

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 14-1150

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW OF LETTERS DATED APRIL 2 AND JUNE 18, 2014
FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel for Respondent United States Environmental Protection Agency (“EPA”) certifies as follows:

A. Parties and Amici. All parties are listed in the Brief for Petitioner (Pet’r Br. ii), except that, after the filing of that brief, the National Association of Clean Water Agencies moved for and was granted leave to file a brief as amicus curiae in support of Petitioner Center for Regulatory Reasonableness (“Center”).

B. Alleged Rulings Under Review. The Center seeks review of two letters dated April 2, 2014, and June 18, 2014, from EPA addressed to, respectively, the International Municipal Lawyers Association and the National Association of Clean Water Agencies [Pet’r Appx. 1-3].

C. Related Cases. The case on review was not previously before this Court or any other court. But currently pending is *Hall & Associates v. EPA*, 1:15-cv-1055-KBJ (D.D.C.), in which counsel for the Center alleges that EPA acted contrary to the Freedom of Information Act in responding to the Center’s request for documents, the subject matter of which is related to that here. Otherwise, counsel is not aware of any related cases currently pending in this Court or in any other court.

s/ Andrew J. Doyle

ANDREW J. DOYLE

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EPA's Primer for Municipal Wastewater Treatment Systems (Sept. 2004),
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GLOSSARY

APA	Administrative Procedure Act
Act	Clean Water Act
Agency	Respondent United States Environmental Protection Agency
Center	Petitioner Center for Regulatory Reasonableness
CWA	Clean Water Act
<i>Iowa League</i>	<i>Iowa League of Cities v. EPA</i> , 711 F.3d 844 (8th Cir. 2013)
EPA	United States Environmental Protection Agency
EPA Suppl. Appx.	EPA's Supplemental Appendix
FOIA	Freedom of Information Act
NPDES	National Pollutant Discharge Elimination System, 33 U.S.C. § 1342
<i>NRDC 1987</i>	<i>NRDC v. EPA</i> , 822 F.2d 104 (D.C. Cir. 1987)
Pet'r Addm.	Addendum to Petitioner's Brief (Evidentiary Support for Standing) (Doc. #1579918)
Pet'r Appx.	Petitioner's Appendix (Doc. #1579957)
Pet'r Br.	Brief for Petitioner (Doc. #1579912)
POTWs	Publicly-owned treatment works

STATEMENT OF JURISDICTION

For four reasons, the Center fails to properly invoke this Court's jurisdiction: the Center does not seek review of "final" agency action, *see infra* pp. 21-30; the Clean Water Act's judicial review provision, 33 U.S.C. § 1369(b)(1), does not authorize the Center's claims, *see infra* pp. 30-33; the Center lacks standing, *see infra* pp. 33-35; and the Center's claims are not ripe, *see infra* pp. 35-37.

STATEMENT OF THE ISSUES

In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the United States Court of Appeals for the Eighth Circuit vacated and remanded two letters from EPA to a United States Senator responding to certain Clean Water Act ("Act" or "CWA") questions. In the present case, the Center alleges that EPA subsequently made a decision, memorialized in letters dated April 2 and June 18, 2014, that *Iowa League* does not bind the Agency outside the Eighth Circuit, and that EPA will continue to apply the Act or its regulations outside that circuit in a manner the Center contends is contrary to *Iowa League*.

1. To be "final" and immediately reviewable, an administrative action must generally be the product of a completed process and carry legal consequences. In the letters challenged here, EPA stated, in pertinent part, that "[t]he Eighth Circuit's decision applies as binding precedent in the Eighth Circuit." In addition, the letters are consistent with the understanding of interested persons, set forth in a letter to which EPA was

