12-1-2014

"Dear EPA" or the "Bait and Sue": Unraveling a Decade of Sewage Policy with a Letter

Allison Clark

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation
Allison Clark, "Dear EPA" or the "Bait and Sue": Unraveling a Decade of Sewage Policy with a Letter, 41 Ecology L. Q. 207 (2014).

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38P84M

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
“Dear EPA” or the “Bait and Sue”: Unraveling a Decade of Sewage Policy with a Letter

Allison Clark

Federal agencies routinely explain their interpretations of statutes and regulations at the request of regulated parties and members of Congress in order to increase predictability and transparency. The Administrative Procedure Act explicitly carves out exceptions in the rulemaking process for these interpretative rules and general statements of policy. Until recently, procedural hurdles usually insulated informal agency statements from legal challenge, leaving agencies free to exercise discretion and balance political pressures from the elected branches. However, in Iowa League of Cities v. EPA, the Eighth Circuit limited this flexibility by characterizing a statement in a letter to a Senator as a new legislative rule that exceeded EPA’s authority under the Clean Water Act. This Note traces a decade of EPA sewage policy through the informal political process to demonstrate that the Eighth Circuit’s decision to vacate EPA’s policy undermined administrative and political accountability.

Introduction

I. Clean Water Aspirations Dampened by Aging Infrastructure
   A. The Clean Water Act Grants EPA Broad Authority
   B. Sewage Capture and Treatment
   C. Clean Water Act Requirements for Sewage Treatment
      1. Secondary Treatment Regulations
      2. Bypass Regulations
   D. Peak Wet Weather and Blending

II. Layers of Influence
   A. “Apolitical” Control: Judgment Is No Substitute for Policy

Copyright © 2014 Regents of the University of California.

* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2015; Master, Gastronomic Sciences and Quality Products, Università degli Studi di Scienze Gastronomiche, Colorno, Parma, Italy, 2007; B.S., Nutritional Sciences, University of California, Berkeley, 2005. Special thanks to Professors Robert Infelise and Holly Doremus for your guidance, expertise, and friendly candor; to Liz Long and the rest of the Ecology Law Quarterly team for your careful editing and feedback; to my parents, Marilyn and Derrick Clark, for your endless support and positivity; and to my fiancé, Brent Johnson, for your love, encouragement, and tolerance of fun sewage facts at the dinner table.
B. Congressional Control: Money Makes the Rules Go Round ...... 225
C. Executive Control: It’s My Party and I’ll Use OIRA if I Want
To ........................................................................................................... 226

III. The Rulemaking Limbo Zone .............................................................. 228

IV. Eighth Circuit to the “Rescue” ............................................................. 231
A. A New Route to Federal Jurisdiction: The “Bait and Sue” ....... 232
B. A Legislative Rule Hidden in a Letter to a Senator....................... 235

V. Two Stakeholders + One Senator + the Eighth Circuit = the New
EPA ........................................................................................................ 238

Conclusion ............................................................................................. 241

“Polluted waters menace the public health through the contamination of
water and food supplies, destroy fish and game life, and rob us of other benefits
of our natural resources.” - Senate Report No. 462, 1948

“Man is the only creature that seems to have the time and energy to pump
all his sewage out to sea, and then go swimming in it.” - Miles Kington

INTRODUCTION

The old English word “sewer” means “seaward.” “Seaward system”
succinctly describes a centuries-old approach to dealing with human waste: collect it and channel it to a body of water that will dilute it and wash it away. This basic premise remains intact today, but the Clean Water Act (CWA) guards water quality by requiring significant treatment of waste streams before they complete their journey seaward. The CWA tasks the Environmental Protection Agency (EPA) with balancing the statute’s water protection mandates with the realities of maintaining a sewer system that contains enough pipes to reach the moon twice. Recognizing the complexity of this assignment, Congress granted EPA broad authority to work in concert with municipalities and state regulators to protect the nation’s waters by building, maintaining, and monitoring systems for capture, treatment, and release of waste.

3. EPA, supra note 1, at 2-5 (recounting a surprisingly entertaining history of the evolution of wastewater treatment systems).
4. See id. at 2-4 to 2-6. Fun sewage fact: In 1858, the year of “The Great Stink,” the sewage stench from the Thames drove thousands of people out of London, and caused Parliament to attempt to block the foul odors by soaking the curtains in chloride of lime. Id.
Despite this broad delegation, the Eighth Circuit’s 2013 *Iowa League of Cities v. EPA (ILOC II)* decision used a “murky” legal doctrine to wipe out over a decade of EPA’s work to address ongoing health and environmental problems associated with sewage treatment during heavy rains.\(^8\) The case targeted correspondence between EPA and Senator Charles “Chuck” Grassley of Iowa (who campaigns on his ongoing “oversight crusade” to let “more sunshine in on how the government conducts the people’s business”\(^9\)) regarding CWA requirements for “blending” partially treated sewage and fully treated sewage during storms.\(^10\) Iowa League of Cities petitioned for review of EPA’s responses to Senator Grassley’s inquiries, and the Eighth Circuit held that EPA’s statements in the letters constituted new legislative rules promulgated in violation of the Administrative Procedure Act (APA).\(^11\) The court also found that EPA lacked statutory authority for its position on blending.\(^12\) The court remanded the issue to EPA, and it denied the agency’s request for rehearing and rehearing en bane.\(^13\)

The *ILOC II* opinion gives the judicial stamp of approval to a “bait and sue” technique that will allow stakeholders to exert undue influence on administrative policy. The League used a Senator and questions framed in neutral terms as bait to get a written statement from EPA about the controversial blending issue.\(^14\) Normally jurisdictional barriers and the APA’s exceptions for informal communication insulate agencies from challenges to statements such as those in the EPA letters; this protects informal communications that fulfill important transparency and efficiency goals in ways that no other administrative tools can. The Eighth Circuit took a new approach. After granting itself jurisdiction and re-characterizing a responsive letter as a legislative rule, the court invalidated a tentative blending policy that reflected over a decade of public input and political negotiation, and went on replace it with the League’s position on blending. In doing so, the court significantly expanded the scope of judicial intervention in administrative policy and shifted responsibility for a complex environmental balancing decision into the hands of the least politically accountable branch of the federal

\(^8\). *Iowa League of Cities v. EPA (ILOC II)*, 711 F.3d 844, 873 (8th Cir. 2013).


\(^10\). *ILOC II*, 711 F.3d at 855. The suit also addressed EPA policies on controversial “mixing zones” used for diluting discharges. Id. For background on mixing zones, see generally Gershon Eliezer Cohen, *Mixing Zones: Diluting Pollution under the Clean Water Act*, 14 TUL. ENVTL. L.J. 1 (2000).

\(^11\). *ILOC II*, 711 F.3d at 854.

\(^12\). Id. at 878.

\(^13\). Id. EPA did not file an appeal to the Supreme Court.

government.

I. CLEAN WATER ASPIRATIONS DAMPENED BY AGING INFRASTRUCTURE

ILOC II will probably have a more significant effect on the contours of the legislative rules doctrine than on water quality, because guidance documents have fewer staunch defenders than the nation’s waters do. Nonetheless, the historical and environmental context of the blending controversy highlights the boldness of the Eighth Circuit’s decision to wade into the complicated and controversial world of sewage treatment.

A. The CWA Grants EPA Broad Authority

Passed over President Nixon’s veto in 1972, the CWA has significantly reduced water pollution and improved water quality in the U.S. The statute seeks to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” It begins with a sweeping declaration of goals and policies, including an ambitious plan to eliminate the discharge of pollutants into waters of the United States by 1985. Prior to implementation of the CWA, states attempted to regulate water pollution with water quality standards alone. This approach relied on states to bring enforcement actions against dischargers who caused violations of the standards. The standards proved largely unenforceable, mostly because states found it difficult to access relevant discharge information and demonstrate causation. The CWA took a new approach, targeting pollution primarily through effluent limitations that prohibit “discharge of any pollutant” to “waters of the United States” without a permit. Congress armed EPA with a number of pollution-fighting tools,


17. See id.

18. EPA, supra note 1, at 2-11.

19. Id.

20. Id.

21. 33 U.S.C. §§ 1311(a), 1362(6), 1362(12) (‘Pollutant’ means ‘dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials,
including authority to define the effluent limitations. However, as the D.C. Circuit noted in 1987, the CWA is “quite broad in its sweep. EPA is not limited . . . to . . . establishing effluent standards and issuing permits, but is empowered . . . to prescribe regulations necessary to carry out its functions under the Act.” The CWA also grants EPA substantial power to issue administrative orders and penalties, as well as refer cases to the Department of Justice. Though the country did not completely eliminate water pollution by 1985, the CWA “established a new national policy that firmly rejected the historically accepted use of rivers, lakes, and harbors as receptacles for inadequately treated wastewater.”

