No. 17-542

In the Supreme Court of the United States

SOUTHERN CALIFORNIA ALLIANCE OF PUBLICLY OWNED TREATMENT WORKS, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 1369(b)(1)(E) or (F) vests the court of appeals with jurisdiction over a petition for review challenging a letter in which the U.S. Environmental Protection Agency asserted an objection to draft National Pollutant Discharge Elimination System permits prepared by a state agency.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 853 F.3d 1076.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2017. A petition for rehearing was denied on July 10, 2017 (Pet. App. 31-32). The petition for a writ of certiorari was filed on October 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The Act generally bars "the discharge of any pollutant by any person," 33 U.S.C. 1311(a), unless the person "obtain[s] a permit

and compl[ies] with its terms." *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted).

The CWA established the National Pollutant Discharge Elimination System (NPDES) for the permitting of discharges. A State may administer its own NPDES program and approve permits for discharges of pollutants within its borders. See 33 U.S.C. 1342(b). Forty-six States, including California, currently administer NPDES programs. See 39 Fed. Reg. 26,061 (July 16, 1974); U.S. Envtl. Prot. Agency, *National Pollutant Discharge Elimination System (NPDES): NPDES State Program Information: State Program Authority*, https://www.epa.gov/npdes/npdes-state-program-information. If a State does not operate an NPDES permitting program, the U.S. Environmental Protection Agency (EPA) issues NPDES permits for discharges within the State. 33 U.S.C. 1342(a)(1).

NPDES permits generally establish permissible rates, concentrations, or quantities of specified constituents, or other limitations and conditions for discharges. See 33 U.S.C. 1342(a)(1) and (2); 40 C.F.R. Pts. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000). EPA promulgates rules describing the conditions that the permits must impose. See 40 C.F.R. 123.25(15). Permits must include limitations based on the degree of control that can be achieved by implementing specified levels of pollution-control technology. 40 C.F.R. 122.44(a)(1). In addition, when necessary to meet state-specific water quality standards, permits must include more stringent water-quality-based limitations. 40 C.F.R. 122.44(d)(1)(i); see 33 U.S.C. 1313(a) and (c)(2).

A State that administers the NPDES program within its borders must provide EPA with a copy of each permit application it receives and must notify EPA of any proposed permit. 33 U.S.C. 1342(d)(1); 40 C.F.R. 123.43(a)(1)-(2). A State may not issue a permit if EPA timely objects to the permit "as being outside the guidelines and requirements of" the CWA. 33 U.S.C. 1342(d)(2)(B); see 40 C.F.R. 123.44(c)(1)-(9). If EPA objects, the State or any interested person may request a hearing on the permit, after which EPA can reaffirm, modify, or withdraw its objection. 33 U.S.C. 1342(d)(4); 40 C.F.R. 123.44(e) and (g). If EPA raises and does not withdraw an objection to a permit, the issuing State may either revise the proposed permit to address EPA's objection or decline to do so. 33 U.S.C. 1342(d)(4). If the State declines to revise the proposed permit, the authority to issue the permit passes to EPA, which undertakes its own permitting process and then makes a final decision on the proposed permit. *Ibid.*; 40 C.F.R. 123.44(h).

The CWA vests the federal courts of appeals with exclusive jurisdiction to review challenges to some types of EPA decisions implementing the CWA. Those include, as relevant here, EPA's "promulgati[on] [of] any effluent limitation or other limitation under section 1311," 33 U.S.C. 1369(b)(1)(E), and EPA action in "issuing or denying any permit under section 1342," 33 U.S.C. 1369(b)(1)(F).[*] Final EPA actions that are reviewable under principles of administrative law, but are not subject to direct court of appeals review under Section

[*] Challenges to five other types of EPA action are also directly routed to the courts of appeals under the CWA, but those types of action are not at issue in this case. See 33 U.S.C. 1369(b)(1)(A)-(D) and (G).

