resolve several longstanding issues that are the subject of a December 22, 2005 draft Peak Flows Policy. The Agency held four public listening sessions and a webcast and provided the public with an opportunity to submit additional information. In addition, the Agency has announced a workshop, open to the public, on July 14-15, 2011, in the Washington, D.C. area to further discuss these issues. We encourage any interested member of the public, including IWEA members, to attend the workshop.

Again, thank you for your letter. If you have further questions, please contact me or your staff may call Greg Spraul in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0255.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy K. Stoner", is written over a horizontal line.

Nancy K. Stoner
Acting Assistant Administrator

Enclosure

ENCLOSURE

Responses to Questions Posed by the Iowa Water Environment Association (IWEA)

1. May a state approve a bacteria mixing zone for waters designated for body contact recreation when permitting CSO or stormwater discharges? If so, under what circumstances? If not, what type of discharges and settings does this permitting prohibition apply to, and how are effluent limits determined in these circumstances?

A mixing zone is a limited area or volume of water around the point of discharge where initial dilution and secondary mixing of a discharge takes place and where numeric water quality criteria can be exceeded. The basic concept of a mixing zone is that it may be appropriate in some circumstances to allow for ambient concentrations above the criteria in small areas near point source outfalls as long as the designated use of the waterbody as a whole is protected.

According to the EPA regulations at 40 CFR 131.13, states may, at their discretion, include mixing zone policies in their state water quality standards, and such policies are subject to the EPA's review and approval. The EPA does not have additional regulations specific to mixing zones. Instead, the EPA has provided recommendations regarding the use of mixing zones in technical and policy guidance it has developed (e.g., Water Quality Standard Handbook: Second Edition (EPA-833-B-94-005a, 1994) and Technical Support Document for Water Quality-Based Toxics Control (TSD) (EPA/505/2-30-001, 1991)).

In order to protect human health, it has been the EPA's long-standing policy that mixing zones are not appropriate in circumstances where they may pose significant human health and environmental risks (considering all likely pathways of exposure) or where they may endanger critical areas (e.g., recreational areas, drinking water supplies, breeding grounds, and areas with sensitive biota). In a memorandum from Ephraim S. King, Director of the EPA's Office of Science and Technology, to William Spratlin, Director of the EPA's Region 7, Water, Wetlands, and Pesticides Division, dated November 12, 2008, the EPA explains that significant human health risks could be presented if a mixing zone for bacteria is established in a river or stream designated for primary contact recreation. This memo is included at the end of this enclosure. A primary contact recreation designation assumes that people are protected (i.e., not exposed to an unacceptable risk level) when swimming or engaging in other contact recreation activities at any point in the designated waterbody or segment. People recreating in or downstream from a bacteria mixing zone (where bacteria levels may be elevated above the criteria levels) may be exposed to greater risk of gastrointestinal illness than would be allowed by the state water quality criteria for protection of the recreation use. Therefore, the EPA's position, as stated in the memorandum, is that mixing zones that allow for elevated levels of bacteria in rivers and 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.

Where mixing zones are prohibited, water quality-based effluent limits would be established at the end-of-pipe.

2. 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? If not, what requirements must be demonstrated to allow use of such facilities to assist in processing peak wet weather flows without violating either the secondary treatment or bypass regulations?

The issues raised by this question are among those being actively considered as part of a broader effort to clarify the National Pollutant Discharge Elimination System (NPDES) regulations on wet weather permitting. These are also issues that EPA has attempted to address through the issuance of policy recommendations, and it is therefore important to place these questions in that context. On December 22, 2005, in the *Federal Register*, the Agency requested public comment on a draft Peak Flows Policy, which clarified that the bypass provision applies to wet weather diversions at wastewater treatment plants serving separate sanitary sewers. Further, the draft Policy explained how the NPDES authority should implement 40 CFR 122.41(m)(4)(ii) when it receives a request for approval of anticipated peak wet weather flow diversions at wastewater treatment plants serving separate sanitary sewer collection systems when the diverted flows are recombined with flow from the secondary treatment units prior to discharge. The approach in the draft policy is based on language in the bypass regulation that provides that if the NPDES authority determines that the criteria of 40 CFR 122.41(m)(4)(i) will be met, the NPDES authority may approve an anticipated bypass of peak wet weather flow diversions around secondary treatment units.

Although the 2005 draft Policy has not been finalized, the EPA maintains that the approach explained in the draft Policy continues to be a viable path forward for utilities to meet their obligations under the bypass regulation. Whereas the regulation itself establishes whether a particular diversion is a bypass, the draft Policy recommends guidance on implementing the bypass provision, including setting forth a process for determining whether or not feasible alternatives exist to bypasses around secondary treatment units. We will continue to implement the existing bypass regulation as permits are reissued, and will continue to consider whether the 2005 Policy should be finalized or incorporated into the EPA's other potential wet weather rulemaking effort announced June 1, 2010 in the *Federal Register*.

3. Under what circumstances must a community report basement backups as violations of an NPDES permit or as unauthorized discharges? How are these events classified – as unpermitted discharges or another form of violation? Does this reporting requirement apply even if the basement backup cannot possibly reach waters of the U.S.?

The EPA believes that sewage backing up into buildings is a significant human health risk and may indicate systemic capacity and/or maintenance related problems in the collection system. These concerns exist apart from whether or not the untreated sewage is discharged to a water of the United States. A description of the extent of human health and environmental impacts caused by overflows and backups, along with other information, is provided in the Agency's *Report to Congress on the Impacts and Control of CSOs and SSOs* (EPA, 2004), downloadable at http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm.

NPDES permits establish reporting requirements for a permittee. The reporting requirements for a given permittee will depend on the specific language in their permit. The NPDES regulations establish standard permit conditions that provide minimum requirements for NPDES permits. One standard permit condition, when incorporated into a permit, requires permittees to report any instance of noncompliance to the NPDES authority. SSOs that result in discharges to waters of the United States constitute noncompliance, which the permittee must report under these provisions. In addition, sewage backups from sanitary sewer collection systems may be an indicator that the NPDES permittee is violating a permit condition requiring proper operation and maintenance of the collection system and may have to be reported as noncompliance.

The issue of appropriate reporting requirements for SSOs and basement backups is one that the Agency is actively considering as part of a rulemaking effort on wet weather permitting (See the June 1, 2010 notice in the *Federal Register*).

4. Are all sewer system overflows, regardless of cause or ability to control, considered violations of federal law? Where state rules establish "design conditions" for the proper sizing of a sewer system, may a state permit discharges that occur due to a greater storm event, so long as the system is being properly operated and maintained? If not, what sewer system design is considered acceptable to EPA?

SSOs are releases of untreated sewage from a municipal separate sanitary sewer collection system. SSOs that reach waters of the United States are point source discharges and are prohibited unless authorized by an NPDES permit. NPDES permits generally prohibit SSOs, although some States have issued permits that limit State enforcement if certain specified conditions are met. Such provisions represent a prospective exercise of enforcement discretion by the State regulatory authority, not an authorization of the discharge.

JUL 27 2011 12:19PM

GRASSLEY 2022281684

NO. 0278 P. 2

REPLY TO:

- ☐ 135 HART SENATE OFFICE BUILDING
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(202) 224-3744
e-mail: grassley.senate.gov/contact.cfm
- ☐ 721 FEDERAL BUILDING
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DES MOINES, IA 50309-2140
(515) 288-1145
- ☐ 150 1ST AVENUE NE
SUITE 325
CEDAR RAPIDS, IA 52401
(319) 383-8832

United States Senate

CHARLES E. GRASSLEY

WASHINGTON, DC 20510-1501

July 27, 2011

REPLY TO:

- ☐ 103 FEDERAL COURTHOUSE BUILDING
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- ☐ 210 WATERLOO BUILDING
531 COMMERCIAL STREET
WATERLOO, IA 50701-5487
(319) 232-6657
- ☐ 131 WEST 3RD STREET
SUITE 180
DAVENPORT, IA 52801-1418
(563) 322-4331
- ☐ 307 FEDERAL BUILDING
8 SOUTH 6TH STREET
COUNCIL BLUFFS, IA 51501-4204
(712) 322-7103

Ms. Joyce Frank
Assoc. Admin. For Cong. & Intergov. Relations
Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Room 3426 ARN
Washington, DC 20460

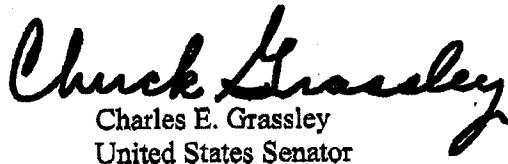
Dear Ms. Frank:

Enclosed please find a communication from Dan Riney, President of the Iowa Water Environment Association, requesting further clarification of EPA's response to previous correspondence.

I would appreciate any assistance you could provide pertaining to this matter. Please mark your return correspondence to the attention of James Rice when responding to my office.

Thank you for your attention to my request.

Sincerely,


Charles E. Grassley
United States Senator

CEG/jr

RANKING MEMBER,
JUDICIARY

Committee Assignments:

AGRICULTURE
BUDGET
FINANCE

CO-CHAIRMAN,
INTERNATIONAL NARCOTICS
CONTROL CAUCUS

PRINTED ON RECYCLED PAPER



July 27, 2011

Senator Charles Grassley
135 Hart Senate Office Building
Washington, D.C. 20510-1501

Re: Follow-up on Wet Weather Compliance Questions

Dear Senator Grassley:

Thank you for your assistance in obtaining clarification from EPA regarding various Federal regulatory requirements applicable to wet weather permitting and reporting under the Clean Water Act. EPA's letter of June 30, 2011 provided clear responses regarding Issue #1 (bacteria mixing zones) and Issue #3 (basement backup reporting). We find the responses to Issue #2 (allowable peak flow processing approaches) and Issue #4 (acceptable sewer system design and permitting) somewhat confusing because the Agency's response did not directly answer the questions raised. These are two critical issues that control how collection systems and plant improvements may be designed and funded in Iowa. Unless we have a clear understanding of the applicable Federal requirements, it is very difficult for remediation projects to move forward. Therefore, we respectfully request that you ask EPA for further clarification on these two issues.

As we understand EPA's reply with regard to acceptable peak flow processing methods (Issue #2), the Agency is saying:

1. There are ongoing discussions on acceptable methods for peak flow treatment.
2. The bypass rule, as discussed in the 2005 Peak Flows Policy, limits the use of certain peak flow processing methods ("the bypass provision applies to wet weather diversions... the regulation itself establishes whether a particular diversion is a bypass").
3. To permit use of these peak flow processing methods the discharger must demonstrate "no feasible alternatives" ("the NPDES Authority should implement 40 CFR 122.41 (m)(4)(ii) when it receives a request for approval of peak wet weather flow diversions...").

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4. As permits arise, EPA will continue to implement the current bypass rule interpretation described in the 2005 Peak Flow Policy.

While it is apparent from EPA's response that the use of certain peak flow processes may be proscribed unless the community demonstrates "no feasible alternative" was available, EPA did not specifically indicate whether processes such as ACTIFLO fall into this category. A clear response to that question is needed because this is a process option under active consideration for side-stream treatment of peak flows. In addition, EPA's response to Issue #4 seemed to confirm that EPA considers any sanitary sewer overflow (SSO) to be an illegal discharge, regardless of the circumstances. ("Such provisions [state permit authorizations] ...represent a positive exercise of enforcement discretion...not an authorization to discharge."). This may explain why EPA did not respond to the question regarding acceptable state sewer system design conditions (i.e., "design storm"). However, as EPA did not respond to the "design storm" question, the degree to which a state may permit an SSO to occur is also not completely evident.

Therefore, we respectfully request that you ask that EPA respond to the following additional questions:

1. Is the understanding of EPA's responses to Issue 2, as contained in this letter, accurate?
2. Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?
3. May a state utilize a "design storm" approach to authorize an untreated discharge from a collection system, under conditions where the "design storm" is exceeded? If not, what rule prohibits this approach?

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We look forward to receiving EPA's supplemental response to these questions.

Sincerely,

Dan Rincy
President



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 14 2011

The Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

OFFICE OF WATER

Dear Senator Grassley:

Thank you for your July 27, 2011, letter forwarding a request that the U.S. Environmental Protection Agency (EPA) further clarify our responses to your May 19, 2011, letter. The Iowa Water Environment Association (IWEA) asked for further information in several areas related to wet weather permitting. I am enclosing responses to the additional questions IWEA raised in its letter to you.

The EPA acknowledges the importance to the public of a clear understanding of applicable Federal requirements. To further this objective, on several occasions, the agency has sought input from the public on how best to achieve this goal. Most recently, in June and July 2010, the EPA held four well-attended listening sessions at which the agency heard recommendations on how any potential rulemaking effort should address certain issues associated with sanitary sewer overflows (SSOs) and peak wet weather flows. These issues are at the heart of IWEA's two letters to your office. As a follow up to the listening sessions, on July 14-15, 2011, the EPA also held an SSO/Peak Flows Workshop in Washington, DC, which brought together EPA and state permitting authorities, municipal wastewater treatment plant and collection system experts, and environmental organizations, as well as over 75 members of the public, to offer recommendations to the Agency on the best path forward on these issues. A representative from the Iowa League of Cities participated as part of the expert panel at the Workshop.

Over the next few months, the EPA will be evaluating the recommendations made at the Workshop in order to determine what actions are necessary in the near and long term. In the meantime, if you have any questions or suggestions please contact me, or your staff may contact Greg Spraul in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0255.

Sincerely,

Nancy K. Stoner
Acting Assistant Administrator

Enclosure

Enclosure

Responses to Questions Posed by the Iowa Water Environment Association (IWEA)

1. **Is IWEA's understanding of EPA's responses to Issue 2, as contained in this letter, accurate?**

Yes. EPA's regulations at 122.41(m) define a "bypass" as an intentional diversion of waste streams from any portion of a treatment facility. The regulation provides that "bypasses" are expressly "prohibited," and the NPDES authority may take enforcement action against the permittee except for very limited exceptions. One of these limited exceptions is found at 40 CFR 122.41(m)(4)(i)(B). This provision enables a permitting authority to "approve"¹ – but not "authorize" – a bypass if the record supports that there are "no feasible alternatives" to the bypass such as through greater reductions of inflow and infiltration into the collection system, or building auxiliary treatment facilities.

2. **Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?**

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA 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 at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.41(m)(4).

In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units.