The CWA framework relies heavily on a National Pollution Discharge Elimination System (NPDES) permitting program that combines technology-forcing effluent limitations with other requirements that target water quality. EPA issues some NPDES permits directly, but the agency also authorizes states, territories, and tribes to implement components of the program; forty-six states currently administer their own NPDES programs with EPA oversight. NPDES permits translate the general goals of the CWA into obligations of individual dischargers. Most dischargers must use “best practicable control technology” to limit pollutants in discharges, but for the publicly owned treatment works (POTWs) that handle most of the nation’s sewage, EPA issues effluent limitations “based upon secondary treatment.” The effluent limitations for POTWs reflect the minimum levels of effluent quality attainable using demonstrated technologies. EPA develops these standards “independently of the potential impact of a discharge on the receiving

radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”)

25. EPA, supra note 1, at 2-18.
27. See 33 U.S.C. § 1342(a), (b); 40 C.F.R. pts. 122-23.
28. ILOC II, 711 F.3d at 855 n.4; EPA, supra note 15, at 2-4 to 2-5.
30. 40 C.F.R. § 403.3(q) (2013) (defining a POTW as “a treatment works as defined by section 212 of the [CWA], which is owned by a State or municipality (as defined by section 502(4) of the [CWA]”).
32. See 33 U.S.C. §§ 1311, 1314; Maier v. EPA, 114 F.3d 1032, 1034–35 (10th Cir. 1997). Congress intended to phase in a stricter “best practicable waste treatment technology” standard for POTWs, but it later limited this provision to federally funded POTWs. Id. at 1035 (citing 33 U.S.C. § 1311(b)(2)(B) (1973) and Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. No. 97–117, § 21(b), 95 Stat. 1623, 1632 (1981)).
33. EPA, supra note 15, at 5-1.
This means that while the purpose of effluent limitations is environmental protection, the effluent limitations are designed without regard to the effects of the effluent on the environment—they simply seek to provide as much treatment as feasible with current technology. However, NPDES permits also include separate requirements based on state water quality standards that directly address the impacts of the discharge on the local environment.35

B. Sewage Capture and Treatment

For many, the CWA evokes images of EPA chasing (or failing to chase) companies that dump chemicals directly into rivers, but the provisions that govern sewage treatment and wastewater disposal systems also have significant impacts on our water quality.36 While seemingly simple at the modern indoor plumbing level, sewage capture and treatment involves a massive system of pipes designed to carry about 50 trillion gallons of raw sewage each day.37 In most systems, separate sanitary sewer pipes, which carry raw sewage, connect to the treatment plant, but storm water pipes do not.38 However, because the porous pipes often run parallel to each other, and aging infrastructure is prone to breaks and leaks, storm water can work its way into the sanitary pipes, resulting in capacity problems for treatment plants and even overflows in home basements.39

The “ew” factor aside, incomplete sewage treatment creates public health

34. Id.
35. Id. States must adopt water quality standards that protect designated “uses” for all waters within their jurisdiction. 33 U.S.C. § 1313. The incorporation of water quality standards in NPDES permits “protect[s] the quality of the specific waterbody receiving the discharge” by placing further restrictions on effluents in areas where water quality is already compromised. EPA, supra note 15, at 1-3.
37. DORFMAN, supra note 6, at 1. Fifty trillion gallons would cover a flat surface the size of California with about nineteen inches of sewage, or cause Lake Tahoe to overflow. Frequently Asked Questions about Lake Tahoe and the Basin, U.S. Forest Serv., http://www.fs.usda.gov/main/ltbmu/about-forest/about-area (last visited Apr. 14, 2014). Two types of pipelines may transport household waste and storm water: combined sewer systems or separate sewer systems. Combined systems capture all waste in a single pipeline. Alexandra Dapolito Dunn, Overview of Legal and Regulatory Requirements Applicable to Combined and Sanitary Sewer Overflow, SH041 ALI-ABA 71, 74 (2002). Combined systems, which are more common in older urbanized areas, use overflow points to guard against large flows that would otherwise overwhelm wastewater treatment plants. Id. When they reach capacity, overflow points allow untreated sewage to flow out of the pipeline before reaching the treatment plant, saving treatment plants from total breakdown, but allowing raw sewage to enter streams, rivers, and oceans. Id. For more background on problems with combined systems and what EPA has done to address them, see EPA, REPORT TO CONGRESS: IMPACTS AND CONTROL OF CSOs AND SSOS 2-9 to 2-10 (2004), available at http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm.
38. Dapolito Dunn, supra note 37, at 74.
39. See id.; DORFMAN, supra note 6, at v. Despite its potential as a topic ripe for jokes, an Internet search turned up no funny stories about sewage back-ups in basements. Rather, sewage spills in the home are dangerous and expensive. See generally DORFMAN, supra note 6. Even the cartoons are sad. See, e.g., April Showers Bring . . . , AUCHTOON!, http://auchtoon.com/?m=201304 (last visited Apr. 14, 2014) (“What’s the old saying children? ‘April showers bring –’ Raw sewage!”).
risks and causes environmental damage. Overflows frequently contain dangerous microbes, substances that deplete oxygen, toxins, nutrients (such as fertilizer run-off), and “floatables.” These pollutants can impact aquatic life, drinking water, fish and shellfish consumption, and water-based recreation. In 2001, EPA estimated that as many as 3.5 million people get sick each year from swimming in waters contaminated with sewage.

The regulatory issues raised by POTWs differ from other dischargers, because in addition to being where everyone’s waste meets, municipalities own them; the allocation of public funds directly influences their ability to comply. The CWA’s sewage and storm water treatment requirements spurred construction of thousands of POTWs in the late 1970s and early 1980s, and the majority of U.S. communities now rely on POTWs to process their sewage and storm water before it is reused or discharged into nearby bodies of water. This several-decades-old treatment infrastructure now needs serious renovation. For example, Washington, D.C. faces an average of one pipe break per day. However, repairs and replacements require significant expenditures. In 2008, EPA estimated that the nation’s water quality infrastructure needs $298 billion in updates within the next twenty years. Kansas City’s renovation plan illustrates the daunting costs that infrastructure updates can incur. In 2010 the city entered a consent decree with EPA to address sewage overflows. The plan will cost the city an estimated $2.5 billion in updates.

---

41. See EPA, supra note 37, at 5-2 to 5-3, GL-3 (“Floatables . . . are visible buoyant or semi-buoyant solids including organic matter, personal hygiene items, plastics, styrofoam, paper, rubber, glass and wood.”).
42. Id. at 5-2.
43. Dorfman, supra note 6, at 2.
44. EPA, Primer for Wastewater Treatment 1 (1980), available at nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=200044GQ.TXT.
45. See Dapolito Dunn, supra note 37, at 73. Approximately 16,255 POTWs in the United States process wastewater for 75 percent of the population; they treat 32 billion gallons of wastewater every day. Basic Information about Water Security, supra note 31. Large POTWs are 3 percent of the total number of POTWs, but these few POTWs, along with medium POTWs, serve nearly 90 percent of the POTW-using population, while 80 percent are small POTWs that serve only 11 percent of the POTW-using population. Id. Larger facilities typically handle wastewater from industrial facilities in addition to residential waste. EPA, supra note 15, at 2-6.
46. Dorfman, supra note 6, at v.
48. Id.
50. See Garrison & Hobbs, supra note 47, at Kansas City, Missouri 1.
51. Id.
billion to implement and still will not completely eliminate spills. Thus, sewage regulation has complicated and critical implications for both public health and local budgets.

C. Clean Water Act Requirements for Sewage Treatment

When sewage arrives at a treatment works, it goes through several stages of processing. Municipalities have used physical “primary treatment” to remove solids from wastewater since the late 1800s. Primary treatment relies on filtration and settling to remove a significant portion of the coarser solids from untreated waste. However, in the first half of the twentieth century, serious water pollution problems (partly due to urban migration that overwhelmed city sewers) led to recognition that primary treatment alone was insufficient.

“Secondary treatment” methods for cleaning wastewater emerged around the turn of the twentieth century to complement primary treatment, and today these methods are a fundamental step in the sewage treatment process. Secondary treatment typically refers to biological treatment of wastewater to remove pollutants that can deplete the water’s oxygen content and increase its acidity. Activated sludge treatment, the most common biological treatment used by modern treatment plants, uses microorganisms to remove solids that remain in the waste stream after primary treatment. Removal of solids prior to discharge is critical, because when microorganisms dine on organic material in waste streams, they consume dissolved oxygen. If microorganisms consume these waste solids and oxygen in the natural environment after discharge, instead of at the sewage treatment plant, they deplete dissolved oxygen in the receiving waters that other aquatic organisms need, which disturbs balance in aquatic ecosystems. In addition to its positive effects on solids and oxygen levels, biological treatment can reduce health risks by removing some viruses and bacteria from the waste stream, as well as improving the activity of chlorine and ultraviolet disinfection in supplementary

52. Id.
53. EPA, supra note 1, at 2-7.
54. COPELAND, supra note 40, at CRS-2.
55. EPA, supra note 37, at 2-1 (noting the percentage of urban Americans rose from 11 percent in 1840 to 28 percent in 1880); EPA, supra note 1, at 1, 2-7 to 2-8.
56. EPA, supra note 1, at 2-9.
57. COPELAND, supra note 40, at CRS-2.
59. COPELAND, supra note 40, at CRS-2.
60. See DORFMAN, supra note 6, at 14–15; COPELAND, supra note 40, at CRS-2 & n.2.
61. DORFMAN, supra note 6, at 15.
Treatment plants also use other physical and chemical technologies for post-primary treatment of waste streams. For example, ballasted flocculation relies on a coagulant to aggregate suspended solids. After the aggregation step, fine sand (ballast) and a polymer bond to the solids, helping them settle out of the waste stream. A ballasted flocculation system called ACTIFLO can be used at a variety of treatment stages. The ILOC II controversy centered on whether an ACTIFLO system may replace biological treatment to meet POTW secondary treatment requirements and whether use of ACTIFLO is considered a prohibited “bypass” of required treatment processes.

1. Secondary Treatment Regulations

The CWA left the statutory mandate for secondary treatment quite vague. The statute gives only two main directions with regard to secondary treatment: it charges EPA with establishing “effluent limitations based upon secondary treatment,” and it categorizes “such biological treatment facilities as oxidation ponds, lagoons, and ditches and trickling filters” that meet certain criteria established by EPA as “equivalent of secondary treatment.” However, the authors of these provisions recognized that “the term ‘secondary treatment’ defined a level of treatment for municipal wastewater that provided for the removal of organic matter and suspended solids.” Consistent with the CWA’s technology-forcing scheme, EPA’s secondary treatment regulations leave specific technology choices for POTWs open; they do not require particular treatment processes or preclude non-biological secondary treatment. The regulations currently set POTW effluent requirements for three parameters: biochemical oxygen demand, suspended solids, and pH. NPDES permits for POTWs require dischargers to meet these technology-based requirements as


63. See EPA, supra note 37, at 8-14 to 8-15, TMT-1 to TMT-9 (describing technologies that may add supplemental wastewater processing capacity during storms).

