IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	Civil Action No. 4:22-cv-359 (BSM)

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

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INTRODUCTION

Defendants U.S. Environmental Protection Agency ("EPA") and Michael Regan, in his official capacity as the Administrator of EPA, respectfully submit this brief in support of EPA's motion to dismiss under Federal Rule of Civil Procedure Rule 12 and in opposition to the motion for preliminary injunction, ECF Nos. 2–4, filed by Plaintiff Arkansas Department of Energy and Environment, Division of Environmental Quality ("DEQ"). DEQ challenges EPA's four objection letters concerning two proposed National Pollutant Discharge Elimination System ("NPDES") permits and alleges that EPA's objections were untimely under Clean Water Act ("CWA"), 33 U.S.C. § 1342, and its implementing regulations in 40 C.F.R. § 123.44. Specifically, DEQ claims that EPA's objection letters, the first of which was sent on December 30, 2021, came too late as DEQ had issued the final permits earlier that month.

This matter is premature and dismissal is proper on three related but independent grounds: (1) DEQ fails to assert claims ripe for adjudication as DEQ has not exhausted its remedies through the administrative process provided by the CWA and its regulations for addressing EPA's objections; (2) judicial review in this Court would improperly interfere with the potential future jurisdiction of the Eighth Circuit; and (3) DEQ does not challenge a final agency action under the Administrative Procedure Act ("APA").

EPA's objections are interim steps in statutorily prescribed administrative proceedings for state permits—proceedings that are still underway. EPA has not yet scheduled a hearing, has not yet decided whether it will maintain its objections, and has not yet decided whether it will issue the permits in place of the state. There are still a number of steps to take and possible outcomes on the administrative level, some of which could fully resolve this litigation. DEQ's claims are therefore not ripe as DEQ has not exhausted its administrative remedies, nor has DEQ alleged a final agency action, which is required to state a cognizable claim under the APA.

In addition, the Court lacks jurisdiction because review here could interfere with the potential future jurisdiction of the Eighth Circuit. Under well-established precedent, a Circuit Court of Appeals has exclusive jurisdiction over claims that could interfere with its potential future jurisdiction. While EPA disputes that jurisdiction over permit objections is proper in *any* forum at this time, if and when EPA takes final agency action by issuing permits to facilities in Arkansas following its objections, exclusive jurisdiction to review those permits would belong to the Eighth Circuit under 33 U.S.C. § 1369(b)(1)(F).

Even if dismissal were not proper, injunctive relief is not warranted. Injunctive relief at this stage is an extraordinary remedy, and DEQ has failed to establish any of the four factors required for a preliminary injunction. First, there is no substantial likelihood of success on the merits. Despite DEQ's purported issuance of final permits, the permits are not final because DEQ failed to adhere to the process for state issuance of final NPDES permits, under which DEQ was required to prepare and send proposed permits to EPA for its review. EPA's objections therefore were a valid exercise of its oversight authority.

Second, DEQ fails to allege any harm that qualifies as irreparable. The alleged "harm to DEQ from the imposition of an arbitrary effluent limitation for phosphorus," Pl. Br. 24, has not and may not ever materialize, given that EPA has not even assumed authority over the two permits, let alone issued federal permits. The objections themselves do not impose legally binding effluent limitations, and as such, have not caused the two facilities at issue to change their operations. Lastly, the balance of equities and public interest, merged here because the United States is the defendant, weigh in EPA's favor. The public has an interest in ensuring that DEQ complies with the CWA when issuing permits in lieu of EPA and, specifically here, that excess phosphorous, a nutrient pollutant that diminishes water quality and threatens the Illinois

River's status as a Scenic River, is properly regulated. And the government has an interest in ensuring that the statutorily prescribed administrative process for resolving EPA's permit objections is followed.

BACKGROUND

A. Statutory and Regulatory Background

1. The Administrative Procedure Act

The APA identifies who may challenge agency action and what actions may be challenged. Section 702 provides a cause of action for those suffering actual injury as a result of a final agency action. 5 U.S.C. § 702. "Final agency action" forms the basis of a court challenge and provides the court the authority to review the case under the APA. 5 U.S.C. § 704 ("Agency action made reviewable by statute and *final agency action for which there is no other adequate remedy in a court* are subject to judicial review.") (emphasis added). "Final agency action" is the consummation of the agency's decisionmaking process from which "legal consequences will flow" or "rights or obligations have been determined." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Under the APA, the court may "hold unlawful and set aside" final agency action that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

2. The Clean Water Act

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with an interim goal, where attainable, to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and which provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Toward this end, Congress created the NPDES permitting program, which requires, with very limited exceptions, dischargers of pollutants to obtain an NPDES permit before discharging into waters

of the United States. 33 U.S.C. §§ 1311(a) and 1342. These permits control the quantity, rate and concentration of effluents that may be discharged. CWA Section 301 mandates that every permit contain (1) effluent limitations that reflect the pollution reduction achievable by using technologically based controls, 33 U.S.C. §§ 1311(b)(1)(A), and (2) any more stringent limitations necessary for the receiving waterbody to meet water quality standards, 33 U.S.C. § 1311(b)(1)(C). "An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger, and the [CWA] provide[s] for direct administrative and judicial enforcement of permits." *EPA v. California ex rel. State Water Res. Control Bd*., 426 U.S. 200, 205 (1976).

Water quality standards, which are adopted by each state for waterbodies within its jurisdiction, designate specific uses for the waters involved, and then establish water quality criteria in order to protect those uses. 33 U.S.C. § 1313(a), (c)(2). Water quality criteria can be expressed either in numeric form for specific pollutants, or in narrative form (*e.g*., "waters shall contain no phosphorus or nitrogen in such concentrations that would impair any existing or designated uses, unless naturally occurring"). Under the federal regulations implementing the NPDES program, if a discharge is found to cause, have the reasonable potential to cause, or contribute to an exceedance of a numeric or narrative state water quality criterion, a permit must contain effluent limitations as necessary to achieve state water quality standards. *See* 40 C.F.R. §§ 122.44(d)(l), (d)(5).

EPA's regulations further provide that where a state has not established a numeric criterion for a pollutant that has reasonable potential to cause a violation of applicable narrative criteria, the permitting authority must establish effluent limitations using specified options. 40

C.F.R. § 122.44(d)(1)(vi)(B). These options include establishing effluent limitations on a case-by-case basis, using EPA's recommended water quality criteria published under CWA Section 304(a), 33 U.S.C. § 1314(a), as supplemented where necessary by other relevant information. *Id*.

The CWA's cooperative federalism framework gives states "the primary responsibilit[y] and right[] . . . to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). A state can assume responsibility for administering the NPDES program only if the state adopts a program that meets specific requirements and is approved by EPA. *Id*. § 1342(b). Arkansas, like the majority of states, has the authority to administer the NPDES program. 51 Fed. Reg. 44518 (Dec. 1986). When states administer the NPDES program, EPA acts in an oversight role, and is responsible for reviewing proposed state NPDES permits to ensure those permits are consistent with the guidelines and requirements of the Act. 33 U.S.C. § 1342(d).