3. **May a state utilize a "design storm" approach to authorize an untreated discharge from a collection system, under conditions where the "design storm" is exceeded? If not, what rule prohibits this approach?**

Section 301(a) of the Clean Water Act prohibits the discharge of pollutants to waters of the United States except in compliance with certain provisions of the CWA. These requirements include Section 402 of the CWA which establishes the NPDES program under which EPA or an authorized NPDES State may issue a permit authorizing a discharge, provided the permit contains applicable technology-based effluent limitations and any more stringent effluent limitations necessary to meet applicable water

¹ Approval of an anticipated bypass does not "authorize" the bypass, rather an approval of an anticipated bypass describes the circumstances in which the NPDES authority will not take an enforcement action against the permittee for a prohibited bypass.

quality standards (See CWA Section 301(b); 40 CFR 122.44). Sanitary sewers serving a municipal sewage treatment plant are considered to be part of the publicly owned treatment works under the CWA and sanitary sewer overflow (SSO) discharges must meet effluent limitations based upon secondary treatment as defined by 33 U.S.C. 1311(b)(1)(B) and any more stringent limitations necessary to meet water quality standards. As a practical matter, untreated SSOs cannot meet effluent limitations based upon secondary treatment (and, in many cases, applicable water quality-based effluent limitations). Thus, NPDES permits typically prohibit SSOs. In addition to such specific prohibitions, some state NPDES authorities have chosen to include provisions in permits that limit state enforcement of SSOs if certain specified conditions are met. Where this has occurred, such provisions represent a prospective exercise of enforcement discretion, not an authorization of the discharge.

The issue of whether certain SSOs that are caused by extreme wet weather conditions or by such conditions that are beyond the reasonable control of the POTW operator should be excused or protected by an affirmative defense is one that EPA anticipates evaluating if it moves forward with a federal rulemaking.

United States Court of Appeals
For the Eighth Circuit

No. 11-3412

Iowa League of Cities

Petitioner

v.

Environmental Protection Agency

Respondent

Petition for Review of an Order of the
Environmental Protection Agency

Submitted: November 13, 2012

Filed: March 25, 2013

Before SMITH, BEAM, and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

The Iowa League of Cities (“League”) seeks direct appellate review of two letters sent by the Environmental Protection Agency (“EPA”) to Senator Charles Grassley. The League argues that these letters effectively set forth new regulatory requirements with respect to water treatment processes at municipally owned sewer systems. According to the League, the EPA not only lacks the statutory authority to impose these regulations, but it violated the Administrative Procedures Act (“APA”),

5 U.S.C. § 500 *et seq.*, by implementing them without first proceeding through the notice and comment procedures for agency rulemaking. We find that we have subject matter jurisdiction over the claims, and we vacate under APA section 706(2)(C), (D).

I. Background

The League previously sought our review in 2010 of six EPA documents, consisting of letters, internal memoranda, and a Federal Register notice, that allegedly constituted new regulatory requirements for water treatment processes. The EPA moved to dismiss, arguing that judicial review was premature because the documents were part of an ongoing agency decisionmaking process. An administrative panel of this court granted the EPA's motion to dismiss for lack of subject matter jurisdiction.

The League continued to perceive a conflict between the agency's official written policies and the expectations it was transmitting to the state entities that served as liaisons between the EPA and municipal wastewater treatment facilities. Consequently, the League enlisted the assistance of Senator Charles Grassley to obtain clarification from the EPA. The EPA sent two letters ("June 2011 letter" and "September 2011 letter") in response to Senator Grassley's inquiries. According to the EPA, these guidance letters merely discuss existing regulatory requirements. The League disagrees, viewing the letters as contradicting both the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the EPA's lawfully promulgated regulations. As it did in 2010, the EPA moved to dismiss for lack of subject matter jurisdiction. This time an administrative panel denied the motion but requested that the parties address the merits of all relevant jurisdictional and substantive arguments.¹

¹Our ability to make a final decision on jurisdiction is unaffected by the rulings of either this administrative panel or the 2010 administrative panel. *See In re Rodriquez*, 258 F.3d 757, 758-59 (8th Cir. 2001) (per curiam).

The APA “empowers federal courts to ‘hold unlawful and set aside agency action, findings, and conclusions’ if they fail to conform with any of six specified standards.” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375 (1989) (quoting 5 U.S.C. § 706(2)). *Inter alia*, a reviewing court may set aside agency action that has failed to observe those “procedure[s] required by law.” § 706(2)(D). Agencies must conduct “rule making” in accord with the APA’s notice and comment procedures. 5 U.S.C. § 553(b), (c). However, only new “legislative” rules are required to be created pursuant to notice and comment rulemaking. *See id.*; *see also Minnesota v. Ctrs. for Medicare & Medicaid Servs.*, 495 F.3d 991, 996 (8th Cir. 2007). “Interpretative rules”² and “general statements of policy” are statutorily exempt from the procedural requirements applicable to “rule making.” *See* § 553(b)(3)(A); *see also Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995). The crux of the League’s procedural claim is that the EPA’s letters announced new legislative rules for water treatment processes at municipally owned sewer systems, thereby modifying the EPA’s existing legislative rules. The EPA admits it did not engage in notice and comment procedures, but it insists there has been no procedural impropriety because the letters should be considered general policy statements or, at most, interpretative rules.

The League asks us to find not only that the EPA’s actions are procedurally invalid but also to go one step further and set aside the rules as imposing regulatory requirements that surpass the EPA’s statutory authority. *See* § 706(2)(C) (authorizing federal courts to set aside agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

The two areas of regulation addressed in the challenged EPA letters are “mixing zones” and “blending.” Our analysis first requires a discussion of the CWA’s regulatory scheme and the water treatment processes at issue.

²Some courts also use the phrase “interpretive” rules interchangeably with “interpretative” rules.

A. The Clean Water Act

The CWA forbids the “discharge of any pollutant”—defined as the “addition of any pollutant to navigable waters from any point source”³—unless executed in compliance with the Act’s provisions. 33 U.S.C. §§ 1311(a), 1362(12). A permit program called the National Pollution Discharge Elimination System (“NPDES”) plays a central role in federal authorization of permissible discharges. *See* 33 U.S.C. § 1342. The EPA may issue an NPDES permit, but states also are authorized to administer their own NPDES programs. § 1342(b). The vast majority elect to do so.⁴ If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA. § 1342(a); 40 C.F.R. § 122.41.

Many of these rules are in the form of “effluent limitations,” which “restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources.” *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (citing §§ 1311, 1314). The NPDES permit system “serves to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger.” *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). The EPA applies effluent limitations at the point of discharge into navigable waters, known as “end-of-the-pipe,” unless monitoring at the discharge point would be “impractical or

³A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). This case involves municipal wastewater treatment facilities, which both parties agree are point sources.

⁴Iowa is one of forty-six states approved to administer an NPDES program. EPA, State Program Status, <http://cfpub1.epa.gov/npdes/statestats.cfm> (last visited Feb. 14, 2013).

infeasible.” 40 C.F.R. § 122.45(a), (h). The baseline effluent limitations are “technology-based,” § 1311(b); 40 C.F.R. § 125.3(a), in that they set “a minimum level of effluent quality that is attainable using demonstrated technologies.” EPA, NPDES Permit Writers’ Manual 5-1 (2010).⁵ The EPA has interpreted this regime as “preclud[ing] [it] from imposing any particular technology on a discharger.” *In re Borden, Inc.*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 78 (Feb. 19, 1980), at *2; *see also* NPDES Permit Writers’ Manual 5-14, 5-15 (“Therefore, each facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines.”). The technology-based effluent limitations applicable to publicly-owned treatment works (“POTWs”),⁶ such as municipal sewer authorities, are based on a special set of rules known as the “secondary treatment” regulations. § 1311(b)(1)(B); 40 C.F.R. § 125.3(a)(1); *see generally* 40 C.F.R. § 133.102 (describing average monthly and weekly “minimum level[s] of effluent quality attainable by secondary treatment”). The secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. *See* 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983). When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. 33 U.S.C. § 1312(a).

Thus, the CWA is a program of state and federal cooperation, but state discretion is exercised against a backdrop of significant EPA authority over state-run NPDES programs. The EPA dictates the effluent limitations applicable to all permits,

⁵*Available at* http://www.epa.gov/npdes/pubs/pwm_2010.pdf.

⁶POTWs are “any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature” that are “owned by a State or municipality.” 40 C.F.R. § 403.3(q).

while states are in charge of categorizing their waterways in terms of designated uses and setting forth “water quality standard[s]” for each type of waterway. 33 U.S.C. § 1313(c)(2). These standards supplement effluent limitations to ensure that overall water quality remains at an acceptable level. *Arkansas*, 503 U.S. at 101. A major component of a state’s water quality standards is “the set of water quality criteria sufficient to support the designated uses of each waterbody.”⁷ NPDES Permit Writers’ Manual 6-4. At least every three years, states must submit their water quality standards to the EPA for approval. § 1313(c)(1). The EPA must approve the standards within sixty days or disapprove them within ninety days. 66 Fed. Reg. 11,202, 11,215 (Feb. 22, 2001). States are also required to forward a copy of each permit application they receive to the EPA, which is afforded an opportunity to block the issuance of the permit. § 1342(d); 40 C.F.R. § 123.29. In sum, states evaluate discharge permit applications under a mixture of federal regulations and their own water quality standards, crafted subject to federal approval.

B. Bacteria Mixing Zones

One element of state water quality standards are policies regarding “mixing zones.” The EPA has defined mixing zones as “[a] limited area or volume of water where initial dilution of a discharge takes place and where numeric water quality criteria can be exceeded.” EPA, Water Quality Handbook Ch. 5.1 (1994) (“Handbook”); *see also* NPDES Permit Writers’ Manual 6-15. In effect, a mixing zone allows the permit holder to create a higher concentration of pollutants in navigable waters near the immediate point of discharge, as long as the discharge is sufficiently diffused as it moves through the larger body of water. The requisite water

⁷“Water quality criteria are the threshold values against which ambient concentrations are compared to determine whether a waterbody exceeds the water quality standard. . . . NPDES permits must establish limits on any pollutant, where necessary to attain and maintain applicable water quality standards.” 54 Fed. Reg. 23,868, 23,872 (June 2, 1989).

quality criteria, then, need not be met at the end of the pipe. It is undisputed that in at least some instances, states are allowed to approve discharge permit applications that incorporate mixing zones. *See* 40 C.F.R. § 131.13 (“States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones . . .”). But as one of its water quality standards, a state’s policy on mixing zones remains subject to the triennial review of the EPA. *See* § 1313(c)(1). In addition, the EPA has the authority to veto any permit application incorporating what it views as an inappropriate mixing zone. *See* § 1342(d)(2).

Mixing zones are addressed in one of the EPA’s regulations, 40 C.F.R. § 122.44(d)(1). Subparagraph (ii) of that regulation describes the procedures a state should apply when determining whether a discharge would cause—or contribute to causing—a body of water to deviate from the state’s water quality criteria, thereby necessitating the imposition of water-quality based effluent limitations on that discharge (in addition to the default technology-based effluent limitations already in effect). *See* 54 Fed. Reg. 23,868, 23,872 (June 2, 1989). In particular, state permitting authorities should consider “any dilution of the effluent in the receiving water, after considering mixing zones if applicable.” *Id.* Although some commentators responded to the proposal of subparagraph (ii) by requesting that the EPA prohibit mixing zones, the EPA subsequently reiterated that the “use of mixing zones raises issues that are more appropriately addressed in the state water quality standards adoption process,” and therefore it would retain “the reference to mixing zones in paragraph (d)(1)(ii).” *Id.* The League portrays 40 C.F.R. § 122.44(d)(1)(ii) as channeling any federal objections to mixing zones, including mixing zones for bacterial effluents (“bacteria mixing zones”), through the EPA’s process of approving or rejecting state water quality standards.

The June 2011 letter admits that, pursuant to 40 C.F.R. § 131.13, states “may, at their discretion, include mixing zone policies in their state water quality standards.”

Citing a 2008 memorandum from the Director of the EPA's Office of Science and Technology to a regional EPA director ("the King memorandum"), however, the June 2011 letter then recites "the EPA's long-standing policy" that all bacteria mixing zones in waters designated for "primary contact recreation" carry potential health risks and flatly states that they "should not be permitted." The letter further acknowledges that the EPA "does not have additional regulations specific to mixing zones," but it then refers the reader to the additional "recommendations regarding the use of mixing zones" in policy guidance such as the Handbook. The Handbook encourages states to incorporate a "definitive statement" into their water quality standards regarding "whether or not mixing zones are allowed" and, if they are, to "utilize a holistic approach to determine whether a mixing zone is tolerable." Ch. 5.1, 5.1.1. The Handbook cautions, however, that mixing zones must be utilized in ways that "ensure . . . there are no significant health risks, considering likely pathways of exposure." Ch. 5.1. Additionally, mixing zones "should not be permitted where they may endanger critical areas," such as "recreational areas." *Id.* From the League's perspective, states are able to approve bacteria mixing zones, even in waters designated as "primary contact recreation," so long as site-specific factors create scenarios in which there are no health risks and recreational areas are not endangered. The EPA argues that the June 2011 letter is consistent with the Handbook, which explicitly envisioned limitations on mixing zones in recreational areas.

C. Blending

The second contested regulatory area involves "blending." POTWs typically move incoming flows through a primary treatment process and then through a secondary treatment process. Most secondary treatment processes are biological-based, but the secondary treatment regulations do not "specify the type of treatment process to be used to meet secondary treatment requirements nor do they preclude the

use of non-biological facilities.”⁸ 68 Fed. Reg. 63,042, 63,046 (Nov. 7, 2003). At many POTWs, primary treatment capacity exceeds secondary treatment capacity. Biological-based processes in particular are sensitive to deviations in volume of flow and pollutant level. Correspondingly, during periods of rain and snow, large influxes of stormwater can overwhelm a facility’s standard biological secondary treatment processes, potentially rendering them inoperable. *Id.* Blending can prevent this, by 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. *Id.* at 63,045. Just like non-blended streams, the combined output must still comply with all applicable effluent limitations, including the water quality levels specified in the secondary treatment regulations. *Id.* at 63,047.

Some members of the League wish to incorporate a method of treatment called ACTIFLO into the secondary treatment procedures at their wastewater treatment facilities. ACTIFLO units employ non-biological processes and are used as auxiliary secondary treatment units for peak wet weather flows.⁹ The parties disagree on the circumstances in which the CWA and EPA regulations permit the use of ACTIFLO. The League views ACTIFLO as a permissible technology within a POTW facility, as long as the overall output from the secondary treatment phase meets the effluent

⁸Biological-based systems use microorganisms to treat incoming flows. A facility can be designed to use non-biological treatment processes, such as chemical additives or physical filtration equipment, instead of or in conjunction with biological facilities.

⁹ACTIFLO is a physical/chemical process that uses ballasted flocculation. “In ballasted flocculation or sedimentation, a metal salt coagulant is added to the excess wet weather flows to aggregate suspended solids. Then, fine-grained sand, or ballast, is added along with a polymer. The polymer acts like glue which bonds the aggregated solids and sand. The process increases the particles’ size and mass which allows them to settle faster.” EPA, Report to Congress: Impacts and Control of CSOs and SSOs 2 (2004).

limitations imposed by the secondary treatment regulations. The EPA, on the other hand, views ACTIFLO as an impermissible “diversion” from traditional biological secondary treatment facilities.

