No. 11–3412

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Iowa League of Cities,

Petitioner,

v.

United States Environmental Protection Agency,

Respondent.

Petition for Review of Agency Letters
to a Member of Congress

BRIEF FOR THE RESPONDENT

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RESPONSIVE SUMMARY OF THE CASE

This is the second time in just over a year that the Iowa League of Cities asks this Court to vacate letters from the U.S. Environmental Protection Agency (EPA or Agency) to a Member of Congress. The League alleged in its first case that EPA's letter responding to questions that Senator Charles Grassley relayed for three Iowa cities was reviewable under section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), based on the theory that EPA's letter amended regulations that, when promulgated, were reviewable under that section. In November 2010, the Court dismissed that case for lack of jurisdiction.

The League now admits (Br. 17–18) that, after its first case was dismissed, its members sought Senator Grassley's help obtaining EPA's view of "whether certain state or local actions" are "allowable" under federal law. The Senator again sent the cities' questions to EPA; the Agency again responded by letter; and the League again claims that EPA's responses are regulations in disguise, which are reviewable under section 509(b)(1) and must be vacated because EPA responded without initiating and completing a notice-and-comment rulemaking.

New letters – same issues. The Court still lacks jurisdiction.

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JURISDICTIONAL STATEMENT

EPA previously moved to dismiss this case, arguing that the Court lacks jurisdiction to hear it. On January 30, 2012, the Court denied the motion in an order that reads in relevant part as follows: "The EPA's motion to dismiss this appeal has been considered by the court, and the motion is denied."

The League cites the January 30 order in its Jurisdictional Statement (Br. 1) for the proposition that the Court "ruled that it possesses subject matter jurisdiction[,]" which the League states (Br. 2) is now "law of the case" and "should not be further briefed by the parties." The League fails to mention, however, that the Court already considered and rejected that very construction of its January 30 order.

Two days after the Court denied EPA's motion to dismiss, the League asked the Court to clarify that, in denying EPA's motion, it "decided" that it has subject-matter jurisdiction and that it would thus be "unnecessary" for the parties to further brief these issues in their respective briefs on the merits. *See* Pet's Motion for Clarification at 2–3

(Feb. 1, 2012).[1] On March 1, 2012, the Court granted clarification, explaining that the parties should not interpret its prior order in that manner: "The parties to this appeal should address all jurisdictional and substantive arguments it deems appropriate to the resolution of this matter in their merits briefs."

The petition should be dismissed for lack of jurisdiction. As we explain in Argument I below, the League does not challenge *any* "final agency action," and the letters to Senator Grassley are not among the specifically enumerated "actions" that courts of appeals may review under section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1). Moreover, as we show in Argument II, even if those letters could be construed as new regulations that fall within the ambit of section 509(b)(1)(E), as the League claims, the Court still could not hear the matter because there is no ripe controversy and the League has failed to demonstrate that at least one of its members imminently would suffer Article III injury but for a decision vacating those letters.

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[1] EPA responded that it agreed clarification would be helpful, but asked the Court instead to clarify that it had intended to refer to the merits panel all "jurisdictional and substantive arguments it deems appropriate to just resolution of this case." *See* EPA's Response at 2 (Feb. 2, 2012).

STATEMENT OF THE ISSUES

The Iowa League of Cities asks the Court to vacate two letters that EPA's Acting Assistant Administrator sent to Senator Charles Grassley. The challenged letters responded to questions that were prepared by the League's members and conveyed to the Agency by the Senator, and that expressly requested EPA's interpretation of various regulations. The League alleges that the answers EPA provided to the cities' questions are new regulations that must be vacated because the Agency admittedly did not publish draft responses in the Federal Register or solicit public comment thereon. It also claims that EPA's interpretations are inconsistent with the Clean Water Act and existing regulations, so it asks the Court to permanently enjoin EPA from interpreting its regulations as it does in the challenged letters. Against that background, the issues presented are:

1. Are the challenged letters "final" EPA action and a "promulgat[ed] . . . effluent limitation or other limitation" subject to this Court's original jurisdiction under section 509(b)(1)(E) of the Clean Water Act?

   a. Most apposite statutory provision: 33 U.S.C. § 1369(b)(1)(E).

b. Most apposite cases: *Bennett v. Spear*, 520 U.S. 154 (1997) (finality); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (finality and section 509(b)(1)); *Friends of the Earth v. EPA*, 333 F.3d 184 (D.C. Cir. 2003) (finality and section 509(b)(1)).

2. Has the League established that the views expressed in the challenged letters are ripe for review and that there is a substantial probability that at least one of its members imminently would face Article III injury but for a decision in its favor?

a. Most apposite constitutional provision: U.S. Constitution, Article III, section 2.

b. Most apposite cases: *City of Ames v. Reilly*, 986 F.2d 253 (8th Cir. 1993) (ripeness and section 509(b)(1)); *Minnesota P.U.C. v. FCC*, 483 F.3d 570 (8th Cir. 2007) (ripeness); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (standing); *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002) (standing in the petition for review context).

3. If the challenged letters are rules that this Court has jurisdiction to review, should it conclude that the letters are "interpretative rules" expressly exempt from notice-and-comment rulemaking?

a. Most apposite statutory provision: 5 U.S.C. § 553(b)(3)(A).

b. Most apposite cases: *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995); *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986); *Northwest Nat'l Bank v. United States Dep't of the Treasury,* 917 F.2d 1111 (8th Cir. 1990).

STATEMENT OF THE CASE

EPA, like other administrative agencies, routinely employs a wide range of informal measures to inform regulated parties and the public of the Agency's view of existing law. Although the reviewability of particular conduct depends on the circumstances and the statutory scheme at issue, an agency's response to an unsolicited request for its interpretation of a legal framework it administers is generally not subject to judicial review. In so holding, courts have applied various administrative-law doctrines, while agreeing on the essential principles: agencies frequently engage in informal communication with regulated entities; such practices are beneficial to both agencies and regulated parties; and allowing judicial review of these actions would have a chilling effect on this sort of communication and would be a poor use of judicial resources.

The League and its members actively sought Senator Grassley's assistance obtaining EPA's view of federal regulatory requirements for municipalities that wish to discharge sewage and other pollutants into waters covered by the Clean Water Act, and the Agency responded. Such communications serve important administrative purposes and enable congressional oversight of administrative agencies, and their effectiveness (and agencies' ability to timely respond to these inquiries) would be substantially reduced if they were subject to judicial review at the behest of a recipient or other dissatisfied private party. Further, if such responses were subject to judicial review, courts would soon be overwhelmed with requests to render what essentially would be advisory opinions.

Section 509(b)(1)(E) of the Clean Water Act vests the courts of appeals with original jurisdiction to review EPA's "promulgati[on]" of certain "effluent limitation[s]" and other specified "limitation[s.]" 33 U.S.C. § 1369(b)(1)(E). But no court of appeals has found jurisdiction under that section to review letters of this nature under a theory that the letters are new regulations that promulgate such limitations, and the League has provided no good reason for this Court to be the first.

The fact that EPA forthrightly agreed to provide its current view of the requirements of its *existing* regulations does not transform these otherwise workaday letters into "final agency action." Rather, the "agency action" that would be the proper focus of judicial review is a further rulemaking by EPA on these issues, or a site-specific permit decision or enforcement action, should the State of Iowa or EPA ever *apply* the challenged interpretations in a concrete context. Insofar as the legality or rationality of the site-specific decision turns on the validity of the regulatory interpretations set forth in EPA's letters to Senator Grassley, a party challenging the site-specific decision may assert that EPA's interpretations are contrary to the statute or the regulations; but the "agency action" that the court will ultimately uphold or set aside is the site-specific decision rather than the letters to the Senator.

