UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT, DIVISION OF ENVIRONMENTAL QUALITY, Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 4:22-cv-359 (BSM)

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

EPA attempts to present this case as a complicated administrative framework involving technical fact questions yet to be resolved, but this case poses a simple question ripe for review—whether Defendants made timely objections within the unambiguous mandates of its oversight role for Arkansas's National Pollutant Elimination Discharge System (NPDES) program. As is common under the Clean Water Act (CWA), the Environmental Protection Agency (EPA) delegated the administration of the NPDES program to Plaintiff Arkansas Department of Energy and Environment, Division of Environmental Quality (DEQ) when it approved Arkansas's NPDES permit program in 1986. While EPA delegated its primary authority to administer the NPDES program in Arkansas, it retains an important oversight role to review, comment on, and object to NPDES permits issued by DEQ. In its oversight role, EPA must comply with the timelines and procedures established in the CWA, federal regulations, and the Memorandum of Agreement between DEQ and EPA that sets out how the parties will coordinate within the NPDES permit program (NPDES MOA).

By and large, EPA does not dispute the factual timeline alleged by DEQ. Instead, EPA argues that it has many layers of administrative proceedings left to complete that may or may not resolve this case, and even then, once those proceedings are complete, DEQ should file its challenge in the Eighth Circuit, not this Court. But EPA ignores the fundamental question raised by DEQ in this action—whether EPA's objections were timely. EPA's brief (Dkt. 17) puts the cart before the horse. If, as DEQ argues, EPA missed its deadlines (by hundreds of days, no less) to object to the NPDES permits issued by DEQ, then there is no dispute that EPA cannot begin its administrative proceedings and there cannot be a review by the Eighth Circuit following those proceedings. The resolution of the simple question presented by DEQ has resounding impacts. EPA's *ultra vires* objections directly infringe Arkansas's sovereign authority to regulate its

waterways; regional authorities charged with watershed management are trying to make multi-million-dollar decisions based on DEQ's permits and now also on EPA's objections; and DEQ itself has expended significant public resources preparing and revising the permits at issue which will be wasted if EPA's untimely objections have force.

DEQ does not ask this Court to wade into complex, technical questions surrounding appropriate levels of pollutants in Arkansas waterways. This case does not require the Court to resolve EPA's belated objections to the NACA and Springdale permits. Rather, this case asks the Court to interpret the plain meaning of statutes and regulations to determine whether EPA's objections were timely within the confines of its authority. That question is well-within this Court's jurisdiction and is ripe for decision now.

For the reasons discussed below and in DEQ's Motion for Preliminary Injunction (Dkt. 3), DEQ respectfully asks this Court to preliminarily enjoin EPA's untimely objections and deny EPA's motion to dismiss.

STANDARDS OF REVIEW

The granting of a preliminary injunction "depends upon a flexible consideration" of whether (i) the applicant is likely to succeed on the merits; (ii) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in the applicant's favor; and (iv) an injunction is in the public interest. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1036 (8th Cir. 2016); *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). The grant of preliminary relief is largely within the discretion of the Court. *Richland/Wilkin*, 826 F.3d at 1035. A party seeking injunctive relief "is not required to prove [its] case in full at a preliminary-injunction hearing." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather, the analysis "mandates that the court's approach be flexible enough to encompass the particular circumstances of each case." *Dataphase*, 640

F.2d at 113. "[N]o single factor is determinative." *Id.* Instead, "where the balance of [all] factors tips decidedly toward a plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for a more deliberate investigation." *Id.*

To satisfy federal pleading standards, a claim must be merely "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim has facial plausibility when the complaint's factual content allows the court to draw the reasonable inference the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement.'" *Id*. "In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must 'accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the nonmoving party.'" *Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 784 (W.D. Ark. 2021) (*quoting Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012)). "[T]he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. Ultimately, evaluation of a complaint upon a motion to dismiss is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (*quoting Iqbal*, 556 U.S. at 679).

ARGUMENT

I. A Preliminary Injunction Is Necessary to Preserve the Status Quo

DEQ has established that EPA issued its objection letters hundreds of days after expiration of the statutory review period. Defendants have not presented an explanation for their failure to comply with the statutory timelines, let alone a convincing legal argument to support their actions. And, contrary to arguments in Defendants' Brief in Support of Motion to Dismiss and in Response to Plaintiff's Motion for Preliminary Injunction (Dkt. 17, "Defendants' Brief"), a preliminary injunction in this case would not go beyond the status quo, nor would it require

EPA to "take affirmative action." Def. Br. 16-17. Far from it, DEQ's priority is to stop EPA from advancing an unlawful administrative procedure. Preserving the status quo in this case means that DEQ retains its role as the primary permitting authority for the NACA and Springdale facilities, and that EPA does not take any further administrative action on the state-issued permits pending this Court's decision on the merits. Preserving the status quo is necessary to prevent irreparable harm from EPA's unlawful actions and protect the integrity of the CWA, the timelines and procedures established therein, and the statute's cooperative federalism foundation.

A. DEQ Will Succeed on the Merits of Its Claims

In its Complaint and opening brief, DEQ provided a detailed timeline and explanation for why EPA's objection letters were not timely issued and explained why Defendants' counter arguments would fail. Compl. ¶¶ 29-56; Plaintiff's Brief in Support of Motion for Preliminary Injunction (Dkt. 3, "Plaintiff's Brief") at 14-18. The timeline speaks for itself and demonstrates that EPA's objection letters were issued hundreds of days after the statutory timeline closed. Defendants do not dispute the timeline or that their objection letters were issued hundreds of days after the close of their statutory review period. Instead, Defendants cobble together a series of misleading facts and statements and cite to inapposite case law. Defendants' misdirection cannot hide a simple fact—EPA waived its right to object to the NACA and Springdale permits by failing to issue objections within the statutory time period.

As explained in DEQ's opening brief, after EPA's review period on those permits closed, DEQ was authorized to issue the final permits without further EPA review because (a) the proposed final permits were the same as or more stringent than the draft permits EPA previously reviewed; (b) EPA had not objected to the draft permits; and (c) significant public comments were not made on the draft permits. Pl. Br. 11 (*citing* 33 U.S.C. § 1342(d)(2), 40 C.F.R. § 123.44(b), NPDES MOA § III.B.7). Defendants have not substantively responded to the factual

assertions or legal arguments DEQ presented in support of (a) and (b), and therefore waived their right to do so. *See Hacker v. Barnhart*, 459 F.3d 934, 937 (8th Cir. 2006) ("A party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue."); *see also Johnson v. City of Little Rock*, 164 F. Supp. 3d 1094, 1097 (E.D. Ark. 2016) ("[C]ourts in the Eighth Circuit will not consider arguments raised for the first time in a reply brief.")