All issued permits must comply with federal regulations regarding “bypass,” which is the “intentional diversion of waste streams from any portion of a treatment facility.” 40 C.F.R. § 122.41(m)(1). Bypass is generally prohibited unless there are “no feasible alternatives.” § 122.41(m)(4). The bypass rule “is not itself an effluent standard,” but instead it “merely ‘piggybacks’ existing requirements.” 53 Fed. Reg. 40,562, 40,609 (Oct. 17, 1988). The rule’s purpose is to “ensure that users properly operate and maintain their treatment facilities . . . [pursuant to applicable] underlying technology-based standards,” by requiring incoming flows to move through the facility as it was designed to be operated. *Id.* Like the more general secondary treatment regulations, the bypass rule does not require the use of any particular treatment method or technology. *Id.*; *see also NRDC v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987).

In 2003, the EPA offered “a proposed interpretation of the bypass provision (40 CFR [§] 122.41(m)) as it applies to . . . blending.” 68 Fed. Reg. at 63,049. Prior to this proposal, the EPA had “not established a national policy (either through rulemaking or through non-binding guidance to assist in the interpretation of the bypass regulation) regarding whether and under what circumstances wet weather blending at a POTW plant would not constitute a bypass.” *Id.* at 63,052. The 2003 proposed policy would have “provide[d] guidance to EPA Regional and State permitting authorities . . . on how EPA intends to exercise its discretion in implementing the statutory and regulatory provisions related to discharges from POTWs where peak wet weather flow is routed around biological treatment units and then blended with the effluent from the biological units prior to discharge.” *Id.* at 63,051. Going forward, blending “would not be a prohibited bypass and could be authorized in an NPDES permit” so long as certain enumerated conditions were met.

Id. at 63,049-50. These conditions primarily focused on ensuring that the discharge met all applicable effluent limitations and water quality standards, that it passed through a primary treatment unit prior to discharge, and that a “portion of the flow [w]ould only be routed around a biological or advanced treatment unit when the capacity of the treatment unit is being fully utilized.” *Id.* The EPA posted the proposed policy on its website and declared its consistency with the CWA. Implicitly, the 2003 policy seemed to view the secondary treatment phase as encompassing both traditional biological secondary treatment units and auxiliary non-biological treatments for peak wet weather flows, such as ACTIFLO. Accordingly, flows sent through ACTIFLO were not being intentionally “diverted” from a process they should have gone through; instead, these excess flows were simply designated to receive a different type of secondary treatment. The focus was on whether the water quality of the resulting combined discharge at the end of the secondary treatment phase met all applicable effluent limitations.

Two years later, the EPA abandoned the 2003 proposal. 70 Fed. Reg. 76,013, 76,015 (Dec. 22, 2005). The EPA acknowledged recent “confusion regarding the regulatory status of peak wet weather flow diversions around secondary treatment units at POTW treatment plants” and observed that they were treated only intermittently as bypasses. *Id.* at 76,015. The 2005 policy announced that this type of “diversion” was now considered a bypass and would be allowed only if there were “no feasible alternatives.” *Id.* at 76,016. As of the creation of the EPA letters in 2011, the 2005 policy had not been finalized or otherwise officially adopted. As late as June 2010, the EPA continued to solicit input on the 2005 policy through notices in the Federal Register. *See* 75 Fed. Reg. 30,395, 30,401 (June 1, 2010).

During the spring of 2011, the League asked the EPA whether it could use “physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule].” The June 2011 letter responded by summarizing the

EPA's 2005 proposed policy without specifically addressing how the application of that policy would impact the use of ACTIFLO or similar processes. The League sought additional clarification on whether this response meant that ACTIFLO could be used only if there were no feasible alternatives, which the September 2011 letter answered in the affirmative. According to the EPA, ACTIFLO units fail to "provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." Because ACTIFLO by itself is not considered a satisfactory secondary treatment unit, the EPA views the practice of intentionally routing flows away from a facility's traditional biological secondary treatment units and through ACTIFLO as a bypass that would only be allowed upon a showing of no feasible alternatives.

The League argues that by prohibiting the use of ACTIFLO internally, as one element of a facility's secondary treatment procedures, the EPA is effectively dictating treatment design, despite the agency's acknowledgment that the bypass rule and secondary treatment regulations do not allow for such determinations at the federal level. The League also claims that the EPA is effectively applying secondary treatment effluent limitations within a treatment facility; that is, it is applying effluent limitations to the individual streams exiting peak flow treatment units, instead of at the end of the pipe. The EPA responds that using ACTIFLO to process peak wet weather flows diverts water from biological secondary treatment units, and therefore subjecting its use to a no-feasible-alternatives analysis comports with the plain language of the bypass rule.

II. Jurisdiction

A. Direct appellate review

The League challenges the EPA's positions on bacteria mixing zones and blending, as set forth in the two letters, as new rules promulgated in violation of APA

notice and comment requirements and as in conflict with the CWA. The APA waives sovereign immunity for suits seeking judicial review of an “[a]gency action made reviewable by statute.”¹⁰ 5 U.S.C. § 704. “The CWA establishes a bifurcated jurisdictional scheme whereby courts of appeals have jurisdiction over some categories of challenges to EPA action, and the district courts retain jurisdiction over other types of complaints.” *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 755 (5th Cir. 2011). The League invokes CWA section 509(b)(1)(E), which vests the courts of appeals with exclusive jurisdiction to review the EPA’s “action . . . in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345.” 33 U.S.C. § 1369(b)(1)(E). The EPA counters that we have no jurisdiction to review guidance letters and that, in any event, its positions are consistent with the CWA.

“The existence of subject-matter jurisdiction is a question of law that this court reviews de novo.” *ABF Freight Sys., Inc. v. Int’l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011). In order to be timely filed, interested parties must file for review within 120 days from the date of the promulgation. § 1369(b)(1). The 120-day window to challenge promulgations begins two weeks after a document is signed. 40 C.F.R. § 23.2. Here, the letters were signed on June 30, 2011, and September 14, 2011, and therefore the time period to challenge the letters—should they be found to be promulgations—began on July 14, 2011, and September 28, 2011, respectively. The League filed for review on November 4, 2011, and thus its petition is timely.

¹⁰The APA does not create federal subject matter jurisdiction. *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996). Rather, a federal court has federal question jurisdiction under 28 U.S.C. § 1331 over challenges to federal agency action. *Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010); *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993).

We must consider, then, whether the act of sending the letters constituted an action “promulgating any effluent limitation or other limitation.”¹¹ The EPA urges us to dismiss the case for lack of subject matter jurisdiction, disputing the factual basis for the League’s characterization of the letters. Because the EPA raises a factual challenge to our jurisdiction under Federal Rule of Civil Procedure 12(b)(1), “no presumptive truthfulness attaches to the [League’s] allegations, and the existence of disputed material facts will not preclude [us] from evaluating . . . the merits of the jurisdictional claims.” *Osborn v. United States*, 918 F.2d 724, 729-30 & n.6 (8th Cir. 1990) (quoting *Mortenson v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)).

1. “[P]romulgating”

Neither the Supreme Court nor this court has defined the circumstances in which an agency action can be considered a promulgation. Black’s Law Dictionary defines “promulgate” as “(Of an administrative agency) to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal.” (8th ed. 2004). This narrow interpretation would allow direct appellate review only of rules formally promulgated through notice and comment procedures. Yet, the Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the APA. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985) (“Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.”); *see also Nat’l Auto. Dealers Ass’n v. FTC*, 670 F.3d 268, 305 (D.C. Cir. 2012); *Jaunich v. Commodity*

¹¹The League did not contend that the EPA’s letters were “actions . . . approving” effluent or other limitations, rather than promulgating them, and therefore we did not consider the matter.

Futures Trading Comm’n, 50 F.3d 518, 521 (8th Cir. 1995). Moreover, the Supreme Court has interpreted broadly the direct appellate review provision in CWA section 509(b)(1)(F), which authorizes review of agency “action . . . in issuing or denying a permit.” The Court viewed an EPA veto of a state-issued permit to be “functionally similar” to a direct denial of a permit application by the EPA itself, and therefore held that the petitioner could bring his challenge directly to a court of appeals under section 509(b)(1)(F). *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980) (per curiam). By analogy, we are persuaded that it would be more appropriate to interpret “promulgating” to include agency actions that are “functionally similar” to a formal promulgation. See *Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 271 (3d Cir. 1986) (finding jurisdiction to review directly “the agency’s interpretation of pretreatment standards applicable to indirect dischargers” because they constituted an action “promulgating any effluent . . . pretreatment standard” under CWA section 509(b)(1)(C)); see also *NRDC v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982) (“Our decision . . . follows the lead of the Supreme Court in according section 509(b)(1) a practical rather than a cramped construction.”).

In considering jurisdictional statutes similar to section 509(b)(1)(E), our colleagues on the District of Columbia Circuit have adopted a practical conception of whether an agency action constitutes a promulgation. That court has explained, “To determine whether a regulatory action constitutes promulgation of a regulation, we look to three factors: (1) the Agency’s own characterization of the action; (2) whether the action was published in the Federal Register . . . ; and (3) whether the action has binding effects on private parties or on the agency.” *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (internal citation omitted). *Molycorp* identifies the third factor as the “ultimate focus” of this test, and we agree that whether an agency announcement is binding on regulated entities or the agency should be the touchstone of our analysis. To place any great weight on the first two *Molycorp* factors potentially could permit an agency to disguise its promulgations through superficial formality, regardless of the brute force of reality. See also *Cement Kiln Recycling*

Coal. v. EPA, 493 F.3d 207, 227-28 (D.C. Cir. 2007) (holding that it lacked jurisdiction to consider a purported agency “promulgation” because the document was not binding).

“[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding.” *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citations omitted). Thus, our functional analysis of whether an agency action constitutes a promulgation encompasses those words and deeds that bind legally or as a practical matter. *Cf. South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (“Agency statements can be binding upon the agency absent notice-and-comment rulemaking in certain circumstances.”); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (“[W]e have also recognized that an agency’s other pronouncements can, as a practical matter, have a binding effect.”). This includes statements prospectively restricting the agency’s discretion, *see Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993), or having a “present-day binding effect” on regulated entities, thereby “conclusively disposing of certain issues,” *see McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988).¹²

¹²The EPA argues that no federal court has jurisdiction over this claim because these letters are not “final agency actions.” Even if there were an implicit finality requirement applicable to “[a]gency actions made reviewable by statute,” this would not affect federal jurisdiction; the APA’s requirements are part of a party’s cause of action and are not jurisdictional. *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) (“The judicial review provisions of the APA are not jurisdictional.”); *see also Ochoa*, 604 F.3d at 549 (8th Cir. 2010); *Trudeau v. FTC*, 456 F.3d 178, 183-84 (D.C. Cir. 2006). In this case, analyzing whether an agency pronouncement is binding evokes considerations of finality. However, they arise not from the APA, but rather from the conditions placed on the CWA’s grant of direct appellate jurisdiction. The APA allows judicial review in two situations: “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court” 5 U.S.C. § 704. The word “final” modifies the

Here, the letters can be considered “promulgations” for the purposes of establishing our jurisdiction under section 509(b)(1)(E) because they have a binding effect on regulated entities. “If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding.’” *Appalachian Power Co.*, 208 F.3d at 1021. In particular, the court in *Appalachian Power* found that the contested agency guidance before it was binding because it reflected “a position [the EPA] plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in settling the terms and conditions of permits issued to petitioners, a position EPA officials in the field are

second use of “agency action,” but not the first. While some courts have interpreted the phrase “[a]gency action made reviewable by statute” as including an implied finality requirement, *see, e.g., Appalachian Energy Grp. v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994); *Carter/Mondale Presidential Comm., Inc. v. Fed. Election Comm’n*, 711 F.2d 279, 285 n.9 (D.C. Cir. 1983), we decline to conjure up a finality requirement for “[a]gency actions made reviewable by statute” where none is located in the text of the APA, particularly where the Supreme Court has implied that the two phrases incorporate distinct requirements, *see Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990) (“When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the ‘agency action’ in question must be ‘final agency action.’”); *id.* at 891 (“Some statutes permit broad regulations to serve as the ‘agency action,’ and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt.”); *see also Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1012 (8th Cir. 2010) (“[T]he ‘cardinal canon’ of statutory interpretation is ‘that a legislature says in a statute what it means and means in a statute what it says there.’” (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992))). The CWA expressly makes specified agency actions reviewable, and our task therefore is to determine whether the asserted agency action falls within the statutory terms.

bound to apply.” *Id.* at 1022. This reasoning persuades us that the June 2011 and September 2011 letters are binding as well.

First, the June 2011 letter reflects a binding policy with respect to bacteria mixing zones. In response to the League’s 2010 challenge to the EPA’s policy on mixing zones, the EPA submitted to this court a motion to dismiss, which described the King memorandum as nothing but “one office director’s view of a regulatory requirement.” But in the June 2011 letter to Senator Grassley, the EPA characterized the King memorandum as reflecting “the EPA’s position.” Although the EPA coyly continues to insist that the letter is the “consummation of nothing,” something apparently was consummated between 2010 and June 2011. Furthermore, the language used to express “the EPA’s position”—“should not be permitted”—is the type of language we have viewed as binding because it “speaks in mandatory terms.” *Ubbelohde*, 330 F.3d at 1028; *see also Gen. Elec. Co.*, 290 F.3d at 383 (“[T]he mandatory language of a document alone can be sufficient to render it binding”); *cf. Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 34 (D.C. Cir. 2009) (per curiam) (finding that an agency memo was not binding because it “‘encouraged’ states to address all nine factors EPA identified, but did not require them to do so”). The League’s appendix includes several affidavits from representatives of municipal wastewater treatment facilities and the Iowa Department of Natural Resources, the state permitting authority.¹³ These individuals averred that they indeed have taken the

¹³The League provided these affidavits in an unopposed appendix supplementing the EPA’s administrative record. After oral argument, the League filed a motion to further supplement the record with additional affidavits from the Iowa and Kansas water permitting authorities. The EPA objects to the League’s attempt to further supplement the record at this stage. The Supreme Court has explained that when applying the arbitrary and capricious standard of review under APA section 706(2)(A), “the focal point for judicial review should be the administrative record already in existence.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Therefore, if “there is a contemporaneous administrative record and no need for additional explanation of the agency decision,” we will permit supplementation of the administrative record

June 2011 letter at face value, interpreting it as establishing a new prohibition on bacteria mixing zones, one by which they must abide in the permit application process. We agree that private parties have “reasonably [been] led to believe that failure to conform will bring adverse consequences,” which tends to make the document binding as a practical matter. *See Gen. Elec. Co.*, 290 F.3d at 383 (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1328 (1992)).