1369(b)(1), may be challenged in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704; 28 U.S.C. 1331. In addition, when a State serves as the NPDES permitting agency, the State's final permitting decisions can be reviewed in state court. See 40 C.F.R. 123.30; see, *e.g.*, *General Motors Corp.* v. *EPA*, 168 F.3d 1377, 1382 (D.C. Cir. 1999).

2. a. Petitioner is a trade association whose members include the county sanitation districts that operate the Whittier Narrows Water Reclamation Plant and the Pomona Water Reclamation Plant (Plants). Pet. App. 4, 8. The Los Angeles Regional Office of the California State Water Board (L.A. Board) prepared draft NPDES permits for the Plants. *Id.* at 8. The L.A. Board attached to the draft permits a fact sheet that specified that effluent limitations were necessary in order to address the risk of chronic toxicity from "whole effluent toxicity"—the toxicity risk that may result from several pollutants operating together even when no one pollutant alone would likely cause harm to aquatic organisms. *Ibid.*; see *id.* at 8 n.2. The draft permits addressed whole effluent toxicity in a section entitled "Chronic Toxicity Trigger and Requirements," which required additional testing and investigation if chronic toxicity were established, but did not include any numeric limitations to address whole effluent toxicity. *Id.* at 8-9.

After the L.A. Board submitted the draft permits to EPA for review, EPA objected to the draft permits. Pet. App. 9; see *id.* at 37-65 (EPA objection letter). EPA stated that the L.A. Board was required to include numeric effluent limitations for whole effluent toxicity unless it could explain why the calculation of such limits

would be infeasible. *Id.* at 38-39, 43. EPA further explained that the "Chronic Toxicity Trigger and Requirements" sections of the draft permits did not meet the requirements for an effluent limitation because they simply required additional testing and investigation if chronic toxicity were detected, without requiring the Plants to restrict effluent discharges. *Id.* at 40. EPA also objected that the L.A. Board had failed to explain how "Chronic Toxicity Trigger and Requirements" would achieve the water quality criterion for chronic toxicity. *Id.* at 43-44. Finally, EPA explained that, because the L.A. Board's fact sheets had concluded that daily effluent limitations were needed to protect against highly toxic peaks of toxicity in order to meet the water quality standards, the permits should have included daily effluent limitations. *Id.* at 46-47.

The L.A. Board revised the draft permits in light of EPA's objections. Pet. App. 9. EPA reviewed the revised permits and notified the L.A. Board that its objections had been satisfied. *Ibid.* After completing procedures required by state law, the L.A. Board issued final permits for the Plants. *Ibid.*

Petitioner—along with other parties—filed an administrative appeal of the final permits with the California State Water Board (State Board). Pet. App. 10. Petitioner then requested that the State Board hold its appeal of the final permits in abeyance until August 2017 and—later—for an additional two years. *Ibid.*; Pet. 5. The State Board granted petitioner's requests to hold its appeals of the state permitting decisions in abeyance. *Ibid.*

b. Meanwhile, petitioner filed a petition for review in the Ninth Circuit, challenging the EPA letter that had objected to the L.A. Board's draft permits. Pet.

App. 10. The court dismissed petitioner's challenge to EPA's objection letter for lack of jurisdiction. *Id.* at 1-24. The court explained that, when a State is responsible for issuing NPDES permits within its borders, "[a]n objection by EPA to a draft state permit is merely an interim step in the state permitting process," and is not itself subject to review in the federal courts of appeals under Section 1369(b)(1). *Id.* at 11.