Because the challenged letters merely contain EPA's current view of existing regulatory requirements – in the abstract and divorced from any particular application of that view by the State or EPA – the Court should dismiss the petition for lack of subject-matter jurisdiction.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters.[2] 33 U.S.C. § 1251(a). The Act's principal tool for meeting that objective is section 301(a), which prohibits the discharge of any pollutants into waters of the United States by any person except in compliance with certain enumerated provisions. 33 U.S.C. § 1311(a).

Section 402 provides one of the primary means for obtaining authorization to discharge pollutants by establishing a permitting program known as the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342. Under the NPDES permitting program, point source dischargers (including municipalities) may obtain

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[2] The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "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." *Id.* § 1362(14).

permits to discharge pollutants into our Nation's waters. 33 U.S.C. §§ 1342, 1362(5). The States have primary responsibility for implementing the NPDES program, 33 U.S.C. § 1251(b), and may establish and administer their own NPDES programs provided such programs conform to federal guidelines and receive EPA's approval. 33 U.S.C. § 1342(b). The State of Iowa has approval to administer its NPDES program. *Id.* § 1342(c); 57 Fed. Reg. 37,162–63 (Aug. 18, 1992).

All NPDES permits must include effluent limitations (*i.e.*, restrictions on qualities, rates, and concentrations of discharged pollutants, *see* 33 U.S.C. § 1362(11)) that require the permittee's adherence to technology-based standards and, where applicable, more stringent water quality-based limitations designed to ensure that the waters that receive the discharge attain and maintain state water quality standards. *See* 33 U.S.C. §§ 1311(b), 1342(a)(1); 40 C.F.R. §§ 122.4(d), 125.3(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 104–07 (1992). For publicly-owned treatment works (POTWs),[3] technology-

[3] EPA regulations define POTWs to include "any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature" owned by a municipality or State. 40 C.F.R. § 403.3(q).

based effluent limitations must be based upon secondary treatment standards. 33 U.S.C. §§ 1311(b)(1)(B), 1314(d). EPA's secondary-treatment regulations are found at 40 C.F.R. Part 133.

Each State must adopt water quality standards for all waters within its jurisdiction and submit those standards to EPA for review and approval. 33 U.S.C. § 1313(c). States must specify one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, fish propagation, or agriculture) and must establish water quality criteria to protect those uses. *Id.* § 1313(c)(2)(A). States must also develop and implement antidegradation policies to maintain existing uses of waterways and prevent further degradation. *Id.* § 1313(d)(4)(B); 40 C.F.R. § 131.11(a) (criteria must protect the designated use); *see also PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).

Federal regulations include standard conditions that must be included in all NPDES permits, whether issued by EPA or a State. At issue in this case are the requirements that POTWs at all times properly maintain and operate their wastewater treatment facilities, 40 C.F.R. § 122.41(e), and not "bypass" treatment facilities by intentionally

diverting untreated or partially treated sewage-containing wastewater from any portion of the treatment facility, *id.* § 122.41(m).[4]

The League challenges two letters that EPA sent to Senator Grassley that reference the Agency's regulations that govern municipally owned sewer systems. As a general matter, such systems may include "sanitary sewers" intended to carry raw sewage or "combined" sewers that carry both sewage and storm water. Sanitary sewer overflows (discharges of untreated sewage, termed "SSOs") occur when water overloads the system, for example directly from precipitation through storm drains, or indirectly from groundwater that infiltrates through sewer pipe joints or cracks. *See* 75 Fed. Reg. 30,395, 30,397–99 (June 1, 2010) (summary of regulations governing POTWs).

[4] EPA's regulations define a "bypass" as the "intentional diversion of waste streams from any portion of a treatment facility." 40 C.F.R. § 122.41(m)(1)(i). The regulations further provide that any "[b]ypass is prohibited," *id.* § 122.41(m)(4)(i), but that a permitting authority may "approve an anticipated bypass" if the permitting authority determines that the criteria set forth in 40 C.F.R. § 122.41(m)(4)(i) will be met.

II. FACTUAL BACKGROUND

A. The League's 2010 case and its relevance here.

On July 26, 2010, the League petitioned this Court to review six EPA-generated documents that it claimed constituted "final rules, regulatory determinations, and reviewable final actions" subject to review under section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1). *Iowa League of Cities v. EPA (Iowa League I)*, No. 10–2646; EPA Appx. 1–22 (2010 petition for review and attachments). The League alleged that those documents set forth EPA's "revised interpretations of its 'bypass' regulation . . . , its 'secondary treatment' rule . . . [and], its 'operation and maintenance' rule"; contained "new mandates regarding the design of treatment plants and the performance of collection systems"; and imposed on the regulated community "new permitting restrictions on allowable effluent concentrations for *Escherichia coli* (e. coli)." EPA Appx. 1. The challenged documents, which ranged from e-mail chains among EPA staff to a Federal Register notice announcing that the Agency would hold public "listening sessions," each referenced the regulations identified above. *See* EPA Appx. 3–22.

EPA moved to dismiss the 2010 case for lack of jurisdiction. *Iowa League I*; EPA Appx. 23–42 (2010 motion to dismiss). EPA explained in its motion that the documents challenged by the League in its first case were not "final agency action" reviewable under section 509(b)(1), that the issues were not ripe, and that the League could not establish a basis for Article III standing. EPA Appx. 23–24, 30–40. We also explained why, even under the League's theory of jurisdiction, its challenge was untimely as to four of the six documents. *Id.* at 36–37.

On November 16, 2010, a three-judge panel of the Court entered judgment granting EPA's motion to dismiss. *Iowa League I*; EPA Appx. 43. Although the judgment specified that dismissal was based on a finding that the Court lacked subject-matter jurisdiction to address the merits of the petition, it did not elaborate. *Id.* ("The motion of respondent for dismissal of this appeal is granted. The appeal is hereby dismissed for lack of subject matter jurisdiction.").

The League subsequently petitioned for panel rehearing, which the Court denied on December 27, 2010. *Iowa League I*; EPA Appx. 44.

B. After the 2010 case, the League's members remained "uncertain[]" and "confuse[d]" about certain regulatory issues, so they asked EPA for its view.

The League and its members say (Br. 17) they continued to feel "'uncertainty' and 'confusion'" about their federal regulatory obligations. On the one hand, EPA explained in its motion to dismiss the 2010 case that certain views expressed in the challenged documents did not contain EPA's definitive word on the issues. *See id.* On the other hand, the League's members had apparently "been told by IDNR [the Iowa Department of Natural Resources] that certain permitting approaches were now illegal based on statements made by EPA." *Id.* Thus, "the League sought the Iowa Water Environment Association's (IAWEA) assistance" obtaining from EPA clarification of its view of certain "requirements applicable to municipal wastewater and stormwater dischargers." *Id.*

IAWEA is not a party to this case, but "[m]any of the League's members are members" of IAWEA. Appx. 25 (¶7). In fact, "[t]he League asked IAWEA to send a regulatory clarification request to EPA" in an effort to obtain the Agency's responses to its questions. *Id.*

IAWEA subsequently provided Senator Grassley's office with a list of questions, on behalf of itself and the League. *See* Appx. 25 (¶7), 212; Br. 17. The purpose of the request was to obtain from EPA its "settled position (*or acknowledgment that no such position exists*)" with respect to each of the questions. Appx. 213 (emphasis added). "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." Appx. 212 (emphasis added).

C. The questions that Senator Grassley relayed to EPA, and the Agency's responses.

1. EPA's June 30, 2011 letter.

In May 2011, EPA received a letter from Senator Grassley enclosing questions that IAWEA had asked the Senator to convey to the Agency. Appx. 209–13. The Senator specifically asked that EPA "return correspondence" to his office that "provid[es] the requested clarification and respond[s] to the . . . questions." Appx. 209.

