

No. 17-542

In the Supreme Court of the United States

SOUTHERN CALIFORNIA ALLIANCE OF
PUBLICLY OWNED TREATMENT WORKS,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY;
REGIONAL ADMINISTRATOR, USEPA, Region IX,
Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Largely parroting the decision of the Ninth Circuit, Respondents fail to address the central issues raised in SCAP's Petition. Under the Ninth Circuit's ruling, no federal forum exists to challenge USEPA's unlawful Objections that denied reissuance of the Proposed Permits, and promulgated or approved new NPDES effluent limitations contrary to established federal rules without engaging in notice and comment rulemaking procedures. Like the Ninth Circuit, Respondents would prefer an "irrational bifurcated system" of review where Petitioner is relegated to challenging State-issued permits only in State courts regardless of USEPA's actions in coercing or crafting the terms of those permits. *See* Resps. Br. 6-7, 9.

Respondents also categorize USEPA's Objections as an unreviewable "intermediate step" in determining the contents of the final permits. *Id.* However, such a system of review fails to acknowledge the gap created between what USEPA can lawfully object to in a proposed permit, and the restrictions that a final State permit may lawfully impose. Within this gap, and without effective federal appellate court review pursuant to Clean Water Act Section 509(b)(1)(E) and (F), an unimpeded path will be cleared for USEPA to pressure States into imposing restrictions contrary to the plain wording of federal regulations, and force States to do what USEPA could not.

USEPA's actions cannot be left beyond the reach of federal court review. Appellate review must be authorized as in *Crown Simpson Pulp. Co. v. Costle*, 445 U.S. 193, 197 (1980) ("*Crown Simpson II*"); *see also Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. ___,

No. 16-299, 2018 WL 491526, at *12-13 (2018) (“*NAM*”) (recognizing that *Crown Simpson II* remains good law). This Court must also reiterate its ruling that federal judicial review may be appropriate even where additional state or federal actions will take place after an initial or interim step by a federal agency. *See U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, ___ U.S. ___, 136 S. Ct. 1807, 1814-15 (2016) (“*Hawkes*”).

Respondents also make the untenable claim that the Ninth Circuit’s decision “does not conflict with any decision of this Court or another court of appeals.” Resps. Br. 8-10. To the contrary, the Ninth Circuit’s decision directly conflicts with this Court’s decision in *Crown Simpson II*, other federal circuit authority on the issue of federal appellate court review under Clean Water Act Section 509(b)(1)(E) and (F), as well as analogous decisions interpreting binding agency decisions. *See, e.g., Crown Simpson II*, 445 U.S. at 197; *Iowa League of Cities v. USEPA*, 711 F.3d 844, 863, 866 (8th Cir. 2013) (“*Iowa League of Cities*”); *see also* Pet. 2, 21-22.

Finally, this Court’s recent decision in *NAM* confirms that SCAP’s Petition involves a question of immense and immediate practical importance. Unlike the “Waters of the United States” Rule (WOTUS Rule) in *NAM*, USEPA’s Objections in this case constituted the promulgation of effluent limitations and an NPDES permit denial, both of which fit squarely under the ambit and “plain language” of Clean Water Act Section 509(b)(1)(E) and (F). *NAM*, 2018 WL 491526 at *14; *see also id.* at *15 (“Although § 1369(b)(1) does not authorize immediate circuit-court review of all national rules under the Act, it does permit federal appellate

courts to review directly certain effluent and other limitations and individual permit decisions.”) (citing 33 U.S.C. § 1369(b)(1)(E) and (F)). Accordingly, SCAP’s Petition must be granted.

I. Under the Ninth Circuit’s Decision, No Forum Exists to Directly Challenge USEPA’s Objections.

Under the Ninth Circuit’s decision, Petitioner is left without the ability to directly challenge USEPA’s actions, which fundamentally denied the issuance of the Proposed Permits and imposed new NPDES effluent limitations that contradict existing federal regulations without engaging in notice and comment rulemaking procedures. As this Court explained in *NAM*, there are “two principal avenues” of judicial review of USEPA action—in federal district court under the Administrative Procedure Act (APA) or in a federal appellate court under Clean Water Act Section 509(b)(1). *NAM*, 2018 WL 491526 at *4; *see also id.* at *6 (“For ‘certain suits challenging some agency actions,’ the Act grants the federal courts of appeals original and ‘exclusive’ jurisdiction.”). Here, however, the Ninth Circuit foreclosed both avenues, choosing state court instead.