The court of appeals held that the interim permitting step of an EPA objection letter was not reviewable under 33 U.S.C. 1369(b)(1)(E), which "provides for federal appellate review of EPA action 'in approving or promulgating any effluent limitation or other limitation'" under specified sections of the CWA. Pet. App. 12 (quoting 33 U.S.C. 1369(b)(1)(E)). Applying circuit precedent, the court explained that EPA's objection letter did not fall under Section 1369(b)(1)(E) because it did not "approve or promulgate" any limitation. *Id.* at 14 (citation omitted). Instead, the court explained, EPA's letter simply "applied preexisting regulations on an individualized basis to determine that the [d]raft [p]ermits were inadequate." *Ibid.* The court further explained that EPA's objection letter did not finally determine whether the disputed permits should issue, but merely served as "an interim step in a complex statutory scheme" to decide that question. *Id.* at 16. The court distinguished the Eighth Circuit's decision in *Iowa League of Cities* v. *EPA*, 711 F.3d 844 (2013), which had found reviewable certain guidance letters, because the objection letter here did not set out any new effluent limitations or finally determine whether the Plants should receive the permits in question. Pet. App. 15-16.

The court of appeals also held that EPA's objection letter was not reviewable under Section 1369(b)(1)(F),

which authorizes direct court of appeals review of "an EPA action 'issuing or denying any permit under section 1342.'" Pet. App. 18 (quoting 33 U.S.C. 1369(b)(1)(F)). The court recognized that, under *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (per curiam), EPA objections to NPDES permits under the pre-1977 CWA were reviewable in the courts of appeals under Section 1369(b)(1)(F), because such objections were the functional equivalent of permit denials. Pet. App. 18-22. The court observed, however, that this Court in *Crown Simpson* had "expressly declined to consider" whether that conclusion would still hold under amendments to the CWA that Congress had enacted in 1977. *Id.* at 18.

Turning to that question, the court of appeals concluded that EPA permit objections are not reviewable under Section 1369(b)(1)(F) following the 1977 amendments because those amendments "alter[ed] the permit-approval process so that an EPA objection no longer automatically and finally results in the denial of a permit if the state refuses to conform to EPA's request." Pet. App. 21. Instead, if EPA objects, there are "other procedures still available to the interested parties before the state denies the permit." *Ibid.* And if the State declines to revise the permit to accommodate EPA's objection, the permit is not finally denied; rather, authority to issue the permit "simply transfers out of the state's hands and back to the federal level," where EPA must conduct its own permitting process before deciding whether to issue the permit. *Id.* at 21-22.

The court of appeals observed that its conclusion that EPA objection letters are not reviewable under Section 1369(b)(1)(F) accords with the holdings of the other courts of appeals that have addressed the post-1977 CWA framework. Pet. App. 22-23 (citing *City of*

Ames v. *Reilly*, 986 F.2d 253, 256 (8th Cir. 1993); *American Paper Inst., Inc.* v. *United States EPA*, 890 F.2d 869, 873-875 (7th Cir. 1989)).

ARGUMENT

Petitioner contends (Pet. 11-25) that the court of appeals had jurisdiction under 33 U.S.C. 1369(b)(1)(E) and (F) to review an EPA letter to the L.A. Board objecting to several draft permits. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. There is no need to hold the petition for a writ of certiorari pending this Court's decision in *National Ass'n of Manufacturers* v. *Department of Defense*, No. 16-299 (argued Oct. 11, 2017) (*NAM*), because the decision below rests on grounds that are not at issue in that case. Further review is not warranted.

1. a. The court of appeals correctly held that EPA's letter to the L.A. Board objecting to several draft permits is not reviewable under Section 1369(b)(1)(E). Section 1369(b)(1)(E) authorizes direct court of appeals review of EPA action "in approving or promulgating any effluent limitation or other limitation" under specified CWA provisions. 33 U.S.C. 1369(b)(1)(E). An EPA letter objecting that draft permits do not meet existing EPA rules is not reviewable under this provision because such a letter does not effect the "establishment of new regulations," but simply "determine[s] the proper application of already promulgated effluent limitation regulations" to particular permits. Pet. App. 14 (citation omitted). And because such a letter is merely "an interim step in a complex statutory scheme," it does not finally determine whether a proposed permit is consistent with EPA regulations. *Id.* at 16; see *id.* at 16-17.