3. EPA's Role and Responsibilities Where the State Administers the NPDES Program.

The CWA and EPA's implementing regulations specifically address EPA's authority with respect to a permit proceeding in a state authorized to administer the NPDES program. The state must provide EPA with a copy of each permit application received. 33 U.S.C. § 1342(d)(1). During its consideration of the permit application, the state must notify EPA of actions related to the application, including any proposed permit.[1] *Id*. Section 1342(d)(2)(B) prohibits the state from issuing a permit if, within 90 days of receiving the proposed permit, EPA objects in writing to the issuance of the permit "as being outside the guidelines and requirements

[1] A "proposed permit" is a state NPDES permit prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the state. 40 C.F.R. § 122.2. A "draft permit," by contrast, is a document prepared under 40 C.F.R. § 124.6 indicating the state's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a permit. *Id*.

of this chapter." *See also* 40 C.F.R. § 123.44(c)(1)-(9) (identifying grounds for an objection by EPA).

The CWA gives the state a choice of how to respond to an EPA objection. The state may request a hearing. 33 U.S.C. § 1342(d)(4); *see also* 40 C.F.R. § 123.44(e) (hearing also may be requested by "any interested person"). If a hearing is held, following the hearing, EPA shall "reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision." 40 C.F.R. § 123.44(g). If EPA does not withdraw the objection, the state then has 30 days from notice of EPA's decision following the hearing to submit a proposed permit that is revised to address EPA's objection. 33 U.S.C. § 1342(d)(4); *see also* § 123.44(h)(2). If there is no hearing, the state has 90 days after the objection to submit a proposed permit that is revised to address the objection. 33 U.S.C. § 1342(d)(4); 40 C.F.R. §123.44(h)(1). Under both scenarios (hearing or not), if the state does not timely provide a revised proposed permit to address an objection, the authority to issue the permit passes to EPA exclusively. 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(h)(3).

EPA may agree, as it did here, to review draft permits instead of proposed permits in its Memorandum of Agreement for implementing the NPDES program with the state. 40 C.F.R. § 123.44(j). Under such circumstances, the state is not required to propose and send a proposed permit to EPA for review "unless the State proposes to issue a permit which differs from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment." *Id*.

If authority to issue the permit transfers to EPA, the agency follows its standard processes for issuing a permit under the federal NPDES permit regulations. Specifically, EPA provides an opportunity for comment, as well as a public hearing, on its proposed permit (or notice of intent

to deny a permit), considers and responds to comments, compiles the administrative record, and issues (or denies) a permit. 40 C.F.R. §§ 124.1-.21, 124.51-.66. EPA's final action on a permit application may generally be appealed to the Environmental Appeals Board, an EPA administrative tribunal. *Id*. § 124.19(a)(1). For NPDES permits, a decision by the Board constitutes the consummation of EPA's decision-making and is a mandatory prerequisite for judicial review. *City of San Diego v. Whitman*, 242 F.3d 1097, 1101–02 (9th Cir. 2001). *See* 40 C.F.R. § 124.19(e).

Congress carefully delineated the EPA actions that are reviewable under 33 U.S.C. § 1369(b)(1) and included final permit decisions issued under 33 U.S.C. § 1342. *See Nat'l Ass'n of Mfrs. v. DOD*, 138 S. Ct. 617 (2018). Thus, the appropriate Circuit Court of Appeals has exclusive jurisdiction to review the issuance or denial of NPDES permits. 33 U.S.C. § 1369(b)(1)(F); *see also Def. of Wildlife v. Browner*, 191 F.3d 1159, 1161 (9th Cir. 1999).

B. Factual Background

1. The Memorandum of Agreement

In 1986, EPA and the Arkansas Pollution Control and Ecology Commission entered into a Memorandum of Agreement ("MOA"), which established "policies, responsibilities and procedures, pursuant to 40 C.F.R. Part 123 and define[d] the manner in which the [NPDES program would] be administered" by the state. MOA, Introduction at 1, Ex. F to the Declaration of Charles W. Maguire ("Maguire Decl."), attached as Ex. 1. The MOA transferred responsibility for the issuance of NPDES permits to Arkansas but reserved oversight authority for EPA. *Id*., Section I at 7. By its own terms, "[n]othing in this MOA shall be construed to authorize the issuance of permits which do not comply with applicable provisions of federal or State laws, rules, regulations or effluent guidelines, nor to relinquish the right of EPA to petition

the State for review of any action or inaction because of violation of Federal or State laws, rules, regulations, or effluent guidelines." *Id*. Section III.B.20 at 26–27. Further, "[n]othing in this MOA shall be construed to limit the authority of EPA to take action" pursuant to the CWA. *Id*., Section VII.5.e at 57. EPA may request, in writing, that the state issue, reissue, or modify a permit. *Id*., Section III.B.4 at 16.

Under the MOA, DEQ must transmit copies of draft permits to EPA 45 days before the draft is published for public comment. *Id*., Section III.B.7 at 18. If no comments are received from EPA within 30 days, DEQ may proceed with issuance of the public notice. *Id*. Copies of all public notices and fact sheets describing the permits must be provided to certain federal and state agencies specified in the MOA as well as to adjacent states, if the draft permit affects them. *Id*., Section III.C.2 at 25. If no comments are received from EPA within 90 days of EPA's receipt of the draft permit, DEQ may assume EPA has no objection to issuance of the NPDES permit. *Id*., Section III.B.7 at 18.

EPA may make a general objection to the draft permit in the initial 30-day period. *Id*., Section III.B.8. EPA must then file specific objections within 90 days of the date of receipt of the draft permit. *Id*., Section III.B.9. If EPA fails to provide a written objection to a draft permit within the initial time period, EPA shall be deemed to have waived its right to object to the draft permit. *Id*.

After the public notice period, DEQ "shall consider all comments *received as a result of the public notice, including those comments from EPA* and may revise the draft permit as it considers appropriate," before issuing a permit. *Id*. Section III.B.11 (emphasis added). If "(a) the proposed permit is the same as or more stringent than the draft permit submitted to EPA . . . and (b) EPA has not objected to such draft permit, and (c) valid and significant public comments

have not been made, the State may issue the permit without further review by EPA." *Id*. However, "[i]n *all* other cases," the state will send one copy of the proposed permit to EPA. *Id*. (emphasis added). EPA will then, within 30 working days after receipt of the proposed permit, notify DEQ and the permit holder of general objections authorized under Section 402(d) of the CWA. *Id*. EPA will then notify DEQ of specific objections within 90 days of receiving the proposed permit. *Id*. If objections are not resolved in accordance with 40 C.F.R. § 123.44(h), DEQ may not issue the permit and exclusive authority to issue the permit passes to EPA. *Id*., Section 3.B.12.

2. Phosphorous in the Illinois River

The Illinois River watershed spans a portion of northwest Arkansas, northeast Oklahoma, and includes land in the Cherokee Nation. Maguire Decl., ¶ 4. The Illinois River watershed is an important resource for a diverse range of stakeholders. *Id*. The watershed holds significant cultural and natural resources important to the Cherokee Nation, whose reservation is downstream of the discharge. *Id*.

The primary water quality challenge the Illinois River faces is nutrient impairment (phosphorous and nitrogen) in Oklahoma. *Id*. Nutrient pollution causes an oxygen deficit that makes it difficult for certain aquatic plants and animals, including food sources for organisms up the food chain, to survive and thrive, thus degrading the entire ecosystem. *Id*. ¶ 6. Excess nutrients can in some circumstances lead to toxic algae that can present a risk to people. *Id*.