On June 30, 2011, Nancy Stoner, Acting Assistant Administrator for EPA's Office of Water, responded to Senator Grassley. Appx. 200–

03. She noted at the outset that IAWEA's questions were then (as they are now) being addressed by EPA in the context of regulatory proceedings. Appx. 200. In fact, Ms. Stoner explained, the Agency had published notice in the Federal Register the prior year informing stakeholders that EPA is "considering whether to propose modifications to the National Pollution Discharge Elimination System (NPDES) regulations, including establishing standard permit conditions that specifically address sanitary sewer collection systems and sanitary sewer overflows (SSOs)." *Id.*; *see also* 75 Fed. Reg. at 30,395–401. She then pointed out that, to address the sort of issues raised by IAWEA's questions, EPA had recently held four public listening sessions, hosted a webcast, invited the public to submit information, and announced that it would hold a two-day public workshop the next month. Appx. 200. Ms. Stoner then responded to the specific questions that the Senator conveyed. Appx. 201–03.

The first question requested EPA's views on the use of bacteria mixing zones for waters designated for human body contact, such as swimming. Appx. 201. A "mixing zone" is a limited area or volume of water in a water body near a point of discharge where initial dilution of

a discharge takes place and where certain numeric water-quality criteria may be exceeded. Appx. 226. Ms. Stoner explained that States may, "at their discretion," include mixing-zone policies in their water-quality standards. Appx. 201. She then expressed EPA's view that the use of mixing zones is "not appropriate" where such use "may pose significant human health and environmental risks . . . [or] may endanger critical areas . . . ." *Id.* For example, EPA believes that mixing zones for bacteria "should not" be authorized for use in areas designated for primary-contact recreation activities, such as swimming. *Id.*

The second question asked for EPA's opinion on whether certain activities would be consistent with its secondary-treatment and bypass regulations. Appx. 202; *see also* 40 C.F.R. Part 133 (secondary-treatment regulation); 40 C.F.R. § 122.41(m) (bypass regulation). Ms. Stoner explained that the issues raised by this question "are among those being actively considered" in connection with the Agency's "broader effort to clarify the [NPDES] regulations on wet weather permitting" that it had recently announced in the Federal Register. Appx. 202. She then cited EPA's "draft peak flows policy," published in

the Federal Register in 2005 (70 Fed. Reg. 76,013), which articulated how the bypass and secondary-treatment regulations could work in concert for POTW treatment facilities. Ms. Stoner noted that, although the 2005 policy "has not been finalized," EPA believes that it presents "a viable path forward" for utilities to comply with the bypass regulation. Appx. 202.

The third and fourth questions sought EPA's view on regulatory requirements associated with municipalities who operate their treatment facilities in a manner that sewage overflows from and backs up into buildings. Appx. 202–03. As to the third question, which asked for EPA's view of when a POTW should report these issues, Ms. Stoner explained that "NPDES permits establish reporting requirements for a permittee" and that the reporting requirements for any given permittee "will depend on the specific language in [its] permit." Appx. 203. A "standard permit condition" requires that the permittee report permit-noncompliance to the NPDES authority. *Id.* If that condition is incorporated into a given permit, and a sewer overflow results in an unpermitted discharge to our Nation's waters, in EPA's view that discharge must be reported. *Id.* Moreover, if sewage backups occur,

this "may" suggest that the permittee is not properly operating or maintaining its collection system, and "may" require the permittee to report permit noncompliance. *Id.* "The issue of appropriate reporting requirements for [sewer overflows] and basement backups is one that the Agency is actively considering as part of a rulemaking effort on wet-weather permitting." *Id.*

As to the fourth question, which asked whether EPA believes that sewer overflows are prohibited regardless of cause or ability of a POTW to control, Ms. Stoner responded that the Clean Water Act prohibits discharges of untreated sewage into waters of the United States. Appx. 203. She noted, however, that some State NPDES authorities have issued permits with provisions that limit the circumstances in which the State will bring an enforcement action based on its "prospective exercise of its enforcement discretion. . . ." *Id.*

2. EPA's September 14, 2011 letter.

In July 2011, EPA received a letter from Senator Grassley enclosing follow-up questions from IAWEA. The Senator's second letter, like his first, asked that EPA respond to his office by "correspondence." Appx. 205.

On September 14, 2011, Acting Assistant Administrator Stoner again responded by letter for EPA, first detailing relevant regulatory efforts that had taken place since her last response and then reiterating that IAWEA's questions raise issues that are "at the heart of" ongoing regulatory proceedings. Appx. 205. She then responded to the additional questions. Appx. 205–07.

The first question asked whether the following summarizes the Agency's present view on peak flows: (1) discussion (*i.e.*, the regulatory process) is "ongoing" on this issue; (2) "the bypass rule, as discussed in the 2005 [draft] Peak Flows Policy, limits the use of certain peak flow processing methods"; (3) "[t]o permit use of these peak flow processing methods the discharger must demonstrate 'no feasible alternatives[,]'" per 40 C.F.R. § 122.41(m)(4)(i)(B); and (4) EPA intends to continue to implement its draft peak flows policy. Appx. 217–18. The Agency agreed with that summary, subject to its additional explanation that the bypass regulation expressly provides that bypasses are "prohibited" and, should a bypass occur, the permittee may be subject to an enforcement action unless it satisfies the conditions set forth at 40 C.F.R. § 122.41(m)(4). Appx. 206.

The second question asked for EPA's view on whether the use of a physical-chemical treatment process known as ACTIFLO® constitutes a "bypass" that would be prohibited unless a POTW satisfies the "no feasible alternatives" criteria at 40 C.F.R. § 122.41(m)(4)(i)(B), or if ACTIFLO® instead constitutes secondary treatment for purposes of 40 C.F.R. Part 133. Appx. 206. EPA responded that "[b]ased on the data [it] has reviewed to date," ACTIFLO® systems that do not contain biological components do not satisfy the Part 133 regulations, and thus do not constitute secondary treatment. *Id.* In the Agency's view, "[w]astewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO® or similar treatment processes is a bypass" that, to be approved, must satisfy the criteria at 40 C.F.R. § 122.41(m)(4)(i)(B). *Id.* Nevertheless, the Agency "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.*

Last, EPA was asked whether a State may use a "design storm" approach to "authorize an untreated discharge" of sewage into waters

subject to Clean Water Act jurisdiction. *Id.* Ms. Stoner responded that the Act prohibits the unauthorized discharge of pollutants (including water containing sewage) into waters of the United States. *Id.* She further noted that, as a practical matter, untreated overflows of sewage cannot satisfy effluent limitations based upon secondary treatment and often cannot satisfy applicable water quality-based effluent limitations. Appx. 207. For these reasons, NPDES permits typically prohibit sanitary sewer overflows, although some State NPDES authorities have issued permits with provisions that limit the circumstances in which they may bring an enforcement action. *Id.*

On November 4, 2011, the League filed its petition for review of the two EPA letters.

SUMMARY OF THE ARGUMENT

Agency action must be "final" before it is subject to judicial review in *any* court, and to be reviewable in *this* Court (under the provision invoked by the League) the final action also needs to be a regulation that establishes an "effluent limitation or other limitation." The letters at issue in this petition for review constitute none of these things.

Common sense and basic precepts of administrative law all point to the conclusion that the challenged letters are not final agency action or regulations of any sort. Rather, they are mere responses to questions – drafted by the League's members and conveyed to the Agency by a Member of Congress – that requested EPA's views of existing law. The League's members are free to disagree with EPA's responses. That's because the views expressed in those letters are not binding on the League, they are not binding on any State permitting authority, and they are not binding on EPA.

Even if letters of this nature could conceivably be construed as regulations in some circumstance, *these* letters would not fit the bill. Although EPA was willing to provide its current views of existing law, the letters emphasize the ongoing nature of EPA's deliberation and do not fix any legal obligations. Thus, the views expressed in those letters cannot be considered "final" for purposes of judicial review. But even if the letters are final in some sense, they certainly are not regulations that establish an "effluent limitation or other limitation" within the meaning of the judicial review provision that the League invokes, so this Court would lack jurisdiction in any event.