Petitioner asserts (Pet. 15, 20) that the court of appeals failed to take into account petitioner's allegation that EPA's objection imposed new requirements, rather than simply applying preexisting rules. But EPA's objection letter does not itself impose any constraints because it is simply an intermediate step in the process of determining whether petitioner is entitled to a permit. See Pet. App. 17, 21-22. Insofar as petitioner believes that the final permits issued by the L.A. Board imposed requirements that lack a basis in EPA regulations or the CWA, petitioner can challenge the L.A. Board's permitting decision through state channels culminating in state-court review—as it has already done.

b. Petitioner's contention (Pet. 21-22) that EPA's objection letter is reviewable under Section 1369(b)(1)(E) does not implicate any conflict among the courts of appeals.

Contrary to petitioner's suggestion (Pet. 21-22), the decision below is consistent with *Iowa League of Cities* v. *EPA*, 711 F.3d 844 (8th Cir. 2013). That decision found jurisdiction under Section 1369(b)(1)(E) to review EPA letters to a U.S. Senator that the Eighth Circuit understood to set forth new, binding effluent limitations pertaining to waste-treatment facilities' use of bacteria mixing zones and blending techniques. *Id.* at 863-878. The EPA letter at issue here, by contrast, did not set out any binding effluent limitations, but simply objected to particular permits as inconsistent with preexisting policies. Pet. App. 15-16. Further, the EPA letter was "an interim step in a complex statutory scheme" that did not finally establish the terms of the permits to be issued for the Plants. *Id.* at 16.

Petitioner also asserts (Pet. 22) that the court of appeals' refusal to exercise jurisdiction under Section

1369(b)(1)(E) conflicts with two decisions of the D.C. Circuit asserting jurisdiction over challenges to certain agency guidance documents. Petitioner's reliance on those decisions is misplaced, since neither decision addressed jurisdiction under Section 1369(b)(1)(E). In *General Electric Co.* v. *EPA*, 290 F.3d 377 (D.C. Cir. 2002), the court addressed whether a guidance document was reviewable under the judicial-review provision of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2618(a)(1)(A) (2000). See 290 F.3d at 381-385. In *Appalachian Power Co.* v. *EPA,* 208 F.3d 1015 (D.C. Cir. 2000), it addressed whether EPA's action in promulgating a guidance document constituted final agency action that was reviewable under the broad jurisdictional provisions of the Clean Air Act (CAA), 42 U.S.C. 7607(b)(1). See 208 F.3d at 1020-1023 & n.10. In each case, moreover, the D.C. Circuit determined that the challenged policy document set out the agency's final, binding guidance regarding, respectively, CAA monitoring requirements, see *id.* at 1022-1023, and the assessment of risks under the TSCA, see *General Elec. Co.*, 290 F.3d at 385. In the present case, by contrast, the court below concluded that EPA's objection letter was only an intermediate step in the permitting process and did not set out new rules or policies. Pet. App. 12-18. There is thus no conflict between the decision below and the D.C. Circuit decisions on which petitioner relies.

2. a. The court of appeals also correctly held that EPA's letter to the L.A. Board is not subject to direct court of appeals review under Section 1369(b)(1)(F) because it is not an EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). Under the current version of the CWA, EPA's submission of a letter that objects to a proposed permit is not

tantamount to denial of the permit. Pet. App. 19-22. Rather, an EPA objection is simply an intermediate step in the process of permit review, following which "[t]he state and EPA may resolve their dispute over the objection informally, * * * the state may request that EPA hold a public hearing, or [the State may] hold its own public hearing." *Id.* at 21. Thereafter, "EPA may reaffirm, withdraw, or modify its objection, * * * the state may decide to modify the permit, and EPA may accept the modifications; or the state may decide not to act or refuse to accept EPA's modifications, and EPA may then issue the permit on its own authority." *Ibid.* EPA's transmission of an objection letter therefore is not an EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F).