The Ninth Circuit’s denial of review under Section 509(b)(1) created a chasm between what USEPA can lawfully object to in a proposed permit, and the restrictions that a final State permit may impose. This has created an even more “irrational bifurcated system” of review than the system this Court unanimously rejected in *Crown Simpson II*.

In addition, even if USEPA's Objections were only an "interim step" in the permitting process, this Court already held in *Hawkes* that federal court review may be appropriate for challenging interim agency actions even where additional state or federal actions remain. See 136 S. Ct. at 1814-15.

A. The Ninth Circuit's Decision Conflicts with *Crown Simpson II* and Resurrects an "Irrational Bifurcated System" of Review.

Respondents assert that the Ninth Circuit's decision is consistent with *Crown Simpson II*. Resps. Br. 11. Quoting the Ninth Circuit, Respondents contend that USEPA's Objections are simply "one step in 'a process in which the *state* can request a hearing [regarding USEPA's Objections], following which there is additional opportunity for back and forth between the *state* and EPA.'" *Id.* (emphasis added). Such procedures, however, do not recognize *SCAP's* or the *permittee's* ability to challenge USEPA's promulgation of new effluent limits or denial of permits pursuant to Section 1369(b)(1)(E) or (F). *Crown Simpson II*, 445 U.S. at 196. The State is not the entity regulated by the permit, and the Ninth Circuit's decision should not eliminate the federal due process rights of the permittee.

Respondents' claim that the Ninth Circuit's decision does not create an "irrational bifurcated system" of review is also wrong. Resps. Br. 12. Instead of bifurcation—with some cases heard in federal district courts, and some in federal appellate courts—now other cases, where USEPA objected to the terms of the permit and the State capitulated by incorporating

USEPA's objections into final State-issued permits, will be heard only in State court. As described in the Petition, State courts have already ruled on these exact issues on the merits, yet USEPA continues unimpeded. Pet. 14-17. Only federal appellate court review can curtail this indefensible action.

Undeniably, this complicated and "irrational bifurcated system" may create different NPDES-permitting results based simply on the "fortuitous circumstances" of whether the State or USEPA issued the permits. *See Crown Simpson II*, 445 U.S. at 196-97. Moreover, the additional level of review in State administrative and court proceedings ignores this Court's admonitions against substantial delay of the resolution of disputes. *NAM*, 2018 WL 491526 at *14; *Crown Simpson II*, 445 U.S. at 197; *see also Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 593 (1980).

Under the Ninth Circuit's decision, delay would be inevitable as a State court cannot invalidate USEPA's Objections. After several years in California's overburdened superior and appellate court system, a State court could rule that the revised final State-issued permit was contrary to law, and remand the permit to the State for modification. Once modified, USEPA could object once again in a manner contrary to the federal regulations, potentially forcing another round of State court review, yet never once reaching the underlying source of the problem—USEPA's unlawful Objections. *See* 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44; *see also* Pet. 14-16.

B. SCAP Should Be Able to Challenge USEPA's Objections even if the Objections were an "Interim Step" in the State Permitting Process.

A permittee, such as SCAP's members, should have the ability to challenge USEPA objections regardless of whether those objections are merely an "interim step" in the state permitting processes (Resps. Br. 6, 9) because USEPA's Objections substantively altered the conditions and trajectory of the Proposed Permits. In other words, even if USEPA's Objections are classified as an "interim step" in the *state* permitting process, USEPA's Objections equated to final *federal* agency action because USEPA's Objections provided that agency's final word regarding the Proposed Permits. Thus, SCAP should be able to challenge USEPA's actions under Section 509(b)(1)(E) and/or (F).

This Court addressed a similar situation in *Hawkes*. In that case, the respondents challenged a United States Army Corps of Engineers' Clean Water Act jurisdictional determination that their property contained "Waters of the United States" under the APA. *Hawkes*, 136 S. Ct. at 1811-13. This Court held that the Corps' jurisdictional determination constituted final agency action reviewable under the APA in federal district court even though additional state or federal actions followed. *See id.* at 1814-15.

Here, although Clean Water Act Section 509 does not require "final agency action," to review the promulgation of effluent limitations or an NPDES permit denial, USEPA's Objections were nonetheless that agency's final word. Pursuant to *Hawkes*, SCAP

should have the ability to directly challenge USEPA's Objections.