- responding, that the Agency would address any *Iowa League* issues “on a case-by-case basis.” Does the Center fail to establish that EPA’s letters of April 2 and June 18, 2014, are final?
2. The Center invokes a subsection of the Act’s judicial review provision that only allows immediate review of EPA action in “approving or promulgating any effluent limitation or other limitation,” 33 U.S.C. § 1369(b)(1)(E). In light of the neutral statements in EPA’s letters of April 2 and June 18, 2014, does the Center fail to establish that the letters fall within the scope of that provision?
 3. To establish standing, an organizational petitioner must demonstrate, *inter alia*, that the challenged action actually injures or imminently threatens to injure at least one of its members. The Center’s affidavits indicate that, in case-specific contexts, EPA has either not addressed *Iowa League* or, at most, shared with state regulators or facilities incomplete and interlocutory views regarding *Iowa League*. Does the Center fail to establish its standing?
 4. Under the ripeness doctrine, even final agency action may be unfit for review if it is not attached to a concrete dispute and the claims rest on contingent future events. The challenged letters were not written in the context of a concrete dispute, and none of the case-specific contexts in which the Center alleges EPA said something about *Iowa League* appears to

- involve a completed proceeding. Does the Center fail to establish that its challenge to EPA's letters of April 2 and June 18, 2014, is ripe?
5. Even assuming the Court may reach the merits (which it should not), the Center cannot prevail unless it establishes that the Act or other federal law mandates that EPA follow *Iowa League* outside the Eighth Circuit. Does the Center's primary argument fail?
 6. The Center's fallback argument is that even if *Iowa League* does not bind EPA outside the Eighth Circuit, this Court should still require EPA to follow that decision because, the Center contends, *Iowa League* is necessarily correct. Does that argument also fail?
 7. Are the Center's motions to supplement EPA's certified administrative record unnecessary for the Court to address or, in any event, unfounded?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Center's addendum.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

With the objective of "restor[ing] and maintain[ing] the . . . integrity of the Nation's waters," 33 U.S.C. § 1251(a), the Act prohibits discharges of pollutant to waters of the United States except in accordance with other Act provisions. *Id.* § 1311(a). In addition, the Act "establishes distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S.

700, 704 (1994). Under the Act, EPA-authorized States are primarily responsible for issuing National Pollutant Discharge Elimination System (“NPDES” or “discharge”) permits. *See* 33 U.S.C. §§ 1251(b), 1342.¹ Discharge permits must set forth technology-based discharge requirements and, where applicable, more stringent water quality-based limitations. *See id.* §§ 1311(b), 1342(a)(1); 40 C.F.R. §§ 122.4(d), 125.3(a). In addition, EPA prescribes conditions for discharge permits to assure compliance with listed provisions of the Act, including conditions on data and information collection, reporting, and other appropriate requirements. *See* 33 U.S.C. § 1342(a)(2). Implementing these provisions, the Act’s regulations enumerate “conditions [that] apply to all NPDES permits.” 40 C.F.R. § 122.41 (introduction).

The Act requires publicly-owned treatment works (“POTWs”) to achieve technology-based effluent limitations based upon secondary treatment. 33 U.S.C. §§ 1311(b)(1)(B), 1314(d). EPA has defined secondary treatment at 40 C.F.R. Part 133, and it traditionally involves biological treatment. *See* Primer for Municipal Wastewater Treatment Systems (EPA Sept. 2004) at 11, available at <http://www.epa.gov/npdes/npdes-resources> (last visited Jan. 26, 2016). Like other permittees, POTWs must also meet, where applicable, more stringent water quality-based limitations. Other permit conditions apply. POTWs must, for example, properly maintain and operate their wastewater treatment works. 40 C.F.R. § 122.41(e).

¹ To date, 46 states are authorized to issue discharge permits.

POTWs must *not*, however, “bypass” or intentionally divert waste streams from any portion of the treatment facility. *Id.* § 122.41(m). These longstanding regulations further provide that any “[b]ypass is prohibited,” but that the permitting authority may “approve an anticipated bypass” if it determines that certain criteria, including a showing of “no feasible alternatives,” will be met. *Id.* § 122.41(m)(4)(i)-(ii). *See NRDC v. EPA*, 822 F.2d 104, 124-26 (D.C. Cir. 1987) (“*NRDC 1987*”) (explaining “bypass” and upholding that regulation).