The only substantive issue disputed by EPA is whether "significant public comments" were made on the draft permits. Def. Br. 29. In other words, the only way EPA can prevail on the merits of this case is if its interpretation of "significant comments" is more compelling than DEQ's interpretation. As described more fully below, EPA's interpretation is self-serving, authorizes it to treat any and all comments as "significant," does not address the actual purpose of EPA's permit review and oversight role, and nullifies key aspects of the NPDES MOA that governs the relationship between DEQ and EPA in this context.

i. The Term "Significant" Must Have Some Meaningful Limitation

Both parties agree that the term "significant" is not defined in statute, EPA regulation, or the NPDES MOA. This definitional question is significant because both DEQ's preliminary injunction motion and EPA's motion to dismiss hang in the balance.

Faced with an undefined term, courts typically invoke standard rules of interpretation to provide it meaning and context. In the Eighth Circuit, "when a word is not defined by statute [or regulation], as is the case here, [it] normally construe[s] it in accord with its ordinary or natural meaning. Ordinarily, a word's usage accords with its dictionary definition. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted. . . ." *Thompson Truck & Trailer, Inc. v. United States*, 901 F.3d 951, 953 (8th Cir. 2018) (internal citations and quotations omitted); *see also Massachusetts Mut. Life Ins. Co. v. United States*, 782

F.3d 1354, 1365 (Fed. Cir. 2015) ("When construing a regulation, the court applies the same interpretative rules it uses when analyzing the language of a statute. Accordingly, it is appropriate to first consider the 'plain language [of the regulation] and consider the terms in accordance with their common meaning.'") (alteration in original) (internal citations omitted).

Webster's defines "significant" as "having or likely to have influence or effect" and as "important." Merriam-Webster's Collegiate Dictionary 1159 (11th ed. 2003); *see also Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1094 (8th Cir. 2021) (*citing Black's Law Dictionary* (11th ed. 2019 (defining "significant" as "[o]f special importance; momentous")). This definition is consistent with DEQ's interpretation and contrary to Defendants'. In this context, comments that are "significant" must be important enough to influence or affect the need for continued EPA oversight, which at base is to ensure compliance with the CWA. To be meaningful, this analysis must also take into account EPA's prior review. Here, DEQ provided the draft permit to EPA, and EPA did not comment on the proposed phosphorus limit or raise CWA compliance or water quality concerns. Declaration of Alan York in Support of Motion for Preliminary Injunction (Dkt. 4, "York Dec.") ¶¶ 6-7, 23-24. Oklahoma did comment on the phosphorus limit, and DEQ worked collaboratively with its regulatory partners in Oklahoma to address *and resolve* their comments. *Id.* ¶¶ 16, 27, Exs. P, Q. DEQ therefore did not consider the comments to be "significant" for purposes of EPA's CWA oversight. Pl. Br. 16-18. Put another way, DEQ did not believe Oklahoma's comments would have a meaningful influence or effect that would change the outcome of EPA's prior review or oversight of the permit because those comments were resolved and DEQ made the NACA permit more stringent (not less) than the draft permit.

DEQ acknowledged that comments from another state can be significant—particularly if those comments come from the state's NPDES permitting authority and the permitting state

rejects those comments—but those facts were not present in this case. *Id*. at 17; *see also* 33 U.S.C. § 1342(b)(5). Instead, DEQ explained how it worked to address the downstream state's comments to the satisfaction of that state. Pl. Br. at 17; *see also* Supplemental Declaration of Alan York in Support of Plaintiff's Motion for Preliminary Injunction (Supp. York Dec.) ¶ 23; York Dec. ¶ 16, Ex. P. These facts are more than sufficient to support DEQ's view that no "significant" comments were submitted during the public comment period that warranted EPA's further oversight and engagement.

By contrast, EPA appears to interpret the term "significant" so broadly that virtually any comment could be used by EPA to retain oversight authority, rendering the term meaningless in EPA's regulations and the NPDES MOA while also nullifying significant portions of that MOA. *See* 40 C.F.R. § 123.44(j); NPDES MOA § III.B.11. Unsurprisingly, EPA cites to inapposite case law to support its overly broad test.

The cases Defendants cite in support of their proposed "significance" test analyze an agency's obligation *under the Administrative Procedure Act* (APA) to respond to public comments submitted on proposed rules. Def. Br. 31. None of the cases EPA cites consider the CWA Section 402 NPDES permit program or EPA's oversight role. This is problematic because the rationale for determining the significance of comments in the context of the APA is very different than it is for EPA's oversight role under the CWA Section 402 program. As explained by Defendants' own cited precedent, an agency's obligation to respond to public comments during APA rulemaking is driven by requirements to fully explain a policy or legal decision, to consider all substantive comments submitted during a mandated APA public participation process, and to ensure that an agency considers all aspects of a problem during a generally applicable rulemaking. *Oakbrook Land Holdings, LLC v. Comm'r of Internal Revenue*, 28 F.4th

700 (6th Cir. 2022) (cited at Def. Br. 31). These concepts are designed to ensure that the APA's procedural mandates are satisfied, but do not speak to whether a state is adequately performing its delegated CWA authorities or whether a negotiated implementation agreement of EPA's oversight responsibilities like the NPDES MOA should be overridden.

For example, EPA suggests that *Carlson v. Postal Regulations Commission*, 938 F.3d 337 (D.C. Cir. 2019) requires an agency to respond "to significant comments that challenge 'a fundamental premise' underlying the proposed agency action" and that Oklahoma's comments "directly addressed the fundamental purpose of EPA's oversight [by] raising concerns that the total phosphorus limitations in the draft permits did not comply with the CWA" and therefore those comments were significant for purposes of EPA's oversight. Def. Br. 31. Defendants' Brief does not address the other comments that EPA identified as significant in its untimely objection letters—those from the City of Bentonville and the advocacy organization Save the Illinois River (STIR)—but if Defendants' arguments are to be taken seriously these comments must also fall within their legal test. The problem is that the Bentonville and STIR comments barely whisper a suggestion that the draft permit may not comply with the CWA and under any plausible interpretation would not be considered objectively significant for purposes of EPA oversight. Pl. Br. 18. The reality in the NPDES permit program is that public comments from any individual, business, property owner, or a state may assert that a permit or condition does not comply with the CWA. A mere assertion, by any individual or organization, cannot be sufficient to reopen EPA's oversight and review period.