When evaluating the propriety of review in this case under Clean Water Act Section 509, this Court should not “conjure up a finality requirement for ‘[a]gency actions made reviewable by statute’ where none is located in the text of the APA” *Iowa League of Cities*, 711 F.3d at 863 n.12. Because SCAP brought suit under the specific Congressional authorization of Section 509, this Court’s review does not depend on the existence of “final agency action.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990). Instead, this Court need only determine “whether the asserted agency action falls within the statutory terms [of Section 509].” *Iowa League of Cities*, 711 F.3d at 863 n.12. Here, USEPA’s Objections clearly fall within the plain language of Section 509(b)(1)(E) and (F). *NAM*, 2018 WL 491526, at *14-15.

Even if finality were required, USEPA’s Objections constituted “final agency action.” An action is considered final when it “mark[s] the ‘consummation’ of the agency’s decisionmaking process . . . [and is] one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow[.]’” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). USEPA’s Objections met the first prong because, by setting forth USEPA’s final position, the objections consummated the agency’s decision for purposes of *Bennett*. *Id.* Under the second prong, USEPA’s Objections dramatically influenced the “rights or obligations” of SCAP members by mandating that the Regional Board modify the Proposed Permits, to add new numeric and daily maximum effluent limitations never before

contained in the decades of final permits that came before. *Id.*; *see also* Pet. 9-10; Pet. App. 38, 46. Therefore, although Clean Water Act Section 509 contains no finality requirement, USEPA's Objections met both conditions for finality. Thus, regardless of whether USEPA's Objections represent an "interim step" in the permitting process, SCAP must have the ability to challenge USEPA's unlawful conduct in federal court.

II. The Ninth Circuit's Decision Conflicts with this Court's Authority and Other Federal Circuit Court Authority.

Respondents take the untenable position that the Ninth Circuit's decision "does not conflict with any decision of this Court[,] [] another court of appeals[.]" or that the authority is otherwise distinguishable. Resps. Br. 8-10. Like the government in *NAM*, Respondents and the Ninth Circuit would rather ignore "than confront th[e] statutory text" of Clean Water Act Section 509(b)(1)(F). *NAM*, 2018 WL 491526, at *12-13. However, as explained above (*see supra* pp. 4-5), as well as in SCAP's Petition (Pet. 11-21), the Ninth Circuit's decision directly conflicts with this Court's precedent in *Crown Simpson II*.

Another reason for this court to grant SCAP's Petition is the Ninth Circuit's reasoning that *Crown Simpson II* "expressly declined to consider" the impact of the 1977 Clean Water Act amendments on whether Section 509(b)(1)(F) applied. *See* Pet. App. 18; Resps. Br. 7. The Ninth Circuit concluded that Section 509(b)(1)(F) would not apply after the 1977 amendments because objections were no longer the functional equivalent of a permit denial and more

process existed. This theory is illogical because even USEPA-issued NPDES permits have additional process and can be administratively reviewed by the Environmental Appeals Board (“EAB”) prior to appellate review. *See* Pet. App. 21; Resps. Br. 7; *see also* 40 C.F.R. § 124.19 (EAB appeal procedures for NPDES permits). Under the Ninth Circuit’s logic, Section 509(b)(1)(F) has no meaningful purpose and has been effectively excised from the statute. *Corley v. United States*, 556 U.S. 303, 314 (2009) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”).

Even apart from the Ninth Circuit’s position, this Court just confirmed that *Crown Simpson II* remains good law regarding the applicability of Section 509(b)(1)(F). *NAM*, 2018 WL 491526 at *12-13. Unlike the WOTUS Rule in *NAM*, USEPA’s Objections imposed that agency’s final decision on an “individual permit application[].” *Id.* at *13; *see also supra* at pp. 6-8. Thus, appellate review is authorized under Section 509(b)(1)(F).

The Ninth Circuit’s decision conflicts with other federal circuit court authority as well. In *Iowa League of Cities*, the Eighth Circuit reviewed whether two USEPA letters regarding the use of blending or mixing zones at municipally owned sewer systems constituted the promulgation of effluent limitations under the Clean Water Act. 711 F.3d at 860-61. The court held that USEPA’s letters were properly considered “promulgations” for the purpose of establishing federal appellate court jurisdiction under Section 509(b)(1)(E) because USEPA’s letters had a “binding effect on

regulated entities.” *Id.* at 863. Here, USEPA’s Objections stated, in pertinent part, that “[t]his formal objection letter describes the *changes to the permits that are required* as a condition to eliminate EPA’s formal objection[.]” Pet. App. 38 (emphasis added). USEPA’s Objection letters should be similarly viewed as binding, and appellate jurisdiction should be granted under Section 509(b)(1)(E).