State-issued discharge permits are subject to EPA oversight. Before a State may issue, renew, or modify a permit, the State must submit a draft or proposed permit to EPA for review. 33 U.S.C. § 1342(d)(1); 40 C.F.R. § 123.44(j). EPA may, but is not required to, object to any permit that does not comply with any applicable statutory or regulatory requirement. 33 U.S.C. § 1342(d)(2)-(3); 40 C.F.R. § 123.44(c); *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980). If EPA objects, the State may modify the permit to meet the objection or request that EPA hold a public hearing. 33 U.S.C. § 1342(d)(4). If the State does not pursue either option, authority to issue (or deny) the permit passes to EPA. *Id.*

The CWA vests federal courts of appeals with exclusive, original jurisdiction over petitions for review of certain enumerated categories of EPA decisions implementing the Act, including EPA action “in approving or promulgating any effluent limitation or other limitation” under specified provisions of the Act. 33 U.S.C. § 1369(b)(1)(E). *See also id.* § 1362 (defining “effluent limitation” but not

“approving,” “promulgating,” or “other limitation”).² If petitions are filed in more than one circuit, 28 U.S.C. § 2112(a) requires the “consolidat[ion of] such proceedings in a single court.” *Remington Lodging & Hospitality, LLC v. NLRB*, 747 F.3d 903, 904 (D.C. Cir. 2014).

Other final EPA actions that do not fall within the scope of 33 U.S.C. § 1369(b)(1)(A)-(G) may instead be reviewable in district courts under the Administrative Procedure Act (“APA”) and 28 U.S.C. § 1331. *See* 5 U.S.C. § 704.

B. The Eighth Circuit’s Decision in *Iowa League*

1. Background of *Iowa League*

In May 2011, United States Senator Charles Grassley, at the request of an organization representing POTWs in the state of Iowa (the Iowa League of Cities), wrote to EPA seeking “clarification on federal wet weather permitting . . . requirements.” May 2011 Inquiry at 1 [EPA Suppl. Appx. 1]. The first question read: “May a state approve a bacteria mixing zone for waters designated for body contact recreation when permitting [combined sewer overflows] or stormwater discharges?” *Id.* at 5 [EPA Suppl. Appx. 5].³ The second question read: “May a state approve the

² EPA’s issuance or denial of a permit is also subject to review. 33 U.S.C. § 1369(b)(1)(F). State-issued permits are subject to review in state court. *See General Motors Corp. v. EPA*, 168 F.3d 1377, 1382 (D.C. Cir. 1999).

³ “[A] mixing zone is an area where an effluent discharge undergoes initial dilution and is extended to cover the secondary mixing in the ambient waterbody. A mixing zone is an allocated impact zone where water quality criteria can be exceeded as long

Cont.

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 application of federal bypass or secondary treatment rule requirements?” *Id.*

In June 2011, EPA responded. EPA explained that while mixing zones are a matter of state discretion under 40 C.F.R. § 131.13, existing EPA guidance and recommendations state that “mixing zones that allow for elevated levels of bacteria in rivers and streams designated for primary contact recreation are inconsistent with the designated use and should not be permitted because they could result in significant human health risks.” June 2011 Response at 2 [Pet’r Appx. 10]. Turning to the second question, EPA discussed its “draft peak flows policy,” a proposal published in 2005, 70 Fed. Reg. 76,013 (Dec. 22, 2005) [Pet’r Appx. 16-21], regarding how the bypass regulation could work for POTWs that “blend” biologically-untreated wastewater with biologically-treated wastewater. *See* June 2011 Response at 3 [Pet’r Appx. 11].⁴ EPA noted that the draft policy was not complete but presented “a viable path forward.” *Id.*

as acutely toxic conditions are prevented.” Compilation of EPA Mixing Zone Documents (July 2006) at 1 [Pet’r Appx. 51].

⁴ Blending involves diverting a portion of peak wet weather flows around a POTW’s biological secondary treatment units, bypassing a part of the POTW treatment facility. The flow diverted from secondary biological treatment units may sometimes be routed through non-biological treatment units. This flow is subsequently returned

Cont.

In July 2011, Senator Grassley wrote EPA a follow-up letter “requesting further clarification” regarding blending. July 2011 Inquiry at 1 [EPA Suppl. Appx. 6]. He asked EPA to confirm its intent to implement its draft peak flows policy. July 2011 Inquiry at 2 [EPA Suppl. Appx. 7]. He also inquired about whether Actiflo constitutes “bypass.” *Id.* at 3 [EPA Suppl. Appx. 8].