The permits at issue are central to a decades-long effort by EPA and the states to improve water quality in the Illinois River watershed, as well as at the heart of a long-running dispute between Arkansas and Oklahoma over water quality in rivers crossing into Oklahoma through Arkansas. *Id*. ¶ 3. In 1992, landmark litigation brought by Arkansas against Oklahoma resulted

in the Supreme Court's ruling that upstream states must protect downstream states' water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

Northwest Arkansas, where the facilities at issue in this case are located, is an economically strong area with several growing municipalities and a developed agricultural and poultry industry. Maguire Decl. ¶ 5. Both the industrial and municipal land uses in Arkansas contribute large amounts of phosphorus to the Illinois River watershed that Arkansas shares with Oklahoma. *Id*.

Arkansas has a narrative water quality criterion for nutrients, applicable to phosphorus, that states, in part, "[m]aterials stimulating algal growth shall not be present in concentrations sufficient to cause objectionable algal densities or other nuisance aquatic vegetation or otherwise impair any designated use of the waterbody." *Id*. ¶ 7. In 2002, Oklahoma established a numeric water quality criterion for total phosphorous of 0.037 milligrams per liter ("mg/L") for waterbodies within the state designated as "Scenic Rivers," including the Illinois River, which runs through Arkansas into Oklahoma. *Id*. ¶ 8. Oklahoma established a 10-year compliance schedule, meaning that permits did not need to include effluent limitations to meet this standard until 2012.[2] *Id*.

3. The NACA Permit

EPA's oversight of permitting with respect to a wastewater treatment facility owned by Northwest Arkansas Conservation Authority ("NACA"), and specifically its nutrient discharges, extends back more than a decade. Maguire Decl. ¶¶ 3, 14. In 2009, EPA objected to a draft

[2] Arkansas and Oklahoma have entered into various agreements regarding nutrient pollution in the Illinois River. Maguire Decl. ¶ 11. Nevertheless, none of these agreements purported to or could replace the CWA's requirement that discharge permits must include limitations necessary to meet water quality standards. *Id*.

permit for the facility, based on concerns that the draft permit's total phosphorous limitation of 1.0 mg/L was not sufficient to ensure achievement of either Arkansas's narrative or Oklahoma's numeric water quality standards. *Id.* ¶ 14. EPA ultimately withdrew that objection, after DEQ revised the permit to include a total phosphorous limitation of 0.1 mg/L. DEQ reissued the NACA permit with a total phosphorous limitation of 0.1 mg/L (as a 30-day average) in 2012, and that permit expired in 2017 and is administratively continued. *Id.*

On October 28, 2020, EPA received from DEQ a new draft permit for NACA, NPDES Permit No. AR0050024, which renewed and amended the facility's previous permit. *Id.* ¶ 13. The draft permit contained a 0.1 mg/L total phosphorous effluent limitation as part of its initial limitations (referred to as "Tier I" limitations) but allowed for an increase to 0.5 mg/L effective on the date of completion of construction of a new facility (referred to as "Tier II" limitations). *Id.* ¶ 15. Under Tier II limitations, NACA could double the amount of discharge from the facility, from 3.6 million gallons per day to 7.2 million gallons per day. *Id.* EPA sent comments on these provisions to DEQ within 30 days, on November 23, 2020. York Decl., Ex. B, ECF No. 4–2. The draft permit was made available to the public on December 20, 2020. York Decl., Ex. A, ECF No. 4-1.

EPA became aware of comments on the draft permit, including comments from two Oklahoma state agencies expressing concerns with the total phosphorous limitations, and on February 11, 2021, prompted by those comments, requested additional information from DEQ. Maguire Decl. ¶¶ 17–21; York Decl., Ex. C, ECF No. 4-3. Based on these comments and further analysis completed by EPA, the agency noted that the proposed increase in design flow from 3.6 million gallons per day to 7.2 million gallons per day and the increased total phosphorous limitation caused concern. *Id.* EPA requested additional information regarding DEQ's

evaluation of both technology-based effluent limitations and water quality-based effluent limitations. *Id*. In particular, EPA requested information on how the proposed Tier II limitations of 0.5 mg/L of total phosphorous would not impair water quality downstream and would not cause "backsliding" of effluent limitations. *Id*. DEQ had claimed that the Tier II limitations would not violate total phosphorous limitations because the expansion of the NACA facility would lead to net load reductions in total phosphorous, and EPA also requested additional information to support DEQ's claim. *Id*.

EPA and DEQ began communicating to address EPA's concerns. Maguire Decl. ¶¶ 22–25. On September 28, 2021, EPA identified additional concerns that it had with the draft permit. *Id*. ¶ 25; *see also* York Decl., Ex. E, ECF No. 4-5. EPA was clear that there were live concerns with the permit, and that EPA believed significant comments were received. Maguire Decl. ¶ 25. However, on December 1, 2021, DEQ prematurely issued what it deemed a final permit, without first preparing a proposed permit to send to EPA for review, as required by the MOA and 40 C.F.R. § 123.44(j). Maguire Decl. ¶¶ 26–27; York Decl., Ex. F, ECF No. 4-6. On December 30, 2021, EPA notified DEQ that:

> [DEQ's] issuance of the NACA permit violated the provisions of Clean Water Act (CWA) Section 402, federal implementing regulations at 40 CFR Part 123, and the Memorandum of Agreement signed between the EPA and the Arkansas Pollution Control and Ecology Commission (APC&EC) upon approval of the State of Arkansas to implement the National Pollutant Discharge Elimination System (NPDES) program ("the MOA"). Consequently, the December 1, 2021, NACA permit is not a validly issued final NPDES permit. Instead, the EPA has determined the December 1, 2021, permit to be a proposed permit subject to EPA review under CWA Section 402(d), 40 C.F.R. 123.44(j) and Section III.B.11 of the MOA.

Maguire Decl. ¶ 30; York Decl., Ex. G, ECF No. 4-7. In the letter, EPA also exercised its authority under 33 U.S.C. § 1342(d), 40 C.F.R. § 123.44(b), and Section III.B of the MOA, to make a general objection to the proposed permit within the 30-day window for EPA to review.

Id. EPA objected to, among other things, DEQ's failure to comply with the procedures required by the MOA, including submission of significant comments to EPA in writing; failure of the Tier II total phosphorous limitations in the proposed permit to ensure achievement of all applicable water quality standards, including those of the downstream State of Oklahoma, as required by 40 C.F.R. § 122.44(d); and violation of the anti-backsliding provisions found in CWA section 402(o) and 40 C.F.R. § 122.44(l). Maguire Decl. ¶ 30; York Decl., Ex. G, ECF No. 4-7.

On January 21, 2022, EPA made specific objections that further refined and explained its general objections. Maguire Decl. ¶ 31; York Decl., Ex. H, ECF No. 4-8. In response to a request by counsel for DEQ, EPA sent additional correspondence on April 1, 2022, further explaining its position. Maguire Decl. ¶ 36; York Decl., Ex. I, ECF No. 4-9. Under the CWA and its implementing regulations, DEQ had until April 21, 2022, to resolve EPA's objections or request a hearing. *Id*. ¶ 37. On April 21, 2022, DEQ timely requested a hearing "under protest."[3] *Id*. EPA has not yet scheduled a hearing and does not anticipate that one will be held within the next five months. *Id*. ¶ 38. Once EPA schedules a hearing, the agency will publically notice the hearing at least 30 days in advance. *Id*. ¶ 38.