Likewise, in *Iowa League of Cities*, the Eighth Circuit held that USEPA’s letters involved effluent limitations for purposes of establishing federal appellate court jurisdiction under Section 509(b)(1)(E). *Iowa League of Cities*, 711 F.3d at 866. The court explained 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.” *Id.* Here, USEPA’s Objections similarly imposed binding restrictions, namely numeric limits and daily effluent limits, not otherwise prescribed by law. *See* Pet. App. 46; *see also* 40 C.F.R. § 122.44(d)(1)(i) and (v); 40 C.F.R. § 122.44(k) (allowing non-numeric effluent limitations); 40 C.F.R. § 122.45(d)(2) (requiring only monthly and weekly average effluent limits for Publicly Owned Treatment Works such as SCAP’s members). Thus, unlike *NAM*, Respondents cannot meaningfully dispute that USEPA’s Objections promulgated or approved effluent limitations mandated to be included in the Permits and are thus subject to review under Section 509(b)(1)(E). *See NAM*, 2018 WL 491526, at *9; *see also* 33 U.S.C. § 1311(b)(1)(C) (governing the use of more stringent water quality-based effluent limitations).

Finally, Respondents cite inapposite authority in support of the Ninth Circuit's decision. *See* Resps. Br. 12-13. In *City of Ames v. Reilly*, the State took the rare position that it would not revise an NPDES permit to incorporate USEPA's objections. 986 F.2d 253, 255 (8th Cir. 1993). In response, USEPA conducted a public hearing regarding its proposed objections before entering a formal ruling. *Id.* In other words, USEPA did not issue a final objection letter nor did it undertake any action that was the functional equivalent of a permit denial. *See id.* Because "[v]arious administrative opportunities still remain[ed,]" the Eighth Circuit held that the City's petition was premature. *Id.* at 256. Here, by contrast, the State issued the Revised Permits, which incorporated and were the direct result of USEPA's Objections.

Similarly, in *American Paper Institute, Inc. v. USEPA*, USEPA objected to thirteen NPDES permits, but still allowed comments on the objections, and provided a public hearing. 890 F.2d 869, 872 (7th Cir. 1989). In response to the comments made to USEPA's objections, USEPA modified some of its original objections. *Id.* The court also reasoned that the holding in *Crown Simpson II* was concerned about creating a system of bifurcated review "of state-issued permits between state and federal courts." *Id.* at 874. Here, USEPA's Objections promulgated new NPDES effluent limitations without providing the opportunity for notice and comment on the Objections, and created that feared state/federal bifurcation.

III. SCAP's Petition Involves Questions of Immense and Immediate Practical Importance.

Finally, Respondents' assertion that SCAP's Petition does not involve questions of immense and immediate practical importance is wrong (Resps. Br. 13). The Revised Permits, which were modified based upon USEPA's Objections, have civil and criminal liabilities attached to the new conditions. 33 U.S.C. § 1319. To the extent that the requirements contained in those permits are unlawful, the permittees have an immense and immediate interest in rectifying those requirements prior to a potential enforcement action, similar to the interests of the property owners in *Hawkes*. *Hawkes*, 136 S. Ct. at 1815 ("As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'")

Furthermore, this Court's recent decision in *NAM* confirms the importance of determining what cases are appropriately heard under Section 509 of the Clean Water Act. The Ninth Circuit (supported by Respondents) would rather have permittees relegated to State administrative proceedings and tribunals to challenge the end result of USEPA's unlawful objections to State-issued permits than rule on the Objections itself. However, "[a]s this Court has noted time and time again, the Court is 'obliged to give effect . . . to every word Congress used' when it provided direct federal appellate court review to challenge the promulgation of effluent limitations and the denial of NPDES permits under the 'plain

language” of Clean Water Act Section 509(b)(1)(E) and (F). *See NAM*, 2018 WL 491526 at *14-15. Respondents’ statement that USEPA’s Objections do “not impose new constraints beyond those set out in EPA’s regulations” (Resps. Br. 13) is simply not true. Pet. 9-10.

Federal review of the merits of this clear case and controversy is required.

Respectfully submitted,

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