Perhaps more troubling is Defendants' view that, "EPA was always entitled to exercise its own independent judgment to determine the significance of comments and how they are to be addressed." Def. Br. 32. This statement is not supported by a citation to any law, regulation, or

guidance (even if legally nonbinding), and it suggests that EPA believes itself to have complete discretion to determine that any comment is significant, reopen its statutory review period at any time, and assert authority or control over how a state agency responds to certain comments. This position effectively protects EPA from the consequences of conducting a cursory review of a draft permit and preserves its ability to step in at any time during or after the state permit process to impose its policy preferences. This is clearly not what Congress intended when it established specific statutory review periods within which EPA is to exercise its oversight authority.

More importantly, EPA's interpretation would effectively override the draft versus proposed permit review provisions of the NPDES MOA. As explained in DEQ's Opening Brief (Pl. Br. 1-4), uder the CWA and EPA's regulations, EPA is authorized to review proposed state NPDES permits and object to those permits within 90 days. 33 U.S.C. § 1342(d)(2). However, for purposes of streamlining EPA's oversight role, EPA and a state can agree that EPA's review could occur at the draft permit stage, essentially occurring concurrently with the required public comment period. 33 U.S.C. § 1342(e); 40 C.F.R. §§ 123.24, 123.44. The NPDES MOA includes these streamlined procedures such that EPA would step in for additional review only if significant public comments were received. *Id*. In principle, this system works to streamline the process for all parties, but if EPA can effectively declare any public comment significant and override a state's determination of significance even after a final permit is issued, then the review provisions of a negotiated NPDES MOA become meaningless. There needs to be some rational boundary.

Where that boundary lies likely should be the subject of future rulemaking. This Court need not define the term with precision to resolve the instant dispute, but it should adhere to foundational principles, including avoiding an interpretation that creates absurd results or renders

provisions of an instrument meaningless. *See Thompson Truck & Trailer, Inc.*, 901 F.3d at 953 (courts should avoid interpretations that lead to "absurdity" or "any contradiction of other parts of the instrument"); *see also Dorchester Mins., LP v. Chesapeake Expl., LLC*, 215 F. Supp. 3d 756, 761 (E.D. Ark. 2015) ("'A construction that neutralizes any provision of a contract should never be adopted, if the contract can be construed to give effect to all provisions.'") (internal citations omitted). DEQ's interpretation adheres to those principles while EPA's does not.

To reopen EPA's oversight and review period, a "significant" comment should create a circumstance where the analysis EPA initially used to evaluate a permit no longer applies based on some new information that EPA did not have available during its initial review. Not just new information that a commenter disagrees with the draft permit, but actual new technical, design, engineering, water quality, or other specific data or information that changes how EPA would have evaluated the permit in the first place. Additionally, the CWA requires DEQ to provide EPA comments from affected states that DEQ *rejects*. 33 U.S.C. § 1342(b)(5). This CWA provision indicates that whether and how DEQ responds to a comment should also be considered before triggering a second EPA review period. In other words, if DEQ receives a comment and works with the commenter to address the concern, this should factor into whether the comment triggers a second EPA review period.

In this case, DEQ considered and responded to all comments received, worked closely with its counterparts in Oklahoma to address their concerns, and even made the NACA permit more stringent than the version EPA reviewed. Pl. Br. 16. On these facts, DEQ is likely to succeed on the merits of its claims because it appropriately concluded that no comments received on either permit were "significant" to reopen EPA's oversight and review period.

ii. DEQ Was Not "On Notice" That EPA Considered Oklahoma's Comments to Be "Significant"

Defendants' claim that DEQ was "on notice" prior to issuance of the permits that EPA considered certain comments to be "significant" is simply inaccurate. Defendants assert that DEQ was on notice as early as February 2021 that EPA considered Oklahoma's comments on the NACA permit to be "significant," and that DEQ was "well aware" that EPA also considered comments on the Springdale permit to be significant. Def. Br. 30-31. The record before this Court demonstrates otherwise.

EPA did not express to DEQ in the February 2021 letter that any comments on the NACA permit were "significant" for its oversight purposes. EPA's February 11, 2021 letter states, "our office was made aware of concerns expressed by the Oklahoma Water Resource Board (OWRB) and the Oklahoma Conservation Commission" and "[i]n light of this additional information EPA requests additional information on the proposed permit as stated below." York Dec., Ex. C at 1. EPA could easily have stated in its letter that it considered the comments to be "significant," but it did not. Even so, DEQ engaged with EPA in a good faith effort to address EPA's concerns, just as it did with Oklahoma. York Dec. ¶ 45; York Supp. Dec. ¶¶ 9-20; Declaration of Stacie Wassell in Support of Motion for Preliminary Injunction ("Wassell Dec.") ¶¶ 12-13.

Seven months later, in its September 28, 2021 letter, EPA also did not express to DEQ that it considered any comments on the NACA permit to be "significant." In that letter, EPA does not even mention comments from the Oklahoma entities or ask whether that state's concerns have been addressed, but generically states that "[d]uring the public comment period on the draft permit, we [EPA] expressed concerns about the proposed Tier II phosphorus limits. . . ." York Dec. Ex. E at 1. DEQ is not aware, and the record before this Court does not reflect, that

EPA commented on the Tier II phosphorus limit during the public comment period.[1] York Supp. Dec. ¶¶ 3-7.

Following receipt of EPA's September 28, 2021 letter, DEQ and EPA engaged both in person, and via email and telephone.[2] On October 19, 2021, DEQ and EPA leadership and staff met in person to discuss the draft NACA permit. Wassell Dec. ¶¶ 4-13; York Supp. Dec. ¶¶ 13-17; York Dec. ¶ 14. During this hours-long meeting the discussion focused on EPA's preferred 0.1 mg/L phosphorus limit and DEQ's offset calculations. *Id.* At no time during the meeting did EPA raise or discuss Oklahoma's comments or communicate directly or indirectly to DEQ that it considered those comments to be "significant" for purposes of its oversight. Wassell Dec. ¶¶ 15-16; York Supp. Dec. ¶ 22.