The EPA asks us to believe that the June 2011 letter did not flatly prohibit the use of bacteria mixing zones in waters designated for primary contact recreation because although it intoned that states “should not” permit bacteria mixing zones in primary contact recreation areas, it nonetheless mentioned that under 40 C.F.R. § 131.13, states “may, at their discretion, include mixing zone policies in their state water quality standards.” With respect to bacteria mixing zones in primary contact recreation areas, we struggle to spot the surviving state discretion. The letter instructs state permitting authorities to reject certain permit applications, regardless of the state’s water quality standards. The EPA’s protestations to the contrary are particularly unavailing where, as here, Iowa’s water permitting authority has received

only where there is a “strong showing of bad faith or improper behavior.” *Newton Cnty. Wildlife Ass’n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). The rationale for this rule is that judicial review of the reasonableness of an agency’s actions should concentrate upon the evidence available to the agency when making its decision. *See Robinette v. Comm’r*, 439 F.3d 455, 459 (8th Cir. 2006). But where, as here, rulemaking masquerading as explication is alleged, the informality of the agency’s decisionmaking process makes the possibility of a sparse “contemporaneous administrative record” more likely. While we question whether the *Camp* standard would necessarily apply to such challenges under APA section 706(2)(D), we need not decide the matter because we reached our conclusions without resort to the League’s proposed supplementary materials. Therefore, we deny the League’s motion to supplement the record.

communications from the EPA indicating that it would object to any permits that were inconsistent with the policy outlined in the EPA letters. In effect, the EPA asks us to agree that when it couches an interdiction within a pro forma reference to state discretion, the prohibition is somehow transformed into something less than a prohibition. We decline to accept such Orwellian Newspeak.

Second, the September 2011 letter presents a binding policy on blending. Although the June 2011 letter describes the “2005 draft Policy” on blending as merely “a viable path forward” that “has not been finalized,” the September 2011 letter applies the 2005 policy to the League’s proposed use of ACTIFLO.¹⁴ In requiring ACTIFLO to pass a no-feasible-alternatives analysis, the EPA made clear that it

¹⁴League Question: “Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a ‘no feasible alternatives’ demonstration?” EPA Response: “Yes.” The EPA insists that this challenge is time-barred because the proper time to raise the challenge was in 2005. We find this contention unpersuasive because prior to the September 2011 letter, the EPA never indicated that the 2005 policy became final. For example, the June 1, 2010 Federal Register notice explained that the EPA was continuing to “solicit[] input from the general public concerning the impact of the proposed rule.” 75 Fed. Reg. 30,395, 30,401 (June 1, 2010). Even the June 2011 letter explained that the agency was “continu[ing] to consider whether the 2005 Policy should be finalized or incorporated into the EPA’s other potential wet weather rulemaking effort announced June 1, 2010 in the Federal Register.” In contrast, the September 2011 letter simply applies the 2005 Policy to the regulated entities as if it had already been finalized. The EPA’s approach to the period for seeking appellate review would eviscerate the direct appellate review provisions of the CWA by enabling an agency to announce consideration of a proposal and then wait 121 days before treating the proposal as binding. *Cf. CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (refusing to find that the petitioners’ claim was time-barred “because the new rule clearly represents the first time that the agency has adopted an unequivocal, wholesale ban”). The time to seek direct appellate review begins to run not when the agency first floats its proposal to the public, but rather when the agency promulgates that announcement—in other words, when they make its substance binding.

“plans to follow [the 2005 policy] in reviewing State-issued permits,” and “it will insist State and local authorities comply with [the 2005 policy] in settling the terms and conditions of permits issued to petitioners.” *See Appalachian Power Co.*, 208 F.3d at 1022. Just as it did in *Appalachian Power*, the EPA dissembles by describing the contested policy as subject to change. *See id.* at 1022-23. Yet, all regulations are susceptible to alteration. Hedging a concrete application of a policy within a disclaimer about hypothetical future contingencies does not insulate regulated entities from the binding nature of the obligations and similarly cannot serve to inoculate the agency from judicial review.

Accordingly, we hold that the June 2011 and September 2011 letters were promulgations for the purposes of CWA section 509(b)(1)(E).

2. “[A]ny effluent limitation or other limitation”

The CWA defines effluent limitations as “any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.” 33 U.S.C. § 1362(11). The Supreme Court has referred to effluent limitations as “direct restrictions on discharges.” *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976). Other circuits have held that the expansiveness of the phrase “any restriction” encompasses both numerical and non-numerical effluent limitations. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005) (“[W]e believe that the terms of the nutrient management plans constitute effluent limitations”); *NRDC v. EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981) (finding an effluent limitation where, “[a]s a practical matter,” agency action “restrict[s] the discharge of sewage by limiting the availability of a variance to a class of applicants”).

The phrase “other limitation” leaves much to the imagination. The Fourth Circuit explained that it “construe[s] that term as a restriction on the untrammelled discretion of the industry . . . [as it existed] prior to the passage of the [CWA].” *Va. Elec. & Power Co. (VEPCO) v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977). *VEPCO* found jurisdiction under section 509(b)(1)(E) because although the challenged regulations involved “structures,” rather than “discharges of pollutants into the water,” and therefore were not “effluent limitations,” they were nonetheless “other limitations” because they “refer[red] to information that must be considered in determining the type of intake structures that individual point sources may employ.” *Id.* at 449-50. Many of our sister circuits have adopted the *VEPCO* approach. *See, e.g., Friends of the Everglades v. EPA*, 699 F.3d 1280, 1287 (11th Cir. 2012) (finding no jurisdiction under section 509(b)(1)(E) because challenged rule did the opposite of restricting industry discretion, by “free[ing] the industry from the constraints of the permit process”); *Nw. Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1015-16 (9th Cir. 2008) (finding no jurisdiction under section 509(b)(1)(E) because the challenged regulations created “categorical and permanent exemptions” from “any limit imposed by” CWA permit requirements); *NRDC*, 673 F.2d at 402, 405 (finding jurisdiction under section 509(b)(1)(E) to review “a complex set of procedures for issuing or denying NPDES permits” that restricted industry discretion). We agree that an agency action is a “limitation” within the meaning of section 509(b)(1)(E) if entities subject to the CWA’s permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes.

Applying this definition, we find that the contested letters involve “effluent or other limitations.” The EPA’s position that bacteria mixing zones in waters “designated for primary contact recreation . . . should not be permitted” is a restriction that directly affects the concentration of discharge from a point source and therefore is an effluent limitation. *See Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 986 (D.C. Cir. 1997) (per curiam) (finding jurisdiction under CWA section 509(b)(1)(E) to review “the prohibition in Guidance Procedure 3.C against using mixing zones for

new and existing BCC discharges”). The rule regarding the use of blending is an “other limitation” because, as in *VEPCO*, it restricts the discretion of municipal sewer treatment plants in structuring their facilities.

As a result, both requirements for direct appellate review are satisfied here.¹⁵

B. Ripeness

The judicially created doctrine of ripeness “flows from both the Article III ‘cases’ and ‘controversies’ limitations and also from prudential considerations for refusing to exercise jurisdiction.” *Neb. Pub. Power Dist. v. MidAm. Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). “‘Ripeness is peculiarly a question of timing’ and is governed by the situation at the time of review, rather than the situation at the time of the events under review.” *Id.* at 1039 (quoting *Anderson v. Green*, 513 U.S. 557, 559 (1995) (per curiam)). A party seeking review must show both “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Pub. Water Supply Dist. No. 10 of Cass Cnty. v. City of Peculiar*, 345 F.3d 570, 572-73 (8th Cir. 2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Both of these factors are weighed on a sliding scale, but each must be satisfied “to at least a minimal degree.” *Neb. Pub. Power Dist.*, 234 F.3d at 1039.

Fitness rests primarily on whether a case would “benefit from further factual development,” and therefore cases presenting purely legal questions are more likely

¹⁵The EPA insists that as a result of finding its conduct here reviewable, there will be a chilling effect on the informal channels of communication between agencies and regulated entities. We acknowledge the great value in such modes of communication and encourage agencies to continue to utilize them. However, when agencies veer from merely advisory statements or interpretations into binding proclamations, they become susceptible to judicial review.

to be fit for judicial review. *Pub. Water Supply*, 345 F.3d at 573. The hardship factor looks to the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review. *Neb. Pub. Power Dist.*, 234 F.3d at 1038. We do not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them, but the injury must be “certainly impending.” *Pub. Water Supply*, 345 F.3d at 573 (quoting *Paraquad, Inc. v. St. Louis Hous. Auth.*, 259 F.3d 956, 958-59 (8th Cir. 2001)). “The immediacy and the size of the threatened harm” will also affect the interplay of these factors. *Neb. Pub. Power Dist.*, 234 F.3d at 1038.

This case hinges upon whether the EPA’s letters constitute legislative rules. We agree with our colleagues who have commented that “whether [a] Guidance Document is a legislative rule is largely a legal, not a factual, question, turning . . . primarily upon the text of the Document.” *Gen. Elec. Co. v. EPA*, 290 F.3d at 380; *see also Warder v. Shalala*, 149 F.3d 73, 79 (1st Cir. 1998); *Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327, 1330 (9th Cir. 1997). As primarily legal questions, such challenges tend to present questions fit for judicial review. On the other hand, postponing a procedural challenge to an agency guidance document may be appropriate where further factual development regarding the agency’s application of the document would aid our decision. *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003). This is so because the purpose of the ripeness doctrine is to prevent courts “from entangling themselves in abstract disagreements over administrative policies.” *Abbott Labs.*, 387 U.S. at 148.

In this case, we are not wading into the abstract because the disagreements before us are quite concrete. Nothing about the proclamation that “the EPA’s position, as stated in the [King] memorandum, is that [bacteria mixing zones in primary contact recreation waters] should not be permitted” indicates that the EPA’s posture will vary based on each applicant’s specific factual circumstances. Similarly, when asked if the use of “peak flow treatment processes” such as ACTIFLO would

be subject to a “no feasible alternatives” demonstration, the EPA responded “Yes.”¹⁶ The question is whether the statements are simply reminders of preexisting regulatory requirements or whether they create new regulatory obligations. Because such inquiries do not implicate contingent factual circumstances, this controversy is ripe for our review. *See CropLife Am. v. EPA*, 329 F.3d 879, 884 (D.C. Cir. 2003) (finding that petitioners presented a “purely legal question” that was ripe for review where “the EPA directive states unequivocally that the agency will not consider *any* third-party human studies”).

The second ripeness factor, hardship to parties, is also present. Although the EPA portrays the harm as lurking, if at all, on the distant horizon, the threatened harm is more immediate, and it is certainly not speculative. League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that—if these letters are in effect new legislative rules—were viable before the publication of the letters but will be rejected when the letters are applied as written. *See Neb. Pub. Power Dist.*, 234 F.3d at 1039 (“Delayed judicial resolution would only increase the parties’ uncertainty, and would require [petitioners] to gamble millions of dollars on an uncertain legal foundation.”). Postponing our review until the EPA has denied a permit application in accord with the letters renders a hardship on

¹⁶The September 2011 letter acknowledged that if ACTIFLO independently met secondary treatment requirements, then flows moving through ACTIFLO units instead of the facility’s biological secondary treatment units would not be considered a bypass. However, the letter also stated that ACTIFLO failed to meet these requirements and that the EPA would “continue to explore in what circumstances use of [ACTIFLO-type] technologies is consistent with a determination that there are ‘no feasible alternatives.’” During oral argument, counsel for EPA informed us that the use of newer, modified versions of ACTIFLO units “may well satisfy the secondary treatment regulations.” This type of belated backpedaling is insufficient to render these challenges so intertwined with hypothetical future conditions that they are unripe for review.

municipal water authorities, who already would have invested irretrievable funds into their applications. *Cf. Toilet Goods Ass’n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967) (finding a challenged agency action not ripe for review where “no irremediable adverse consequences [would] flow from requiring a later challenge to this regulation”). Therefore, we find that denying judicial review would be a hardship to the parties and that this case evinces the requisite degree of ripeness. *See Abbott Labs.*, 387 U.S. at 153 (“Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted, absent a statutory bar or some other unusual circumstance”); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201-02 (1983) (finding a challenge to an as-yet unimplemented statute ripe because “requir[ing] the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship”); *see also Sackett v. EPA*, 566 U.S. ---, 132 S. Ct. 1367, 1374 (2012) (“[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review”).

C. Article III Standing

If a litigant lacks Article III standing to bring his claim, then we have no subject matter jurisdiction over the suit. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012). “To show standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury.” *Young Am. Corp. v. Affiliated Computer Servs. (ACS), Inc.*, 424 F.3d 840, 843 (8th Cir. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Because the League, rather than an individual permit applicant, is filing suit, it also must prove associational standing.

“An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). The League need not establish that all of its members would have standing to sue individually so long as it can show that “any one of them” would have standing. *See Ward v. Seldin*, 422 U.S. 490, 511 (1975). The EPA concedes that the League meets the second and third elements of the associational standing test, and we agree. The only remaining element is whether any individual member would have standing to sue in its own right, which requires any League member to satisfy the three components that encompass the “irreducible constitutional minimum of standing.” *See Am. Library Ass’n v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005) (quoting *Lujan*, 504 U.S. at 560).

“[S]tanding is to be determined as of the commencement of the suit.” *Lujan*, 504 U.S. at 570 n.5. The party seeking judicial review bears the burden of persuasion and must support each element “with the manner and degree of evidence required at the successive stages of litigation.” *Id.* at 561. Therefore, at the pleading stage a petitioner can move forward with “general factual allegations of injury,” whereas to survive a summary judgment motion, he “must set forth by affidavit or other evidence specific facts.” *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007) (quoting *Lujan*, 504 U.S. at 561). The Supreme Court has not addressed “the manner and degree of evidence required” when a petitioner is seeking appellate review of an administrative action, nor has this circuit addressed the matter. The District of Columbia Circuit has equated such a petition with a motion for summary judgment, in that both request a final judgment on the merits. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Accordingly, parties seeking direct appellate review of an agency action must prove each element of standing as if they were moving for summary judgment in a district court. *Id.* Our colleagues on the Seventh Circuit have

also taken this approach. *See Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008). This reasoning is sound; because parties in the League's position seek the type of relief available on a motion for summary judgment, they correspondingly should bear the responsibility of meeting the same burden of production, namely "specific facts" supported by "affidavit or other evidence." *See Lujan*, 504 U.S. at 561.

The EPA raises a factual challenge to our subject matter jurisdiction by attacking the facts asserted by the League with respect to standing, and therefore the League must establish standing "without the benefit of any inferences in [its] favor." *Defenders of Wildlife, Friends of Animals & Their Env't v. Lujan*, 911 F.2d 117, 120 (8th Cir. 1990), *rev'd on other grounds*, 504 U.S. 555 (1992). Parties seeking to litigate in federal court "have the burden of establishing jurisdiction," including standing, "by a preponderance of the evidence." *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir. 1990). *But see Sierra Club*, 292 F.3d at 899 (imposing a burden of proof to establish elements of standing to a "substantial probability" (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000))). The League seeks to assert both a procedural and a substantive challenge to the letters. We address separately its standing to make each claim. *See Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1483-84 (D.C. Cir. 1994).