4. The Springdale Permit

The Springdale Water and Sewer Commission, Springdale Water Treatment Facilities ("Springdale"), another wastewater treatment facility, currently operates its facility under an NPDES permit issued by DEQ in 2004, which expired in 2009 and is administratively continued. Maguire Decl. ¶ 43. The 2004 permit contains a total phosphorous limitation of 1.0 mg/L total phosphorous, as the permit was written before the 2012 compliance date for achievement of

[3] There is no provision in the CWA or its regulations that recognizes a request for a hearing "under protest."

Oklahoma's 2002 water quality standard of 0.037 mg/L for total phosphorous. *Id*. Springdale submitted a permit renewal application in 2008, but the renewal was held up because of concerns over the appropriate total phosphorous effluent limitations to include. *Id*.

On December 14, 2020, DEQ submitted a draft permit to EPA for review. Maguire Decl. ¶ 43; York Decl. ¶ 23. The draft permit contained a 1.0 mg/L total phosphorous effluent limitation continued from Springdale's previous permit. Maguire Decl. ¶ 43. EPA submitted comments but did not submit objections to the draft permit. *Id*. ¶ 46. On February 14, 2021, DEQ noticed the draft permit for public comment. York Decl. ¶ 22, Ex. J, ECF No. 4-10. During the public comment period, DEQ received comments from three Oklahoma state agencies, raising significant concerns to the draft permit. Maguire Decl. ¶ 47. One agency questioned the draft permit's change in measuring total phosphorous limitations, from a monthly average to a six-month average. *Id*. Other agencies raised similar concerns about whether the draft permit met water quality standards. *Id*. ¶¶ 48–49. As with the NACA permit, because DEQ received significant comments on the draft Springdale permit, DEQ was required to notify EPA, prepare a proposed permit, and send it to EPA for review. 40 C.F.R. § 123.44(j); Section III.B.11 of the MOA. And, as with the NACA permit, DEQ chose not to do so. Maguire Decl. ¶ 55. DEQ issued a permit it deemed final on December 1, 2021. York Decl. Ex. L, ECF No. 4–12.

Because DEQ had not completed the processes required under EPA's regulations and under the MOA to prepare and send a proposed permit to EPA prior to issuance of a final permit, EPA treated the purportedly final permit as a proposed permit under its regulations. Maguire Decl. ¶ 56. Just as with the NACA permit, on December 30, 2021, EPA timely made general objections based upon, among other things, the failure of DEQ to follow requisite procedures in

connection with the permit and the permit's failure to ensure compliance with applicable water quality standards as required by 40 C.F.R. § 122.44 (d)(1). Maguire Decl. ¶ 57; York Decl., Ex. M, ECF No. 4-13. On February 10, 2022, EPA made specific objections, which further refined and explained the bases for its objections to the permit. Maguire Decl. ¶ 60; York Decl., Ex. N, ECF No. 4-14. In response to a request by DEQ, EPA sent additional correspondence on April 1, 2022, further explaining its position. Maguire Decl. ¶ 63; York Decl., Ex. I, ECF No. 4-9. Under EPA's regulations, DEQ had until May 11, 2022, to resolve objections or request a hearing. Maguire Decl. ¶ 64. On May 9, 2022, DEQ timely requested a hearing. *Id*. EPA has not yet scheduled a hearing. *Id*. ¶ 65. As with the NACA permit, the agency does not anticipate that a hearing will be held within the next five months. *Id*.

C. Procedural Background

On April 21, 2022, DEQ brought suit in the Eighth Circuit alleging that EPA's objections set an unlawful effluent limitation without proper rulemaking, reviewable under 33 U.S.C. § 1369(b)(1)(E). *See Arkansas Dep't of Energy and the Env't v. EPA*, Case No. 22-1831 (8th Cir.). One day later, DEQ filed the instant action and, at the same time, moved for a preliminary injunction. ECF Nos. 1–4. DEQ's complaint alleges four separate counts, two of which challenge the general and specific objection letters to the December 2021 NACA permit, and two of which challenge the general and specific objection letters to the December 2021 Springdale permit. *See* York Decl., Exs. G, H, M, N, ECF Nos. 4-7, 4-8, 4-13, 4-14. The first count alleges that EPA's objections on the NACA permit exceeded EPA's authority. Compl. ¶¶ 57–73. The second alleges that EPA's objections were arbitrary and capricious under the APA because EPA improperly determined that the NACA December 2021 permit was a proposed permit. *Id*. ¶¶ 74–79. The third and fourth make similar allegations as to the Springdale permit. *Id*. ¶¶ 80–101.

STANDARD OF REVIEW

A. Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of claims where the court lacks jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). Jurisdiction is a threshold issue that a court must determine first. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause."); *see also Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir.2003). "The issue of ripeness, which has both Article III and prudential components, is one of subject matter jurisdiction." *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 362 F.3d 512, 520 (8th Cir. 2004).

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of claims where a plaintiff has failed to state a claim upon which relief can be granted. While the Court must treat every factual allegation as true, the Court need not accept as true "a legal conclusion couched as a factual allegation," nor inferences that are unsupported by the facts set out in the complaint. *Trudeau v. F.T.C.*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Additionally, the Court need not "accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice." *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004).

B. Preliminary Injunctions

Preliminary injunctions are "extraordinary remed[ies] that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22, 129 (2008); *see also Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc*., 815 F.2d 500, 503 (8th Cir. 1987). "The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full effective relief." *Ferry-Morse Seed Co. v. Food Corn, Inc*., 729 F.2d 589, 593 (8th Cir. 1984). Here, DEQ seeks an order to go

beyond the status quo and award it, at the outset, the entire relief it seeks through this lawsuit. However, "[r]equiring [EPA] to take affirmative action . . . before the issue has been decided on the merits goes beyond the purpose of a preliminary injunction." *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co*., 997 F.2d 484, 490 (8th Cir. 1993). "The burden of demonstrating that a preliminary injunction is warranted is a heavy one where, as here, granting the preliminary injunction will give plaintiff substantially the relief it would obtain after a trial on the merits." *Dakota Indus., Inc. v. Ever Best Ltd*., 944 F.2d 438, 440 (8th Cir. 1991). "[W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc*., 640 F.2d 109, 114 (8th Cir. 1981). "The burden of proving that a preliminary injunction should be issued rests entirely with the movant." *Goff v. Harper*, 60 F. 3d 518, 520 (8th Cir. 1995) (citing *Mod. Comput. Sys. Mod. Banking Sys.*, 871 F.2d 734, 737 (8th Cir. 1989) (en banc)).

When one party is a United States agency, the public interest "merge[s]" with that agency's interest, and the public interest weighs in favor of the agency's decision. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *cf. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 549 (1978). Indeed, "[c]ourts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. . . . Both are instruments for realizing public purposes." *Scripps-Howard v. FCC*, 316 U.S. 4, 15 (1942) (cited approvingly by *Nken*, 556 U.S. at 421, 426–27); *see also Salazar v. Buono*, 559 U.S. 700, 714 (2010) ("a court should be particularly cautious when contemplating relief that implicates public interests." (citations omitted)).