It was not until December 30, 2021, 29 days after DEQ issued the final permits that EPA for the first time asserted that it considered comments received on the NACA and Springdale permits to be "significant." York Dec. Exs. G, M. DEQ did not have notice or knowledge that EPA considered Oklahoma's comments to be significant until it received these letters. Wassell Dec. ¶¶ 16-17; York Supp. Dec. ¶ 22. Yet, it is on these facts that Defendants' Brief claims that DEQ "prematurely" issued the final permits without observing the process for when "significant" comments are received. As discussed in detail in its opening brief, DEQ did not consider any comment received on either permit to be "significant" and issued the final permits in the normal course. Pl. Br. 5-9. EPA's attempt now, before this Court, to suggest that DEQ was

[1] EPA's comment letter on the draft NACA permit expressed no concerns at all about the phosphorus limit in the NACA permit. York Dec. ¶ 7, Ex. B. It was not until *after* EPA's review period closed and *after* the public comment period closed that EPA raised any concerns with the phosphorus limit. York Dec. ¶¶ 7-9.

[2] The Declaration of Charles Maguire states that after EPA issued its September 28, 2021 letter, DEQ issued the NACA and Springdale permits "without further communication with EPA." Declaration of Charles W. Maguire (Dkt. 17-1, "Maguire Dec.") ¶ 26. This statement is demonstrably false, and DEQ assumes that it was made in careless error and without malice. *See, e.g.*, Wassell Dec. ¶¶ 4-15; York Supp. Dec. ¶¶ 11-20.

on notice of EPA's "significant comment" concerns prior to issuing the final permits is, *at best*, *ex post facto* justification to support a litigating position.

B. DEQ Will Be Irreparably Harmed Absent Preliminary Relief

Defendants contend that injunctive relief is not warranted because all they have done is send a few innocuous letters that have no legal, administrative, or economic effect on the Plaintiff or the permittees. Defendants' arguments are misleading. In reality, and as Defendants themselves have demonstrated in their court filings, EPA believes that its letters have the immediate effect of changing the status of state-issued *final* permits, which establish legally binding rights and obligations, to *proposed* permits that have no force or effect of law. Defendants also explain throughout their brief that they believe the objection letters have initiated a months- or years-long administrative process. There is no world in which purporting to invalidate lawfully issued permits and commencing a lengthy administrative process has no legal, administrative, or economic effect.

Defendants completely disregard the actual harm caused by a federal agency ignoring its own statutory deadlines, inserting itself into a state process hundreds of days late, and invalidating lawful state-issued permits. Defendants criticize DEQ's opening brief as "a treatise on the cooperative federalism framework of the CWA." Def. Br. 32. But that framework is critical to the state's ability to administer its EPA-approved programs, and contrary to Defendants' assertions, DEQ does recognize and respect the role of EPA in performing its administrative oversight authority under the CWA. Pl. Br. 1-4 (outlining EPA's oversight role), 11-13 (reciting EPA's oversight process for both permits); York Dec. ¶¶ 6-15 (providing EPA review of NACA permit); 23-30 (providing EPA review of Springdale permit); ¶ 45 (continued engagement with EPA past its oversight period); York Supp. Dec. ¶¶ 9-20 (explaining DEQ's continued engagement with EPA past its oversight period); Wassell Dec. ¶ 3-15 (explaining

DEQ's effort to address EPA's comments in good faith even well after its oversight period). But EPA's authority must be exercised within the boundaries, and statutory deadlines, that Congress establishes.

The value of a legal treatise is that it shares with a broader community the foundational principles of a legal issue. That DEQ's opening brief would focus on cooperative federalism should be noncontroversial, as it is one of the bedrock principles of the CWA and the NPDES program that it establishes: "It is the policy of Congress that the States . . . implement the permit programs under sections 402 and 404 of the [CWA]." 33 U.S.C. § 1251(b); s*ee also New York v. United States*, 505 U.S. 144, 167 (1992) (describing the CWA as "a program of cooperative federalism"). This Court should disavow EPA of its belief that it can run roughshod over that cooperative federalism framework, ignore its own deadlines, and impose its policy preferences at will. The harms presented in DEQ's opening brief and declarations are real and immediate. They cannot be simply disregarded by an executive branch agency that has grown accustomed to ignoring the will of Congress.

Equally troubling is Defendants' view that DEQ is simply another member of the public complaining about having to go through an administrative process that it deems unnecessary. Def. Br. 33. Setting aside the State's sovereign status, its lawfully-delegated authorities under the CWA, Congress' preference for state control over the NPDES permit program, EPA's own regulations, and the NPDES MOA that was negotiated in good faith between two governments, that EPA believes DEQ is simply an "unwilling participant" in some standard administrative proceeding underscores EPA's paternalistic view of the cooperative federalism framework—it is a partnership as long as EPA's views are controlling.

EPA also argues that "mere participation" in its administrative processes does not constitute irreparable harm because "[a] person cannot evade agency process simply by claiming the agency is operating Ultra Vires." Def. Br. 33 (*quoting West v. Bergland*, 611 F.2d 710, 711 (8th Cir. 1979)). However, EPA neglects to mention that in the sentence immediately following the language it quotes, the Eighth Circuit explained that "early judicial review" *is warranted* "in those cases in which agencies have transgressed clearly marked boundaries to their jurisdiction." *West*, 611 F.2d at 717. That is precisely the case here where EPA blew its jurisdictional deadlines to object to DEQ's permits by hundreds of days. This type of question is "one well within judicial competence" to assess, and "not one requiring application of specialized understanding" that would require technical knowledge or understanding that EPA may be better suited to determine. *Id*. at 715. Moreover, the *West* court noted that a party can demonstrate "irreparable injury" by showing that complying with a challenged agency action would cause "the immediate destruction or loss of the very substantive right that the [plaintiff] seeks to protect." *Id*. at 718. Again, that is precisely the type of harm to Arkansas's sovereign authority that DEQ will suffer absent injunctive relief. Pl. Br. 32. For these reasons, the Eighth Circuit actually held that the district court had properly found that the plaintiff in *West* did not have to exhaust his administrative remedies prior to filing in federal court. *Id*. at 720. The same result should hold here.