64. Id. at TMT-2.

65. Id.


67. ILOC II, 711 F.3d at 858–59. See generally EPA, supra note 37, at 8-14 to 8-15, TMT-1 to TMT-9 (describing technologies for wastewater processing).


69. Id. § 1314(d)(4).


well as any local water-quality-based limits for specific pollutants, such as bacteria.  

2. Bypass Regulations

NPDES permits also include a series of standard conditions that place additional restrictions on dischargers. One standard condition addresses “bypass,” defined as any “intentional diversion of waste streams from any portion of a treatment facility” that causes effluent limitations to be exceeded. The regulations prohibit bypasses that result in a violation of effluent limitations, except when:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
(B) There were no feasible alternatives to the bypass . . . and
(C) The permittee submitted [required] notices . . .

POTWs may use bypasses that do not cause effluent limitations to be exceeded, but only “for essential maintenance to assure efficient operation.” The bypass regulation survived a legal challenge in 1987, when the D.C. Circuit held that the rule was reasonable, fell within EPA’s authority, promoted the goals of the CWA, and was consistent with the CWA’s technology-forcing approach. Industry intervenors argued that the regulation conflicted with Congress’s decision to “avoid dictating specific treatment technologies,” but the court rejected this assertion for a couple of reasons. First, rather than dictate a specific technology, the bypass regulation requires that the plant operate “as designed” and in compliance with its NPDES permit conditions. Second, the “first principle of the [CWA] is . . . that it is unlawful to pollute at all.” The court was unconvinced that the CWA’s statutory scheme allowed POTWs to carry out any less than the maximum feasible treatment at any time. Thus, the court concluded that EPA’s adoption of the bypass regulation with its “two broad and sensible exceptions” was lawful. Nonetheless, many municipalities continue to object to the “no feasible alternatives” analysis requirement, claiming it is time-consuming and resource-intensive, with minimal benefits.

---

73. See NATURAL RES. DEF. COUNCIL, supra note 62, at 20; Dapolito Dunn, supra note 37, at 73.
74. See 40 C.F.R. § 122.41.
75. Id. § 122.41(m).
76. Id.
77. Id. § 122.41(m)(2).
79. Id. at 122–23.
80. Id. at 123.
81. Id.
82. Id.
83. Id. at 126.
84. Brief for Petitioner, ILOC II, 711 F.3d 844 (8th Cir. 2013) (No. 11-3412), 2012 WL 1029853, at *42 nn.35 & 37 (citing affidavits from Iowa cities with financial impacts estimates ranging from $1.2 million to $250 million).
“diversion,” has remained highly controversial, because it has a significant effect on the ability of municipalities to react to peak flows during big storms.

D. Peak Wet Weather and Blending

Municipalities design treatment plants to handle predictable flows, but challenges can arise when incoming flows increase. During wet weather like rainfall and snowmelt, extra water may seep into sewers, increasing the sewage volume that arrives at treatment plants. The added load on treatment plants during these peak flow conditions may reduce treatment efficiency, exceed the capacity of treatment components, and wash out the microorganisms used for biological secondary treatment (particularly in activated sludge systems), which can reduce treatment capacity for months. Overflows are “practically impossible” to completely eliminate, because natural disasters and pipe failures inevitably lead to occasional unavoidable spills. Additionally, engineers cannot design biological treatment plants with capacity to treat all wastewater during peak flows, because the microorganisms used for secondary treatment would “essentially starve to death” during drier periods. However, treatment plants can theoretically manage most peak flows by improving operation and maintenance programs, enlarging pipes, increasing storage capacity, adding treatment facilities, or using alternative treatments. For example, Milwaukee and Chicago use huge systems of underground tunnels to hold excess flows during wet weather. Treatment plants can also use auxiliary physical or chemical-based secondary treatment units that run only during peak flow periods. On the wastewater “supply” side, municipalities can reduce the burden on sewer systems with green infrastructure elements, such as “green roofs, street trees, green space, rain barrels, rain gardens, and permeable pavement.”

Nonetheless, some POTWs have dealt with wet weather by diverting flows that exceed biological treatment capacity around secondary treatment units. After part of the incoming stream undergoes secondary treatment, the

85. COPELAND, supra note 40, at CRS-4.
87. Id. at 63,044-45, 63,051.
88. COPELAND, supra note 40, at CRS-4 to CRS-5.
89. Id. at CRS-7.
90. Id. at CRS-4.
91. Id. at CRS-7.
92. Id.
completely treated and partially untreated flows are blended to create an outgoing stream that meets end-of-the-pipe effluent limitations. In a 2002 survey, almost half of respondents said they use blending a few times a year, during wet weather conditions. Treatment plant operators view this practice as preferable to potential overflows and treatment plant damage. Blending critics argue that the secondary treatment requirements and bypass regulation prohibit blending and that blending negatively impacts public health and the environment. Disease outbreaks associated with inadequately treated sewage can costs millions of dollars in medical bills and lost productivity, and contamination can also negatively impact economies that rely on water-based recreation. Blending proponents argue that any benefits of avoiding blending do not justify the large costs to municipalities associated with infrastructure changes; moreover, blending would allow more POTWs to meet permits “all or a majority of the time.”

Blending has been highly controversial for over a decade. In 2001, EPA circulated a draft guidance document to stakeholders that addressed POTW permit requirements and enforcement procedures for three specific wet weather situations, including blending. EPA eventually pared the document down to a proposal that focused only on blending, and the agency published a request for comments on the policy in November 2003. The 2003 draft blending policy stated EPA would not consider diversions around biological treatment units to be bypasses if they were blended with fully treated flows prior to discharge so as to meet effluent requirements, and they met certain criteria. While only a handful of people and organizations normally comment on informal rulemaking proceedings, EPA received over 98,000 comments on

96. COPELAND, supra note 40, at CRS-8.
97. Id.
98. See, e.g., NATURAL RES. DEF. COUNCIL., supra note 62, at 3.
99. Id. at 26–27.
100. See COPELAND, supra note 40, at CRS-8.
102. COPELAND, supra note 40, at CRS-6.
103. 70 Fed. Reg. at 76,014; COPELAND, supra note 40, at CRS-6.
104. 70 Fed. Reg. at 76,014.
105. Stephen M. Johnson, Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking, 65 ADMIN. L. REV. 77, 82 (2013). Most rules receive fewer than thirty-five comments, but occasional cases with significant public interest can generate more. Id. For example, a 1991 rule regarding Medicare physician fees received 95,000 comments, and in 1997, the U.S. Department of Agriculture received more than 250,000 comments regarding the proposed national organic standards. Id. EPA received fewer than 50,000 comments on a
the blending proposal. Many commenters opposed the policy due to human health concerns, and seventy-three members of Congress signed a letter urging EPA not to adopt it. In a May 2005 press release, EPA announced that it would not finalize the policy. Congress gave the proposal its final flush down the drain in the 2006 appropriations bill, which explicitly prohibited EPA from using federal funding to implement the 2003 policy. Thus, as of late 2005, EPA had not adopted a final policy on whether blending was subject to a “no feasible alternatives” analysis under the bypass regulations, but it had rejected the “blending is not a bypass” approach.

The Natural Resources Defense Council (NRDC) and the Association of Metropolitan Sewerage Agencies (AMSA, now called National Association of Clean Water Agencies [NACWA]) took opposite positions during the 2003 blending policy debate. NRDC called the policy “both illegal and unwise,” because it conflicted with the CWA and the bypass regulations and it endangered public health and the environment. AMSA strongly supported the policy, claiming that it “restate[d] in writing the Agency’s long-standing interpretation of the current regulation.” In the aftermath of the failed 2003 proposal, EPA encouraged the organizations to find a compromise that would balance their interests. In October 2005, NRDC and NACWA submitted a joint proposal to EPA. The proposal required application of the bypass rule to all wet weather diversions at POTWs that serve separate sanitary sewers.

In December 2005, EPA invited comments on a revised peak flows policy that reflected the NRDC/NACWA approach. Its notice described the

---

112. NRDC/NACWA Letter, supra note 111.
113. Id.
114. Id.
115. Id.
116. Id.
inconsistent implementation of the bypass rule that prompted EPA to re-attempt clarification:

In recent years there has been substantial confusion regarding the regulatory status of peak wet weather flow diversions around secondary treatment units... In some cases, such diversions have been considered a bypass and held to the criteria of the NPDES bypass regulation. In other cases, diversion scenarios around secondary treatment units at POTW treatment plants have been constructed and permitted at facilities without consideration of the bypass regulation criteria.  

The introduction to the 2005 policy reiterated a statement that EPA made when it rescinded the 2003 policy: the agency “strongly discourages reliance on peak wet weather flow diversion around secondary treatment units as a long-term wet weather management approach.” EPA explained that it expected POTWs to reduce their need for bypasses over time by increasing storage and treatment capacity and reducing sources of peak flow volume. The notice went on to describe EPA’s new proposal, which would subject wet weather flow diversions to the bypass rule’s no-feasible-alternatives requirements.

The docket for the 2005 policy includes notes from an EPA, NRDC, and NACWA meeting after the close of the comment period as well as two draft versions of the Federal Register notice that would have finalized the policy. However, an internal EPA email from June 2008 indicated that the peak flows policy was still under interagency review. The agency apparently took no further public action on the issue until June 2010, when it published a notice describing EPA’s interest in including the policy in a comprehensive rulemaking on sanitary sewer permitting. The 2010 notice simply stated that “EPA ha[d] not, to date, finalized the draft Policy.” The explanation for the delay likely lies in partisan politics and presidential control of the EPA.