In September 2011, EPA responded to the follow-up letter, confirming its previous response and noting that these issues, particularly the extent to which Actiflo could be used consistent with applicable regulations, would continue to be explored on a case-by-case basis. *See* Sept. 2011 Response at 2 [Pet’r Appx. 14]. For example, EPA stated that, based on data it had reviewed, “[Actiflo] systems that do not include a biological component[] do not provide treatment necessary to meet the minimum requirements provided in . . . regulations[.]” *Id.* At the same time, EPA noted that “[i]n certain circumstances, [it] supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions.” *Id.* “For this reason,” the letter provided, “the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are ‘no feasible alternatives’ to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units.” *Id.*

and recombined with the flow from the biological units, and the now-combined (or “blended”) stream is discharged. *See* 70 Fed. Reg. at 76,014 [Pet’r Appx. 17].

In November 2011, the Iowa League of Cities filed a petition with the Eighth Circuit, contending that EPA's June and September 2011 letters were subject to review under the Act's judicial review provision, 33 U.S.C. § 1369(b)(1).

2. The Eighth Circuit's Assertion of Jurisdiction

In March 2013, the Eighth Circuit issued its decision. As a threshold matter, the court found the Iowa League of Cities' demonstration of jurisdiction to be adequate.

The court rejected EPA's argument that the challenged letters were not reviewable because they were not "final." 711 F.3d at 863 n.12. The court concluded that, with respect to agency actions that otherwise fall within one of the enumerated categories in 33 U.S.C. § 1369(b)(1), neither the Act nor the APA requires agency action to be "final" to be reviewable. But the court acknowledged contrary precedent. 711 F.3d at 863 n.12 (citing, *inter alia*, *Carter/Mondale Presidential Comm., Inc. v. Federal Election Com'n*, 711 F.2d 279, 284 n.9 (D.C. Cir. 1983)).

The court found that the letters constituted EPA's "promulgat[ion of] any effluent [] or other limitation" within the meaning of 33 U.S.C. § 1369(b)(1)(E). *See* 711 F.3d at 861-64. The court based its conclusion largely on the tone of EPA's letters and what the court found to be their "binding effect on regulated entities." *See id.* at 863. The court found the letters to be "definitive" and "unequivocal." *See, e.g., id.* at 858, 873 n.17. The court viewed the letters as setting forth an "other limitation" based on a "clear" indication that EPA "plans to follow [its draft peak flows policy]

in reviewing State-issued permits,’ and ‘it will insist State and local authorities comply with [the draft peak flows policy] in settling the terms and conditions of permits issued to petitioners.’” *Id.* at 865 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)).

Regarding EPA’s responses about bacteria mixing zones in swimmable waters, which the court regarded to be “effluent limitations,” the court stated: “The letter instructs state permitting authorities to reject certain permit applications, regardless of the state’s water quality standards.” 711 F.3d at 864-65. The court further found that the correspondence “indicat[ed] that [EPA] would object to any permits that were inconsistent with the policy outlined in the EPA letters.” *Id.* at 865.

The court also found, based on affidavits, that the petitioner had standing and presented ripe claims. *See* 711 F.3d at 868-70. The court found, for example: “At least some members are currently operating under permits that allow them to utilize blending and bacteria mixing zones in circumstances inconsistent with the EPA letters, which they must imminently rectify.” *Id.* at 870. Further, the court stated, “[m]oving into compliance will be costly.” *Id.*

3. The Eighth Circuit’s Resolution of the Merits

Reaching the merits, the Eighth Circuit first concluded that EPA’s letters “[e]xpand[ed] the footprint of [existing] regulation[s] by imposing new requirements[.]” 711 F.3d at 873. As such, the court held, the correspondence constituted “legislative rules” rather than “interpretative rules” or “policy statements”;

the former are subject to the APA's notice-and-comment rulemaking requirements, 5 U.S.C. §§ 551(4), 553(b)-(c), whereas the latter are not, *id.* § 553(b)(3)(A).

With respect to EPA's response to Senator Grassley's first question, the court found that, prior to such response, EPA had largely left it to States, in the exercise of their discretion, to allow bacteria mixing zones in swimmable waters. *See* 711 F.3d at 873-74 (citing, *inter alia*, 40 C.F.R. § 131.13). As a result of EPA's letters, the court found that "state permitting authorities no longer have discretion to craft policies regarding bacteria mixing zones in primary contact recreation areas." *Id.* at 874.