For many of the same reasons that the letters are not final, they also are not ripe for review. The letters lack the force of law and impose nothing new. Moreover, withholding review will not harm the League because its members would have a statutory right to judicial review if, at some point in the future, the State of Iowa or EPA actually takes final action to implement the views set forth in the challenged letters in the context of a permit, rulemaking, or other administrative proceeding. In such circumstance, the League's ability to challenge EPA's regulatory interpretations will ripen insofar as a court may evaluate the Agency's construction of its regulations should the State or EPA ever apply the views set forth in the challenged letters in a manner adverse to any member of the League.

Even if the challenged letters are final regulations ripe for review, the Court still would not have jurisdiction because the League has failed to satisfy the "irreducible constitutional minimum" for standing, *i.e.*, to show that there is a substantial probability that at least one of its members imminently would suffer Article III injury from the letters that would be redressed by a decision in its favor.

The League's merits arguments should be rejected even if the Court were to reach them. As an initial matter, even if the letters could somehow be deemed a "rule," they would at most be an interpretative rule, which is expressly exempt from notice and comment requirements. Moreover, and contrary to the League's arguments, the letters are entirely consistent with existing EPA regulations, and therefore the Court should reject the suggestion that notice and comment rulemaking was required because the Letters effectively amended existing regulations.

STANDARD OF REVIEW

The League invokes this Court's original jurisdiction under section 509(b)(1)(E) of the Clean Water Act, which, as relevant here, authorizes courts of appeals to review final EPA "action . . . in promulgating any effluent limitation or other limitation" set forth in that section. 33 U.S.C. § 1369(b)(1)(E); *see also Nat'l Pork Producers Council v. EPA,* 635 F.3d 738, 755 (5th Cir. 2011) (judicial review under section 509(b)(1) is limited to certain "final actions"). Any review under that section would be conducted pursuant to the deferential standard set forth in the Administrative Procedure Act, under which the Court asks

only whether the challenged action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see, e.g, Cerro Copper Prod. Co. v. Ruckelshaus,* 766 F.2d 1060, 1066 (7th Cir. 1985) (regulations promulgated under section 509(b)(1) are reviewable under the arbitrary-and-capricious standard).

As explained below, the Court should dismiss this petition for review without reaching the League's substantive challenge to EPA's view of existing regulatory requirements. However, if the Court does reach the merits, substantial deference is due to EPA's interpretation of the Clean Water Act, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–45 (1984), and its own regulations. *Siebrasse v. United States Dep't of Agric.*, 418 F.3d 847, 851 (8th Cir. 2005). With regard to EPA's interpretation of its regulations, which is the focus of the League's claims, so long as the views expressed by EPA "do[] not violate the Constitution or a federal statute, [they] must be given 'controlling weight unless . . . plainly erroneous or inconsistent with the regulation.'" *Shalala v. St. Paul-Ramsey Med. Ctr.,* 50 F.3d 522, 528 (8th Cir. 1995) (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)). Under that standard, EPA's interpretation must carry the

day "unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [Agency's] intent at the time of the regulation's promulgation.'" *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

ARGUMENT

I. THE LETTERS ARE NOT FINAL AGENCY ACTION

The Clean Water Act has a bifurcated jurisdictional scheme under which the courts of appeals have original jurisdiction over the categories of final EPA action set forth in section 509(b)(1), 33 U.S.C. § 1369(b)(1), and the district courts retain jurisdiction over other types of final action pursuant to the Administrative Procedure Act, 5 U.S.C. § 704.[5] *Nat'l Pork Producers Council*, 635 F.3d at 755. As we explain

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[5] Section 509(b)(1) confers jurisdiction on the courts of appeals to review only the following seven types of "action" of EPA's Administrator:

> Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of

(*continued*)

below, the challenged letters to Senator Grassley are not reviewable in *any* court because they do not constitute "final" agency action. However, even if they were final, they still would not be reviewable in *this* Court because they do not fall within one of the enumerated categories in section 509(b)(1).

A. The letters are not "final" agency action reviewable in any court.

The Supreme Court has held that, for an agency action to be final, it must satisfy two criteria. First, the action must mark the "consummation" of the agency's decision-making process; it cannot be tentative or interlocutory. Second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal citations and quotations omitted); *accord Sierra Club v. United States Army Corps of Eng'rs,* 446 F.3d 808, 813 (8th Cir. 2006) (applying *Bennett's* two-part finality test). In determining whether a

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> this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title. . . .

33 U.S.C. § 1369(b)(1).

challenged agency action is final, the Supreme Court has "interpreted the 'finality' element in a pragmatic way." *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967), *abrogated on other grounds*, 430 U.S. 99 (1977). Neither attribute of finality is present here.

As to the first *Bennett* prong, the challenged letters do not mark the culmination of any decision-making process. Rather, the letters themselves note that the issues addressed in each "are at the heart of" ongoing EPA regulatory proceedings. Appx. 205; *see also* Appx. 200, 202, 203, 207 (identifying issues under regulatory consideration). For example, the June 2011 letter cites the existing requirements at 40 C.F.R. § 122.41(m) and Part 133 (Appx. 201), explains that the use of treatment processes such as ACTIFLO® "are among those being actively considered" by EPA (Appx. 202), notes that the Agency "will . . . consider" whether to finalize its draft peak flows policy in connection with rulemaking efforts announced in June 2010 (*id.*), and explains that EPA is "actively considering" "[t]he issue of appropriate reporting requirements for SSOs and basement backups." Appx. 203.

Similarly, the September 2011 letter explains that "the data EPA has reviewed to date" indicates that ACTIFLO® does not constitute

secondary treatment but that the Agency will "continue to explore" when its use would be consistent with a no-feasible-alternatives demonstration and be appropriate to approve in a permit. Appx. 206. Moreover, Ms. Stoner noted that EPA has actively solicited public input on these issues and had a representative from the League serve on a panel in July 2011 convened "to offer recommendations to the Agency on the best path forward on these issues." Appx. 205. Rather than provide EPA's definitive word on the issues, the challenged letters simply respond to a Member of Congress's request that EPA provide his constituents with the Agency's view of existing regulatory requirements, a view that is not "final." *See American Paper Inst., Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (rejecting argument that a document setting forth EPA's "approach to regulation" was final agency action subject to review under section 509(b)(1)(E)).

As to the second *Bennett* prong, it is equally clear that EPA's letters to Senator Grassley do not determine anyone's "rights or obligations" (*e.g.*, they do not bind the State of Iowa, EPA, or the League's members), and that no legal consequences flow from those letters. *Bennett*, 520 U.S. at 178. They do not order the League's

members to take or refrain from any action; do not modify the terms of any existing permit; and do not themselves establish legal authority that would be binding in a future permitting action. Moreover, in any future enforcement action against one of the League's members, that member could face liability for noncompliance with its permit, but not for failing to comply with EPA's letters to Senator Grassley. *See* 33 U.S.C. § 1319(b), (c), (g).

Rather than impose any new legal obligations, the challenged letters simply "express[] [an agency's] view of what the law requires.'" *Fairbanks N. Star Borough v. United States Army Corps of Eng'rs*, 543 F.3d 586, 594 (9th Cir. 2008) (quoting *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)). Because the letters are bare statements of EPA's opinion, they can be neither the subject of "immediate compliance" nor of defiance. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239–40 (1980). Thus, the challenged documents lack any indicia of reviewable "final" agency action, and they do not satisfy the second *Bennett* prong. *Bennett*, 520 U.S. at 177–78; *Nat'l Pork Producers Council*, 635 F.3d at 756 ("[a]gency actions that have no effect on a party's rights or obligations are not reviewable final actions");

Fairbanks N. Star Borough, 543 F.3d at 593–94 (explaining that the second *Bennett* prong was not met where "rights and obligations remain unchanged"); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review").

