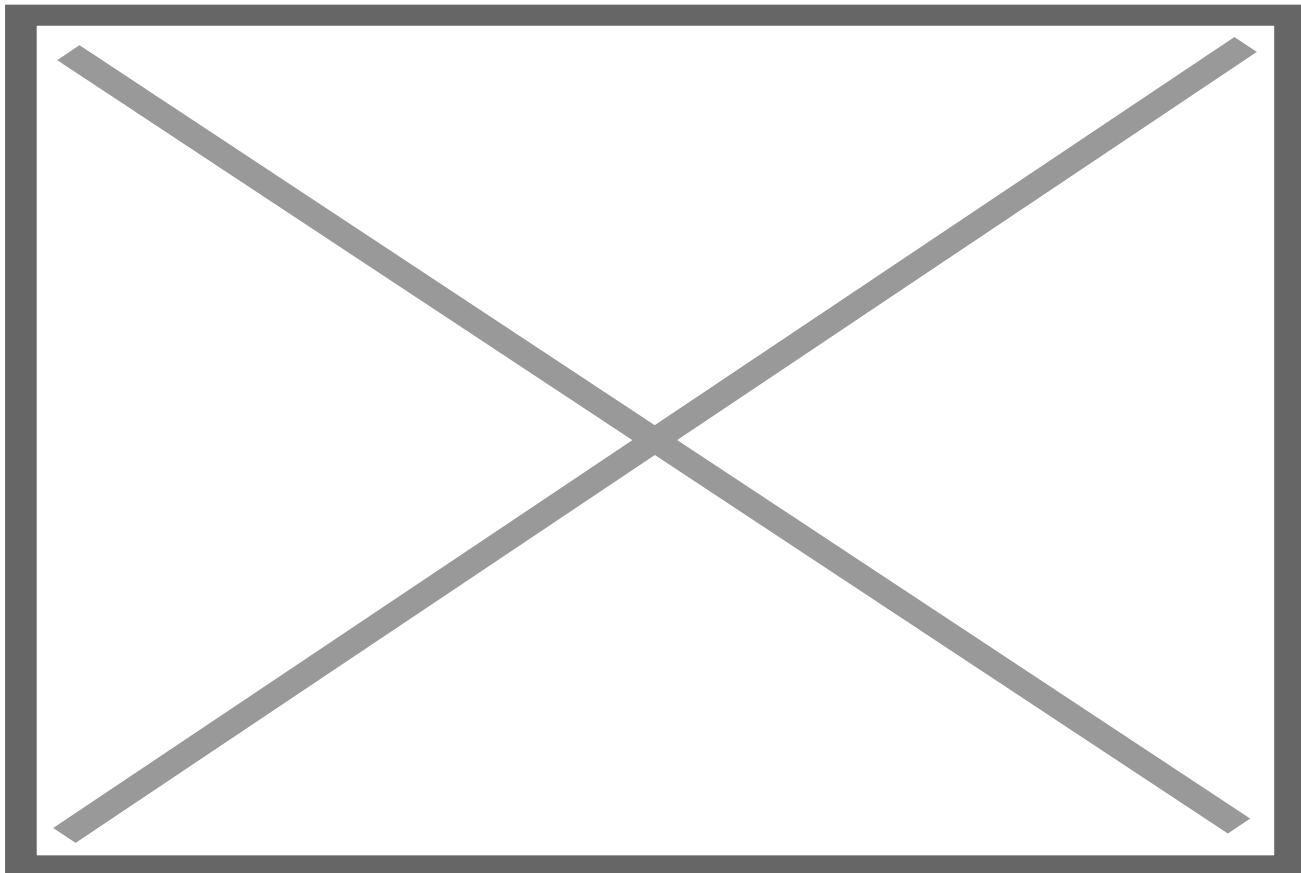


## Federal Courts Lack Jurisdiction to Hear Challenges to EPA Objections to State Water Pollution Discharge Permits

Federal courts of appeal do not have original jurisdiction under the Clean Water Act to hear a challenge to EPA's objection to a state's draft water pollution discharge permit, the Ninth Circuit held in *Southern California Alliance of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076 (9th Cir. 2017). The Clean Water Act allows EPA to delegate primary responsibility for issuing pollution discharge permits to a state. When a state assumes permitting authority, it must submit draft permits to EPA for review. If EPA objects to a state's draft permit, the state may either revise the permit to address EPA's objection or, if the state does not address EPA's objection, permitting authority will revert to EPA. This litigation arose over discharge permits for two water reclamation plants in California, a state that has assumed primary permitting authority. EPA objected to the state's draft permits, primarily because of concerns related to numeric limitations for whole effluent toxicity. The state revised the permits to satisfy EPA's objections and, after receiving approval from EPA, issued the permits. The Southern California Alliance of Publicly Owned Treatment Works (SCAP) then petitioned the Ninth Circuit for review of EPA's objection letter. [caption id="attachment\_4742" align="aligncenter" width="675"]



Environmental Protection Agency (EPA) at Federal Triangle in Washington D.C. [caption] Before reaching the merits, the court considered whether it had subject matter jurisdiction to hear the case. The Clean Water Act gives federal courts of appeal original jurisdiction to hear challenges to certain EPA actions. In this case, SCAP relied on 33 U.S.C. §§ 1369(b)(1)(E), which allows for review of EPA action "in approving or promulgating any effluent limitation, and 1369(b)(1)(F), which allows for review of EPA action "issuing or

denying any [effluent discharge] permit." The court concluded that neither provision gave it subject matter jurisdiction to review EPA's objection letter. The court held that it did not have jurisdiction under section 1369(b)(1)(E) because the objection letter was not an action "approving or promulgating any effluent limitation." The court relied on the Ninth Circuit's decision in *Crown Simpson Pulp Co. v. Costle*, 599 F.2d 897 (9th Cir. 1979), which held that EPA's veto of a state's draft permit was not the functional equivalent of a newly promulgated regulation. The court explained that promulgating effluent limitations, which set standards for an entire industry, are different from the individualized adjudications that occur in the permitting process; section 1369(b)(1)(E) only allows review of the former. The court further held that it did not have jurisdiction under section 1369(b)(1)(F) because the objection letter was not an action "issuing or denying any permit." The court explained that an objection letter is merely an interim step in the permitting process. After EPA issues an objection letter, there remain several possible outcomes: EPA and the state may resolve their dispute, EPA may modify or withdraw its objection after holding a hearing on the permit, the state may agree to accept EPA's modifications, or EPA may issue a permit itself if the state refuses to accept EPA's modifications. The court also noted that the Seventh and Eighth Circuits had reached similar conclusions on the issue of whether they had jurisdiction under section 1369(b)(1)(F) to hear challenges to an objection letter. Thus, the court held that it lacked subject matter jurisdiction to hear SCAP's challenge to EPA's objection letter and dismissed the case. \* \*

\* An aggrieved party in a state that has assumed primary permitting authority is not without recourse—it may still pursue state administrative and judicial remedies to challenge a permit that conforms to EPA's objection letter (with the possibility of ultimate review in the U.S. Supreme Court). Federal courts of appeal, however, are not the proper forum for challenging an EPA objection letter.

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