DEQ's irreparable harm is not simply monetary, although the State does take wasting taxpayer resources seriously. As explained in its opening brief and accompanying declaration, participating in the continued illegitimate administrative process following EPA's waiver of that process will require significant expenditure of time and resources, unless DEQ simply abdicates its legal responsibilities to its stakeholders, which will prohibit DEQ from deploying those

resources on other important aspects of its mission. Pl. Br. 19-20; York Dec. ¶¶ 33-38. That includes staff time that could be processing other permit applications, developing standards, monitoring pollution events, and other mission-critical activities. Perhaps EPA is unaware of the actual costs and resources needed to run an NPDES program, as it oddly questioned DEQ's expenditures in issuing the NACA and Springdale permits ("if true"). Def. Br. 34. But to suggest that the State could not be harmed absent some threat to its continued existence (*id*.) again places the State on equal footing, according to Defendants' view of the world, with other members of the public in a standard administrative setting.

EPA also argues that DEQ's irreparable harm—diverting limited state resources away from other environmental causes—is not "certain and great" and of sufficient "imminence" because those costs are both "sunk" and speculative. Def. Br. 34 (*citing Iowa Utilis. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996)). Again, EPA ignores the authority it relies on. In *Iowa Utilities Board*, the Eighth Circuit held that state agencies had alleged irreparable harm resulting from federal agency overreach. There, like here, the federal agency argued that the state agency plaintiffs alleged harm that was uncertain and "merely speculative." *Id*. at 425. The Eighth Circuit disagreed, finding that participants in the marketplace were "already breaking down" as a result of the agency actions and some were altering their practices in anticipation of the proposed agency rule. *Id*. These changes in the marketplace demonstrated that the potential agency action would "derail current efforts" to the states' and industry actors' detriment. *Id*. The same is true here. For example, agreements and contracts to connect new customers with NACA's water treatment are now at risk because of the regulatory uncertainty created by EPA. Declaration of Michael G. Neil in Support of Motion for Preliminary Injunction (Neil Dec.) ¶¶ 27-33. Additionally, Springdale has halted its long-term planning process because it does not know

what its regulatory obligations will be over the next five years. Declaration of Heath Ward in Support of Motion for Preliminary Injunction (Ward Dec.) ¶¶ 8-10. And again, as in *Iowa Utilities Board*, if DEQ and others are later forced to incur expenses to challenge or otherwise adapt to EPA's untimely objections, they are unlikely to be able to recover those costs. 109 F.3d at 426.

Defendants' claims that the permittees are not harmed by EPA's actions demonstrate the agency's lack of understanding of how important regulatory certainty is for these facilities to conduct long term planning for capital improvements and rate setting. For example, with its DEQ-issued permit invalidated, Springdale has paused its typical planning process. Ward Dec. ¶ 10. This is because if EPA's objections are found by this Court to be timely, EPA's months- or years-long administrative process may culminate in a new permit with different discharge limits. Specifically, if EPA ultimately imposes its 0.1 mg/L phosphorus discharge limit, Springdale will need to plan for up to $60 million in upgrades to advanced treatment and a significant rate increase for its customers. *Id.* ¶¶ 11-15. If Springdale's permit is modified with some other phosphorus discharge limit, the treatment system and cost will likely be different, resulting in different rate changes. Springdale cannot conduct long term planning without knowing what its regulatory obligations are or will be over the next five years (the length of a NPDES permit term). *Id.*

Similarly, the permit DEQ issued to NACA authorizes a much-needed expansion to accommodate growth in its communities and regionalization. Neil Dec. ¶ 6-11, 14-15, 24. This expansion will bring new communities into the treatment program, resulting in significant improvements in water quality throughout the watershed, but it requires near-term facility changes that are already under contract and longer-term changes that require significant advance

planning. *Id*. ¶¶ 5-15; Wassell Dec. ¶¶ 11-12. With the DEQ permit invalidated, this expansion and all of the contracts and planning is on hold indefinitely. This not only affects NACA's ability to serve its customers effectively *but delays watershed improvements* that will result from the expansion and regionalization of small communities that currently do not treat wastewater to the level that NACA treats. Neil Dec. ¶¶ 6-14, 28-33.

DEQ has more than met its burden to show that the state, the permittees, and the regulated community will suffer irreparable harm if EPA's unlawful actions are not enjoined.

C. The Balance of Equities and Public Interest Favor a Preliminary Injunction

Defendants cite *Nken v. Holder*, 556 U.S. 418, 435 (2009) for the proposition that, when the government is opposing an injunction, the balancing of equities and public interest factors "merge." Def. Br. 34. While that is true, to be clear, the balance of equities and public interest also merge when state governments are parties. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 789 (7th Cir. 2011) ("Typically, after we balance these party-specific equities, we evaluate whether the injunction would advance or impede the public interest. That additional analysis is not necessary in this case, however, because the parties themselves … are governmental entities that represent the interests of the public.") (citations omitted). In this case, as in *Michigan*, government agencies are both the plaintiff and defendant. Importantly, Defendants do not argue that EPA's interests are superior because they are representing the people of the United States. Rather, Defendants argue that the balance of harms analysis overlaps with the public interest analysis because the government represents the "public." *Id*. Defendants do not take the argument one step further to assert that either the federal interest or the state interest is superior by virtue of one public interest compared to another. Other cases deciding injunctive relief in disputes between federal and state governments likewise do not attempt to evaluate which government, state or federal, more adequately represents the public. Rather,

courts assess the substantive merits of each government's argument regarding the best course for the public interest. *See, e.g., Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), as revised (Nov. 25, 2015); *Louisiana v. Biden*, 543 F. Supp. 3d 388, 418 (W.D. La. 2021).

As explained in DEQ's opening brief, the balance of equities and public interest factors weigh strongly in DEQ's favor. Pl. Br. 24-28. Here, EPA will suffer no harm if it's administrative process is stayed pending resolution of DEQ's claims, while DEQ will be forced to participate in a process that may ultimately be ruled unlawful; the role of DEQ as the lead permitting authority will be preserved as intended by Congress; DEQ's negotiated agreement with Oklahoma to improve the quality of the Illinois River watershed will be respected; and the expectation that EPA timely comply with its statutory obligations will be established.