EPA, like other agencies, issues innumerable non-"final" letters and opinions setting forth its interpretation of the law it administers, often in response to inquiries from regulated parties and Members of Congress. *See, e.g., Nat'l Pork Producers Council*, 635 F.3d at 754–56 (EPA letter to congressmen and industry executive not reviewable "final agency action" under section 509(b)(1)); *Indep. Equip. Dealers Ass'n v. EPA,* 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.) (EPA letter to trade group not reviewable "final agency action"); *City of San Diego v. Whitman*, 242 F.3d 1097, 1099–1100 (9th Cir. 2001) (letter from EPA Administrator responding to city's inquiry regarding EPA legal interpretation concerning future permit application not "final agency action"); *Wilson v. Pena*, 79 F.3d 154, 161 (D.C. Cir. 1996) (EEOC letter explaining how it would calculate back pay not final); *USAA Fed. Sav.*

Bank v. McLaughlin, 849 F.2d 1505, 1508–10 (D.C. Cir. 1988) (letter stating extent of regulatory jurisdiction, in response to inquiry, not reviewable). Such communications serve important administrative purposes, and their utility would be substantially reduced if they were subject to judicial review.

The courts' general reluctance to review agency communications of this character serves the long-term interests of regulated parties as well as those of the government. That reluctance rests in part on the courts' recognition that, although immediate judicial review of an agency's response to a request for its regulatory interpretation might sometimes assist private parties by clarifying their rights and obligations at an earlier point, "[t]o permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue." *Nat'l Automatic Laundry & Cleaning Council v. Shultz,* 443 F.2d 689, 699 (D.C. Cir. 1971) (citations omitted).

Given the advisory nature of the views expressed in the challenged letters, it is futile for the League to argue that the letters are

binding on their face. It nevertheless alleges (Br. 18) that the letters declare in "unequivocal terms" that bacteria mixing zones are "prohibited" in primary-contact recreation waters and that ACTIFLO® and similar processes constitute "illegal bypasses" unless they satisfy the secondary-treatment regulation or the no-feasible-alternatives test set out in the bypass regulation. The letters make no such unequivocal statements. With respect to mixing zones, the letters provide EPA's view that mixing zones for bacteria "should not" be allowed in waters designated for primary-contact recreation (*e.g.*, swimming), but make clear that "states may, *at their discretion*" authorize mixing zones according to the water-quality standards regulation at 40 C.F.R. § 131.13. Appx. 201 (emphasis added). As for ACTIFLO®, EPA explained that "[t]he data it has reviewed to date" show that the technology does not satisfy the secondary-treatment regulation. But the Agency also explained that it "supports" the use of this technology in certain circumstances, it will "continue to explore" the circumstances in which ACTIFLO® and similar processes would satisfy the no-feasible-alternatives test set forth in the regulation, and it will evaluate

"where it would be appropriate to approve in a permit the use of such units." Appx. 206.

The League also argues (Br. 6) that the letters constitute final agency action because in practice they have a coercive effect on the League's members and State regulators, in effect compelling compliance with EPA's interpretation in order to avoid a future permit denial by the State of Iowa or disapproval by EPA. The League thus claims (*id.*) that "the legal threshold of finality is satisfied" because some of its members have apparently been told that EPA headquarters has informed the State of Iowa that EPA will veto any permit that does not conform with the views expressed in the challenged letters.

Even if some EPA employee made a statement to that effect, that alone would not transform these otherwise non-final letters into "final agency action" subject to judicial review. *See Nat'l Ass'n of Home Builders*, 415 F.3d at 13–16 (incentive to comply voluntarily with agency views is insufficient to establish legal consequences under second prong of *Bennett*); *AT&T*, 270 F.3d at 975 (courts lack authority to review claims where "an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party").

Rather, the permit process will provide the League's members with an opportunity to advocate their views directly to the State, in a specific and concrete context. Should the State of Iowa deny a permit to one of the League's members, that member would have a right to seek judicial review of any final permit decision in State court. 40 C.F.R. § 123.30. Similarly, if Iowa issues a permit to which EPA objects and the State fails to issue a modified permit, the affected member would have a right to judicial review after exhausting its administrative remedies. 33 U.S.C. § 1369(b)(1)(F); 40 C.F.R. § 124.19; *see also City of Ames,* 986 F.2d at 256. Particularly where, as here, an agency simply responds to a request for its interpretation of existing legal requirements, regulated parties are not generally entitled to obtain judicial review simply to gain certainty about the validity of an interpretation that they think the agency might apply in the future. *See Standard Oil,* 449 U.S. at 242 (filing of an administrative complaint was not "final agency action" because additional steps were necessary before the agency's definitive position could be established); *see also Nat'l Ass'n of Home Builders*, 415

F.3d at 13–16; *AT&T*, 270 F.3d at 975.[6]

The three D.C. Circuit cases that the League cites without analysis (Br. 6) are clearly distinguishable. For example, in *Appalachian Power Company v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), the court found jurisdiction to review a document that EPA agreed contained its "settled" position (*id.* at 1022), where the particular document read "like a ukase" in that "[i]t commands, it requires, it orders, [and] it dictates." *Id.* at 1023. Similarly, in *CropLife America v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003), the court agreed to review an EPA directive containing "clear and unequivocal language" expressing a new "binding norm" announcing that the Agency "will not consider"

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[6] To the extent the challenged letters could be described as anything other than responses to congressional inquiries, they would constitute "general statements of policy" (or "policy statements"), as those phrases are used in the Administrative Procedure Act and by the courts. Although not defined in the Act, this Court and others have described a "policy statement" as a statement that "does not establish a 'binding norm,' but instead announces the agency's tentative intentions for the future." *Iowa Power and Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 811 (8th Cir. 1981) (citations omitted). Policy statements "advise the public prospectively of the manner in which the agency propose[s] to exercise a discretionary power[,]" lack "substantial impact on existing rights and obligations[,]" and leave the agency "free to exercise [its] informed discretion." *Id.* (citations and internal quotations omitted). Policy statements are exempt from notice-and-comment rulemaking procedures. 5 U.S.C. § 553(b)(3)(A).

certain studies in connection with ongoing and future adjudicative proceedings, and the particular directive was "directly aimed at and enforceable against petitioners." Likewise, in *General Electric v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002), the court found that it may review a document that purports "[o]n its face" to "impose[] binding obligations upon applicants to submit applications that conform to the Document and upon the Agency not to question" conforming applications.

Here, by contrast, EPA does not agree that the letters to Senator Grassley contain its "settled" views, and even a cursory review of those letters makes clear that they do not "command," "require," "order," or "dictate" anything. *Appalachian Power*, 208 F.3d at 1023. Moreover, neither letter states that a permitting authority may "not consider" particular information in permit proceedings, nor is either letter to Senator Grassley "aimed at and enforceable against" the League or its members. *CropLife America*, 329 F.3d at 881. Finally, the letters do not purport on their face "to impose[] binding" obligations on the League, the State, or anyone else, and they certainly do not "command[]" that the League's members "submit applications that conform" with the views expressed in those letters. *General Electric*,

290 F.3d at 385. In any event, "any hardship suffered by [the League] as a result of postponement of judicial review is ameliorated by its opportunity to challenge EPA's regulatory interpretation" at a later date, unlike the petitioners in *Appalachian Power* and *CropLife*. *General Motors Corp. v. EPA,* 363 F.3d 442, 452 (D.C. Cir. 2004).

In short, legal consequences do not flow from the challenged letters in the way that *Bennett v. Spear* plainly requires. The challenged letters thus are not reviewable "final" actions, and no court has jurisdiction to review them.