With respect to the substantive challenges, as the foregoing discussion regarding hardship has indicated, the League members' affidavits evince the type of "concrete" and "actual or imminent" harm necessary to establish an injury in fact. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 1999) (en banc) ("[I]n many cases, ripeness coincides squarely with standing's injury in fact prong."). At least some members are currently operating under permits that allow them to utilize blending and bacteria mixing zones in circumstances inconsistent with the EPA letters, which they must imminently rectify. *Cf. CropLife Am.*, 329 F.3d at 884 ("The disputed directive concretely injures petitioners, because it unambiguously

precludes the agency's consideration of . . . studies that petitioners previously have been permitted to use to verify the safety of their products.”). Moving into compliance will be costly. The League has therefore articulated an injury in fact. *See City of Waukesha v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003) (per curiam) (“The administrative record shows that the City of Waukesha would face substantial costs if it was required to comply with the . . . regulations. EPA has not disputed that record evidence. This is sufficient for injury-in-fact.”). Causation for standing purposes requires that the harm asserted be “fairly traceable to the challenged action of the defendant.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009) (quoting *Lujan*, 504 U.S. at 560). The EPA disputes causation because it argues that the letters are not binding. Because we have ruled otherwise, we find that the League has established causation. Finally, the League has shown that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). If the rules were vacated as substantively unlawful, it is indeed likely that the members’ injuries would be redressed.

With respect to the procedural challenge, namely that the EPA dodged the APA’s notice and comment procedures and *de facto* implemented new legislative rules regulating members’ activities under the CWA, the violation of a procedural right can constitute an injury in fact “so long as the procedures in question are designed to protect some threatened concrete interest of [the petitioner] that is the ultimate basis of his standing.” *Lujan*, 504 U.S. at 573 n.8; *see also Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998). The League’s members have a concrete interest not only in being able to meet their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them. Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 316

(1979) (“In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.”). Thus, the League has established an injury in fact related to the EPA’s purported procedural deficiencies.

Causation and redressability, and therefore standing to assert this procedural challenge, follow from these conclusions. Where a challenger is the subject of agency action, “there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it.” *Lujan*, 504 U.S. at 561-62. This is particularly true for individuals asserting violations of procedural rights. *Id.* at 572 n.7 (“The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”). If a petitioner “is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *see also Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012) (“Having shown its members’ redressable concrete interest, [a petitioner association] can assert violation of the APA’s notice-and-comment requirements, as those procedures are plainly designed to protect the sort of interest alleged. As to such requirements, [the petitioner association] enjoys some slack in showing a causal relation between its members’ injury and the legal violation claimed.”). Correspondingly, redressability in this context does not require petitioners to show that the agency would alter its rules upon following the proper procedures. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002) (“If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency’s rule, section 553 would be a dead letter.”); *see also Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 247 n.4 (3d Cir. 2011) (“Even if the [U.S. Forest Service is correct on the merits], the Agreement nevertheless establishes—in violation of appellees’ notice and

comment rights—a new substantive rule This suffices for standing purposes.”); *Pye v. United States*, 269 F.3d 459, 471 & n.7 (4th Cir. 2001). The League’s remaining burden as to standing is met because “there is some possibility that the requested relief,” namely remanding to the EPA for application of notice and comment procedures, would “prompt the [EPA] to reconsider the decision that allegedly harmed” League members. *See Massachusetts*, 549 U.S. at 518.

We conclude that the League has standing to assert its claims. Having resolved all jurisdictional questions, we now turn to the merits of the League’s petition for review.

III. Merits of Procedural Challenge

A. Standard of Review

The parties disagree over the appropriate standard of review to be applied where, as here, an appellate court reviews challenges to agency procedural compliance under § 706(2)(D). The League urges us to follow the Ninth Circuit, which “reviews de novo the agency’s decision not to follow the APA’s notice and comment procedures . . . [,] because complying with the notice and comment provisions when required by the APA ‘is not a matter of agency choice.’” *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003) (quoting *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 n.4 (9th Cir. 1992)). The EPA argues its characterization of the letters is entitled to a deferential abuse of discretion review. Our prior decisions have not clearly announced a standard of review, other than to note that the agency’s characterization of its rule as legislative or interpretative, “while not dispositive, is entitled to deference.” *Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986). *But see United States v. Hacker*, 565 F.3d 522, 524 (8th Cir. 2009) (stating in dicta that challenges to procedural compliance under the APA present “a question of law, which we review de novo”), *abrogated on other grounds by Bond v. United States*,

564 U.S. ---, 131 S. Ct. 2355 (2011); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (“Where a policy statement purports to create substantive requirements, it can be a legislative rule regardless of the agency’s characterization.”).

We agree with our colleagues on the Ninth Circuit that much of the rationale for granting deference to administrative decisions is simply not applicable where the topic of our review—compliance with APA procedural requirements—is not a matter that Congress has committed to the agency’s discretion. In other words, whether and when an agency must follow the law is not an area uniquely falling within its own expertise, and thus the agency’s decision is less deserving of deference. *Cf. Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 120 n.14 (1st Cir. 2002) (“We are unaware of any line of cases that allows an agency to make a binding determination that it has complied with specific requirements of the law. . . . As to the so-called ‘specialized experience’ of the agency, it would appear that it is the courts that qualify for such a title on an issue of legislative interpretation.”). Furthermore, because the categorization of an agency’s action as a legislative or interpretative rule is largely a question of law, a *de novo* standard of review is consistent with the standard of review we generally apply to questions of law in similar contexts. *See Qwest Corp. v. Minn. Pub. Utils. Comm’n*, 427 F.3d 1061, 1064 (8th Cir. 2005).

At least two circuits in addition to the Ninth Circuit have expressly announced a *de novo* standard of review when distinguishing between legislative rules and other types of agency action. *See Meister v. Dep’t of Agric.*, 623 F.3d 363, 370 (6th Cir. 2010); *Warder*, 149 F.3d at 79. We adopt a *de novo* standard of review as well. This is not to say that the agency’s label is to be ignored. As discussed above, an agency’s characterization of its rule is a relevant component of our review and is a factor entitled to some deference. Our posture in this regard mirrors similar comments made by other courts of appeals. *See Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (“[T]he agency’s own label, while relevant, is not dispositive.”) (en banc); *accord Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592,

595 (5th Cir. 1995); *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992); *Metro. Sch. Dist. of Wayne v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992); *Friedrich v. HHS*, 894 F.2d 829, 834-35 (6th Cir. 1990); *Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972).

The critical distinction between legislative and interpretative rules is that, whereas interpretative rules “simply state what the administrative agency thinks the statute means, and only ‘remind’ affected parties of existing duties,” a legislative rule “imposes new rights or duties.” *Nw. Nat’l Bank v. U.S. Dep’t of the Treasury*, 917 F.2d 1111, 1117 (8th Cir. 1990) (quoting *Jerri’s Ceramic Arts, Inc. v. Consumer Prod. Safety Comm’n*, 874 F.2d 205, 207 (4th Cir. 1989)). When an agency creates a new “legal norm based on the agency’s own authority” to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules. See *Ubbelohde*, 330 F.3d at 1028; *Martin v. Gerlinkski*, 133 F.3d 1076, 1079 (8th Cir. 1998); *Syncor Int’l Corp.*, 127 F.3d at 94-95. It follows from this distinction that interpretative rules do not have “the force of law.”¹⁷ *Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 527 n.4 (8th Cir. 1995). Whether or not a binding pronouncement is in effect a legislative rule that should have been subjected to notice and comment procedures thus depends on whether it substantively amends

¹⁷The EPA insists the letters are neither legislative nor interpretative rules but rather constitute policy statements. Policy statements are not binding, either as a legal or practical matter. See *NRDC v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (“To begin with, because the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule.”). Because we have determined that the letters evince binding rules regarding bacteria mixing zones and blending, neither can be characterized as a policy statement.

or adds to, versus simply interpreting the contours of, a preexisting rule. *See U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005).

Identifying where a contested rule lies on the sometimes murky spectrum between legislative rules and interpretative rules can be a difficult task, but it is not just an exercise in hair-splitting formalism. As agencies expand on the often broad language of their enabling statutes by issuing layer upon layer of guidance documents and interpretive memoranda, formerly flexible strata may ossify into rule-like rigidity. An agency potentially can avoid judicial review through the tyranny of small decisions. Notice and comment procedures secure the values of government transparency and public participation, compelling us to agree with the suggestion that “[t]he APA’s notice and comment exemptions must be narrowly construed.” *Prof’ls & Patients for Customized Care*, 56 F.3d at 596 (quoting *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989)); *see also City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 201 (2d Cir. 2010).

B. Bacteria Mixing Zones

Since at least 1994, the EPA’s long-standing policy toward bacteria mixing zones has been that states should exercise their “discretion”—as set forth in 40 C.F.R. § 131.13—to adopt a “definitive statement” in their water quality standards “on whether or not mixing zones are allowed.” Handbook Ch. 5.1, 5.1.1. States are authorized to consider mixing zones in determining the types of standards necessary to preserve water quality. 40 C.F.R. § 122.44(d)(1)(ii). States do not enjoy complete discretion in creating a mixing zone policy because they operate within the shadow of EPA-crafted effluent limitations. The Handbook interprets certain instances of mixing zones as inconsistent with EPA regulations: states should not draft water quality standards that allow point source dischargers to utilize mixing zones in ways that “may endanger critical areas,” such as recreational areas, or pose “significant health risks.” Ch. 5.1. Notably, no preexisting regulation establishes that *all* bacteria

mixing zones in recreational areas necessarily “may endanger critical areas” or create “significant health risks.”¹⁸ In fact, under the Handbook, whether a mixing zone causes such a state of affairs was to be determined based on a “holistic approach.” *Id.*

Yet, when now asked if a state “[m]ay . . . approve a bacteria mixing zone for waters designated for body contact recreation,” the EPA flatly proclaims that such mixing zones “should not be permitted.” The June 2011 letter tells state permitting authorities that mixing zones in primary contact recreation areas are necessarily inconsistent with achieving the water quality levels required by federal regulations. The EPA eviscerates state discretion to incorporate mixing zones into their water quality standards with respect to this type of body of water. In effect, the EPA has created a new effluent limitation: state permitting authorities no longer have discretion to craft policies regarding bacteria mixing zones in primary contact recreation areas. Instead, such mixing zones are governed by an effluent limitation that categorically forbids them. To be sure, in 1994 the EPA stated that as its “understanding of pollutant impacts on ecological systems evolves, cases could be identified where no mixing zone is appropriate.” Handbook Ch. 5.1.1. It seems that the EPA’s understanding of pollutant impacts has so evolved, and it has now identified an entire class of cases “where no mixing zone is appropriate.” However, the effect of the EPA applying its more developed understanding of pollutant impacts is to promulgate a new effluent limitation that state permitting authorities must follow. *See Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)

¹⁸The EPA’s own guidance also belies any interpretation of its preexisting legislative rules as categorically prohibiting the use of mixing zones in waters designated for primary recreational contact. *See* EPA, Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews 5 (2001) (describing how states may alter their water quality standards to apply bacteria water quality criteria “at the beach or at the point of contact rather than at the end-of-pipe or at the edge of the mixing zones”); EPA, Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits 1 (1996) (“Thus, individual state law and policy determine whether or not a mixing zone is permitted.”).

(“Thus, a rule is legislative if it attempts ‘to supplement [a statute,] not simply to construe it.’”) (alteration in original). In short, the June 2011 letter creates a new legal norm for bacteria mixing zones based on the EPA’s authority to promulgate effluent limitations.

The hallmark of an interpretative rule or policy statement is that they cannot be independently legally enforced. It is the underlying legislative rules that drive compliance, and thus when an agency applies a newly announced interpretative rule or policy statement, there must be some external legal basis supporting its implementation. *See St. Paul-Ramsey Med. Ctr.*, 50 F.3d at 528 n.4; *Prof’ls & Patients for Customized Care*, 56 F.3d at 596. The EPA has not cited any preexisting effluent limitation or lawfully promulgated legislative rule that supplies the basis for the prohibition on bacteria mixing zones in primary contact recreation areas. This reinforces our conclusion that this new legal norm is a legislative rule and that the EPA violated the APA when it bypassed notice and comment procedures. Accordingly, we vacate the EPA’s new rule banning bacteria mixing zones in all waters designated for primary contact recreation as promulgated “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

C. Blending

The EPA contends that the letters simply reflect an interpretation of the bypass rule, which it has been considering since 2005. *See* 70 Fed. Reg. at 76,015 (describing the 2005 policy as “the Agency’s interpretation” of the bypass rule). To be sure, a legislative rule is not created simply because an agency “supplies crisper and more detailed lines than the authority being interpreted.” *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Nevertheless, the EPA’s new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule. *See Nat’l Family Planning & Reprod.*

Health Ass’n, 979 F.2d at 235 (“If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.” (alteration in original) (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 396 (1985))).

The September 2011 letter simply applies the 2005 draft Policy to the proposed use of ACTIFLO as if the 2005 draft were an existing obligation of regulated entities. However, the record indicates that prior to 2005, the EPA had not viewed the use of a process such as ACTIFLO as an inevitable trigger of a no-feasible-alternatives requirement. The 2005 draft Policy characterized itself as “significantly different” from the EPA’s 2003 proposal on blending. 70 Fed. Reg. at 76,014. The 2003 proposal, in turn, corresponds to what the record indicates is the reality on the ground: widespread use by POTWs of blending peak wet weather flows. The 2005 draft Policy acknowledges that blending previously had been “permitted at [POTWs] without consideration of the bypass regulation criteria.” 70 Fed. Reg. at 76,015. In a response to a 2002 Freedom of Information Act (“FOIA”) request, the EPA admitted to “the use of federal funds under the Construction Grants Program to build facilities that were designed to blend effluent from primary treatment processes with effluent from biological treatment processes during peak wet weather events.”¹⁹ In a 2004 report to Congress, the EPA praised the use of blending processes like ACTIFLO to deal with peak wet weather flows with no reference to a no-feasible-alternatives requirement. Various Iowa municipal water authorities have averred that the Iowa Department of Natural Resources has approved permits—with no objection from the EPA and no imposition of a no-feasible-alternatives requirement—allowing cities to construct facilities utilizing non-biological peak flow secondary treatment processes.

¹⁹FOIA request submitted by John Hall to the EPA on October 25, 2001; response dated April 5, 2002, No. HQ-RIN-00459-02.

Municipalities chose to use ACTIFLO and analogous blending methods as an exercise of their discretion under the bypass rule, *see* 53 Fed. Reg. at 40,609, and secondary treatment rule, *see* 48 Fed. Reg. at 52,259, to select the particular technologies they deemed best suited to achieving the applicable secondary treatment requirements. However, the September 2011 letter severely restricts the use of “ACTIFLO systems that do not include a biological component” because the EPA does not “consider[] [them to be] secondary treatment units.” The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA’s new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. 40 C.F.R. § 122.45(h). There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See* 40 C.F.R. § 133.100-102. But the blending rule applies effluent limitations within facilities’ secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units “do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133.” If streams move around traditional biological secondary treatment processes and through a non-biological unit that “is itself a secondary treatment unit,” then the system would not need to meet the restrictive no-feasible-alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged.