ARGUMENT

I. The Court Should Dismiss for Lack of Jurisdiction.

The Court should dismiss DEQ's complaint for lack of jurisdiction for two related but independent reasons. First, DEQ's claims are not ripe as it has not exhausted its administrative remedies under the CWA's statutorily prescribed process for resolving EPA's objections to proposed permits. Thus, DEQ's claims are not fit for judicial review, and DEQ will not suffer hardship from delaying review. Second, if EPA eventually issues or denies a permit, exclusive jurisdiction to review that action would lie with the Eighth Circuit. This Court should dismiss the action to avoid infringing on the Circuit Court's potential future jurisdiction.

A. DEQ's Claims Are Not Ripe as DEQ Has Not Exhausted its Administrative Remedies.

The Court lacks jurisdiction because DEQ's claims are not ripe. "The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000). The doctrine seeks "'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.*; *Paraquad, Inc. v. St. Louis Hous. Auth.*, 259 F.3d 956, 958 (8th Cir. 2001) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). The ripeness inquiry requires examination of both the "'fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Neb. Pub. Power*, 234 F.3d at 1038; *see also Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003). "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).

Because DEQ has not exhausted its administrative remedies, it fails to meet either prong of the ripeness test.

1. DEQ's Claims Are Not Fit for Judicial Review.

Under the fitness prong of the ripeness test, courts consider "whether the agency action is final;[4] whether the issue presented for decision is one of law which requires no additional factual development; and *whether further administrative action is needed to clarify the agency's position*." *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986) (emphasis added). "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Anderson v. Sullivan*, 959 F.2d 690, 693 (8th Cir. 1992) (citing *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975)); *see also Great Plains Coop v. Commodity Futures Trading Com'n,* 205 F.3d 353 (2000). The administrative remedies process hones the factual record and brings clarity to the legal issues presented in the case. *See Porter v. Nussle*, 534 U.S. 516, 525 (2002) ("for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy").

Under 33 U.S.C. § 1342(d) and federal regulation 40 C.F.R. § 123.44, there is a clear administrative process for addressing EPA objections to proposed permits, which is not yet complete. *See Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 871 (7th Cir. 1989) (providing background on the permit review process). EPA has merely sent letters notifying DEQ that,

[4] Moreover, the existence of "final agency action" is "'a crucial prerequisit[e]' to ripeness." *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003) (citation omitted). As explained more thoroughly below, EPA's objections are not final agency actions. *See infra* Argument, Part II.

because DEQ never prepared and sent proposed permits to EPA for review under 40 C.F.R. § 123.44(j) and the MOA, Section 3.B.11, EPA regards the December 2021 permits as proposed permits under the CWA. *See* York Decl. Exs. G, H, M, N, ECF Nos. 4-7, 4-8, 4-13, 4-14. The letters also contain EPA's general and specific objections to the proposed permits. *Id*. The objections are not legally binding, and DEQ may challenge them, as it has, by requesting hearings for both the NACA and Springdale permits.[5]

Those requests set into motion two administrative processes—one for the NACA permit and one for the Springdale permit. When a hearing is requested by the state, EPA must conduct one. 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(e). After the hearing, EPA must either reaffirm, withdraw, or modify its objections. 40 C.F.R. § 123.44(g). If EPA withdraws its objections, the December 2021 permits may stand as final permits (subject to judicial review in state court). If EPA does not withdraw its objections, DEQ has 30 days from notification of EPA's decision following the hearing to submit a revised permit that addresses EPA's original or modified objections. 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(h)(2). If DEQ does so, the objections are essentially moot and DEQ may issue the revised permits. *Id*. If DEQ does not submit a revised permit, authority over the permit transfers to EPA, and EPA "may" issue a permit. 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(h)(3). This would require further additional administrative processes (including the opportunity for notice and comment on the draft permit terms as well as a public hearing), and any permit would be subject to review by EPA's Environmental Appeals Board and the Circuit Court. *Id*.; *see also* 40 C.F.R. §§ 124.1-.21, 124.51-.66; 33 U.S.C. § 1369(b)(1)(F).

[5] Hearings have not yet been scheduled and EPA does not anticipate scheduling them within the next five months. Maguire Decl. ¶¶ 38, 65.

EPA's objections, therefore, are simply an interim step in an administrative proceeding, which, if completed, may result in either a withdrawal of EPA's objections (in which case DEQ's claims would be resolved) or EPA's issuance or denial of a federal permit, which action could be challenged only in the Eighth Circuit. 33 U.S.C. § 1369(b)(1)(F). Thus, the time and place to *presently* challenge both the timeliness of EPA's objections and the merits is not in this Court but in the ongoing administrative proceedings. Nothing in the CWA or its implementing regulations contemplate judicial review at this premature stage, and allowing DEQ's claims to advance would "short-circuit" an administrative process that Congress prescribed to address EPA's objections to state NPDES permits.

There are no relevant differences between this case and *Great Plains Coop,* 205 F.3d at 355 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205 (1994)). There, the Eighth Circuit affirmed a district court's dismissal for lack of jurisdiction of an action seeking injunctive relief to halt an administrative proceeding before the Commodity Futures Trading Commission. The court concluded that the plaintiff's premature complaint constituted an "impermissible attempt to make an 'end run' around the statutory scheme," because "Congress intended for challenges to adverse administrative actions under [the statute] to occur only after the issuance of final orders of the [agency], and then only in the appropriate court of appeals." *Id*. at 355. There too the plaintiff alleged that the statutory provisions providing for administrative review did not apply because the agency itself lacked jurisdiction, and the district court had authority to determine the limits of statutory authority. *Id*. at 355–56. The court, however, rejected the plaintiff's claim as premature and concluded that administrative process must first be completed before judicial review. *Id*. at 355.

The same considerations are present here. 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44 provide a mechanism for administrative review of EPA's objections to a state NPDES permit. Further, 33 U.S.C. § 1369(b)(1)(F) provides a mechanism for judicial review of final permits that may be issued at the end of that administrative process, but does not provide for judicial review of EPA's objections, standing alone. Thus, should the Court allow DEQ's premature challenge to an interim step in the administrative process, it would "defeat the purpose" of these statutory and regulatory provisions. *Great Plains*, 205 F.3d at 355. DEQ should not be allowed to "short-circuit the administrative review process and the development of a detailed factual record by the agency." *Id*.

Even if this Court finds that DEQ need not exhaust its administrative remedies, there is no question that EPA's objections have not been resolved and that future factual development will aid the Court's review. It would be helpful for the proper reviewing court to know what occurs at the hearing, whether EPA modifies, reaffirms, or withdraws its objections, and whether EPA issues its own permit. Therefore, this is a case where additional factual development would aid the Court's review because "there are many unresolved uncertainties," and harm is not certainly impending. *Paraquad*, 259 F.3d at 960.