Turning to EPA's responses to Senator Grassley's second question, the court rejected the argument that the letters accomplished nothing more than to relay an Agency interpretation that "blending" constitutes a form of bypass around secondary or other treatment. Instead, the court found that the "effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase." *Id.* at 876. *See also id.* at 875 ("EPA's new blending rule is . . . legislative . . . because it is irreconcilable with both the secondary treatment rule and the bypass rule."). The court explained its view that EPA's letters applied the draft peak flows policy as if it were "an existing obligation of regulated entities." 711 F.3d at 875.

Although the court had already vacated the letters for want of notice-and-comment procedures, the court also addressed the petitioner's claim that EPA's allegedly new and binding positions on bacteria mixing zones and blending exceeded the Agency's authority. As to bacteria mixing zones, the court stated that the CWA

did not obviously preclude EPA's position. *Id.* at 877. According to the court, if "EPA wish[es] to institute this rule, it may seek to do so using the appropriate procedures." *Id.*

With respect to EPA's statement on blending, however, the court stated that it "clearly exceeds the EPA's statutory authority" "insofar as [it] imposes secondary treatment regulations on flows within facilities." *Id.* at 877-78. In the court's view, the Act does not authorize EPA to apply secondary treatment "effluent limitations to the discharge of flows from one internal treatment unit to another." 711 F.3d at 877. *But see NRDC 1987*, 822 F.2d at 124 (this Court upheld the bypass regulation on grounds, *inter alia*, that the Act authorizes EPA to regulate bypass and prohibit the diversion of waste streams from secondary and other treatment units even if POTW's discharge in compliance with end-of-pipe effluent limitations); *Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482, 1487-88 (5th Cir. 1988) (upholding a regulation addressing the imposition of effluent limitations and standards to internal waste streams because, consistent with the Act, "it is sometimes necessary to regulate discharges within the treatment process to control discharges at the end"); *Pub. Serv. Co. v. EPA*, 949 F.2d 1063, 1065 (10th Cir. 1991) (rejecting a permittee's contention that the Act "restrict[s]

EPA's authority to impose effluent limitations to the physical point of discharge into . . . waters").⁵

C. EPA's Challenged Letters Here

On November 26, 2013, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, the International Municipal Lawyers Association, and the National Association of Clean Water Agencies wrote a letter to EPA, expressing their concern that "clarification requests regarding the implementation of [*Iowa League*] have gone unanswered" and that the Agency had "yet to withdraw its prior objections to NPDES permits" following the Eighth Circuit's decision. Nov. 2013 Inquiry at 2 [Pet'r Appx. 5]. The organizations shared their understanding "based on recent public comments from EPA officials that the Agency believes the decision to have binding legal effect only in the 8th circuit and that it will be applied to permittees elsewhere in the country on a case-by-case basis." *Id.* Asserting that "there is no legal basis to assert that [*Iowa League*] does not apply nationwide," the organizations closed by requesting "confirmation that EPA will apply the . . . decision uniformly across the country." *Id.*

On April 2, 2014, the Acting Assistant Administrator for EPA's Office of Water responded to the letter, summarizing *Iowa League* and stating, in pertinent part, that the decision "applies as binding precedent in the Eighth Circuit." Apr. 2014

⁵ The Eighth Circuit subsequently denied EPA's petition for rehearing *en banc*. No review by the Supreme Court was sought.

Response at 1 [Pet'r Appx. 1]. EPA also noted that "[t]he Eighth Circuit vacated only the letters at issue in the case." Apr. 2014 Response at 2 [Pet'r Appx. 2]. EPA further explained that the Eighth Circuit did not vacate and could not have vacated the bypass regulation, 40 C.F.R. § 122.41, because it "was subject to the [Act's] exclusive jurisdiction review provision," 33 U.S.C. § 1369(b)(1), and the D.C. Circuit had long ago rejected challenges to it. EPA quoted from this Court's decision: "The . . . bypass regulation which incorporates two broad and sensible exceptions . . . is . . . reasonable and therefore lawful." Apr. 2014 Response at 2 (quoting *NRDC 1987*, 822 F.2d at 126) [Pet'r Appx. 2]. In addition, EPA referenced an upcoming public health forum that would address: (a) "discharges from POTWs that, during certain wet weather events, are diverted around biological treatment units"; and (b) "questions about the public health implications of various bypass and blending scenarios[.]" Apr. 2014 Response at 2 [Pet'r Appx. 2].