EPA may argue in response that a preliminary injunction would allow the NACA facility to expand and increase its phosphorus discharges to the Illinois River watershed. Such an argument would be inaccurate because, as DEQ explained in the NACA final permit and fact sheet, before any expansion could result in an increase in phosphorus discharges, NACA must certify that any increases will be completely offset. York Dec., Ex. F. Moreover, DEQ must review and approve that certification before the Tier II phosphorus limit becomes effective. *Id.* Additional significant reductions of phosphorus inputs are expected with each community that connects to NACA's enhanced treatment facility, Neil Dec. ¶¶ 21, 24, which means that EPA's delays will actually stop beneficial water quality improvements from being implemented. In any case, as the state's environmental quality agency, DEQ has a stronger interest in the quality of water that is discharged within its borders than EPA. Its employees live, work, and recreate on or near those waters and care deeply about the health and wellbeing of the state's environment. To have that work rendered meaningless because EPA had second thoughts about the sufficiency of

its own permit review could undermine the confidence and working relationship between the state and federal governments going forward.

These factors, together with DEQ's likelihood of success on the merits and imminent harm absent a preliminary injunction, weigh heavily in DEQ's favor. *See Dataphase Sys. Inc.*, 640 F.2d at 113.

II. The Motion to Dismiss Should Be Denied

Defendants' Motion to Dismiss presents two arguments that rely on the same flawed premise: that EPA's objection letters and the resulting administrative and judicial processes preclude this Court from hearing the case. Def. Br. 22. The premise is flawed because the administrative process EPA relies on can only proceed—literally—if this Court concludes that EPA's objection letters were timely issued. If EPA's letters were issued hundreds of days too late, as the facts and record before this Court demonstrate, then there is no legitimate administrative process to exhaust—there will be no hearing five or more months from now,[3] no public input or additional evidence, no further factual findings by EPA, no EPA reconsideration of its prior objections, no EPA-issued or -denied permit, and no direct review in the Eighth Circuit. Simply put, Defendants have not raised pleading deficiencies, but rather a merits issue—i.e., whether EPA's objection letters were timely issued—that is improper for final resolution at this stage.

The standard of review is highly relevant here. In ruling on Defendants' 12(b)(6) motion, the Court must accept as true all facts pleaded by the non-moving party *and* must grant all reasonable inferences from the pleadings in favor of the non-moving party. *Gallagher*, 699 F.3d

[3] As explained in its opening brief, DEQ requested a hearing on EPA's objections under protest in an effort to prevent EPA from assuming permitting authority over the NACA and Springdale facilities during the pendency of this legal action. Supp. York Dec. Exs. F, G. If DEQ had not requested hearings under protest, EPA would have acted to assume exclusive permitting authority over the NACA and Springdale facilities and DEQ's interests would have been significantly harmed. DEQ does not believe EPA's objection letters are valid, and therefore, while it requested hearings under protest, DEQ believes the administrative process that would follow is unlawful.

at 1016. Here, there is a legitimate dispute regarding the meaning of the term "significant." DEQ alleged that it "did not consider the comments submitted during the comment period to be significant" for either the NACA or Springdale permits. Compl. ¶ 40 (NACA comments), ¶ 52 (Springdale comments). For purposes of resolving the motion to dismiss, those allegations must be accepted as true. The same is true for DEQ's allegations that it was not on notice of EPA's contrary view until after the final NACA and Springdale permits were issued. *Id*. ¶¶ 35, 42, 50, 54, 55. The same is true for facts concerning potential water quality improvements that would result from a NACA facility expansion. York Dec. Ex. F., Neil Dec. ¶¶ 21, 24. And while the meaning of the term "significant" is ultimately a legal issue to be resolved by this Court, that it have the meaning ascribed by DEQ during the permitting process is a reasonable inference from the pleadings that should at a minimum be resolved, for the instant motion, in favor of DEQ.

A. This Court Has Jurisdiction to Review EPA's Final Actions

Defendants contend that this Court lacks jurisdiction over DEQ's claims because the challenged agency actions are not final. Def. Br. 25-28. But EPA once again misapprehends the key dispute in this case. The issue is whether EPA waived its opportunity to object to the NACA and Springdale permits. EPA's decision to waive its right to object by failing to issue the requisite objection letters within the mandated time period is final and properly before this Court.

Under the finality framework set out in *Bennett v. Spear*, 550 U.S. 154 (1997), two conditions must be satisfied for an agency action to be final: "First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id*. at 177–78 (internal citations and quotations omitted).

By failing to object to the NACA and Springdale permits within its statutory review period, EPA affirmatively waived its ability to do so. 33 U.S.C. § 1342(d); 40 C.F.R. §§ 123.24(a), 123.44(j). EPA received the NACA permit on October 28, 2020, and the Springdale permit on December 14, 2020. York Dec. ¶¶ 6, 23. Pursuant to federal regulations and the NPDES MOA, EPA had 90 days to review, comment on, or object to these permits. 33 U.S.C. § 1342(d)(2). On January 26, 2021, EPA waived its opportunity to object to the NACA permit; and on March 14, 2021, EPA waived its opportunity to object to the Springdale permit. York Dec. ¶¶ 8, 25. These waivers are not merely tentative or interlocutory; they are final because the deadline to object to the draft permits has long since passed. There is no additional decision-making process that would turn back time. Those waivers also had immediate legal effect and consequences, as DEQ was authorized by the CWA, federal rules, and the NPDES MOA to issue the final NACA and Springdale permits with no further review by EPA. 33 U.S.C. § 1342(d); 40 C.F.R. §§ 123.44(j). The waivers therefore are final agency actions for which DEQ has no other adequate remedy at law, properly vesting this Court with jurisdiction. *See* 5 U.S.C. §§ 704, 706.

When it unlawfully attempted to reverse its waivers, EPA also decided that the final NACA and Springdale permits are in fact "proposed" permits under the CWA. York Dec., Exs. G, H, N, I. This determination purports to change state-issued and legally binding final permits into "proposed" permits that do not have the force or effect of law. This action immediately harmed the legal rights and responsibilities of both DEQ and the permittees that rely on the continued and proper administration of the NPDES permit program in Arkansas. York Dec. ¶¶ 32-38, 52-58. EPA's determination purports to impose additional administrative process that would only apply when EPA complies with its statutory timelines and procedures.