2. DEQ Will Not Suffer Hardship from Delayed Review.

As addressed *infra* Argument II, EPA's objections do not contain final requirements that have the force of law. *See* York Decl., Exs. G, H, M, N, ECF Nos. 4-7, 4-8, 4-13, 4-14 (general and specific objection letters). The statutory process to address EPA's objections is incomplete. With regard to both the NACA and Springdale permits, DEQ has only recently requested a hearing, which EPA has not yet scheduled and does not expect to schedule within the next five months. Maguire Decl. ¶¶ 38, 65. After any hearing, EPA may withdraw, modify or reaffirm its

original objections. There is no certainty that EPA will issue permits or what the contents of those permits might be. Thus, any harm that DEQ may suffer is speculative at this point and would result from future agency actions that have not come to pass and may never come to pass.

Notably, DEQ alleges that the objection letters "harm the regulated community," Pl. Br. 22, but does not allege that either NACA or Springdale have changed their operations as a result of EPA's objection letters. Both the December 2021 permits (that DEQ contends are in place under the CWA) and the administratively continued permits (that EPA contends are in place under the CWA) contain the same total phosphorous effluent limitations and require the permittee to comply with the same total phosphorous effluent limitations in the near term.

NACA Permit[6]

	Total Phosphorous Effluent Limitations	**Mass Load Limitations**
December 2021 Permit	0.1 mg/L (Tier I limitations)	3 lb/day
Administratively Continued Permit	0.1 mg/L	3 lbs/day

Springdale Permit

	Total Phosphorous Effluent Limitations	**Mass Load Limitations**
December 2021 Permit	1.0 mg/L	200.2 lbs/day
Administratively Continued Permit	1.0 mg/L	201 lbs/day

[6] The December 1, 2021, permit also includes a Tier II total phosphorous limitations of 0.35 mg/L (6-month rolling average) based on NACA's plans to increase the design flow of the facility to 7.2 million gallons per day. Maguire Decl. ¶ 42. The Tier II total phosphorous limit, which also increases the mass limit to 21 lbs/day, is effective upon future certification by the permittee to Arkansas DEQ that certain specified permit conditions have been met. *Id*. It then remains effective until expiration of the permit. *Id*.

See Maguire Decl. ¶¶ 42, 67. DEQ does not acknowledge that, at this point, from a practical standpoint, NACA and Springdale are both allowed the same total phosphorous effluent limitations, regardless of which permits are in effect, and they likely will continue to operate in the same manner, at least until the administrative process is complete.

Lastly, withholding the court's consideration at this time would not prevent DEQ from challenging the validity of a final EPA-issued permit (or the denial of such a permit), including the underlying objections, at some point in the future, when appropriate. *Atl. States Legal Found.*, 325 F.3d 281, 285 (D.C. Cir. 2003) (plaintiffs "may protect all of their rights and claims by returning to court when the controversy ripens.").

B. Any Potential Future Jurisdiction Lies in the Circuit Court of Appeals.

EPA disputes that any court has jurisdiction over DEQ's claims given the ongoing nature of the administrative proceedings, but if EPA issues or denies a final permit at the end of the proceedings, exclusive jurisdiction to review that action would lie with the Eighth Circuit under 33 U.S.C. § 1369(b)(1)(F). Under *Telecomm. Rsch. and Action Ctr. (TRAC) v. FCC,* "any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." 750 F.2d 70, 75 (D.C. Cir. 1984) (emphasis in original); *see also Automated Matching Sys. Exch., LLC v. U.S. Sec. & Exch. Comm'n*, 826 F.3d 1017, 1024 (8th Cir. 2016) (citing, *TRAC* with approval, in affirming district court dismissal for lack of jurisdiction). To the extent EPA's objections are ever ripe for review, after the completion of the administrative proceedings, the objections would be reviewable in Circuit Court because, under *TRAC*, they "might affect" the Circuit Court's future review of any EPA-issued permit. Therefore, this Court should dismiss for lack of jurisdiction to avoid interfering with the Circuit Court's future potential jurisdiction to review any issuance or denial of a permit by EPA.

Even under DEQ's theory of jurisdiction, which EPA disputes, exclusive jurisdiction lies within the Circuit Court under 33 U.S.C. § 1369(b)(1)(E).[7] Thus, although EPA disputes that any court has jurisdiction now, *this* Court should certainly decline to review the same letters that DEQ has challenged in its petition for review.

II. The Court Should Dismiss for Failure to Allege Final Agency Action.

As addressed *supra* in Argument I.A, DEQ has failed to assert ripe claims, in part, because it has failed to allege any final actions. DEQ's claims arise under the APA, Compl. ¶ 7,[8] but to state a claim under 5 U.S.C. § 706, DEQ must allege final agency action. *See* 5 U.S.C. § 704 (Under the APA, a court may only review "final agency action for which there is no other adequate remedy in a court."). "[T]wo conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decisionmaking 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." *Bennett v. Spear*, 520 U.S. 154, 177–78 (internal citations and quotations omitted); *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). In determining whether a final agency action exists, no one-size-fits-all approach applies. "[T]o ascertain the nature of an agency action, courts should ground the analysis in the idiosyncratic regime of statutes and

[7] DEQ acknowledges that it has brought concurrent lawsuits in both this Court and Circuit Court but presents no clear theory for why both courts should exercise jurisdiction simultaneously. DEQ asserts that EPA is attempting to force DEQ to adopt an unlawful effluent limitation, but it makes this same allegation in its petition for review before the Eighth Circuit. Pl. Br. 20; *see also* Compl. ¶¶ 76, 98.

[8] DEQ also asserts as a basis for jurisdiction, Article III of the Constitution and 28 U.S.C. §§ 1331, 1346, and 1361, Compl. ¶ 7, but only the APA provides a basis for judicial review of final agency action, which is what DEQ challenges. *See* 5 U.S.C. § 706.

regulations that govern it." *Cal. Communities Against Toxics v. EPA*, 934 F.3d 627, 632 (D.C. Cir. 2019).

Here, EPA's objection letters do not qualify as final agency action under either of the two prongs in *Bennet v. Spear*. The objections neither constitute the consummation of the agency's decisionmaking process nor determine any legal obligations, rights, or consequences.

A. EPA's Objections Do Not Consummate EPA's Decisionmaking Process.

The objection letters do not mark the consummation of EPA's decisionmaking process for the same reasons that the objections are not ripe for judicial review. The objections are an interim step in the permitting process and have no binding effect on the ultimate permit terms. *See Am. Paper Inst., Inc.*, 890 F.2d at 871 (providing background of statutory history); *see supra* Argument I.A.1. Other than holding a hearing, it is too early to tell what further action EPA will take with respect to the December 2021 permits.

Multiple Circuit Courts, including the Eighth Circuit, have concluded that EPA objections are not final agency action, but instead are interim, non-dispositive steps, which are not subject to review at all. *See City of Ames v. Reilly*, 986 F.2d 253, 256 (8th Cir. 1993) (finding that EPA's objection "although indicating disapproval with the [state-issued] NPDES permit as drafted, does not constitute a decision by the Regional Administrator – let alone the [EAB], to whom the Regional Administrator's decision is appealable – to issue or deny an NPDES permit."); *see also S. California All. of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1081 (9th Cir. 2017); *Am. Paper Inst., Inc. v. EPA*, 890 F.2d at 875 ("The Act demonstrates an intent for the EPA and the states to work through differences in permitting decisions, and the EPA needs a range of discretion to accomplish this goal. The federal courts should leave EPA with its discretion to review state-issued permits."); *Champion Int'l Corp. v.*

EPA, 850 F.2d 182, 188 (4th Cir. 1988) ("Since the EPA clearly intends to continue the administrative process and ultimately issue or deny a permit to Champion, its objection and assumption of issuing authority are not final actions subject to judicial review under the doctrine of administrative finality.").[9] In some of these cases, the administrative process had advanced further than here. For example, in *Ames*, the state of Iowa also claimed to have issued a permit, to which EPA objected, and EPA had even held a hearing on its objections. 986 F.2d at 255. The state challenged EPA's objections, and the Eighth Circuit dismissed because no final permit had been issued. *Id*. at 256.