On May 30, 2014, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the National Association of Clean Water Agencies wrote a follow-up letter to EPA, asserting that the Agency had "unnecessarily created regulatory uncertainty regarding the practice of peak flow blending[.]" May 2014 Inquiry at 1 [Pet'r Appx. 6]. The organizations characterized blending as having suffered from "inconsistency and uncertainty in the long-term," and contended that there was "no evidence of an increased risk to public health following blending events." May 2014 Inquiry at 2 [Pet'r Appx. 7]. Similarly, the

organizations asserted that “EPA’s piecemeal approach to implementing the 8th Circuit’s ruling will only lead to a patchwork of interpretations on peak flow blending.” May 2014 Inquiry at 1 [Pet’r Appx. 6]. The organizations requested “additional justification.” May 2014 at 2 [Pet’r Appx. 7].

On June 18, 2014, EPA responded, reiterating that *Iowa League* “applies as binding precedent in the Eighth Circuit.” June 2014 Response at 1 [Pet’r Appx. 3]. EPA again referenced the expert forum, which would focus on “public health protection” and what is “feasible from an engineering perspective.” *Id.*

D. Proceedings in this Court

On August 12, 2014, the Center filed its petition for review. The petition asserted that, after *Iowa League*, “EPA announced that it was limiting the decision to the states in the Eighth Circuit and would continue to impose the vacated requirements elsewhere.” Pet. for Rev. at 1-2 [Doc. #1507511]. Invoking the Act’s judicial review provision, 33 U.S.C. § 1369(b)(1), the Center identified EPA’s letters of April 2 and June 18, 2014, as “unequivocally announc[ing]” that alleged decision. Pet. for Rev. at 2.

In October 2014, the parties filed dispositive motions. EPA moved to dismiss for lack of jurisdiction. EPA Mot. [Doc. #1515269]. The Center cross-moved for summary disposition on the merits. Center Mot. [Doc. #1516266].

On December 19, 2014, the Court issued an Order denying the Center’s cross-motion but carrying EPA’s motion to dismiss with the case. The Court “directed [the

parties] to address in their briefs the issues presented in the motion to dismiss rather than incorporate those arguments by reference.” Order at 1 [Doc.# 1528262].

On January 26, 2015, EPA certified and filed the index to the administrative record without prejudice to its jurisdictional defenses. Certified List [EPA Suppl. Appx. 21-24]. That record consists of the incoming correspondence of November 26, 2013, and May 24, 2014, and EPA’s responsive letters of April 2 and June 18, 2014. *Id.*

The Center subsequently filed motions, opposed by EPA, seeking to supplement the administrative record with a host of documents, most of which had been identified as deliberative, privileged, or otherwise withheld by EPA in response to Freedom of Information Act (“FOIA”) requests submitted by the Center’s attorney. *See Hall & Associates v. EPA*, 77 F. Supp. 3d 40 (D.D.C. 2014) (review of some of those FOIA responses). On June 8, 2015, this Court carried those motions with the case, directing “[t]he parties . . . to address in their briefs the issues presented in these motions rather than incorporate those arguments by reference.” Order at 1 [Doc.# 1556265].

The Center’s opening brief followed.

SUMMARY OF ARGUMENT

For four reasons, the Court should dismiss the Center’s petition for lack of jurisdiction. *First*, the Center fails to establish that EPA’s letters of April 2 and June 18, 2014 – the subjects of the Center’s petition – reflect “final” action by the Agency.

The challenged letters merely contain unremarkable statements of law provided by EPA in response to organizations making inquiry about how the Agency regards *Iowa League* outside the Eighth Circuit. The challenged letters are not the product of a completed administrative process that determines and imposes new legally-binding requirements, such as conditions imposed in a final discharge permit.

Nor do the letters carry any legal consequences. Even if EPA had indicated in the letters what it may do in a future permit proceeding (and EPA did not even do that), when and if EPA *actually* does so, an aggrieved party may challenge any such final permit decision at that time. In such a challenge, the validity of EPA's decision will be tested based not on the challenged letters but on its fidelity to the Act, applicable regulations, and the administrative record. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (dismissing challenges to EPA's "Final Guidance," explaining that although it "may signal likely future permit denials[,] "those permit denials can be challenged at that time, and EPA will not be able to rely on the Final Guidance in defending a permit denial").