There is no additional agency decision-making process that would change EPA's determinations. EPA's argument that it is still working to resolve its objections to the proposed permits, which could result in the objections being lifted or EPA issuing its own permits, presupposes the outcome of the actual claim before this Court, which is that EPA's continuing administrative process is *ultra vires*. These final agency actions are therefore properly before the Court.

B. DEQ's Claims Are Ripe

Like their finality argument, Defendants' exhaustion and ripeness arguments presuppose the outcome of the core legal dispute before this Court. "The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention." *Vogel v. Foth & Van Dyke Assocs., Inc.*, 266 F.3d 838, 840 (8th Cir. 2001) (internal quotations omitted). Here, it is undisputed that EPA issued two objection letters hundreds of days after its statutory review period closed. Pl. Br. 6-9. The core elements of the ripeness test are easily satisfied. The disputed agency action is final, the issues presented for decision are purely legal for which no additional factual development through the administrative process would help shape the analysis, and no further administrative action is needed to clarify Defendants' strongly held position. *Action All. of Senior Citizens of Greater Phila. v. Heckler,* 789 F.2d 931 (D.C. Cir. 1986).

As discussed above, the challenged agency actions—EPA's waiver of the right to object to the draft NACA and Springdale permits—are final. The Court's review of those actions will not be enhanced by further factual development. Instead, the continued administrative process that DEQ is asking this Court to enjoin would focus on the underlying substantive provisions in the permits at issue, not whether EPA's objection letters were timely issued. The issue before the Court is therefore fundamentally legal. The Court's analysis of the term "significant" may depend in part on whether the public comment letters raise sufficient factual or legal issues to trigger continued EPA involvement under the NPDES MOA, but EPA's desired administrative

process would not develop further facts that would aid the Court in the threshold question before it. *Atl. Richfield Co. v. U.S. Dep't of Energy (ARCO)*, 769 F.2d 771, 782 (D.C. Cir. 1984) ("The scope of the Secretary's statutory authority is strictly a legal issue, and '[n]o factual development or application of agency expertise will aid the court's decision.'").

Defendants' claim that there will be no hardship from delayed review is not credible. Pl. Br. 22-24. An evaluation of the "hardship to the parties" criterion depends upon the "totality of [the] circumstances." *ARCO*, 769 F.2d at 783. Delayed review in this context means that before DEQ can challenge the timeliness of the objection letters, it will be subject to a lengthy administrative process to adjudicate the substance of the objection letters (e.g., whether DEQ's offset calculations are reasonable and accurate, whether EPA's imposition of a 0.1 mg/L phosphorus limit is arbitrary, etc.). This process may ultimately conclude with EPA assuming exclusive permitting authority over the NACA and Springdale facilities. Def. Br. 20; *compare* York Dec. ¶ 4 and Neil Dec. ¶¶ 24-25 *with* Maguire Dec. ¶¶ 15, 21, 45. Requiring DEQ to participate in this process now is akin to requiring DEQ to "bet the farm" before testing the validity of the objection letters. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010). And, as Mr. Neil explains in his declaration, contrary to EPA's assertion (Def. Br. 23), the potential differences in effluent limitations in DEQ's reissued permit compared to those in the administratively continued permit will have significant, tangible impacts on the regulated community in the very near term. Neil Dec. ¶¶ 30-33; Ward Dec. ¶¶ 10-16.

Moreover, the very first step in EPA's administrative process—scheduling a hearing—will take at least five months according to EPA, after which EPA will make a series of additional decisions that trigger additional procedures, all of which is likely to take a year or more. Def. Br. 20. Throughout that process, DEQ will be enforcing permits that have been administratively

continued for 4 years (NACA) and 13 years (Springdale), environmental improvements that would result from updated permits will not occur, the permittees will not be able to conduct their necessary long term planning procedures, and NACA will not be able to expand to meet the needs of its growing communities or improve the watershed through enhanced treatment for new customers. Neil Dec. ¶¶ 6-14, 30-32; Ward Dec. ¶¶ 8-15. All of this additional process would come after EPA waited hundreds of days to object to the permits in the first place. If EPA had objected to the NACA or Springdale permit when the CWA authorized it to do so—on or before January 26, 2021 and March 14, 2021, respectively—this entire administrative process may well be over by now. But EPA did not object when it was timely and instead waited hundreds of days and objected after final permits were issued by DEQ. There are significant hardships associated with delaying review of whether EPA violated the CWA, and there is a strong public interest in holding federal agencies accountable to their own statutory obligations, which underscores the need for the Court's consideration of this matter.

In any case, exhaustion is not required here, where it is "highly unlikely that the [agency] would change its position if the case were remanded to it." *ARCO*, 769 F.2d at 782; *Monson v. DEA*, 589 F.3d 952, 959 (8th Cir. 2009) ("We also note that "[a] party may be excused from exhausting administrative remedies ... if further administrative procedures would be futile."). EPA has stated in no uncertain terms that it believes it has its own "independent judgment" that allows it alone to determine that its review period was reopened by public comments that it alone deems to be "significant." Def. Br. 32. EPA has not advised DEQ or this Court that it is open to reconsidering, let alone changing its position that its objection letters are valid. It would be futile for DEQ to argue in any administrative proceeding before EPA that EPA's objection letters were untimely. *Monson*, 589 F.3d at 959 (plaintiffs "should not be required to further pursue a futile

course of action."); *ARCO*, 769 F.2d at 782 ("When resort to the agency would in all likelihood be futile, the cause of overall efficiency will not be served by postponing judicial review, and the exhaustion requirement need not be applied."). Requiring exhaustion in this case would be uniquely futile because DEQ would first have to acquiesce to the legitimacy of the administrative proceeding, a proceeding which by law could only occur if EPA's objection letters were validly and timely issued.