118. Id. (internal citation omitted).


120. 70 Fed. Reg. at 76,015; see also GARRISON & HOBBS, supra note 47, at 5 (describing how green infrastructure can reduce incoming flows).

121. 70 Fed. Reg. at 76,015.


123. Petition for Review at 18, Iowa League of Cities v. EPA, 711 F.3d 844 (8th Cir. 2010) (No. 10-2646); see infra Part II.C.


agenda.\footnote{126}{See }infra Part II.C.

II. LAYERS OF INFLUENCE

Though agencies have no explicit obligation to issue clarifying rules or statements (unless statutes specifically direct them to take particular actions),\footnote{127}{Hector v. U.S. Dep’t of Agric., 82 F.3d 165, 167 (7th Cir. 1996).} they constantly communicate with members of government and the public. The APA requirements for formal and informal rulemaking allow agencies to provide information to regulated parties in many forms.\footnote{128}{See }5 U.S.C. §§ 553, 556, 557 (2012).

Judge Posner has noted that “[e]very governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement.”\footnote{129}{Hector, 82 F.3d at 167.} However, Judge Posner’s characterization of agencies as benevolent sharers of information belies the strong political forces that often drive them. Congress and the executive office heavily influence the administrative rulemaking agenda, and an agency’s ultimate decision about how and when to wield its power is highly political.\footnote{130}{See }infra Parts II.B, II.C.

A. “Apolitical” Control: Judgment Is No Substitute for Policy

Agencies create rules that speak to everything from the meaning of specific statutory terms to internal procedures for decision making.\footnote{131}{Connor N. Raso, Strategic or Sincere? Analyzing Agency Use of Guidance Documents, 119 YALE L.J. 782, 822 (2010).} While an agency’s interpretation of a statute or legislative rule may evolve in the process of enforcement, agencies rarely rely on “pure ad hocery” to make decisions.\footnote{132}{RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 496–500 (5th ed. 2010); Richard K. Berg, Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication, 38 ADMIN. L. REV. 149, 163 (1986).} Rules that set policy ex ante create more clarity, predictability, and uniformity, and this can reduce enforcement and adjudication costs, both for agencies and for private parties.\footnote{133}{Berg, supra note 134, at 163.} The rulemaking process can foster fairness, accountability, openness, deliberation, and efficiency\footnote{134}{Raso, supra note 133, at 822.} by helping agencies gather information about their intended approach\footnote{135}{Berg, supra note 134, at 163.} and “reducing the democratic problems introduced by allowing unelected agency leaders to make legally binding rules.”\footnote{136}{Raso, supra note 133, at 822.}
rulemaking than a judge can when addressing a specific case. \(^{137}\)

The APA public participation requirements allow stakeholder input in the rulemaking process, protect against arbitrary decisions, and facilitate monitoring of agencies by the elected branches. \(^{138}\) Under the APA, the malleable term “rule” means “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” \(^{139}\) The APA outlines requirements for rare formal (“on the record”) rulemaking, but most agencies implement their major statutory mandates through the APA’s informal (“notice and comment”) rulemaking process. \(^{140}\) For informal rulemaking, agencies must publish “notice of proposed rule making” in the Federal Register, “give interested persons an opportunity to participate in the rule making,” and provide a “concise general statement of their basis and purpose” in the final rule. \(^{141}\) The APA also requires agencies to give “interested person[s] the right to petition for the issuance, amendment, or repeal of a rule.” \(^{142}\) This process improves public understanding and acceptance of rules. \(^{143}\)

However, the APA specifically reserves tools that facilitate other types of informal, efficient communication. \(^{144}\) The APA exempts “interpretative rules” and “general statements of policy” from notice and comment requirements, so agencies may speak to some statutory, regulatory, and technical issues without new rulemaking. \(^{145}\) Courts and legal scholars commonly refer to rules promulgated pursuant to the APA notice and comment procedures as “legislative rules” or “substantive rules” and agency positions that fall within the exemptions for interpretative rules or general statements of policy as “nonlegislative rules” or “guidance documents.” \(^{146}\) While legislative rules “create law, prescribe, modify, or abolish duties, rights, or exemptions, or fill statutory gaps,” interpretative rules only “clarify an agency’s interpretation

---

137. Pierce, supra note 134, at 496; Johnson, supra note 105, at 79; Raso, supra note 134, at 822.
139. 5 U.S.C. § 551(4).
141. 5 U.S.C. § 553(b), (c).
143. Johnson, supra note 105, at 79.
147. Hickman, supra note 147, at 477 (internal quotation marks and citation omitted).
of an existing legislative rule or statute without imposing substantive changes.”

Policy statements describe how the agency plans to exercise discretionary power. The APA does not define “interpretative rules” or “general statements of policy,” but they commonly including memoranda, manuals, circulars, bulletins, advisories, technical documents, staff policies, and letters. For example, EPA’s website includes CWA guidance documents that address enforcement, penalties, and specialized topics.

Guidance documents can reduce uncertainty about legal obligations and improve parties’ ability to prepare for future action. The notice and comment process requires significant agency resources, but agencies can finalize guidance documents quickly and generate far more guidance than legislative rules. As the D.C. Circuit has noted, regulated parties generally prefer imperfect informal information to no information at all:

A businessman unable to obtain a final, authoritative ruling on the matter at hand is nevertheless interested in an ‘advisory’ indication, perhaps from a subordinate official, which can serve the purpose of providing an informed though not binding prediction. This technique of apprising persons informally as to their rights and liabilities has been termed an ‘excellent practice in administrative procedure.’

Generally applicable guidance documents can save critical time and resources by answering such questions from many stakeholders in a single document, rather than numerous individual replies. Agencies faced with inadequate funding and budget cuts may rely heavily on guidance, so they can still pursue policy development and enforce existing rules.

“In an ideal world, administrative agencies would develop regulations in an informal rulemaking process that would be transparent and efficient and that

---

148. See id.; Raso, supra note 134, at 789.
149. Hickman, supra note 147, at 478; Funk, supra note 147, at 1332.

Substantive rules—rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute. . . . Such rules have the force and effect of law. Interpretative rules—rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers. . . . General statements of policy—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

American Mining, 995 F.2d at 1109.

152. Croston, supra note 143, at 382; Raso, supra note 134, at 822.
155. Croston, supra note 143, at 383.
156. See Raso, supra note 134, at 822.
included broad input from the public, or an entity advocating for the public, as well as the regulated community; instead, concerns about agency capture and political accountability plague the process.  

157  Fearing that the benefits of guidance will lead agencies to deliberately circumvent rulemaking procedures and pursue an administrative “tyranny of small decisions,” 158 courts approach guidance documents suspiciously. 159 The D.C. Circuit described this concern in its widely cited 160 Appalachian Power opinion:

The phenomenon . . . is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations . . . An agency operating in this way gains a large advantage. “It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.” . . . The agency may also think there is another advantage—immunizing its lawmaking from judicial review. 161

Courts worry that secret, unilateral agency action undermines the administrative rulemaking process. 162 However, a recent empirical study on guidance documents challenged this assumption, and the author concluded that recent data showed that these concerns have been overstated. 163 Nonetheless, agencies and courts continue to struggle with the tradeoffs between legislative and nonlegislative rules. 164

When courts attempt to reign in administrative discretion with procedural requirements, they risk unappealing consequences. Restricting use of guidance documents can discourage release of information, rather than force agencies to

---

157. Johnson, supra note 105, at 78.
158. See ILOC II, 711 F.3d at 873; Raso, supra note 134, at 785.
160. See, e.g., Brief for Petitioner, ILOC II, 711 F.3d 844 (No. 11-3412), 2012 WL 1029853, at *20.
161. Appalachian Power, 208 F.3d at 1020 (citing Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 85 (1995)).
162. Raso, supra note 134, at 787.
163. Id. at 787, 796. The study used a large set of data generated by the Bush Executive Order. Id.; see infra Part II.C. The author of the study suggests that the results show “agencies do not engage in widespread abuse of guidance, . . . [so] proponents of restrictions [on guidance] should face the burden of providing empirical evidence for the assumption that agencies frequently abuse guidance.” Raso, supra note 134, at 823.
164. See PIERCE, supra note 135, at 496. See generally Funk, supra note 147 (calling the distinction between legislative and nonlegislative rules “complex”).
use more transparent procedures. To permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue. Instead, agencies might rely more on ad hoc enforcement and adjudication, depriving regulated parties of the notice provided by all types of rules. Thus, courts must carefully consider competing notions of fairness and efficiency when they assess agencies’ choice of administrative tools. However, these practical concerns may drive agency action less than (sometimes competing) pressures from the political branches.

B. Congressional Control: Money Makes the Rules Go Round

While juggling the procedural demands of the rulemaking process, agencies also “do not and cannot ignore Congress.” Beyond directing agency action by statute, Congress uses informal communication to keep a watchful eye on agency activities, and legislators frequently attempt to influence agency officials. To garner goodwill among potential supporters, congressional offices continuously engage in “casework” on behalf of their constituents, which can include resisting enforcement of regulations. Caseworkers typically forward letters from constituents to agencies, with a cover letter from the legislator, and agencies respond promptly to such inquiries. Congressional staff members handle most casework, but members of Congress may participate personally on particularly important cases, especially where the member’s personal clout may overcome agency resistance or where the case involves “a relative, friend, or local VIP.”