Because the September 2011 letter had the effect of announcing a legislative rule with respect to blending peak wet weather flows, the EPA violated the APA's procedural requirements by not using notice and comment procedures. We also vacate this new rule because it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

IV. Merits of substantive challenge

Even if the EPA's legislative rules had been promulgated through the proper procedural channels, the League argues they nonetheless should be "set aside . . . [as] in excess of statutory jurisdiction, authority, . . . or short of statutory right." 5 U.S.C. § 706(2)(C). This subsection of the APA authorizes courts to strike down as ultra vires agency rules promulgated without valid statutory authority. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998). The League urges us to find that the EPA exceeded its statutory authority under the CWA by prohibiting mixing zones outside the state water quality standard adoption process and by using the blending prohibition to dictate facility treatment design and apply effluent limitations internally, rather than at the end of the pipe. Appellate review under APA section 706(2)(C) proceeds under the familiar *Chevron* framework. *See Clark v. U.S. Dep't of Agric.*, 537 F.3d 934, 939 (8th Cir. 2008). We first "conduct an independent review of the statute and of its legislative history." *Ark. AFL-CIO v. FCC*, 11 F.3d 1430, 1441 n.9 (8th Cir. 1993) (en banc). "Deference to the agency is appropriate only when a court finds the statute to be ambiguous." *Id.*; *see also Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). If confronted with an ambiguous statute, we look to whether the agency's construction of the statute is reasonable. *Ark. AFL-CIO*, 11 F.3d at 1441. Agency rules will survive ultra vires allegations so long as we can "reasonably conclude that the grants of authority in the

statutory provisions cited by the government contemplate the issuance.” *O’Keefe*, 132 F.3d at 1257.

We find our circuit in the same position as the District of Columbia Circuit, which recently observed that its “case law provides little direction on whether, having determined to vacate on procedural grounds, we should nonetheless address substantive claims.” *NRDC v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011); *cf. U.S. Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981). The decision implicates competing tensions, both compelling. If we choose to vacate solely on procedural grounds, regulated entities who have already spent considerable time crossing the hot shoals of regulatory uncertainty must continue to do so. On the other hand, should we move to the merits of whether the EPA’s legislative rules reflect an arbitrary and capricious interpretation of the CWA, we short-circuit the APA’s notice and comment procedures and preclude interested parties from participating in the agency’s analytic process. *Cf. Smiley v. Citibank, N.A.*, 517 U.S. 735, 741 (1996) (“[T]he notice-and-comment procedures of the Administrative Procedure Act [are] designed to assure due deliberation.”).

In a recent case, the District of Columbia Circuit found the “interest in preserving the integrity of the notice and comment process” outweighed “concern[s] about delay” where the EPA’s rule was not “obviously preclude[d]” by the relevant enabling act. *See NRDC*, 643 F.3d at 321. Here, too, we conclude that the EPA’s new mixing zone rule is not obviously precluded by the plain meaning of any applicable CWA provisions. Therefore, should the EPA wish to institute this rule, it may seek to do so using the appropriate procedures.

However, the blending rule clearly exceeds the EPA’s statutory authority and little would be gained by postponing a decision on the merits. As discussed above, the September 2011 letter applies effluent limitations to a facility’s internal secondary treatment processes, rather than at the end of the pipe. The CWA permits the EPA to

set “effluent limitations based upon secondary treatment.” 33 U.S.C. § 1311(b)(1)(B). But effluent limitations are restricted to regulations governing “discharges from point sources into navigable waters.” 33 U.S.C. § 1362(11). The EPA is authorized to administer more stringent “water quality related effluent limitations,” but the CWA is clear that the object of these limitations is still the “discharges of pollutants from a point source.” 33 U.S.C. § 1312(a). In turn, “discharge of pollutant” refers to the “addition of any pollutant to navigable waters.” § 1362(11). The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so. *See also Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997) (“The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a ‘point source’; it is not authorized to regulate the pollutant levels in a facility’s internal waste stream.”). Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA’s statutory authority.

V. Conclusion

For the foregoing reasons, we deny the EPA’s motion to dismiss and grant the League’s petition for review. We vacate both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter as procedurally invalid. Further, we vacate the blending rule as in excess of statutory authority insofar as it

would impose the effluent limitations of the secondary treatment regulations internally, rather than at the point of discharge into navigable waters. We remand to the EPA for further consideration.²⁰

²⁰The League also requested attorneys' fees under CWA section 509(b)(3), which authorizes courts, "whenever . . . appropriate," to award litigation costs to any "prevailing or substantially prevailing party." To be a prevailing party entitled to attorneys' fees, a plaintiff must achieve at least some relief on the merits that effectuates a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)); see also *Sierra Club v. City of Little Rock*, 351 F.3d 840, 845 (8th Cir. 2003) (applying *Buckhannon* to a claim for attorneys' fees under the CWA). The League is clearly a prevailing party, even on the basis of its procedural challenge alone. See *Chem. Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1279 (5th Cir. 1989) (describing "substantive significance" of a remand on procedural grounds). An award of litigation costs under section 509(b)(3) must also be "appropriate." Statutory provisions authorizing an award of litigation costs often serve to incentivize the achievement of statutory objectives, and therefore "an award is usually 'appropriate' when a party has advanced the goals of the statute invoked in the litigation." *Id.*; see also *Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1061 (9th Cir. 2009); *NRDC v. EPA*, 512 F.2d 1351, 1357 (D.C. Cir. 1975). The CWA's goals involve the restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The League, however, was largely vindicating its own rights, rather than the purposes of the CWA, and it has neglected to brief us on why an award of attorneys' fees would otherwise be "appropriate." Therefore, we decline to award litigation costs under CWA section 509(b)(3).

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 Guidance Letters

**THE IOWA LEAGUE OF CITIES' RESPONSE TO RESPONDENT'S
PETITION FOR REHEARING EN BANC**

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EPA’s Petition for Rehearing is a conglomeration of dissemblance and misdirection, relying on conclusory characterizations of allegedly “conflicting” circuit court decisions and raising, for the first time, arguments that are irrelevant to EPA’s purposeful decision to mandate compliance with its “*ad hoc*” permitting prohibitions.¹ EPA’s description of the panel’s decision as inconsistent with Supreme Court and Circuit Court precedent is incredible, as both parties’ briefs presented a similar framework to find jurisdiction (*e.g.*, *Molycorp* (D.C. Cir), *Nat’l Pork Producers Council* (5th Cir.), and *Lujan* (Supreme Court)). Consequently, this Court cited much of the same controlling case law that required assessment of specific factors to determine if illegal rulemaking had occurred. That a particular illegal rulemaking case denied review on its particular facts (*Am. Paper Inst.*) illuminates nothing and certainly doesn’t show that this panel’s decision, given the specific facts, conflicted with another circuit court decision.

It is telling that EPA’s *Bennett v. Spear* finality argument never discusses the key findings of this Court that addressed finality: (1) that EPA is mandating

¹ EPA proclaims that any promulgation on its part was “unintentional.” EPA Pet. for Reh., at 1. However, the only thing “unintentional” about EPA’s actions was that it got caught. *See e.g.*, EPA e-mail, at League Appx. 352 (“... Ephraim [King, *i.e.*, author of the mixing zone memo] would certainly like to say that mixing zones for bacteria are not allowed, but that absent a policy memo I think it could be hard to disapprove a mixing zone provision for bacteria that mirrored what we’ve said in the past in the Handbook, the TSD, and the CSO guidance...”); *see also* EPA e-mail, at League Appx. 267 (“Until the Policy is finalized, we are telling permittees that we will be applying the interpretation and approach in the 2005 draft policy.”). The League was forced to reveal EPA’s unlawful activity through Freedom of Information Act requests, congressional inquiry and unrefuted sworn testimony from state officials. These documents confirmed a purposeful approach to illegally amend these rules without rulemaking.

compliance with the new prohibitions as the working law of the Agency, (2) that the draft policies referenced in the letters to Senator Grassley as the basis for EPA's new position radically deviated from the published rules and EPA's historical practices, (3) that permittees and state agencies are being adversely affected by the mandates, (4) and that EPA was "delivering punches" via enforcement actions and threatening states with permit veto letters if they failed to mandate compliance with the prohibitions. These facts – and not permit issuance or Federal Register publication – control this Court's jurisdiction under 33 U.S.C. § 1369(b)(1)(E) and the finality test announced in *Bennett v. Spear*. EPA's suggested approach is simply one more attempt to "eviscerate" judicial review. Op., at n.12.

Likewise, EPA's limited authority to regulate internal wastestreams when end-of-pipe limits are not feasible is not affected by the Court's decision, as it has nothing to do with EPA's attempt to dictate facility design via the bypass and secondary treatment rules. Consequently, as there has been no demonstration that this Court's decision "badly misconstrued jurisdictional and substantive requirements," EPA's Petition for Rehearing should be denied.

I. The Court's Opinion Was Consistent with All Circuit Case Law

Despite EPA's protests to the contrary, the approach taken by this Court was consistent with previous petition cases addressing illegal rulemaking. Such a

review necessarily looks to see whether the Agency’s “guidance letters have made a substantive change in the EPA’s regulation.” *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 755-756 (5th Cir. 2011); *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (“If an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required.”); *S.D. v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (“Where a policy statement purports to create substantive requirements, it can be a legislative rule regardless of the agency’s characterization”); *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) (“If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.”). Inherently, this evaluation requires a detailed factual comparison between an agency’s previously published statements and historical approach to the regulation and the current interpretation now being proclaimed by the agency.

In addition to the “before and after comparison,” reviewing courts have sought to determine whether the allegedly revised rule is “binding” or “is applied in a way that it indicates it is binding.” *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002); *see also Appalachian Power Co. v. EPA* (“APC”), 208 F.3d 1015, 1021 (D.C. Cir. 2000). Among other evidence of a “binding effect,” courts

will look to see whether a document or an agency action “speaks in mandatory terms” (*Gen. Elec. Co.*, 290 F.3d at 383), whether a document is considered to be controlling by the agency’s headquarters (*APC*, 208 F.3d at 1021), whether an agency bases enforcement actions on the document (*id.*), and whether an action leads private parties or state permitting authorities to believe that the agency will declare permits invalid unless they comply with terms of the document. *Id.*; *CropLife Am. v. EPA*, 329 F.3d 876, 881, 883 (D.C. Cir. 2003). Finally, when a legislative rule is being challenged on its face, courts also seek some demonstration of hardship. *See, e.g., Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990) (“a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately ... is ‘ripe’ for review at once”); *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967) (“Where ... a regulation requires an immediate and significant change in the plaintiff’s conduct of their affairs with serious penalties attached to noncompliance, access to the courts ... must be permitted.”).

Consistent with this well-established precedent, this Court made the following findings to confirm that it had jurisdiction to review EPA’s actions:

- The challenged guidance letters specify EPA’s definitive settled position and/or working law on three regulations, 40 C.F.R. §§ 122.44(d), 122.41(m), and Part 133. (Op., at 34-39).²

² As EPA concedes, both the regional offices and the state agencies must abide by the existing rules. EPA Pet. for Reh., at n.3. Further, the regulated community is subject to criminal penalties for knowingly violating the existing rules. 33 U.S.C. § 1319(c)(2). It was for these reasons that Senator Grassley inquired as to the inconsistency between EPA’s statements to this Court in the League’s prior petition case distancing itself from the internal policy documents and

- EPA changed its interpretation of existing regulations. EPA’s historical interpretation and implementation of the rules at issue, as evidenced by regulatory preamble, EPA published guidance, and related Agency correspondence, were inconsistent with the positions set forth in the challenged guidance letters and policy memoranda. (Op., at 34-39).
- EPA directed state officials to issue permits consistent with the requirements specified in the challenged guidance or face permit vetoes. (Op., at 19-21).³
- The issues are not fact-specific as EPA’s new regulatory prohibitions do not vary “based on each applicant’s specific factual circumstance[s].” (Op., at 24-25).
- League members are forced to immediately choose between constructing less costly facilities or far more costly processes to meet EPA’s new mandates. (Op., at 25).
- The new prohibitions impose more restrictive compliance responsibilities. (Op., at 28-29, 38).

While EPA “respectfully disagrees” with these factual findings (EPA Pet. for Reh., at 6), neither its original filings nor its rehearing request provided a shred

the positions being told to the Iowa Department of Natural Resources. In response to Senator Grassley, EPA “fessed up” that it was, in fact, prohibiting mixing zones and mandating compliance with the draft policy that prohibited blending. In fact, in this case, EPA even represented that these prohibitions reflected “longstanding” Agency policy and the “existing regulatory requirements.” Op., at 2, 8. This is why, in part, the Court described EPA’s posture as “Orwellian Newspeak,” “dissembl[ing],” and “belated back-pedaling.” Op., at 20, 21, and 25.

³ On this issue, the League would also note the two letters from state agencies (Iowa and Kansas) that were supplied to the Court after oral argument as well as the recently released letter from EPA Region 5 to the Wisconsin Department of Natural Resources confirming that EPA was demanding immediate compliance with the new rule interpretations. For the Court’s convenience, these letters, which were originally provided to the Court on Dec. 21, 2012 (Entry 3987764) and June 13, 2013 (Entry 4044974), have been resubmitted as attachments to this response. *See* Exs. 1-3.

of objective evidence to contradict these findings.⁴ Moreover, EPA’s petition for rehearing didn’t provide a single case holding that informal (illegal) promulgations are not immediately reviewable given such findings.

In support of rehearing, EPA alleged a conflict with *Am. Paper Inst. v. EPA* (“*API*”), 882 F.2d 287 (7th Cir. 1989). EPA Pet. for Reh., at 9. However, the factual circumstances of *API*, which EPA ignores, are not even remotely similar to this case. In *API*, the Regional office (as opposed to the EPA Headquarters) issued a guidance document explaining how it “might react” in future proposals. *Id.* The “policy” at issue was not applied to any permittee (*id.*); it did not “demand any change in conduct” (*id.*); and, there was no indication “how (or even whether) it would affect any plant.” *Id.* at 290. Consequently, the court denied review as (1) the region had no authority to issue any type of rule (only EPA Headquarters has such authority) and (2) the document had no “legal effect.”

Conversely, in the instant case, the Court found that, *inter alia*, (1) EPA Headquarters imposed the rule changes at issue, (2) EPA demanded that the states must adhere to the new requirements or face a permit veto, (3) there was a significant and immediate impact on the regulated community, and (4) the mandates were “irreconcilable” with the duly adopted NPDES rules. As EPA’s

⁴ EPA’s disagreement with the Court’s findings does not support a request for rehearing *en banc*. See *United States v. Samuels*, 808 F.2d 1298, 1300 (8th Cir. 1987) (“*En bancs* . . . should be ordered only when consideration by the full court is necessary to secure or maintain uniformity of our decision or when the proceeding involves a question of exceptional importance.”).

actions in this appeal have “bite” and “control” permit holders (as well as state agencies) “to do something they would rather not,” EPA’s claim that this Court’s decision conflicts with *API* is meritless. *Id.*, at 289. Different facts, of course, justify different results under applicable the legal standard.