B. The letters are not among the express list of EPA "action" subject to direct appellate court review.

Every court of appeals that has considered the issue has held that the express listing of specific EPA actions in section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1)(E), precludes direct appellate court review of those actions not so specified. *See, e.g., Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) (citing cases).[7] Toward

[7] *See also Natural Res. Def. Council v. EPA,* 542 F.3d 1235, 1242 (9th Cir. 2008); *Narragansett Electric Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005); *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th

(*continued*)

that end, in dismissing a petition for review for want of jurisdiction, this Court explained that it lacks "statutorily provided jurisdiction to review" EPA "actions" not set forth in section 509(b)(1). *City of Ames*, 986 F.2d at 256.

The League invokes the portion of section 509(b)(1)(E) that authorizes courts of appeals to review final EPA "action . . . in . . . promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title. . . ." 33 U.S.C. § 1369(b)(1)(E). It claims (Br. 3, 23) that the challenged letters substantively modify regulations that were once promulgated under section 509(b)(1)(E) and, as such, the letters are themselves reviewable under that section. As explained below, neither of the challenged letters can reasonably be interpreted as having "promulgat[ed]" any final rule or regulation, much less one that established a new "effluent limitation or other limitation" within the meaning of section 509(b)(1)(E).

Neither the Supreme Court nor this Court appears to have identified the circumstances in which an agency document may be

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Cir. 1992); *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1980); *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976).

viewed as "promulgating" a new rule or regulation. However, the D.C. Circuit often confronts the issue and will typically consider (1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency. *See, e.g., General Motors,* 363 F.3d at 448 (citing *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)). "The first two criteria serve to illuminate the third, for the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, *i.e.*, that it has the force of law." *Id.* Under this test, the challenged letters to Senator Grassley do not constitute a promulgated final rule or regulation.

First, and most obviously, EPA never characterized its letters to Senator Grassley as regulations, nor did it publish those letters in the Federal Register or the Code of Federal Regulations. Moreover, the views expressed in the challenged letters do not have the force of law or bind the State of Iowa, EPA, or any regulated entity. Should any of the issues addressed in those letters come up in an NPDES permitting action, the permitting authority must rely on the facts of that case and

the existing regulations to support its position; it would not be appropriate for it to treat EPA's letters to Senator Grassley as binding or as themselves establishing legal authority for any permit decision. Moreover, there is no evidence on the face of the letters that EPA intended regulated entities or permitting authorities to treat the letters as creating new regulatory requirements. Rather than impose new obligations on the League or its members, the letters simply respond to an express request for EPA's view of the requirements that apply by virtue of existing regulations (a view that would, of course, be subject to judicial scrutiny if these issues ever arose in some fashion in a permitting or enforcement action). In sum, the letters lack the indicia of rules or regulations "promulgated" by EPA, and review of those documents is therefore unavailable under section 509(b)(1)(E).

Even if the letters had been "promulgated" by EPA, they still would not be reviewable because they do not contain "an effluent limitation or other limitation," as is required for jurisdiction to lie under section 509(b)(1)(E). 33 U.S.C. § 1369(b)(1)(E). A "limitation . . . must have bite" and "must at least control the states or . . . permit holders." *American Paper Inst.*, 882 F.2d at 289. The EPA letters do not qualify

as a "limitation" because they "require nothing" of the League's members and "impose no obligations enforceable by EPA." *Westvaco Corp. v. EPA,* 899 F.2d 1383, 1388 (4th Cir. 1990).

Furthermore, "effluent limitation" is a statutorily defined term that cannot reasonably be twisted in the manner suggested by the League. "The term 'effluent limitation' means any restriction established by a State or [EPA's] Administrator 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). As the Supreme Court has explained, this term refers to "*direct* restrictions on discharges," *EPA v. California*, 426 U.S. 200, 204 (1976) (emphasis added), not the sort of requirements-by-inference that the League urges the Court to find in EPA's letters to Senator Grassley.

II. THE LETTERS ARE NOT RIPE FOR REVIEW, AND THE LEAGUE HAS FAILED TO SATISFY CONSTITUTIONAL STANDING REQUIREMENTS

If the Court agrees that it lacks jurisdiction for either of the foregoing reasons, it would obviate the need for it to consider our remaining jurisdictional arguments, as the Court is free to dismiss the petition based on one jurisdictional bar without reaching the others.

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999); *see also Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 ("Our conclusion that the EPA letter is not reviewable agency action means that we lack jurisdiction" and "obviates the necessity of considering . . . other jurisdictional arguments[,]" including ripeness and standing.). But, as explained below, the issues also are not ripe for review and the League lacks standing to bring this challenge.

A. The letters are not ripe for review.

The Supreme Court has stated that the rationale for the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148–49. Courts apply a two-part test, evaluating "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 County, Mo. v. City of Peculiar,* 345 F.3d 570, 572–73 (8th Cir. 2003) (quoting *Abbott Labs.*, 387 U.S. at

149). In this Circuit, "[a] party seeking judicial relief must necessarily satisfy both prongs to at least a minimal degree." *Id.* at 573.

In evaluating the fitness of the issues for judicial review, this Court first considers whether it would benefit from further factual development.[8] *See id.* at 574. Here, just as in its 2010 case, the League alleges that the challenged letters contain "rule revisions" to EPA's bypass regulation, 40 C.F.R. § 122.41(m); its secondary-treatment regulation, 40 C.F.R. § 133.100; and its regulations governing water quality-based permitting, 40 C.F.R. § 122.44(d)(1) – regulations that arguably touch on every major component of EPA's program to regulate municipal sewage discharges. But the challenged letters impose no new obligations on the League or its members and lack legal force beyond that of the underlying regulations. Thus, until there is a specific permitting or other action that turns on the challenged interpretations, with an underlying set of facts and thorough administrative record for the Court to review, both the scope of the controversy and the number

[8] The League's statement (Br. 9) that this case is presumptively ripe because it raises "purely legal issues" is belied by its contrary statement (Br. 32) that this case "turns on . . . factual issue[s,]" including whether EPA instructed its regions to veto permits that do not comply with the views expressed in the challenged letters.

of imponderables raised by the League's petition are too great, rendering the matter unsuitable for decision. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Furthermore, these very issues are actively being considered by the Agency in the regulatory process, and a decision by this Court prejudging the issues would undercut one of the basic rationales of the ripeness doctrine, which is to "protect the agencies from judicial interference until an administrative decision has been formalized. . . ." *Abbott Labs.*, 387 U.S. at 148.

Finally, the League will not face immediate and direct hardship if this Court withholds review of the challenged letters. Because EPA's letters to Senator Grassley lack the force of law and impose no obligations on any NPDES authority or regulated entity, neither the League nor its members can even potentially be injured until the State of Iowa or EPA applies the alleged rule revisions set forth in those letters. Withholding review will not harm the League because it or one of its members can obtain judicial review if, at some point in the future, either the State or EPA takes action pursuant to the interpretations set forth in the challenged letters, for example in a challenge to a final permit decision. *City of Ames*, 986 F.2d at 256 (dismissing section

509(b)(1) challenge as unripe, even *after* EPA issued preliminary objections to Iowa's proposed NPDES permit, because "[v]arious administrative opportunities still remain: the State could issue its own permit, the EPA could withdraw its objections, or the EPA could issue a final NPDES permit"). In a site-specific challenge, judicial review would be far more meaningful, since it would involve a concrete dispute illuminated by a facility-specific administrative record.