In addition, the CWA was amended in 1977 to make clear that an EPA objection would not itself be determinative of a final permit, but simply an interim step that would ultimately lead to a state-issued permit (if the state concurred in EPA's view) or to an EPA-issued permit or denial (if the state disagreed with EPA and EPA took over issuance of the permit). The preamble language to NPDES regulation revisions promulgated by EPA crystallize this change:

> EPA permit issuance under section 402 is the only reviewable action associated with an EPA objection. The objection is an interlocutory decision, one which has no effect on the applicant and other interested persons except to shift the forum for hearings and review. Thus, Congress thought judicial review of the permit was the appropriate place to review EPA's determinations.

National Pollutant Discharge Elimination System; Revision of Regulations, 44 Fed. Reg. 32854, 32877, 32878 (June 7, 1979). EPA explained that delaying judicial review was proper in light of both the availability of administrative review and the desire to avoid bifurcating the judicial

[9] Not only has EPA not issued a permit, but permitting authority has not even transferred to EPA, and even if it had, the mere transfer would not be a final agency action. *Marquette Cnty. Rd. Comm'n v. EPA*, 726 Fed. App'x 461, 466–67 (6th Cir. 2018); *see Sierra Club v. EPA*, Case No. 05-209 (D.D.C.), ECF No. 43 (noting that the transfer of authority is automatic under 33 U.S.C. 1342(d)(4) and not final agency action).

review proceedings, which would delay final agency action, given that final permits are already subject to judicial review. *Id*.

Thus, under the present version of the CWA, an EPA objection cannot and does not effectively deny the proposed permit, especially here given that the objection can be withdrawn or modified. EPA's objections were not the consummation of EPA's decisionmaking.

B. EPA's Objections Have No Legal Consequences.

This Court need not assess the second prong of the *Bennett v. Spear* test as DEQ fails to meet the first prong. Even so, the objections fail to satisfy that prong because no legal consequences flow from the letters. Whether an agency action has "direct and appreciable consequences" is a "pragmatic inquiry" that counsels courts to analyze "the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it." *Cal. Communities,* 934 F.3d at 637.

EPA's objection letters state EPA's view that the December 2021 permits are proposed and not final and that the proposed permits do not comply with the requirements of the CWA and its implementing regulations. The letters create no binding rights or obligations. They impose no legal penalties and change no statutes or regulations. Although DEQ disagrees with EPA's view, the objections did not rescind any permits. DEQ's efforts to re-characterize the nature and consequences of the objections are no more than an effort to disrupt the regulatory framework that Congress carefully designed. Under that framework, the objections are an interim step that have no independent, legal consequences.

III. The Court Should Deny DEQ's Motion for Preliminary Injunction.

All four factors weigh against the propriety of a preliminary injunction in this case.

A. DEQ Fails to Demonstrate a Substantial Likelihood of Success on the Merits.

Even assuming the complaint survives EPA's motion to dismiss, DEQ fails to demonstrate a substantial likelihood that it will succeed on the merits. The York Declaration and exhibits reveal that EPA acted within its authority to send its objections and to regard DEQ's purportedly "final" permits as "proposed" permits, subject to further administrative process under 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44.

EPA explained the reasons in its objections that DEQ was obligated to send proposed permits to EPA for review, chief among them that significant comments were made on the draft permits during the public comment period.[10] Although there is some discrepancy between the MOA and 40 C.F.R. § 123.44(j),[11] DEQ does not dispute that both require DEQ to prepare and send proposed permits to EPA following the draft permit process if significant comments are received once the draft permit is noticed for public comment. *See* MOA, Section 3.B.11 at 20–21. Nor does DEQ dispute that for both the NACA and Springdale draft permits, it received comments from Oklahoma state agencies. Maguire Decl. ¶¶ 17–20, 28, 47–52, 55. Yet DEQ's *sole* defense for issuing a purportedly final permit without first preparing and sending a proposed permit to EPA is that DEQ did not consider the comments received to be significant. Pl. Br. 12. DEQ asserts, without any supporting authority that "in the judgment of the expert agency charged with administering the NPDES program in Arkansas, significant public comments had not been made" on the draft NACA permit. *Id*. But this conclusory statement strains credulity.

[10] EPA also asserted other reasons why a proposed permit was required under EPA's regulations, including because the December 2021 permits differ from the draft permits. Maguire Decl. ¶¶ 27, 31.

[11] In the event of a discrepancy between the two, EPA's regulations control. *See* Background B.1 (describing MOA). However, the Court need not decide this issue now as under both the MOA and the applicable regulations, DEQ was required to submit a proposed permit because it received significant comments on the draft permits.

First, EPA Region 6, which has oversight authority to review draft NPDES permits, reasonably viewed comments from an adjacent state, which raised concerns that the draft permits would violate the adjacent state's water quality criterion for phosphorous, as "significant" under both EPA's regulations, 40 C.F.R. § 123.44(j), and the MOA. This was "fair and considered judgment" that warrants deference. *Kisor v. Wilke,* 139 S.Ct. 2400, 2417 (2019) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155)). Notably, DEQ alleges that its interpretation of "significant comments" warrants complete deference; it has not even attempted to justify its position as reasonable, nor has it alleged that EPA's interpretation was unreasonable.

Second, EPA's position is consistent with both the CWA and the MOA. Under 33 U.S.C. § 1342(b)(5), permitting states must accept comments from other states and notify EPA when recommendations by affected states are not accepted by the permitting state. In addition, the MOA requires transmission of public notices and fact sheets to adjacent states that may be affected by the permit, a clear indication that comments from adjacent states are significant. MOA, Section 3.C.2 at 25–26.

Third, with respect to the NACA permit, DEQ was on notice that EPA viewed the comments from the Oklahoma entities as significant as early as February 2021, when EPA sought additional information regarding comments submitted by Oklahoma state agencies. York Decl., Ex C, ECF No. 4-3. EPA sent further correspondence on September 28, 2021, in which it expressly raised concerns about the permit. York Decl., Ex. E, ECF No. 4-5. Yet DEQ prematurely issued what it characterized as a final permit on December 1, 2021, without any acknowledgement of the express provisions in the MOA and the CWA regulations that provide a specific process for when the state receives significant comments on a draft permit. With respect

to the Springdale permit, DEQ also received comments from three Oklahoma state agencies, Maguire Decl. ¶¶ 47–52, 55, and, given the parallel negotiations occurring on the NACA permit, was well aware that EPA regarded such comments as significant. DEQ nonetheless prematurely "issued" the Springdale permit the exact same day as the NACA permit.