Members of Congress normally get answers to their questions, because agency representatives know they may face escalating political pressures if they refuse to cooperate. Congressional committees may call for oversight hearings or other time-consuming and politically exposed processes in order to force an agency to show its hand. Congress can also use the appropriations

172. Levin, supra note 172, at 18.
173. Id. at 18–19.
175. Id.
process to nudge cash-strapped agencies toward a particular outcome.\footnote{176} The ever-looming threat of these heavier-handed options normally suffices to ensure that agencies respond to informal communications from legislators. As noted above, members of Congress used several of these methods to block the 2003 blending policy.\footnote{177}

C. Executive Control: It’s My Party and I’ll Use OIRA if I Want To

Although legislators can influence agency policy, “[w]e live today in an era of presidential administration.”\footnote{178} The executive branch has wielded increasing power over the administrative state in the last half century, and it has a variety of tools for doing so at its disposal.\footnote{179} As an individual, the President can exert direct control over administrative agendas through appointment and removal of agency heads.\footnote{180} Presidents also express policy preferences in signing statements that accompany bill approvals or in formal directives to agencies.\footnote{181} However, “[p]residential control is a ‘they,’ not an ‘it,’”\footnote{182} and numerous White House offices may exercise selective influence over rulemaking activities, alone or in coalitions.\footnote{183} A change in administrations may also halt agency activities while the new executive office assesses policy priorities.\footnote{184} While political oversight of agencies improves transparency and accountability in that voters theoretically hold the President responsible on Election Day, much White House involvement in administrative action is not

\footnote{176} Id.\footnote{177} See 2006 Appropriations, \textit{supra} note 109 (prohibiting spending to finalize the policy); Stakeholder Input for NPDES Permit Requirements for Peak Wet Weather Discharges from Publicly Owned Treatment Works Serving Separate Sanitary Sewer Collection Systems, 75 Fed. Reg. 30,395, 30,399 (June 1, 2010) (noting seventy-three members of Congress signed a letter opposing the policy).\footnote{178} Kagan, \textit{supra} note 169, at 2246.\footnote{179} Michael Hissam, \textit{The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration}, 76 GEO. WASH. L. REV. 1292, 1293 (2008).\footnote{180} U.S. CONST. art. II, § 2, cl. 2; see Myers v. United States, 272 U.S. 52, 119 (1926) (holding removal power operates analogously to appointment power for principal officers).\footnote{181} TODD GARVEY, CONG. RESEARCH SERV., REP. NO. RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS para. 1 (2012), \textit{available at} http://www.fas.org/spp/crs/natsec/RL33667.pdf; Kagan, \textit{supra} note 169, at 2285.\footnote{182} Lisa Schultz Bressman & Michael P. Vandenbergh, \textit{Inside the Administrative State: A Critical Look at the Practice of Presidential Control}, 105 MICH. L. REV. 47, 49 (2006).\footnote{183} Id. at 49–50, 64 n.107, 68, 79.\footnote{184} COPELAND, \textit{supra} note 40, at CRS-5 to CRS-6. For example, in the late 1990s, EPA and a group of stakeholders began to develop a national plan to control overflows from sanitary sewers. \textit{Id.} In 2000, the Clinton administration approved a proposed rule, but the proposal did not make it into the Federal Register before President Bush’s inauguration. \textit{Id.} The Bush administration suspended it for review for several months. “[T]he announcement of the rule by the Clinton Administration, but with revised preamble language . . . . Chief among the controversies raised was whether EPA would . . . . retain the policy detailed in the Clinton rule calling for strict enforcement against any overflows, regardless of fault.” \textit{Id.}
visible to the public.\textsuperscript{185}

In 1981 President Reagan issued the first in a series of executive orders that have increased executive control of administrative activity.\textsuperscript{186} The orders require the Office of Information and Regulatory Affairs (OIRA), housed within the Office of Management and Budget (OMB), to review proposed and final regulations prior to publication.\textsuperscript{187} President Clinton’s version of the Executive Order scaled back Reagan’s approach, but shortly after the Democrats won control of Congress in 2006, President Bush expanded the Order, extending OIRA review to significant guidance documents.\textsuperscript{188} The same day, OMB issued a Final Bulletin on Agency Good Guidance Practices with similar requirements.\textsuperscript{189} President Obama revoked the Bush Order, returning the Clinton Order to its original form, but the OMB Bulletin remains in effect.\textsuperscript{190}

Even though the APA exempts guidance documents from notice and comment requirements,\textsuperscript{191} the OMB Bulletin includes requirements for guidance format, notice, and accepting public input on significant guidance documents, as well as an additional notice and comment requirement for economically significant documents.\textsuperscript{192} Sally Katzan, head of OIRA for the Clinton Administration, described the Bush Executive Order and OMB Bulletin as part of a “steady and unwavering effort to . . . restrict agency autonomy and discretion.”\textsuperscript{193} OIRA review provides a particularly effective hook for influencing agency action, where direct intervention by the President in rulemaking would not be politically palatable:

Let us suppose an agency has held a rule-making proceeding that . . . consider[ed] every significant issue and arrive[d] at the best possible decision. Those who have been watching and participating in such a process are going to be . . . outraged if, just before the agency publishes its final rule, the president calls to tell the agency what rule it should adopt.\textsuperscript{194}

The OIRA review process gives the executive branch the opportunity to do just

\textsuperscript{185} Schultz Bressman & Vandenbergh, supra note 183, at 78 (reporting 97 percent of former EPA officials surveyed stated that “White House involvement was either not visible to the public or only somewhat visible to the public”).


\textsuperscript{187} CURTIS W. COPELAND, CONG. RESEARCH SERV., REP. NO. R41834, REGULATORY REFORM LEGISLATION IN THE 112TH CONGRESS 8 (2011); Schultz Bressman & Vandenbergh, supra note 183, at 49.

\textsuperscript{188} COPELAND, supra note 188, at 9–10; Hissam, supra note 180, at 1295 (noting that under the Clinton Order, review dropped from 2000 to 3000 rules per year to only 500 to 700 per year). See Exec. Order No. 12,866 § 6(b)(1); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007).


\textsuperscript{190} COPELAND, supra note 188, at 10.


\textsuperscript{192} Hissam, supra note 180, at 1299; see Exec. Order No. 13,422; 72 Fed. Reg. at 3432.

\textsuperscript{193} Hissam, supra note 180, at 1302.

\textsuperscript{194} MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS 112 (1988).
that, but in a less politically visible way. The political branches get credit for addressing an issue, but then a policy or rule may simply disappear for an extended period of time.

EPA’s relegation of the peak flows policy to an administrative limbo zone likely had more to do with presidential politics than a failure by the agency to reach a decision. The Bush administration took steps to unravel much of the Clinton EPA’s work on sewage overflows, whittling prior efforts down to the narrow and POTW-friendly 2003 blending proposal. In the face of public outrage at the proposal, Bush faced two politically undesirable options: allow EPA to move ahead with a revised version of the policy that would prove expensive and burdensome for municipalities, or take the political heat for supporting incomplete sewage treatment. It appears that Bush found a third option in the OIRA review process—stall in interagency review for the remainder of his term in office. This approach allowed both political branches to get credit for blocking the unpopular blending policy and generating a new solution, without actually implementing any changes. The remaining gap in EPA action on blending probably reflects the change in administration; the June 2010 proposal to revisit blending as part of a larger CWA permitting overhaul came just a year and a half after Obama took office—lightening fast in presidential years.

III. THE RULEMAKING LIMBO ZONE

Nevertheless, the failure to develop a final peak flows policy in 2005 left municipalities with practical, urgent concerns. In the absence of a clear final decision from EPA on the legal status of blending, states have taken a variety of approaches to blending: “some authorize blending in permits, some approve it as an anticipated bypass, and some prohibit blending outright regardless of whether numerical permit limits are met.” This inconsistency made municipalities uneasy when they contemplated sinking significant public resources into sewage treatment infrastructure. In July 2010, Iowa League of Cities, an organization that represents Iowa municipalities, petitioned the Eighth Circuit for review of several EPA letters and internal memos, as well as the June 2010 Federal Register notice regarding sanitary sewer rulemaking. The League claimed that these documents set forth reviewable “final

195. See COPELAND, supra note 40, at CRS-5 to CRS-6.
198. See ILOC II, 711 F.3d at 854; May Letter, supra note 14.
actions.”201 The challenged documents included EPA’s response to a letter requesting that the agency withdraw the 2005 draft peak flows policy.202 In its reply to that request, EPA had quoted the bypass regulation and stated that “although the 2005 policy [had] not been finalized, it remain[ed] a viable path forward for utilities to meet their obligations under the bypass regulation.”203 Another challenged letter responded to several questions posed by Senator Grassley regarding sewer overflows.204 In its motion to dismiss the petition, EPA argued that none of the documents were rules, regulations, or final actions subject to direct appellate review under the CWA.205 The court granted EPA’s motion to dismiss the claim for lack of subject matter jurisdiction in late 2010, but it did not provide an explanation for its decision.206

Following dismissal of the first case, the League “continued to perceive a conflict between the agency’s official written policies and the expectations it was transmitting to the state entities that served as liaisons between the EPA and municipal wastewater treatment facilities.”207 However, it needed a concrete statement from EPA to have a shot at meeting the ripeness, finality, and exhaustion requirements that normally guard against premature judicial intervention in agency decision-making processes.208 The League enlisted the help of the Iowa Water Environment Association (IAWEA) and the prolific Senator Grassley (whose correspondence with EPA had prompted one of the letters at issue in ILOC I) to extract a detailed statement from EPA about its approach to blending.209

In May 2011, Senator Grassley sent letters to EPA requesting clarifications on several CWA issues raised by IAWEA.210 Though many of the League’s members also belong to IAWEA, the League’s name appeared nowhere in the letters.211 IAWEA framed its inquiry as both urgent and purely informational:

To be clear, our request is not intended to evaluate or debate the merits of any of the Agency interpretations at issue. Our Association is simply requesting that EPA inform the public of its current working law so appropriate solutions can be designed to meet applicable federal rules.

