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Where the State Retains NPDES Permitting Authority under the Clean Water Act the Federal Court Has No Jurisdiction to Review

The Ninth Circuit Court of Appeals found that it lacked jurisdiction to review the requirements of draft National Pollutant Discharge Elimination System (NPDES) permits proposed by the Los Angeles Regional Water Quality Control Board ("LA Board") for two public water treatment plants in Southern California. Petitioners must seek review in accordance with California law. *Southern California Alliance of Publicly Owned Treatment Works* v *U.S. Environmental Protection Agency* (9th Cir. 2017) 853 F.3d 1076.

Under the Clean Water Act (CWA), the United States Environmental Protection Agency (EPA) is tasked with issuing NPDES permits. States may apply to the EPA and obtain approval to issue their own NPDES permits consistent with federal law for discharges within the state. Even when a state obtains permission to issue its own permits, it must allow the EPA an opportunity to review and comment on draft proposed permits. If the EPA objects to the proposed permit, the state may either (1) conform the proposed draft permit to the EPA's stated requirements or (2) relinquish permitting authority back to the EPA. Where the state has permitting authority, an aggrieved party must seek relief in accordance with state law.

The State of California has authority to issue NPDES permits in California. The Regional Water Quality Control Boards are the permitting agency for California. A party may appeal to the State Water Resources Control Board ("State Board") and, if displeased there, may seek review in the California courts.

The plants in the instant action applied to the LA Board for NPDES permits. The LA Board sent copies of the draft proposed permits to the EPA. By way of letter, the EPA sent the LA Board and the plants its written comments objecting to the proposed permits. The LA Board ultimately modified the proposed permits in accordance with the EPA's objections and retained permitting authority.

The plants appealed to the State Board and shortly thereafter, while the appeal was still pending with the State Board, sought review of the EPA's objection letter with the Ninth Circuit Court of Appeals. The plants also asked the State Board to place the appeal in abeyance to allow the parties an opportunity to potentially resolve the matter. The State Board obliged the plants and placed the matter in abeyance.

The plants argued before the Ninth Circuit Court of Appeals that the EPA's objection letter was the equivalent of the EPA issuing or denying issuance of NPDES permits. As such, under the CWA the plants had the right to seek review through the federal courts of the EPA's denial of the permits. The Ninth

Circuit Court of Appeals found that the question of whether the EPA's denial letter was the equivalent of issuing or denying a permit was an issue of first impression. The EPA argued that the federal court lacked jurisdiction to review its objection letter. Ultimately, the Ninth Circuit Court of Appeals agreed with the EPA and found that the EPA's letter was not the equivalent of issuing or denying NPDES permits and, thus, dismissed the petition for lack of subject matter jurisdiction. "An objection by EPA...is merely an interim step in the state permitting process...[T]he permitting decision remains the states." The plants' relief, if any, was to be found under California law.

In the instant action, the plants by all practical accounts had to comply with the permit requirements of the EPA—not the LA Board. As such, it seems reasonable that they should have been able to seek review under federal law. This decision, however, reveals the federal court's reluctance to upset the balance of state and federal regulatory power ("cooperative federalism") as established by Congress and the state legislatures. Where the state retains permitting authority, an aggrieved party must seek relief under California law.