Defendants incorrectly assert that "[t]here are no relevant differences between this case and *Great Plains Coop*." Def. Br. 21. The statute at issue in *Great Plains Coop v. Commodity Futures Trading Commission*, 205 F.3d 353 (8th Cir. 2000), the Commodity Exchange Act (CEA), provides that a person aggrieved by a decision of the Commodities Future Trading Commission "is entitled to a full hearing on the record before the agency or an administrative law judge." *Monson*, 589 F.3d at 960. In *Great Plains*, the Eighth Circuit viewed plaintiffs' claims as an "end run" around that statutory scheme. 205 F.3d at 355. Defendants point to *Great Plains* and 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44 as the counterpart to the CEA hearing process, and assert it is DEQ's exclusive remedy. Def. Br. 21-22. However, DEQ is not seeking to "address" EPA's objections, and DEQ is not challenging EPA's substantive "decision" to object to the NACA and Springdale permits. DEQ claims that EPA violated the CWA when it issued the objection letters hundreds of days after the CWA authorizes it to do so.

In *Monson*, the Eighth Circuit distinguished *Great Plains* on the basis that, "plaintiffs in *Great Plains* had not received any indication from the ALJ that the CFTC's interpretation of the [CEA] would be upheld—the administrative process was ongoing and the outcome was not foreseeable." 589 F.3d at 960. The court went on to explain, "[h]ere, by contrast, the DEA has already indicated in no uncertain terms its intent to treat industrial hemp as a Schedule I

controlled substance under the CSA and to require registration pursuant to the Act before industrial hemp can be grown under North Dakota Law." *Id*. Here, like the DEA in *Monson*, EPA has said in no uncertain terms that it believes its objection letters to be lawful and that it has "independent judgment" to determine if and when its review period is reopened. As in *Monson*, pursuing further administrative process before EPA on the question of EPA's violation of the CWA "would be futile." *Id.*

C. The CWA Does Not Preclude This Court's Review

Defendants read 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44 as the exclusive route for DEQ to pursue its claims. Pl. Br. 22. But neither the statute nor the regulation "expressly limit the jurisdiction that other statutes confer on district courts." *Free Enter. Fund*, 561 U.S. at 489 (*citing* 28 U.S.C. §§ 1331, 2201). Where not express, the intent to restrict judicial review must be "fairly discernible" within the statute, and the claims must be those "of the type Congress intended to be reviewed within the statutory structure." *Id.* When Congress creates procedures designed to rely upon agency expertise, those procedures are generally intended to be exclusive. *Id.* However, in this case the Court must presume that Congress did not intend to limit jurisdiction over DEQ's claims because DEQ's claims are "wholly collateral to a statute's review provisions;" DEQ's claims are "outside the agency's expertise;" and "a finding of preclusion could foreclose all meaningful judicial review." *Id.*

DEQ's claims are not the type that Congress intended to be reviewed through EPA's permit objection process and are therefore wholly collateral to the administrative and judicial review provisions in the CWA. DEQ has not brought a technical dispute over the substance of EPA's objections, which is what the CWA's permit objection process envisions. DEQ's claims do not require any substantive or technical expertise. Rather, DEQ argues that EPA failed to comply with the CWA's mandatory timelines and is seeking to ensure that EPA be held

accountable to its own statutory obligations. This is not a question that Congress intended EPA to consider through its permit objection process and it is well outside of EPA's competence and expertise. DEQ's claims present a "standard question[] of administrative law, which the courts are at no disadvantage in answering." *Id*. at 491.

Finally, EPA's argument that this case belongs in the Eighth Circuit, not now but in the future, misses the mark. As EPA admits, "*if [it] issues or denies a final permit at the end of the proceeding*, exclusive jurisdiction to review that action would lie in the Eighth Circuit under 33 U.S.C. § 1369(b)(1)(F)." Def. Br. 24 (emphasis added). But DEQ's claims challenge EPA's authority to even begin the administrative proceedings because it failed to timely object. DEQ acknowledges that if the Court finds EPA's objection letters were issued timely and in compliance with the CWA, and DEQ must ultimately challenge the substance of EPA's objection letters, these are the types of claims that Congress intended to be reviewed through the 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44 procedures. However, at this time in this case, there is no administrative process for DEQ to circumvent. DEQ's claims are intended to prevent EPA from circumventing its own statutory and regulatory timelines.

DEQ filed concurrent lawsuits before this Court and the Eighth Circuit because each case raises different claims for which the different courts have primary jurisdiction. As explained in both the Petition for Review and the Complaint (Dkt. 1), the Eighth Circuit has jurisdiction over claims that EPA engaged in illegal water quality effluent limitation rulemaking pursuant to *Iowa League Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), a landmark decision with clear factual and legal similarities to DEQ's claims in its Petition. *Arkansas Dep't of Energy & the Env't, Dep't of Envtl. Quality v. United States Env't Protection Agency, et al.*, Case No. 22-1831 (8th Cir. 2022) (April 21, 2022 Pet. For Review). Contrary to Defendants' inaccurate characterization (Def. Br.

25, n. 7), DEQ is not asserting the illegal rulemaking claim in this Court. As the Complaint clearly articulates (Dkt. 1, ¶ 76, n.3, ¶ 98, n.4), DEQ asserts that EPA acted arbitrarily in declaring the final permits to be proposed based, in part, on its attempt to force its illegal effluent limitations into DEQ's permitting process. That is a distinct argument that will be briefed at the merits phase of this litigation. Thus, the cases can proceed concurrently, but to conserve resources and manage schedules, DEQ agreed to stay the Eighth Circuit proceeding pending this Court's resolution of the Motion for Preliminary Injunction. *See Arkansas Dep't of Energy & the Env't, Dep't of Envtl. Quality*, Case No. 22-1831 (8th Cir. 2022) (May 24, 2022 Order holding case in abeyance). Should this Court rule against DEQ on the ultimate merits of its claims, it is possible that DEQ's illegal rulemaking challenge in the Eighth Circuit might be joined with a potential future challenge in that court over the substance of any federally-issued NPDES permit under the direct review provision of 33 U.S.C. § 1369(b)(1)(F), but that is an issue beyond the current concern or jurisdiction of this Court. What is of current concern is that this Court clearly has jurisdiction over EPA's waiver decision and recharacterization of the final NACA and Springdale permits as proposed.

CONCLUSION

For the reasons set forth in the Complaint, Plaintiff's opening brief, and above, this Court should grant DEQ's Motion for Preliminary Injunction preventing EPA from pursuing further its untimely and therefore unlawful objections to the NACA and Springdale permits, including assuming permitting authority over those permits and deny Defendants' Motion to Dismiss.

Respectfully Submitted,

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