The League may prefer to have this Court determine in the abstract whether EPA's letters to the Senator set forth valid regulatory interpretations rather than wait to see if or how the State or EPA ever applies those interpretations in the future. But however desirable and efficient such an advisory opinion might seem to the League, such a use of judicial resources is inconsistent with Article III. *Minnesota P.U.C. v. FCC*, 483 F.3d 570, 582–83 (8th Cir. 2007) (finding statement in FCC order suggesting what the FCC would do "if faced with the precise issue" not ripe because it "does not purport to actually do so and until that day comes it is only a mere prediction"); *see also American Fed'n of Gov't Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 754–57 (D.C. Cir. 1984) (R.B. Ginsburg, J.) (agency opinion letter unripe for review). In

fact, as the Supreme Court has explained, one of the very reasons the ripeness doctrine exists is because the seeming "efficiency" of such advisory opinions is illusory from the Court's point of view: "The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – postimplementation litigation." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998); *see also Nat'l Park Hospitality Ass'n v. United States Dep't of the Interior,* 538 U.S. 803, 811 (2003) (rejecting argument that "mere uncertainty as to the validity of a legal rule constitutes hardship for purposes of the ripeness analysis" because "courts would soon be overwhelmed with requests for what essentially would be advisory opinions").

For these reasons, the petition also should be dismissed as unripe.

B. The League has failed to establish standing.

The "irreducible constitutional minimum" for standing requires the party bringing suit to show that it has suffered a concrete or particularized, and not conjectural or hypothetical, injury that is (1) actual or imminent; (2) caused by or fairly traceable to the

challenged act; and (3) is likely redressable by the court. *Defenders of Wildlife*, 504 U.S. at 560–61. In the petition for review context, a petitioner's burden to establish Article III standing is "the same as that of a plaintiff moving for summary judgment in the district court" and, here, requires the League to "show a '*substantial probability*' that it has been injured, that [EPA] caused its injury, and that the court could redress that injury." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (emphasis added). As an organization representing the interests of multiple cities, the League has the additional burden of establishing associational standing. *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.,* 509 F.3d 406, 419 (8th Cir. 2007) (citation omitted).[9]

For the reasons described above, neither the League nor any of its members have established that there is a substantial probability that it

[9] To establish associational standing, the League must also show that (1) at least one of its members would have standing to sue in its own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit. *Americans United,* 509 F.3d at 419. The only element that EPA disputes in this case is whether at least one of the League's members would have standing to sue in its own right.

would suffer injury stemming from anything EPA wrote in the challenged letters to Senator Grassley that is concrete, actual or imminent, or anything but hypothetical and conjectural. The League does not allege a specific application of any new interpretation in those letters that has harmed any League member or that imminently threatens to harm any League member, as the only "injuries" that the League claims (Br. 7–9) flow from its mistaken belief that the guidance that its members requested and received is binding. Causation is similarly lacking, as the challenged letters impose no new requirements on the League's members and, to the extent they face any burden, that burden was caused by existing regulations and nothing stated for the first time by EPA in the challenged letters. The supposed injuries that the League alleges are not redressable for the same reason. The challenged letters contain nothing new and any qualms that the League has arise from EPA's regulations, not any view of those regulations expressed by the Agency in its letters to Senator Grassley.

Therefore, even if the Court were to vacate the challenged letters, the League and its members would not be any better off.

III. THE LEAGUE'S CHALLENGE LACKS MERIT

On the merits, the League contends that the challenged letters are legislative rules issued in violation of the Administrative Procedure Act and that the substantive content of each is inconsistent with the Clean Water Act and existing regulations. If the Court reaches these arguments, it should reject them. First, as we explained above (at p. 37 n.6), EPA's letters to Senator Grassley are, at most, simple statements of general policy rather than a "rule." However, even if the challenged letters could somehow be considered a new rule, they would at most constitute an "interpretative rule" for which no public notice or opportunity for comment is required. Second, although there obviously is a much more limited record for agency responses to congressional inquiries than there would be for a true rule or regulation, even from the face of the letters it is clear that the views expressed by EPA are entirely consistent with the Clean Water Act and applicable regulations. For these reasons, the letters cannot be construed as

legislative rules invalidly issued without prior notice and opportunity to comment.[10]

A. Even if the letters are new rules, they would be covered by an express statutory exemption from notice-and-comment rulemaking.

The Administrative Procedure Act defines a "rule" as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4). The Act requires notice to the public of proposed "legislative" (also termed "substantive") rules and an opportunity to comment thereon. *Id.* § 553(b), (c). Those procedures are not required, however, for "interpretative rules." *Id.* § 553(b)(3)(A).

Although the Act does not provide a definition for these terms, this Court has described a "legislative" rule as one "enacted by an

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[10] The Court otherwise should not entertain the League's arguments as to whether the letters reflect a reasonable construction of the Clean Water Act or EPA's regulations. The only "merits" argument that could even conceivably be properly presented at this juncture is the essentially procedural question of whether the challenged letters purported to effect a change in existing legal requirements. If the Court answers this question in the negative (as EPA contends it must), the petition for review must be denied. If the Court answer this question in the affirmative (as the League urges), then the only proper remedy is a remand to EPA for further consideration of these issues in the proper procedural context. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973).

administrative agency pursuant to statutory delegation" that "must be judicially enforced as if laws enacted by Congress itself." *Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986). Such rules have the force of law, create new law, or impose new rights or duties. *Northwest Nat'l Bank v. United States Dep't of the Treasury,* 917 F.2d 1111, 1117 (8th Cir. 1990). "Interpretative" rules, by contrast, simply advise the public of an "agency's construction of the statutes and [regulations] which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995).

The letters in this case are not rules of any sort, but instead responses to questions conveyed to a federal agency by a Member of Congress. If this Court determines that it has jurisdiction to hear this case and it believes that the challenged letters to Senator Grassley constitute rules, it should find that the letters are interpretative in nature and exempt from notice and comment. As discussed above, the letters do not purport to create any new regulatory requirements but rather, simply offer EPA's responses to questions requesting how existing requirements may properly be viewed. For many of the same reasons that the challenged letters are not final regulations

promulgated by the Agency, they also are, at most, interpretative. First, the letters "do not have the force and effect of law." *Guernsey*, 514 U.S. at 99. For that reason, the letters can never be "violated," further suggesting that if they are rules of any sort that they are, at most, interpretative. *See Drake,* 797 F.2d at 607 ("An action based on a violation of an interpretive rule does not state a legal claim. Being in nature hortatory, rather than mandatory, interpretive rules can never be violated."). In short, in *Guernsey* parlance, the challenged letters contain EPA's "construction of the statutes and [regulations] which it administers[,]" nothing more. 514 U.S. at 99.

B. The views expressed in the challenged letters are consistent with EPA's existing regulations.

The League appears to argue (Br. 30) that notice-and-comment rulemaking was required because the letters conflict with, and effectively amend, EPA's bypass regulation, its secondary-treatment regulation, and the regulations governing water quality-based permitting.[11] It states (Br. 18) that EPA's letters to Senator Grassley

[11] Citing the D.C. Circuit's decision in *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997), the League suggests (Br. 30–31) that the letters can be considered legislative rules to the extent (*continued*)

announce in "unequivocal terms" that bacteria mixing zones are "prohibited" in primary-contact recreation waters and that ACTIFLO® and similar processes generally constitute "illegal bypasses." As explained above (at pp. 34–35), the letters make no such unequivocal statements on these points. Moreover, the letters do not announce "a new position inconsistent with any of the [Agency's] existing regulations[,]" *Guernsey*, 514 U.S. at 100, as explained below.