201. Id. at 1.
202. Respondent EPA’s Motion to Dismiss Petition for Review at 5, Iowa League of Cities v. EPA (ILOC I), No. 10-2646 (8th Cir. Nov. 16, 2010).
203. See Petition for Review, supra note 123, at 11.
204. Id. at 12.
206. ILOC I, No. 10-2646. The entire judgment reads: “The motion of respondent for dismissal of this appeal is granted. The appeal is hereby dismissed for lack of subject matter jurisdiction. The motion to compel production of the administrative record is denied. See Eighth Circuit Rule 47A(b).” Id.
207. ILOC II, 711 F.3d at 854.
209. See ILOC II, 711 F.3d at 854; Petition for Review, supra note 123, at 12.
210. See ILOC II, 711 F.3d at 854; May Letter, supra note 14.
Given the billions of dollars in Iowa fiscal resources at stake, a clear response to this request is essential.”

The IAWEA letters expressly requested EPA opinions on the application of the bypass rule to specific treatment scenarios. The May letter also asked EPA to weigh in on blending:

May a state approve the use of physical/chemical treatment processes, such as Actiflo (i.e., ballasted flocculation), to augment biological treatment and recombine the treatment streams prior to discharge, without triggering the application of federal bypass of secondary treatment rule requirements? If not, what requirements must be demonstrated to allow use of such facilities to assist in processing peak wet weather flows without violating either the secondary treatment or bypass regulations?  

Senator Grassley received a prompt response from EPA’s Acting Assistant Administrator, Nancy Stoner, that addressed each of IAWEA’s questions. Stoner’s June 2011 letter noted that EPA was considering modifications to the NPDES permitting regulations that might address the issues in the draft peak flows policy. Stoner’s response to the blending inquiry reiterated that EPA was actively working on these issues and that the 2005 policy had not been finalized. She also stated that the “regulation itself establishes whether a particular diversion is a bypass.”

Senator Grassley and IAWEA persisted in their quest for a more concrete answer. In July 2011, Senator Grassley sent a further inquiry from IAWEA to EPA that pressed the agency to explicitly apply the bypass regulation to ACTIFLO:

While it is apparent from EPA’s response that the use of certain peak flow processes may be proscribed unless the community demonstrates “no feasible alternative” was available, EPA did not specifically indicate whether processes such as ACTIFLO fall into this category. A clear response to that question is needed because this is a process option under active consideration for stream-side treatment of peak flows.

Therefore, we respectfully request that... EPA respond to the following additional questions:

1.  

2.  

213. Id.
214. Several years earlier, Stoner had prepared NRDC’s comments on the 2003 blending policy and signed the joint NRDC/NACWA proposal that informed the 2005 peak flows policy. See NATURAL RES. DEF. COUNCIL, supra note 62, at 1; NRDC/NACWA Letter, supra note 111.
215. See ILOC II, 711 F.3d at 854; June Letter, supra note 14.
216. See June Letter, supra note 14.
217. See id.
218. See id.
In September 2011, Stoner responded to IAWEA’s request in a second letter to Senator Grassley. She reiterated that flows diverted around biological treatment units are bypasses unless they are diverted to another secondary treatment unit. Her letter went on to say that:

Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations . . . , and hence are not considered secondary treatment units.

Therefore, she explained, diversion of flows from a secondary treatment unit to the ACTIFLO process would be considered a bypass and allowed only if there are no feasible alternatives.

IV. EIGHTH CIRCUIT TO THE “RESCUE”

The League promptly challenged the new EPA letters on procedural and substantive grounds, and this time it prevailed. It argued that Stoner’s response to the ACTIFLO question was a new ban on ACTIFLO that could only be implemented pursuant to APA notice and comment requirements. It also claimed that by attempting to regulate processes within the POTW facilities, rather than only at the discharge point, EPA reached beyond its CWA authority. The court found that it had jurisdiction to review the letters and held that EPA had announced a new legislative rule for blending in the September letter without following the necessary procedures. In an unusual move, the court did not stop at vacating the “rule” that it extracted from EPA’s letters; it went on to consider the League’s substantive claim that the peak flows policy exceeded EPA’s authority. The court framed the new blending rule as “apply[ing] effluent limitations on the discharge of flows from one internal treatment unit to another,” and concluded that the CWA’s end-of-pipe focus precluded such a rule. Therefore, it vacated the rule, “insofar as [it] impose[d] secondary treatment regulations on flows within facilities.” The Eighth Circuit bent over backward to rule for the League in every step of its blending review. In doing so, it actively disagreed with decisions by other circuits that discourage premature judicial involvement in administrative policy.

221. Id.
222. Id.; see 40 C.F.R. § 133.102 (2013).
224. See ILOC II, 711 F.3d at 854, 878.
225. Id. at 860.
226. Id.
227. Id. at 871–72, 876.
229. See ILOC II, 711 F.3d at 876.
230. Id. at 877–78.
231. Id. at 878.
A. A New Route to Federal Jurisdiction: The “Bait and Sue”

Not surprisingly, very few courts have entertained challenges to agency responses to inquiries from Senators.232 There are sound reasons why such advisory letters and opinions should not be subject to judicial review. . . . . Advisory opinions should, to the greatest extent possible, be available to the public as a matter of routine; it would be unfortunate if the prospect of judicial review were to make an agency reluctant to give them.233

Given the tools that members of Congress have to ensure that agencies respond to questions and the large volume of informal communication that they solicit, challenges to responsive letters to politicians could flood the court system if courts did not keep these types of suits in check.234 As agencies “do not and cannot ignore Congress,”235 an increase in judicial review of responsive letters would also have disastrous results for allocation of public resources; the environmental goals of the CWA would certainly be neglected if EPA had to devote even more taxpayer money to defending its routine communications in court.

EPA’s ILOC II brief focused primarily on jurisdiction, and for good reason: jurisdictional requirements normally preclude judicial review of agency responses to unsolicited requests for speculative applications of the law.236 Several courts have dismissed cases with facts similar to those in ILOC II for lack of jurisdiction.237 For example, the circumstances leading to the Fifth Circuit’s decision in National Pork Producers Council v. EPA followed a familiar pattern. After EPA published a rule regarding NPDES permits for confined animal feeding operations, the agency received requests for clarification from two members of Congress and a farm executive.238 The Assistant Administrator for the Office of Water responded with three guidance letters, and trade groups challenged them, arguing that the letters established a

232. See, e.g., Nat’l Pork Producers Council v. EPA (National Pork), 635 F.3d 738 (5th Cir. 2011) (holding the court lacked jurisdiction to review EPA’s letters to two members of Congress).
234. See Shedd, supra note 175, at 11.
236. Brief for Respondent, ILOC II, 711 F.3d 844 (No. 11-3412), 2012 WL 6660321. EPA dedicated nearly twenty-five pages of its brief to jurisdictional issues, and only addressed the League’s substantive claim regarding the scope of EPA’s authority in a footnote. Id.
237. See National Pork, 635 F.3d 738; Indep. Equip. Dealers Ass’n v. EPA, 372 F.3d 420 (D.C. Cir. 2004); see also City of San Diego v. Whitman, 242 F.3d 1097, 1099–1102 (9th Cir. 2001) (finding lack of jurisdiction to review EPA letter responding to inquiry from a city about applicability of the CWA because it was not the “consummation” of the decision-making process); USAA Fed. Sav. Bank v. McLaughlin, 849 F.2d 1505, 1508–10 (D.C. Cir. 1988) (holding an “unpublished letter to a particular individual responding to a specific inquiry” was not a “definitive statement” of the agency position, due in part to “the informal nature of the communication”). But see Nat’l Automatic Laundry, 443 F.2d at 702 (holding a responsive letter reviewable in light of the court’s “[s]urvey of [o]verall [c]onsiderations [j]udicial [j]review,” including finality).
new substantive rule. The court dismissed the claim, because the guidance letters “neither create[d] new legal consequences nor affect[ed] [the petitioners’] rights or obligations,” so they did not constitute reviewable final agency action under the CWA’s provision for direct appellate review of promulgations of effluent limitations (the review provision at issue in ILOC II). Similarly, in Independent Equipment Dealers Ass’n v. EPA, the D.C. Circuit determined it did not have jurisdiction to review a responsive letter from EPA to a construction and industrial equipment trade association. The letter was not “reviewable agency action,” because it was “purely informational,” “imposed no obligations,” and simply restated the law. Even the League’s first petition for review of EPA informal communications failed due to lack of jurisdiction.

The major jurisdictional issue central to the Fifth Circuit’s concerns about reviewing responsive letters in National Pork is conspicuously absent from the ILOC II opinion: finality. Though the League and EPA both briefed finality, the Eighth Circuit relegated its discussion of the issue to footnote twelve:

The APA allows judicial review in two situations: “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . .” The word “final” modifies the second use of “agency action,” but not the first. While some courts have interpreted the phrase “[a]gency action made reviewable by statute” as including an implied finality requirement, . . . we decline to conjure up a finality requirement for “[a]gency actions made reviewable by statute” where none is located in the text of the APA. . . . The CWA expressly makes specified agency actions reviewable, and our task therefore is to determine whether the asserted agency action falls within the statutory terms.