II. EPA’s Review at the Time of Permitting Arguments Are Misleading and Irrelevant

Throughout EPA’s Petition for Rehearing (and earlier briefs), EPA suggests that the new regulatory mandates may be reviewed only at the time of permitting. *See e.g.*, EPA Pet. for Reh., at 9-10. Putting aside that rehearing *en banc* is not a forum for rearguing issues, EPA does not provide any permit specific facts, the statutory provision, or a single case supporting this self-serving legal theory.

The explanation for this “over sight” is simple. First, such a limitation on review would render 33 U.S.C. § 1369(b)(1)(E) meaningless. As Congress expressly granted Circuit Courts immediate review over EPA promulgations and approvals of regulations governing effluent limitations separately from EPA’s issuance or denial of a permit, review is proper.⁵ *Op.*, at 13. Second, the Court confirmed that EPA’s actions have imposed “immediate” hardship in advance of

⁵ As noted by the Supreme Court, EPA’s construction could “produce the truly perverse situation in which the Court of Appeals would review numerous individual actions issuing or denying permits [under § 509(b)(1)(F), but would have no power of direct review of the basic regulations governing those individual actions.” *E. I. Du Pont De Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977); *see also NRDC v. EPA* (“*NRDC III*”), 859 F.2d 156,167 (D.C. Cir. 1988) (CWA § 509(b)(1) “evinces a strong will that [judicial review] occur at the time of promulgation.”). The D.C. Circuit also specifically rejected this “review at permitting” argument. *APC*, 208 F.3d at n.18.

permitting, both procedural and substantive in nature. *Id.* at 25 (“League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money.”). In such cases, immediate review of a regulation must be permitted. *Lujan*, 497 U.S. at 891 (“a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately ... is ‘ripe’ for review at once”).⁶ Finally, EPA’s approach will continue to allow EPA to use its threats of veto authority to strong-arm states and communities into compliance with the illegal rule revisions in the 46 states where EPA does not issue permits, including Iowa. *Op.*, at n.4; 24-26 (citing *Sackett v. EPA*, 566 U.S. Slip Op. at 9-10 (March 21, 2012) (“[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review....”)). EPA’s suggestion to “wait until permitting” is simply another attempt to “eviscerate” judicial review and, therefore, should not be countenanced.⁷

⁶ “Procedural attacks,” such as failure to adhere to APA notice and comment requirements, “need not await the test of time and can be reviewed immediately.” *Nat’l Indus. Constructors, Inc. v. Occupat’l Safety & Health Rev. Comm.*, 583 F.2d 1048 (8th Cir. 1978); *Op.*, at 29-30.

⁷ EPA’s reliance on *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) for the proposition that “EPA’s veto of NPDES permit [is] reviewable” is disingenuous. EPA Pet. for Reh., at 9 n.10. *Crown Simpson* specifically noted that the decision was based upon the preexisting law and did not consider the impact of the 1977 amendments. 445 U.S. at 197 n.2. Subsequent case law, including this Circuit’s, specifically notes that federal court review of an EPA objection or veto of a State NPDES permit is no longer available. *City of Ames v. Reilly*, 986 F.2d 253 (8th Cir. 1993); *see also Champion Internat’l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988).

III. The Court's Decision Addressed All Finality Concerns

EPA also claims that the Court's decision failed to apply the finality test announced in *Bennett v. Spear*, 520 U.S. 154 (1997). Under this test, to be final and reviewable, (1) the action must be the consummation of decisionmaking and (2) the action must determine "rights and obligations" or have "legal consequences." *Id.*, at 177-178. Even a casual review of the opinion would reveal that all of the components of the *Bennett v. Spear* finality test were addressed by the Court's analysis of "promulgation" and "ripeness." *Op.*, at n.12. Accordingly, EPA's claim that "finality" issues were not addressed is baseless.

For instance, the Court found EPA's actions to be "binding," "mandatory," and "concrete." *Id.* at 17-18, 21. Moreover, as EPA repeatedly represented that the positions espoused were "existing" and "longstanding" (*see, e.g., Id.* at 2, 8), there was nothing tentative about EPA's decision making. *Id.* at 18-21, 24-25. As such, the first prong of the *Bennett v. Spear* finality test was satisfied. Similarly, the Court found (and EPA never denied) that EPA ordered states to comply with the new rule interpretations or face consequences and that, therefore, these mandates had a "binding effect." *Id.* The Court also found that, as result of these directives, it was reasonable for state agencies and permittees to understand that if they proposed projects inconsistent with the EPA's new mandates, the projects would be blocked, leaving them in ongoing noncompliance and with a project and

design that was wasted. *Id.* Such findings clearly constitute the “legal consequences” necessary to satisfy the second prong of the *Bennett v. Spear* finality standard. Therefore, EPA’s claim that the decision disregarded the longstanding principle of limiting judicial review to ‘final’ agency actions is just form over substance.

IV. The Form of the Promulgation Is Irrelevant

EPA repeatedly suggests that Federal Register publication should be determinative of whether judicial review is to be granted. *See, e.g.*, EPA Pet. for Reh., at 7-9. However, once again, EPA did not provide citation to any decision that has ever ruled that formal promulgation in the Federal Register is a prerequisite for judicial review of illegal rulemaking.⁸ EPA’s lack of legal authority on this point comes as no surprise as illegal rulemaking could never be challenged if Federal Register publication was required. *See Lujan*, 504 U.S. at 572 n.7 (procedural challenges are reviewed immediately).

Similarly, EPA opines that this Court’s opinion will, in some way, discourage federal agencies from being candid with members of Congress. Pet. for

⁸ Consistent with the wealth of jurisprudence, this Court adopted a practical construction of 33 U.S.C. § 1369(b)(1)(E) and the word “promulgation.” *See Op.*, at 15-16 citing *Modine Mfg. Corp.*, *NRDC*, *Molycorp, Inc.*, and *Cement Kiln Recycling*. Under this approach, the “ultimate focus” is whether the agency action “has binding effects on private parties or on the agency.” *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). Not only was *Molycorp* decided well after any decision referenced by EPA, but EPA itself has repeatedly informed this Court that the standard announced in *Molycorp* controlled. EPA Br., at 41; EPA MTD, at 7.

Reh., at 7. However, EPA's letters were more than "correspondence to an elected official." As recognized by the Court, these EPA letters affirmatively ratified rule interpretations set forth in the 2005 draft policy and the King memorandum. *Op.*, at 35, 36. Further, the Court concluded that EPA's letters announced "mandatory" and "concrete" regulatory prohibitions that were "irreconcilable" with the existing regulations. *Id.* at 36. The fact that it took the clout of a Senator to have EPA admit what it was doing (*i.e.*, unilaterally creating new multi-billion dollar obligations, contrary to the adopted rules), has no bearing on this Court's jurisdiction and it certainly should not inure to EPA's benefit.

V. EPA's Application of Secondary Treatment Requirements to Internal Waste Streams Clearly Exceeded Statutory Authority

In advance of holding that EPA's blending prohibition exceeded the Agency's authority under the Clean Water Act ("CWA"), the Court made several key findings. First, the Court noted that neither the secondary treatment rule nor the bypass rule "require the use of any particular treatment method or technology." *Op.*, at 10 (citing *NRDC v. EPA* ("*NRDC II*"), 822 F.2d 104, 123 (D.C. Cir. 1987)).⁹ Second, the Court observed that effluent limitations are to be applied "end-of-the-pipe" unless "impractical or infeasible" to do so. *Id.* at 4-5, 38-39

⁹ The Court also noted repeated instances where EPA itself recognized that the CWA does not provide authority to proscribe specific types of processes used to achieve compliance with effluent limitations. *Op.*, at 5, 8-10, 40-41 (*In re Borden, Inc.*; NPDES Permit Writers' Manual; 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983)).

(citing 40 C.F.R. § 122.45(h)). Next, the Court determined that, under EPA’s revised interpretation, secondary treatment compliance has to be achieved by individual treatment units, “*regardless of whether the end of pipe output ultimately meets secondary treatment regulations.*” *Id.*, at 38 (emphasis added). The “effect” of this interpretation, as recognized by the Court, was to “mandat[e] certain technologies as part of the secondary treatment phase.” *Id.* Finally, EPA’s position was exposed as a rubric to prohibit “non-biological” peak flow treatment nationwide, an action contrary to the adopted rules and regulatory history. *Id.*

Having made these initial findings, the Court ultimately ruled, via statutory evaluation, that EPA lacked authority to impose secondary treatment requirements on “the flows from one internal unit to another” and that transforming the secondary treatment rule from an “effluent requirement” to an individual “internal treatment unit” requirement is plainly not within EPA’s authority. *Id.* at 41. EPA now claims, citing no contrary statutory authority, that the Court’s ruling is (1) inconsistent with the D.C. Circuit’s bypass rule decision in *NRDC II* that upheld EPA’s authority to regulate bypasses, and (2) contrary to 40 C.F.R. § 122.45(h). EPA Pet. for Reh., at 12-15. These arguments do not show the panel’s statutory assessment to be erroneous and, as EPA had every opportunity to raise these issues

during merits briefing, they should not be addressed via a rehearing.¹⁰

In *NRDC II*, the case claimed to “conflict” with this Court’s decision, EPA assured the D.C. Circuit that the bypass rule *does not* provide a basis to dictate treatment process design or acceptable treatment technology:

[W]hat the Agency originally intended, and still intends, is to ensure ‘proper pollution control through adequate design operation and maintenance of treatment facilities.’ ‘*Design*’ *operation and maintenance* are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that facilities follow those requirements. *It imposes no specific design and additional burdens on the permittee.*

League Brief, Ex. 14 at Appx. 156 (excerpts from EPA Brief in *NRDC II*) (emphasis added). Based on EPA’s representation, the D.C. Circuit upheld EPA’s bypass regulation, stating that “[t]he regulation thus ensures that treatment systems *chosen by the permittee* are operated as anticipated by the permit writer, that is, as they are designed to be operated and in accordance with the conditions set forth in the permit.” *NRDC II*, 822 F.2d at 122 (emphasis added). How the panel’s decision could be “squarely at odds” with a decision that also reiterated the bypass rule *did not* allow EPA to dictate unit process selection is just more “Orwellian

¹⁰ *United States v. Replogle*, 678 F.3d 940, 942 (8th Cir. 2012) (“Panel rehearing is not a vehicle for presenting new arguments, and we do not ordinarily consider arguments raised for the first time in a petition for rehearing.”). The League’s briefs extensively addressed the holdings of *NRDC II*, which EPA’s responses ignored.

Newspeak.”¹¹ EPA may still use the bypass provision to preclude a facility from “shutting off” treatment units or “coasting” to save money, as it originally intended. EPA Pet. For Reh., at 13. That concern, however, does not provide authority to categorically prohibit “design operations” that incorporate blending.

Likewise, the fact that 40 C.F.R. § 122.45(h) authorizes EPA to establish internal limits to ensure final effluent limit compliance in certain “exceptional” circumstances, in no way justifies (1) EPA’s attempt to categorically prohibit non-biological processes such as ACTIFLO, regardless of final effluent quality, or (2) to set both effluent and internal limits. First, *Tex. Mun. Power Agency* and *Pub. Serv. Co.* (the decisions upholding 40 C.F.R. § 122.45(h)) never address such issues. Second, the rule, on its face, provides no authority for categorically requiring individual treatment units to comply with an end-of-pipe effluent limitation. Third, the D.C. Circuit decision, cited by the Court (Op., at 41), expressly rejected an identical EPA argument. *AISI*, 115 F.3d at 995. In that case, EPA argued that the CWA authorized it to enforce effluent limitations “not only at the point source but also in streams and pools that are inside the facility.” *Id.* at 995. In rejecting this argument, the D.C. Circuit ruled that, although EPA had authority to require monitoring and reporting requirements for internal units, “[t]he

¹¹ On two subsequent occasions, the D.C. Circuit ruled, consistent with its earlier *NRDC II* decision, that EPA lacked statutory authority to dictate treatment plant design. *See NRDC III*, 859 F.2d at 170; *Am. Iron & Steel Inst. v. EPA* (“*AISI*”), 115 F.3d 979, 996 (D.C. Cir. 1997).

agency exceeded its authority when it sought to impose effluent limitations upon non-point-source discharges [internal operations].” *Id.* at 996. Similarly, the *AISI* court noted that, “by authorizing the EPA to impose effluent limitations only at the point source, the Congress clearly intended to allow the permittee to choose its own control strategy.” *Id.*; *see also* *Op.*, at 41.

To be sure this Court’s decision does not infringe on EPA’s authority to impose internal limits *on a permit specific basis* where demonstrating compliance end of pipe is “impractical” for reasons specified in 40 C.F.R. § 122.45(h). However, EPA may not use this exception to categorically prohibit blending or claim that statutory authority exists to impose secondary treatment limits on non-biological treatment units. Accordingly, EPA’s request for rehearing on this issue should be denied.

VI. Conclusion

For the aforementioned reasons, the League respectfully requests that this Court deny EPA’s Petition for Rehearing En Banc and/or specifically reject EPA’s latest arguments contained therein.

Respectfully submitted,

/s/ John C. Hall

John C. Hall, Esq.

Admitted by the Eighth Circuit

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Attorney for Petitioner

Dated: June 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2013, I electronically filed the foregoing Petitioner's Response to Respondent's Petition for Rehearing En Banc. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John C. Hall

Attorney for Iowa League of Cities

EXHIBIT 1



STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
CHUCK GIPP, DIRECTOR

December 14, 2012

John Hall
Hall & Associates
Suite 701
1620 I Street, NW
Washington, DC 2006

RE: Iowa League of Cities v. EPA, 8th Circuit Court of Appeals, No. 11-3412

Dear Mr. Hall,

The Iowa Department of Natural Resources (IDNR) is aware that oral arguments were heard on November 12, 2012 in the case of Iowa League of Cities v. EPA before the 8th Circuit of the U.S. Court of Appeals. The IDNR is interested in the outcome of this litigation and the issues raised therein because such outcome may determine the solutions available to Iowa communities to address peak wastewater flows. Current EPA positions in regard to peak flow treatment and the use of bacterial mixing zones are limiting the treatment options which the IDNR can approve for communities in Iowa.

It is our understanding that, during oral argument, the League of Cities was asked whether IDNR is currently imposing through enforcement actions either of the prohibitions dictated by the EPA letters to Senator Grassley and the associated EPA guidance. This letter is intended to provide a response to the question raised by the court.

Over the last few years, the IDNR has entered into numerous enforcement orders or actions which are designed to address excess wastewater flows. These excess flows can be related to combined sewer systems, insufficient treatment plant capacity, the need for collection system maintenance, or other related factors. Iowa communities subject to these enforcement actions include the cities of Pella, Osceola, Burlington, Ottumwa, Ames, Indianola, Washington and others. The IDNR intends to reach a long term compliance schedule agreement with Davenport, Bettendorf, Riverdale and Panorama Park in the near future.