Although DEQ is correct that "significant comments" is not defined in the MOA, that does not mean that DEQ may ascribe whatever subjective meaning it wants to the term. In the rulemaking context, "assessing significance is context dependent and requires reading the comment in light of both the rulemaking of which it was part and the statutory ends that the proposed rule is meant to serve." *Oakbrook Land Holdings, LLC v. Commissioner of Internal Revenue*, 28 F.4th 700, 714 (6th Cir. 2022). Indeed, courts have required agencies to respond in the rulemaking context to significant comments that challenge "a fundamental premise" underlying the proposed agency action. *Carlson v. Postal Regul. Comm'n,* 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000)). Here, DEQ published for public comment two draft permits to be issued to wastewater treatment facilities under the NPDES program, which regulates the discharge of pollutants from specific sources. 33 U.S.C. § 1342. The comments from the Oklahoma state agencies directly addressed the fundamental purpose of EPA's oversight of the NPDES program, raising concerns that the total phosphorous limitations in the draft permits did not comply with the CWA. Maguire Decl. ¶¶ 20, 52. Moreover, DEQ makes conclusory assertions that comments submitted by various Oklahoma agencies were not significant, but by its own admission, it modified the NACA permit based in part on such comments. Pl. Br. 16 (citing Young Decl. ¶ 20).

DEQ places undue weight on two letters from Oklahoma officials appearing to minimize some of the concerns raised in connection with the draft permits, Pl. Br. 17–18, but nothing in

these letters demonstrates that *EPA's* objections are not valid. Maguire Decl. ¶¶ 35, 59. Although the comments from the Oklahoma state authorities raised issues to EPA's attention, EPA was always entitled to exercise its own independent judgment to determine the significance of comments and how they are to be addressed. The MOA requires DEQ to notify EPA of significant comments and to prepare and send to EPA a proposed permit when there are significant comments for a reason. Comments bring to light issues that EPA may not have initially considered, regardless of whether the commenter later retracts the comments or believes them to be satisfied. In any event, these retractions were communicated after both the December 2021 permits and EPA's December 30, 2021 general objections and thus have no relevance as to EPA's actions before that time.

B. DEQ Fails to Demonstrate Irreparable Harm.

DEQ fails to meet its burden of demonstrating irreparable harm. Much of DEQ's complaint and the motion for a preliminary injunction read like a treatise on the cooperative federalism framework of the CWA, asserting vague claims of harm from "interference" because of the EPA's objections. Pl. Br. 18–24. DEQ fails to acknowledge that EPA is adhering to that same federalism framework, which expressly provides an administrative process for EPA to object and, only if the state does not satisfactorily address the objection, assume permitting authority. *See, e.g.*, Pl. Br. 20; *see also supra* Background A.2 and B.1 (discussing EPA oversight role in NPDES permitting). Moreover, the alleged intrusion on state sovereignty has not caused irreparable harm. "To require some federal scrutiny of a state's action in issuing a permit under delegated federal authority does not begin to impinge on the state's autonomy in the way federal preclearance of state legislation might be thought to do." *Save the Bay v. EPA*, 556 F.2d 1282, 1298 n.15 (5th Cir. 1977) (comparing the objection process to Section 5 of the

Voting Rights Act). Review of individual permits is even less intrusive: "scrutiny of an individual permit of course has but limited effect on the state NPDES program as a whole." *Id*.

Moreover, for the same reasons that this Court lacks jurisdiction, there can be no irreparable harm because DEQ has failed to show that such harm is certain and imminent. *See, supra* Argument I.A; *see also Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). As addressed above, even if DEQ is correct that EPA's objections exceed EPA's authority, they remain only statements of EPA's view. Under the CWA and its regulations, permitting authority over the two permits has not transferred to EPA; indeed, it may never transfer if EPA's objections are resolved in a hearing or if EPA chooses to withdraw its objections. DEQ further expresses concern that EPA may act similarly in the future, Pl. Br. 22, but this too is entirely speculative, about future actions that are not actual controversies, and are certainly not imminent.

In addition, DEQ has not shown that the objections have harmed it or the two facilities. The December 2021 permits have similar total phosphorous limitations to the administratively continued permits that EPA contends are in place. *See supra* Argument I.A.2.

And, as for DEQ's claim that the mere participation in an administrative proceeding that it considers to be unlawful constitutes irreparable harm, Pl. Br. 19, DEQ fails to explain how it is situated any differently from any other unwilling participant in an administrative (or judicial) proceeding. *See F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 ("the expense and annoyance of litigation is 'part of the social burden of living under government.") (citations omitted). "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Id*. (quoting *Renegotiation Bd. v. Bannercraft Clothing Co*., 415 U.S. 1, 24 (1974). Therefore, "[a] person cannot evade agency process simply by claiming the agency is operating Ultra Vires." *West v. Bergland*, 611 F.2d 710, 717 (8th Cir. 1979).

As for DEQ's claim that it has expended significant resources in preparing the December 2021 permits, Pl. Br. 19–20, even if true, past expenses are sunk costs that have nothing to do with prospective irreparable harm. DEQ must "substantiate the claim that irreparable injury is 'likely' to occur." *Packard Elevator*, 782 F.2d at 115. As for future expenses that DEQ alleges it faces, York Decl. ¶ 37, this too is not irreparable harm. A party seeking injunctive relief must demonstrate that the irreparable harm claimed "is certain and great and of such imminence that there is a clear and present need for equitable relief" to prevent irreparable harm. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). Monetary loss alone does not qualify as irreparable harm, unless the loss threatens the very existence of the movant's business. *Packard Elevator*, 782 F.2d at 115 ("[E]conomic loss does not, in and of itself, constitute irreparable harm"). No such allegations exist here.

C. The Balance of Equities and Public Interest Factor Weighs in Favor of EPA

The last two factors (the balance of equities and public interest) "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009) (in the context of injunctive relief of a stay). DEQ claims the balance of equities will favor it because EPA will suffer no harm in the face of an injunction and "DEQ will immediately lose its authority to make regulatory and permitting decisions for the NACA and Springdale facilities[.]" Pl. Br. 24. As addressed above, DEQ's claims are without merit as DEQ has not exhausted its administrative remedies, has not lost permitting authority over the two permits at issue, and may never lose such permitting authority. *See, supra* Argument I.A.2. Rather, DEQ has attempted to prematurely issue permits in violation of the CWA procedures—permits that EPA, the agency Congress entrusted to administer the CWA, has preliminarily determined are not adequately protective of water quality standards. In addition, the public has a strong interest in ensuring that the total

phosphorous limitations comply with the CWA, which EPA's actions are designed to address. Maguire Decl. ¶ 6. Excess phosphorous causes significant damage to the Illinois River, which runs downstream from Arkansas into Oklahoma and the Cherokee Nation. *Id*. ¶ 4. It is particularly important, and uniquely within EPA's authority, to act to address pollutants that may affect parties that are not located in the state responsible for unlawful discharges. Thus the balance of harms tilts against an injunction as "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e*., irreparable." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987). EPA also has an interest in preserving the integrity of the NPDES program, and preventing the delays caused by the adjudication of premature claims that Congress did not intend for judicial review. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (upholding injunction as in the public interest, which recognized the importance of government agencies acting "independently, thoroughly, and transparently when reviewing permit applications." (citation omitted)).

CONCLUSION

For the foregoing reasons, the Court should grant EPA's motion to dismiss and deny DEQ's motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2022, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

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