The court’s assessment of the finality requirement in the CWA directly conflicts with the Fifth Circuit’s holding that “[a]s a threshold matter, in order for this court to have jurisdiction, the guidance letters must constitute an agency final action.” Courts and scholars frequently use the term “finality,” but to say it is a slippery issue would be to vastly understate the confusion in

239. Id. at 755.
240. Id. at 756.
242. Id. at 427–28.
243. ILOC I, No. 10-2646.
244. See ILOC II, 711 F.3d at 860–72; National Pork, 635 F.3d at 756.
245. See Brief for Petitioner, ILOC II, 711 F.3d 844 (No. 11-3412), 2012 WL 1029853, at *4–6; Brief for Respondent, ILOC II, 711 F.3d 844 (No. 11-3412), 2012 WL 6660321, at *27–39.
246. ILOC II, 711 F.3d at 863 n.12 (internal citation omitted).
247. National Pork, 635 F.3d at 755. The Eighth Circuit raises an interesting point. The Fifth Circuit states that the CWA judicial review provision “authorizes original jurisdiction to courts of appeals to review certain agency ‘final actions,’” but it only cites the CWA, which does not use the term “final actions.” See id. at 755 & n.40.
the literature and court system about the vague term. Nonetheless, the Eighth Circuit’s decision to directly disagree with the Fifth Circuit’s interpretation of the exact provision at issue in the case was its first major step toward replacing EPA’s discretion with its own.

With the finality issue brushed aside, the Eighth Circuit focused its jurisdictional analysis on other possible meanings of the CWA’s judicial review provision. The CWA grants the Circuit Court of Appeals exclusive jurisdiction for review of EPA’s “action . . . in . . . promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345.” The court rejected the Black’s Law Dictionary definition of “promulgate,” which refers to the formal rulemaking process, as too narrow. Instead it looked to judicial constructions of “similar” review requirements. It ultimately relied on Molycorp, Inc. v. EPA, a case interpreting the broad review provision of the Resource Conservation and Recovery Act. In Molycorp, the D.C. Circuit identified three factors for determining whether an agency “promulgat[ed] any regulation” under the Act:

(1) the Agency’s own characterization of the action;
(2) whether the action was published in the Federal Register . . . and
(3) whether the action has binding effects on private parties or on the agency.

The ILOC II court latched onto the third factor as the “touchstone” of the assessment and held that the EPA letters were “promulgations” for jurisdictional purposes, “because they [had] a binding effect on regulated entities.” In the court’s view, the September letter presented a binding policy on blending because “although the June 2011 letter describe[d] the ‘2005 draft Policy’ on blending as merely ‘a viable path forward’ that ‘had not been finalized,’ the September 2011 letter applie[d] the 2005 policy to the League’s proposed use of ACTIFLO.” The court completely ignored the League’s role in the negotiation of the policy.

248. See Jason Fowler, Finality: What Constitutes Final Agency Action? The Practical Implications of the D.C. Circuit’s Ruling in Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission, 24 J. NAT’L ASS’N ADMIN. L. JUDGES 311 (2004); see, e.g., Ticor Title Ins. Co. v. Fed. Trade Comm’n, 814 F.2d 731 (D.C. Cir. 1987) (This is the famous D.C. Circuit case in which the three judges on the panel wrote separately—one relying on ripeness, another on finality, and the last on exhaustion—but all reached the same conclusion.).
249. See National Pork, 635 F.3d at 755.
251. ILOC II, 711 F.3d at 861–62 (citing BLACK’S LAW DICTIONARY (8th ed. 2004), which defines “promulgate” as “[t]o carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal”).
252. Id.
253. Id. at 862 (citing Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999)).
254. Id. (citing Molycorp, 197 F.3d at 545).
255. Id. at 862–63. The Molycorp court emphasized the third factor, because “the ultimate focus of [its] inquiry [was] whether the agency action [partook] of the fundamental characteristic of a regulation.” Molycorp, 197 F.3d at 545 (emphasis added).
256. ILOC II, 711 F.3d at 865.
in baiting EPA’s speculative application of the policy to ACTIFLO.\textsuperscript{257} It also failed to note that “promulgating any regulation” under the Resource Conservation and Recovery Act captures a much wider range of agency action than the provision of the CWA at issue in \textit{ILOC II}.\textsuperscript{258}

In sum, the Eighth Circuit bypassed (1) a common threshold for judicial review, (2) another circuit’s recent analysis of the relevant CWA review provision, and (3) the Black’s Law Definition of “promulgate,” any one of which could have denied the court jurisdiction.\textsuperscript{259} But rather than exercising judicial restraint in an area of evolving policy, the court used one prong of an interpretation of a statute with a much broader review provision than the CWA to justify review of the EPA letters. With jurisdiction established, the court plunged ahead into the muddy waters of the legislative rules doctrine.

\section*{B. A Legislative Rule Hidden in a Letter to a Senator}

“[M]uch ink has been spilled” by courts and scholars attempting to find a useful line between legislative and interpretative rules, and the debate still rages on.\textsuperscript{260} Courts fear that strictly procedural definitions will allow agencies to dress new substantive requirements as informal policies, but tests that go to de facto binding effects of agency statements prove overbroad.\textsuperscript{261} All agency statements may elicit a change in behavior, so too much emphasis on practical effects would essentially render the APA rulemaking exemptions for guidance documents meaningless.\textsuperscript{262} The splintered legislative rules doctrine currently attempts to land somewhere in between the extremes of these approaches.\textsuperscript{263}

Courts consider rules legislative if they carry the “force of law,” and they use two tests to identify rules “that agencies do not freely admit possess legal effect but that carry sufficient weight that notice and comment should be required.”\textsuperscript{264} The Fifth Circuit characterizes rules as legislative if they impose

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{257} See July Letter, \textit{supra} note 14 (asking whether “the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment [is] subject to a ‘no feasible alternatives’ demonstration”).
\item\textsuperscript{258} See \textit{Molycorp}, 197 F.3d at 545. The \textit{Molycorp} court assessed what constituted promulgating a regulation, not “promulgating” as a standalone term. See \textit{id. Compare} 42 U.S.C. § 6976(a)(1) (2006) (providing for D.C. Circuit review of “action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter), \textit{with} 33 U.S.C. § 1369(b)(1)(E) (2006) (authorizing appellate review of “the Administrator’s action . . . in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title”).
\item\textsuperscript{259} See \textit{ILOC II}, 711 F.3d at 861–65.
\item\textsuperscript{260} See Mark Seidenfeld, \textit{Substituting Substantive for Procedural Review of Guidance Documents}, 90 Tex. L. Rev. 331, 332 (2011) (comparing the main judicial and academic approaches to the issue).
\item\textsuperscript{261} Id.; see 5 U.S.C. § 553(b)(A) (2012).
\item\textsuperscript{262} Hickman, \textit{supra} note 147, at 480. See generally Funk, \textit{supra} note 147, at 1329 (discussing changes in legislative rules). An agency’s own characterization of a statement as an interpretive rule or general statement of policy is not determinative, although the circuits vary somewhat in the amount of weight they actually give the agency’s perspective. See Hickman, \textit{supra} note 147, at 474 & n.39, 479.
\item\textsuperscript{263} Hickman, \textit{supra} note 147, at 480.
\end{enumerate}
\end{footnotesize}
“rights and obligations” on regulated parties and limit agency discretion.\textsuperscript{265} Most of the other circuits use a version of the test the D.C. Circuit established in \textit{American Mining}: a rule is legislative “if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule.”\textsuperscript{266} An agency intended to act legislatively and “bind regulated parties with the force of law” if:

- The rule is “necessary to provide legislative basis for an enforcement action or conferral of benefits,”
- The rule “revokes or alters an existing legislative rule,”
- The agency “explicitly invoked its general legislative authority,” or
- The rule “seeks to interpret a legislative rule that is itself too vague or open ended to provide independent support for the alleged interpretative rule.”\textsuperscript{267}

Some circuits also hold a rule legislative if it “alters or revokes an existing interpretative rule, if that existing rule is sufficiently ‘well-established, definitive, and authoritative.’”\textsuperscript{268} In \textit{ILOC II}, the Eighth Circuit mentioned several of these factors in its analysis of where the EPA statements fell on the “murky spectrum between legislative rules and interpretative rules,” but it relied on a specific phrase in a narrow rule from the D.C. Circuit: “If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.”\textsuperscript{269} The court proceeded to shoehorn EPA’s letters into this framework, ultimately holding that “EPA’s new blending rule [was] a legislative rule because it [was] irreconcilable with both the secondary treatment rule and the bypass rule.”\textsuperscript{270}

According to the court, the 2005 peak flows policy was “irreconcilable” with the interpretation of the CWA regulations in the 2003 draft blending policy, which “correspond[ed] to . . . the reality on the ground.”\textsuperscript{271} The court used the 2005 peak flows policy notice as evidence of “reality,” noting that blending had been “permitted at [POTWs] without consideration of the bypass regulation criteria.”\textsuperscript{272} However, the court failed to acknowledge the preceding

\begin{footnotes}
\footnotetext[265]{Id. at 480–81 (citing Tex. Sav. & Cnty. Bankers Ass’n v. Fed. Hous. Fin. Bd., 201 F.3d 551, 556 (5th Cir. 2000) and Prof’ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995)).}
\footnotetext[266]{\textit{American Mining}, 995 F.2d at 1109; Hickman, \textit{supra} note 147, at 481.}
\footnotetext[267]{Hickman, \textit{supra} note 147, at 481.}
\footnotetext[268]{Id. at 482.}
\footnotetext[269]{The court dismissed EPA’s argument that the letters were policy statements in another pithy footnote. \textit{ILOC II}, 711 F.3d at 873 n.17. It stated that “[p]olicy statements are not binding, either as a legal or practical matter,” and as the court had already determined the letters “evince[d] binding rules” in its jurisdiction analysis, they could not be policy statements. \textit{Id.}}
\footnotetext[270]{\textit{ILOC II}, 711 F.3d at 875 (quoting Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (brackets in original)).}
\footnotetext[271]{\textit{Id.} (citing Nat’l Family Planning, 979 F.2d at 235).}
\footnotetext[272]{\textit{Id.}}
\footnotetext[273]{\textit{Id.}}
\end{footnotes}
sentence in that notice, which stated the opposite: “In some cases, such diversions have been considered a bypass and held to the criteria of the NPDES bypass regulation.”\(^{274}\) To support its characterization of the 2003 policy as a “first” legislative rule that the “new” rule amended, the court also cited other pre-2005 documents: a 2002 statement that EPA used federal funds to build facilities designed to include blending, a 2004 report to Congress in which EPA allegedly\(^ {275}\) “praised” blending processes without reference to the “no feasible alternatives” requirement, and EPA’s lack of objection to Iowa NPDES permits that approved “facilities utilizing non-biological peak flow secondary treatment processes.”\(^ {276}\) The analysis does not mention EPA’s 2005 renouncement of the 2003 policy or Congress’s effective ban on the 2003 policy in the 2006 appropriations bill.\(^ {277}\)