These enforcement actions establish compliance schedules requiring the communities to take whatever actions are necessary to stop violations but do not typically dictate the exact facility designs to be used to address the underlying violations. The impact of the EPA positions in regard to peak flow treatment and the use of mixing zones occurs during the submission of proposed designs by the communities which are under order to upgrade their systems. The

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PHONE 515-281-5918 FAX 515-281-8895 www.iowadnr.gov

IDNR affirmatively states that the positions taken by EPA, as described in the letters to Senator Grassley, are currently limiting the wastewater facility designs considered approvable by IDNR for communities that are subject to enforcement orders to upgrade their wastewater collection and treatment systems.

Sincerely,

A handwritten signature in black ink, reading "Shelli Grapp". The signature is written in a cursive, flowing style.

Shelli Grapp
Bureau Chief
Water Quality Bureau

EXHIBIT 2



Robert Moser, MD, Secretary

Department of Health & Environment

Sam Brownback, Governor

November 27, 2012

Mr. John C. Hall
Hall & Associates
Suite 701
1620 I Street, NW
Washington, DC 20006

RE: Iowa League of Cities v. EPA, No. 11-3412

Dear Mr. Hall:

We understand that oral argument was heard in the above referenced case on November 12, 2012. The Kansas Department of Health and Environment (KDHE) has been interested in this matter for some time because the decision influences whether EPA will allow the continued use of certain peak flow treatment processes that are currently in use, and have been in use through numerous permit cycles, in our state (e.g., ACTIFLO). Like Iowa, Kansas also has a number of communities under state orders to improve their collection and treatment systems to prevent wet weather overflows of untreated sewage. Progress on resolving these conditions has been slowed due to EPA's ongoing classification of the use of peak flow treatment processes such as ACTIFLO as illegal bypasses and demands that No Feasible Alternative analyses of the collection system be conducted at each 5-year permit cycle.

We understand that, during the oral argument, EPA indicated that they are not presently enforcing the positions specified in the letters to Senator Grassley that were the basis for filing the suit and that EPA's position with regard to ACTIFLO in particular, is still under debate in the agency. Whether or not any internal debate is occurring, any statement or implication that EPA is (1) not presently enforcing the new bypass rule interpretation contained in the draft 2005 Peak Flows Policy and (2) not classifying ACTIFLO as an unlawful bypass is only partially correct. EPA has objected to, and held a permit from issuance in Kansas, however EPA has not issued the permit themselves as would be expected in the case of an objection where the state does not make the modifications EPA required.

On April 17, 2008, KDHE placed on public notice the draft wastewater permit for the Lawrence Kansas wastewater treatment plant which uses the ACTIFLO process to treat peak wet weather flows. On May 9, 2008, EPA provided a letter with their preliminary objections to the draft permit stating that the ACTIFLO system needed to be identified as an illegal bypass and the city must provide a No Feasible Alternatives analysis for its continued use. KDHE contended, and has repeatedly discussed with EPA, that the ACTIFLO process is not a plant bypass as historically defined, but is part of the city's treatment plant designed, built and operated to provide treatment of peak wet weather flows which would damage the secondary biological treatment portion of the plant. However, despite numerous discussions with KDHE and the city of Lawrence, both EPA Region VII and Headquarters have refused to allow KDHE to re-issue the Lawrence Kansas permit unless use of the ACTIFLO process is considered an illegal bypass and the city provides a No Feasible Alternatives analysis.

EPA continues to classify the treatment process as a bypass based on the draft 2005 Policy document referenced in the letters to Senator Grassley. EPA's objections to the draft permit has frozen the permitting process for this facility for over 4.5 years – almost an entire 5-year permitting cycle. In addition, EPA's classification of ACTIFLO as an illegal bypass is affecting the ability of other Kansas communities to use this cost-effective process as part of their treatment works.

While we have not chosen to intervene in this matter, we thought it was important to bring these facts to your attention.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Tate", with a horizontal line extending to the right.

Michael Tate
Director - Bureau of Water

EXHIBIT 3



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 31 2012

REPLY TO THE ATTENTION OF:

WN-16J

Susan Sylvester, Director
Bureau of Watershed Management
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: Proposed Administrative Rules for Sewage Collection Systems

Dear Ms. Sylvester:

The U.S. Environmental Protection Agency has reviewed the proposed revisions to the Wisconsin Administrative Code relating to the operation and maintenance of sewage collection systems. In part, Wisconsin developed the proposed revisions in an effort to address one of the seventy-five issues EPA raised by letter dated July 18, 2011. The revisions, if adopted, may constitute a revision to Wisconsin's approved National Pollutant Discharge Elimination System (NPDES) program and would need to be submitted to the EPA for approval in accordance with 40 C.F.R. § 123.62. As discussed further below, EPA believes that three of the proposed provisions are not as stringent as the federal program. Additional comments and recommendations are provided in the enclosure to this letter.

NR 205.07(1)(u)

Federal regulations include conditions to be included in all NPDES permits. One of those standard conditions is the bypass provision at 40 C.F.R. § 122.41(m). Section 122.41(m) defines a "bypass" as an intentional diversion of waste streams from any portion of a treatment facility. The regulation prohibits bypasses except "[t]he permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation." 40 C.F.R. § 122.41(m)(2).

All other bypasses are prohibited, and the Director of the NPDES program may take enforcement action against a permittee, unless the permittee demonstrates that the bypass meets three very limiting conditions listed in 40 C.F.R. § 122.41(m)(4). Section 122.41(m)(4)(ii) of the bypass regulation provides that the permitting authority may "approve" - but not "authorize" - a bypass if the Director determines, after considering its adverse effects, that the bypass will meet the three conditions, including that there are "no feasible alternatives" to the bypass such as through reductions of inflow and infiltration into the collection system or building auxiliary treatment or storage facilities. See 40 C.F.R. § 122.41(m)(4)(i)(B).

Proposed NR 205.07(1)(u) would “authorize” bypasses in four circumstances:

- a. “Blending,” *see* NR 205.07(1), Paragraph 1;
- b. “Controlled diversions,” *see* Paragraph 2;
- c. “Other” bypasses, when the three limiting conditions at 40 C.F.R. § 122.41(m)(4) have been established, *see* Paragraph 3; and
- d. “Scheduled bypasses,” *see* Paragraph 4.

Proposed NR 205.07(1)(u) is inconsistent with the federal bypass regulation because it would “authorize” certain bypasses that would not be authorized under the federal bypass provision. To ensure that it is at least as stringent as the federal bypass provision, the language in proposed NR 205.07(1)(u) must be modified to only authorize a bypass which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. *See* 40 C.F.R. § 122.41(m)(2). NR 205.07(1)(u), Paragraph 2, pertaining to “Controlled Diversions,” is similar to, but broader than, the limited exception to the bypass prohibition specified in 40 C.F.R. § 122.41(m)(2). Specifically, although Paragraph 2(a), like the federal regulation, limits the exception to situations where effluent limitations are not exceeded, the additional condition in Paragraph 2(c) is broader than the remainder of the federal regulation, which limits the exception to instances where the bypass “is for essential maintenance to assure efficient operation.” For these reasons, proposed NR 205.07(1)(u) is inconsistent with, and is not as stringent as, 40 C.F.R. § 122.41(m).

NR 205.07(1)(u) may provide the criteria which Wisconsin will apply to evaluate when to exercise enforcement discretion; however, the criteria must be as stringent as the criteria listed under 40 C.F.R. § 122.41(m)(4)(ii) of the federal bypass provision.

NR 210.12

Proposed NR 210.12 would allow the State to authorize “blending” in a permit as long as the applicant meets numerous conditions. Proposed NR 210.03(2e) defines “blending” as “the routing of untreated or partially treated wastewater around a biological treatment process, or a portion of a biological treatment process, within a sewage treatment facility, which is then recombined with the biologically treated effluent and where the entire flow is subject to disinfection, if required by the WPDES permit, and the effluent is sampled prior to discharge.”

In general, the diversion of flows around biological treatment units constitutes a bypass, unless the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations, 40 C.F.R. Part 133, to be secondary treatment units. Consequently, blending must be subject to a bypass provision that is at least as stringent as 40 C.F.R. § 122.41(m), unless the diversion is routed to a treatment unit that is itself a secondary treatment unit. Proposed NR 210.12, which would authorize “blending” (the diversion of flows around biological treatment units), is therefore inconsistent with, and is not at least as stringent as, 40 C.F.R. § 122.41(m), in that it would allow for permit authorization of bypassing.

NR 210.21(1)

Section 301(b)(1)(B) of the Clean Water Act (CWA) and 40 C.F.R. §122.44(a)(1) require that NPDES permits for discharges from Publicly Owned Treatment Works (POTW) contain effluent limitations based upon secondary treatment as defined by the Administrator. The Administrator has established effluent limitations based upon secondary treatment at 40 C.F.R. Part 133.

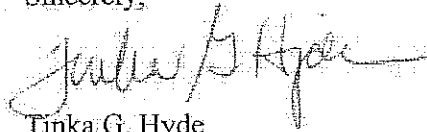
Sanitary sewers serving a municipal sewage treatment plant are considered to be part of the POTW. Consequently, secondary effluent limitations, as well as any additional effluent limitations necessary to meet water quality standards, must be included in NPDES permits for discharges from sanitary sewer systems, whether or not those discharges occur prior to the headworks of a POTW Treatment Plant. As an alternative to including secondary effluent limitations, some state NPDES permitting authorities have chosen to prohibit discharges from sanitary sewer systems.

Proposed NR 210.21(1) provides that, “[i]n accordance with s. NR 205.07(1)(u), sanitary sewer overflows and sewage treatment facility overflows are prohibited and may not be authorized in a permit issued by the department.” As previously noted, proposed NR 205.07(1)(u) is not as stringent as the federal bypass provision. In addition, it does not apply secondary and water quality limits to SSO discharges. To eliminate these problems with proposed NR 210.21(1), Wisconsin could either place secondary and water quality limitations on such overflow or prohibit overflows and delete the phrase “[i]n accordance with s. NR 205.07(1)(u),” so that the first sentence of NR 205.21(1) would read: “Sanitary sewer overflows and sewage treatment facility overflows are prohibited and may not be authorized in a permit issued by the department.”

Proposed NR 210.21(1) provides that, “the department shall consider such information when determining if a permittee has met the exceptions to the prohibitions established in s. NR 205.07(1)(u) 3. a. and b. . . .” The “exception to the prohibitions” provision in proposed NR 205.07(1)(u) is not as stringent as federal provisions for discharges from sanitary sewers. (It is inconsistent with the federal bypass requirement since the criteria listed in the federal bypass provision do not lead to an exception to the prohibition.) We suggest that this provision refer to whether the permittee has documented the facts supporting an application of enforcement discretion.

We hope that this letter will assist Wisconsin in establishing sewage collection systems operation and maintenance rules that are at least as stringent as the federal program. If you have any questions regarding this matter, please contact me or your staff may contact John Wiemhoff at (312) 353-8546 or at wiemhoff.john@epa.gov.

Sincerely,



Tinka G. Hyde
Director, Water Division

Enclosure

cc: Duane Schuettpeiz, WDNR

Enclosure

Additional Comments from USEPA regarding the State of Wisconsin's Proposed Administrative Rules for Sewage Collection Systems

1. Criteria for Application of Enforcement Discretion

EPA recommends that Wisconsin establish additional provisions related to enforcement discretion in its NPDES Enforcement Management System and not in its regulations.

2. Capacity Management, Operations and Maintenance (CMOM) provision (NR 210.23)

EPA is encouraged by the Capacity, Management, Operation and Maintenance (CMOM) provision in NR 210.23. By subjecting all permittees, including satellite sewage collection systems, to develop and implement CMOM programs, communities within the State of Wisconsin should be able to achieve a high level of sewage collection system performance. In January 2005, EPA developed guidance for successful CMOM programs; EPA's Guide for Evaluating CMOM Programs can be found at

http://www.epa.gov/npdes/pubs/cmom_guide_for_collection_systems.pdf. This guide provides useful information that Wisconsin can use in developing a comprehensive CMOM program. The following elements could further enhance the State of Wisconsin's proposed CMOM program:

- Customer Service – Proper communication is essential to determine the scope of complaints and concerns of sewage collection system customers. Wisconsin should consider requiring a standard operating procedure to be developed in CMOM programs for customer service and a system for tracking customer complaints, so that permittees can improve the efficiency of managing complaints and identify recurring problems. For additional information, please see Section III.C. of Chapter 3 in the CMOM guidance.
- Budgeting – Analyzing a sewer collection system financial information is an important component of any CMOM program. Knowing the amount of funds available for sewer collection system maintenance would have a direct effect on planning any future maintenance plan, especially preventive maintenance. For additional information, please see Section IV.A. and Section V.A. of Chapter 3 in the CMOM guidance.
- Water Quality Monitoring – While not applicable to every community, guidance for implementing a water quality monitoring program can be helpful for communities. For additional information, please see Section IV.C. of Chapter 3 in the CMOM guidance.
- Training Program – The current proposed CMOM program specifies “appropriate training” as a component. Wisconsin should further define expectations for appropriate training. Training should include, at a minimum, a safety component for sewage collection system employees. For additional information, please see Section III.B. and IV.E. of Chapter 3 in the CMOM guidance.

- Preventive Maintenance – Preventative maintenance scheduling is an important part of any CMOM Program. Section 4.d. in the CMOM provision in the State of Wisconsin's proposed administrative rules (or guidance issued subsequent to rule adoption) can be expanded with more detail, including a description of each type of potential preventive maintenance activity. Each CMOM program should formalize a specific frequency and schedule for each preventive maintenance activity. At a minimum, Wisconsin should consider changing Section 4.d.4 to the following (added words underlined): "A description and a frequency schedule of routine preventive operation and maintenance activities such as inspections, televising, cleaning, flow monitoring, root removal, and rehabilitation." For additional information, please see Section IV.L.1., Section V, and Section VII of Chapter 3 in EPA's CMOM guidance.

3. Basement Backup Reporting

The frequency of basement backups indicates the performance of a sewage collection system. Regular reporting (more than annual) to the Wisconsin Department of Natural Resources ensures effective tracking and enables a timely response by the wastewater treatment facility. Indiana and Illinois require reporting basement backups. Reporting should include event-specific information such as, at a minimum, the information included in Wisconsin's current sanitary sewer overflow reporting procedure and indicate whether the backup was the responsibility of the municipality or the private resident. EPA suggests revisions to Section 4 of the CMOM provision and NR 210.21 Section 4 to include the above referenced basement backup reporting after each event (not strictly annual in conjunction with CMAR reporting) whether in conjunction with an SSO occurring within the proximate area of the basement backup occurrence or in the absence of an SSO occurring in the proximate area of the basement backup. EPA recommends this reporting timeframe to be consistent with the current SSO reporting requirements in Wisconsin.

4. NR 110.05(3)(c) 2. a.

Wisconsin should revise this provision or add a note to clarify that the compliance determination contemplated therein applies only for the purpose of deciding whether the State will approve a sewer extension.

5. Controlled Diversions (NR 210.13)

EPA is not able to comment on NR 210.13(2) at this time since "final effluent filters" is not defined. A clarification of the intent and meaning of this provision may impact whether such controlled diversions would be at least as stringent as the federal program.