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that they are inconsistent with prior *interpretative* rules. This argument too should be rejected. To begin with, the cited aspect of *Paralyzed Veterans* – which has never been adopted by this Circuit – is inconsistent with the Administrative Procedure Act's requirements for interpretative rules and has been widely criticized by commentators and courts alike. *See* Richard Pierce, *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 561–66 (Spring 2000); *compare, e.g., Warder v. Shalala*, 149 F.3d 73, 81–82 (1st Cir. 1998), and *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) (holding that an agency can change an interpretative rule without notice-and-comment rulemaking), with *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) (endorsing *Paralyzed Veterans*). Recent Supreme Court precedent further undermines *Paralyzed Veterans*. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009) (agency action is not subject to a heightened or more searching standard of review simply because it represents a change in administrative policy). Most importantly, however, the *Paralyzed Veterans* issue is not squarely presented in this case, since this case focuses mainly on an allegation that the challenged letters are inconsistent with EPA's existing *legislative* rules, codified in Part 40 of the Code of Federal Regulations, an argument we refute in the text.

Bypasses. With respect to bypasses, EPA's letters merely restate what has been clear from the face of the regulation for more than three decades: all intentional bypasses are "prohibited," and a NPDES authority may initiate an enforcement action against any permittee for a bypass unless the permittee meets the conditions set forth at 40 C.F.R. § 122.41(m)(4)(A)–(C).[12] Appx. 202, 206. Moreover, and also clear from the face of the regulation, a NPDES authority may "approve" an anticipated bypass in those circumstances set forth in the regulation. *Id.* The letters do not depart from the plain language of the regulation, which "itself establishes whether a particular diversion is a bypass. . . ." Appx. 202.

EPA's September 2011 letter sets forth the Agency's view of its bypass regulation in three respects. First, the Agency states: "In general, flows diverted around biological treatment units would constitute a bypass regardless of whether the diverted flows receive

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[12] EPA's definition of "bypass" has remained essentially unchanged since 1979. *Compare* 44 Fed. Reg. 32,854, 32,905 (June 7, 1979) (defining "bypass" as "the intentional diversion of wastes from any portion of a treatment facility") *with* 40 C.F.R. § 122.41(m)(1) (1983) (currently defining "bypass" as "the intentional diversion of waste *streams* from any portion of a treatment facility") (emphasis added).

additional treatment after the diversion occurs." Appx. 206. This, however, is simply a straightforward application of the bypass regulation, which provides that any "intentional diversion of waste streams from any portion of a treatment facility" is a "bypass." 40 C.F.R. § 122.41(m)(1).

Second, EPA states its view that the one circumstance in which flow diverted around biological treatment units would not constitute a bypass would be if the flow is diverted from one secondary treatment unit to another. Again, this follows logically from the regulation. If flow is diverted from a treatment facility to another facility designed to perform secondary treatment, EPA would not classify that diversion as a "bypass." Appx. 206.

Third, EPA states that flow diverted around secondary treatment to an ACTIFLO® or similar process would, from "the data EPA has reviewed to date," constitute a bypass. *Id.* Based on EPA's current understanding, ACTIFLO® systems "are not considered secondary treatment units. . . ." *Id.* Again, this is a reasonable interpretation of the regulations that follows logically from the first two statements. If any intentional diversion of flow that does not go to secondary

treatment is a bypass, and the data that EPA had reviewed to date suggests that ACTIFLO® does not provide secondary treatment, then any intentional diversion to such systems would be a prohibited bypass. Because the views expressed by EPA in its letters to Senator Grassley do not contradict the regulations' plain language and are reasonable, those views are entitled to controlling weight. *See Thomas Jefferson Univ.*, 512 U.S. at 510–12; *St. Paul-Ramsey Med. Ctr.*, 50 F.3d at 528.

Perhaps recognizing that neither letter to Senator Grassley announced "a new position inconsistent with any . . . existing *regulations*[,]" *Guernsey*, 514 U.S. at 100 (emphasis added), the League argues (Br. 52) that the letters should have gone through notice-and-comment rulemaking because they effectively amended EPA's past *interpretation* of its bypass regulation to prohibit a process known as blending.[13] As noted above (at pp. 54–55 n.11), the D.C. Circuit precedent on which this argument is based should not be followed here; instead, the general rule is that agencies are free to change

[13] "Blending" is not defined in the Clean Water Act or regulations, but is generally recognized to be the practice of diverting a part of peak wet-weather flows at POTWs around biological treatment units and then mixing with the effluent from the biological units prior to discharge.

interpretations and policies without triggering notice-and-comment, so long as they reasonably explain their change in position. Even if this were not the case, it would not be necessary to address the issue because the League admits (Br. 50) that the specific regulatory interpretation that it believes the challenged letters deviate from was a "proposed policy" that EPA never adopted. And it fails to mention that, in May 2005, EPA announced that it "will not finalize" that proposal.[14] EPA Appx. 45 (May 19, 2005 News Release); *see also* Appx. 255 (December 2005 Federal Register notice recounting that, "[o]n May 19, 2005, EPA indicated that . . . the Agency has no intention of finalizing the 2003 proposal.") Thus, to the extent EPA can be viewed as having departed from a prior (proposed) regulatory interpretation, the "action"

[14] In November 2003, EPA solicited public comment on blending and, had it adopted the proposal, certain wet weather diversions around biological treatment units that were blended with wastewater from biological units prior to discharge would not have been considered to constitute a prohibited "bypass" if certain criteria were met. EPA received significant public comment on the 2003 proposal, including more than 98,000 comments opposing adoption of such a policy due to concerns about potential human health risks. EPA also received a letter signed by 73 Members of Congress asking that EPA not move forward with finalizing the policy. On May 19, 2005, EPA announced that, after considering public comments, it did not intend to finalize the 2003 proposal. EPA Appx. 45; *see also* Appx. 255.

that EPA took to depart from that interpretation occurred nearly seven years ago. *Cf.* 33 U.S.C. § 1369(b)(1) (120-day statute of limitations for filing petition for review of EPA action).

Mixing zones. The League claims that, in the June 30, 2011 letter, EPA "flatly prohibited" the use of bacteria mixing zones. Br. 34. It is unclear how the League could read EPA's letter in that manner since the letter expressly provides that States may, "at their discretion," allow for their use. Appx. 201. In any event, the views expressed by EPA on mixing zones are entirely consistent with the Agency's long-standing position on the issue and are not inconsistent with the regulations.

EPA articulated its views on mixing zones in 1994, in its *Water Quality Standards Handbook: Second Edition* (Handbook). Appx. 224–41 (excerpts of Handbook). The Handbook set forth EPA's view that the use of mixing zones is not appropriate where they may pose significant human health risks or where they may endanger critical areas (*e.g.*, recreational areas). Appx. 226. Further, in a November 2008 memorandum that the League unsuccessfully challenged in this Court in its 2010 case (Appx. 270–71 (2008 memorandum); EPA Appx. 16–17

(2010 petition for review challenging that same memorandum)), the director of EPA's Office of Science and Technology explained his office's view that the use of bacteria mixing zones that allow for elevated levels of bacteria in rivers and streams designated for primary-contact recreation activities (*e.g.*, swimming) may pose significant human health risks and, therefore, would not be "appropriate." Appx. 270–71.

EPA's June 2011 letter does not contradict either prior statement on the issue. Although the League suggests (Br. 36–37) that the preambles to two EPA rules explicitly allowed use of bacteria mixing zones, neither preamble articulated a view on the *appropriateness* of bacteria mixing zones. Moreover, the portions of the preambles quoted by the League simply recognize that States retain discretion to allow or disallow such mixing zones and that EPA did not want to undercut that discretion by prohibiting bacteria mixing zones through a federal rulemaking.

CONCLUSION

For all the foregoing reasons, the Court should dismiss the League's petition for review for lack of subject-matter jurisdiction or, in the alternative, deny the petition as meritless.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,533 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and this Court (*i.e.*, counting from "Statement of the Case" through "Conclusion"). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook, 14-point font. Moreover, I have scanned the electronic version of this brief and addendum for viruses using a commercial virus scanning program (Microsoft Forefront Client Security), which reports that the brief and addendum are virus free.

May 8, 2012

/s/ Adam J. Katz
ADAM J. KATZ

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2012, I electronically filed the foregoing 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.

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