

**IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT**

No. 14-1150

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

EPA'S MOTION TO DISMISS PETITION

“those permit denials can be challenged at that time, and EPA will not be able to rely on the Final Guidance in defending a permit denial.” *Id.* at 252.

Similarly, here, even if EPA had indicated what it may do in a final permit decision (and the Agency did not even go that far), an aggrieved party may challenge any such decision at that time. Moreover, as explained in *Nat'l Mining*, in defending any such decision EPA may not rely on the letters at issue. Instead, the validity of the Agency's final permit decision will be tested based on its fidelity to the CWA, applicable regulations, and the administrative record.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The CWA's objective is to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). The Act prohibits the discharge of any pollutant to waters of the United States except as in accordance with certain restrictions. *Id.* § 1311(a). Further, the Act “establishes distinct roles for the Federal and State Governments.” *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). States must, for example, adopt water quality standards and submit them to EPA for review and approval. 33 U.S.C. § 1313(c). States must also designate “uses” for their waters (e.g., recreation), and their water quality criteria must protect those uses. *Id.* § 1313(c)(2)(A). Similarly, States must develop and implement antidegradation

be determined in a permit proceeding, and in the meantime members cannot be prosecuted for failing to abide by the EPA letters as they could for violating permits or duly promulgated regulations.

As this Court recently explained in dismissing a challenge to EPA's "Final Guidance," there is no finality if the Agency "merely explains how [it] will enforce a statute or regulation – in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule." *Nat'l Mining*, 758 F.3d at 252; *supra* pp. 2-3. Here, EPA did not even go that far. EPA commented on the scope and precedential reach of *Iowa League*. It did not resolve or even address whether and to what extent Agency officials may on a case-by-case basis, outside the Eighth Circuit, find *Iowa League* persuasive (if not binding) in any particular permitting matter.¹³ In the context of a particular permit proceeding, a party to that proceeding is free to make any arguments it wishes as to the extent to which *Iowa League* should or should not be followed, and the Agency's decision on that issue would then be subject to judicial review on a specific and more fully developed record.

¹³ Thus, this is not a case like *National Environmental Development Association's Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014), where the Court found EPA to have "announce[d] a new enforcement regime in response to [a] Sixth Circuit's decision." EPA announced nothing of the sort here.

made about the EPA letters here, i.e., EPA's statements about *Iowa League*. Other than sharing its legal conclusion that the decision is binding within the Eighth Circuit, and then noting that this Court has long since upheld the "bypass" regulation, 40 C.F.R. § 122.41, in *NRDC v. EPA*, 822 F.2d at 126; *supra* pp. 6, 13, EPA did not discuss its views in any level of detail relative to the detail it provided in its letters to Senator Grassley in *Iowa League*. EPA did not, for example, discuss whether and to what extent the Agency *may*, as opposed to *must*, follow aspects of the *Iowa League* decision on a case-by-case basis on matters arising outside the Eighth Circuit. EPA left these questions for another day (and permit proceeding).

CONCLUSION

The Center's petition for review should be dismissed for lack of finality and jurisdiction.

Respectfully submitted,

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