Contrary to petitioner's contention (Pet. 12-13), the court of appeals' conclusion on this point is consistent with this Court's decision in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (per curiam). In holding that EPA permitting objections under the pre-1977 CWA were reviewable under Section 1369(b)(1)(F), *id.* at 196-197, the Court explained that an EPA objection had "the precise effect" of "deny[ing] a permit within the meaning of" Section 1369(b)(1)(F), *id.* at 196 (citation and internal quotation marks omitted); see Pet. App. 19 (noting that, under the pre-1977 CWA, "once EPA objected to a state permit, the permit could not be issued unless the state revised it to remedy EPA's objection"). Under the current version of the CWA, by contrast, an EPA objection no longer has that effect. Instead, the objection is one step in "a process in which the state can request a hearing, following which there is additional opportunity for back and forth between the state and EPA." Pet. App. 20. And while an unresolved

EPA objection under the earlier statute resulted in an "impasse" that precluded issuance of a permit, *id.* at 19, the CWA now provides that, if a State declines to revise a permit to which EPA maintains its objection, authority to issue the permit returns to EPA, which begins its own permitting process, *id.* at 21-22.

This Court in *Crown Simpson* observed that its holding avoided a "seemingly irrational bifurcated system" in which EPA's permit denials were routed directly to the courts of appeals, while EPA vetoes of state permits were routed to the district courts under the APA. 445 U.S. at 197; see *id.* at 196-197 (stating that its interpretation eliminated conditions under which "denials of NPDES permits would be reviewable at different levels of the federal-court system"). Contrary to petitioner's contention (Pet. 11-14), the decision below does not produce any such irrational bifurcation. That decision does not route denials to different levels of the federal judiciary; rather, it sends permit denials by state authorities to state courts, while sending permit denials by federal authorities to federal courts. See Pet. App. 6. There is nothing "irrational" about a system that limits federal judicial oversight to cases in which a federal agency is the ultimate decision-maker.

b. The court of appeals' interpretation of Section 1369(b)(1)(F) does not implicate any circuit conflict. The decision below is consistent with the holdings of the other courts of appeals that have addressed the application of Section 1369(b)(1)(F) to EPA permitting objections under the post-1977 CWA framework. See Pet. App. 22-23 (citing *City of Ames* v. *Reilly*, 986 F.2d 253, 256 (8th Cir. 1993); *American Paper Inst., Inc.* v. *United States EPA*, 890 F.2d 869, 873-875 (7th Cir. 1989)).

Petitioner identifies no decision adopting a contrary approach.

3. There is no need to hold the petition for a writ of certiorari pending this Court's decision in *NAM*. *NAM* concerns the reviewability under Section 1369(b)(1)(E) and (F) of a final EPA rule that defines the term "waters of the United States" in the CWA, and thereby dictates the geographic scope of effluent and other limitations promulgated under the CWA as well as the geographic scope of NPDES permitting requirements. See Pet. at i, *NAM, supra* (No. 16-299); Gov't Br. in Opp. at i, *NAM, supra* (No. 16-299). The government has argued that the final rule is reviewable under Section 1369(b)(1)(E) because it establishes an "effluent limitation or other limitation under section 1311," 33 U.S.C. 1369(b)(1)(E), by setting the geographic scope of CWA obligations. The government has further argued that the rule is reviewable under Section 1369(b)(1)(F) because it determines whether particular discharges are subject to CWA permitting requirements at all. See Gov't Br. at 17-49, *NAM, supra* (No. 16-299).

NAM thus concerns a final rule that alters the extent of permitting and other obligations under the CWA. The Court's decision in that case therefore cannot be expected to call into question the court of appeals' determination that EPA's objection letter here is not reviewable because it is merely "an interim step in a complex statutory scheme," Pet. App. 16, and does not impose new constraints beyond those set out in EPA's regulations, *id.* at 14-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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