The court also relied heavily on a myopic view of the CWA’s end-of-the-pipe approach.\(^ {278}\) It focused on an EPA regulation that allows “limits on internal waste streams” only in exceptional circumstances,\(^ {279}\) while disregarding statements the D.C. Circuit made when it addressed the bypass rule in 1987.\(^ {280}\) According to the D.C. Circuit,

The first principle of the [CWA] is . . . that it is unlawful to pollute at all.

\[\ldots\]

[To say that the agency may not prescribe technology in specific cases is not to say that the agency is only to set limits on the discharge levels of pollutants and to ignore the means employed to achieve pollution reduction. As we have previously observed, permits may include conditions other than effluent limitations. . . . The statute’s goals are hardly fostered by allowing dischargers to shut off their systems at will whenever they are in compliance with the requirements represented by the effluent limitations.]\(^ {281}\)

While the \textit{ILOC II} court could easily have treated the EPA’s statements as an
interpretation of the “contours” of the term “diversion” in the bypass regulation, instead it created a conflict with the secondary treatment and bypass rules by framing statements as an effluent limitation on internal waste streams.\textsuperscript{282} Based on its extremely incomplete version of the underlying facts and its own characterization of the EPA statements, the Eighth Circuit held that the “effect of [the September 2011] letter [was] a new legislative rule mandating certain technologies as part of the secondary treatment phase.”\textsuperscript{283}

The elasticity of the legislative rules doctrine leaves courts abundant room to reach a desired outcome, and the \textit{ILOC II} court shifted the boundaries of this flexibility significantly. Arguments for reigning in agencies’ use of guidance documents seem appealing on their face, particularly in situations like the blending controversy, where agency inaction has left important questions unanswered for an extended period of time.\textsuperscript{284} However, given the alternatives—slow and expensive rulemaking, clarification through ad hoc enforcement, or no clarification at all—informal agency communication offers a window into agency processes and policies that may not otherwise exist.

Common sense and basic precepts of administrative law all point to the conclusion that the [EPA letters were] not final agency action or regulations of any sort. Rather, they [were] mere responses to questions—drafted by the League’s members and conveyed to the Agency by a Member of Congress—that requested EPA’s views of existing law.\textsuperscript{285}

By applying the legislative rules doctrine to a responsive letter, the court moved beyond a healthy “checks and balances” level of distrust of agency actions, and into the concerning world of naked judicial policy making. The \textit{ILOC II} opinion contains an implicit holding that significantly expands the scope of the legislative rules doctrine and sends agencies an ominous warning: if you wait too long to articulate your policy, two stakeholders, a Senator, and a court may do it instead.

V. TWO STAKEHOLDERS + ONE SENATOR + THE EIGHTH CIRCUIT = THE NEW EPA

The \textit{ILOC II} holding endorsed a “bait and sue” method that stakeholders can use to force premature resolution of controversial political issues. Even though the EPA statements at issue in the case existed only because Senator Grassley and IAWEA pressed EPA for increasingly concrete answers,\textsuperscript{286} and despite EPA’s many clear statements that its policies were under active

\begin{flushleft}
\textsuperscript{282} See \textit{ILOC II}, 711 F.3d at 874, 876.
\textsuperscript{284} See \textit{ILOC II}, 711 F.3d at 860 (noting EPA had not finalized the 2005 draft peak flows policy).
\textsuperscript{285} Brief for Respondent, \textit{ILOC II}, 711 F.3d 844 (No. 11-3412), 2012 WL 6660321, at *23.
\textsuperscript{286} See July Letter, \textit{supra} note 14; September Letter, \textit{supra} note 14.
\end{flushleft}
consideration, the Eighth Circuit used the statements to implement the League’s version of the blending policy. If courts follow the Eighth Circuit’s lead by (1) finding jurisdiction to review responses to requests from members of Congress or regulated parties, (2) framing informal agency statements as legislative rules subject to APA procedural requirements, and then (3) reaching the merits of the court’s own constructions of these rules, this will shift policy making to the judicial branch in the absence of agency action. The Eighth Circuit’s approach will not just interfere with open and honest agency communication that would otherwise further statutory objectives—it will give any stakeholder with a friendly member of Congress a chance to write administrative policy through the court system.

The tension surrounding the peak flows policy at issue in ILOC II is a frustrating, but permissible, phenomenon. Absent a statutory mandate to promulgate specific regulations, agencies do not have an obligation to clarify vague statutory or regulatory language. Just as Congress may punt politically sticky issues to agencies, agencies can leave room for interpretation in regulations; they may exercise administrative discretion and either pursue statutory goals through enforcement actions or allow conflicting interpretations to remain unaddressed. Further, “the courts cannot give relief merely because the petitioner has a real problem’ and ‘a genuine need for legal advice.’” In the early 1970s, the D.C. Circuit warned against the road the Eighth Circuit has started down:

The general presumption of judicial reviewability, and the modern rulings implementing that approach, are not to be misunderstood as projecting a doctrine of judicial intervention as to administrative rulings or declarations on problems that are hypothetical rather than actual. Aversion to hypothetical inquiries relates to the essence of the judicial function, restricted by the Constitution to cases and controversies, and to restraint in its exercise even when the minimum of constitutional authority is established. Rather, courts “usually shy away from . . . substantive review of agency outcomes, perhaps in recognition of their own inability to claim either a

287. See June Letter, supra note 14; September Letter, supra note 14.
288. See ILOC II, 711 F.3d at 878.
289. Hector v. U.S. Dep’t of Agric., 82 F.3d 165, 167 (7th Cir. 1996) (writing that the agency “does the public a favor if it announces the interpretation in advance of enforcement”).
290. See Sec. Exch. Comm’n v. Chenery Corp., 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”). Hector, 82 F.3d at 167.
292. Id. at 703.
293. Id. at 699.
However, the Eighth Circuit did the opposite in *ILOC II*. EPA’s bypass regulation, promulgated under the “broadly worded” CWA, arguably leaves room for competing interpretations of the word “diversion.” Nonetheless, the *ILOC II* court found it appropriate to decide the blending and bypass debate itself, rather than leave it to agency discretion. EPA had already spent over a decade collecting public input and refining its position in response to public pressure. Rather than give the administrative process (imperfect as it may be) the benefit of the doubt, the court selectively chose from the limited information before it and weighed in on a significant and controversial policy matter. The court briefly reflected on the competing tensions that informed its decision to address the content of the EPA’s “rule”:

If we choose to vacate solely on procedural grounds, regulated entities who have already spent considerable time crossing the hot shoals of regulatory uncertainty must continue to do so. On the other hand, should we move to the merits of whether the EPA’s legislative rules reflect an arbitrary and capricious interpretation of the CWA, we short-circuit the APA’s notice and comment procedures and preclude interested parties from participating in the agency’s analytic process.

The opinion cites *NRDC v. EPA* briefly in its discussion of the bypass regulation, but the discussion of the merits of the rule does not address the conflict that its characterization of EPA’s policy creates with the D.C. Circuit’s previous bypass ruling. Ironically, the court’s decision to vacate the blending “rule” and remand the issue to EPA for further consideration creates far more uncertainty for regulated parties than they faced prior to the lawsuit. Although it had not formally adopted the 2005 peak flows policy, EPA had clearly rejected the 2003 policy. The court’s decision created new guesswork for POTWs about whether “not 2003” or “not 2005” will ultimately win out. And POTWs can bet EPA will not be so forthcoming with its speculative answers this time around.

---

295. See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).
299. *ILOC II*, 711 F.3d at 877.
301. *ILOC II*, 711 F.3d at 878.
CONCLUSION

In an outcome that is at best uncomfortably ironic and at worst nonsensical,\textsuperscript{303} the Eighth Circuit used the APA notice and comment requirements—the requirements that facilitate public input, deliberation, and reasoned administrative decision making—to help Iowa League of Cities undermine the results of the public comment process that shaped EPA’s evolving approach to blending. Nearly a decade ago, the agency, the public, and Congress clearly rejected EPA’s 2003 policy, which would have allowed peak flow diversions to escape the “no feasible alternatives” restriction on bypasses. Essentially, the people spoke, and they said, “We want as little sewage in our waters as possible.” While politics likely slowed EPA’s movement on a final policy during the Bush years, the agency had reinitiated the public input process at the time of Senator Grassley’s inquiries. The court’s intervention at this stage and in this manner was nothing short of an inappropriate power grab, made possible by fuzzy rules that have the potential to do much more damage than the tentative policies that they purported to rein in. EPA’s relegation of the blending policy to an administrative limbo zone raises concerns about politics weighing too heavily in environmental protection decisions, but courts have little power to directly temper the President’s influence on administrative policymaking tools. So instead it did the only thing a court can do when it intercepts unsettling mail meant for someone else: it shot the messenger.

\textsuperscript{303} One might say arbitrary and capricious, but APA procedures do not apply to court action.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.