Indeed, the letters on their face establish that EPA has not made any decision of consequence. Although the Court should confine its review to EPA's certified record, even if the Court considers the Center's extra-record materials, the Center fails to identify any reviewable final agency action. To date, EPA's statements do not reflect any definitive position on the application of *Iowa League* outside the Eighth Circuit. At most, EPA has shared with state regulators or regulated entities certain

incomplete and interlocutory views regarding *Iowa League's* impact or non-impact on the application of the bypass regulation under certain circumstances.

Second, the challenged letters do not constitute action in “approving or promulgating any effluent limitation or other limitation” within the meaning of 33 U.S.C. § 1369(b)(1)(E). “Promulgation means issuing a document with legal effect.” *Am. Paper Institute v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989). The letters that the Center challenges here have no legal effect. Even “telegraphing your punches is not the same as delivering them.” *Id.* at 289.

Third, the Center fails to establish its standing. Not a single member of the Center has demonstrated that a facility has been actually injured or imminently threatened with injury from the challenged letters.

Fourth, the Center fails to establish that its claims are ripe. Unless and until EPA renders a decision in conjunction with a discharge permit or other case-specific context, judicial review is premature. A ripe case or controversy would likely involve a record with: (a) comments from a permit applicant urging EPA to apply one or more of the court’s conclusions in *Iowa League*, and (b) EPA’s response to those comments. But at this time, the Center seeks the equivalent of an advisory opinion divorced from any concrete and fully developed dispute.

Alternatively, if the Court concludes that the Center has properly invoked its limited subject matter jurisdiction, the Court should deny the petition on the merits. The Center’s primary argument, that federal law requires EPA to follow a decision

like *Iowa League* nationally, is baseless. Agencies generally have an option of invoking the doctrine of intercircuit nonacquiescence, and federal courts generally are not bound by the decision of a different circuit. Although Congress has altered those principles in certain circumstances, in neither the Act nor 28 U.S.C. § 2112(a) did Congress do so in the context of a decision like *Iowa League*, which involved a single petitioner; letters to a lawmaker that were never intended to promulgate any kind of rule; and a dubious determination of jurisdiction by the reviewing court.

Nor is there merit to the Center's fallback argument, that *Iowa League* should be followed regardless of whether it is binding outside the Eighth Circuit. On any number of grounds, EPA or this Court may find *Iowa League* to be incorrect or not persuasive. The Eighth Circuit, for example, declined to apply the longstanding requirement of administrative law that agency action must be "final" to be reviewable. And on the merits, the Eighth Circuit's reasoning conflicts with precedent from this Court (and others).

The Court need not reach the Center's pending motions to supplement EPA's certified record. With or without the Court's consideration of extra-record materials, the Center's petition should be dismissed or denied. In any event, the Center's scattershot arguments fail. EPA's record is presumptively complete, and the Agency reasonably excluded deliberative, privileged, and other documents protected from disclosure under FOIA.

STANDARD OF REVIEW

The Court conducts a *de novo* review of its jurisdiction, which the Center bears the burden of demonstrating. See *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015); *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1287-1295 (D.C. Cir. 2007). “In examining whether agency actions are subject to judicial review, the court has looked to a variety of criteria, including the agency’s own characterization of its action, publication or lack thereof in the Federal Register or the Code of Federal Regulations, and whether the action has a binding effect on the rights of parties, and on the agency’s ability to exercise discretion in the future.” *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996).

If and only if the Court reaches the merits, the standard of review is deferential to EPA. Under the APA, the Court may “hold unlawful and set aside agency action, findings, and conclusions” only if they are “found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A). Judicial review under this standard “is narrow and a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Center’s merits claim here focuses on the “accordance with law” part of this standard. In that regard, EPA’s construction of ambiguous provisions of the Act is entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984), and EPA’s interpretation of its regulations is

entitled to an even higher degree of deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Similarly, EPA is entitled to a presumption of regularity with respect to the completeness of the administrative record it certified. *See infra* pp. 47-49.

ARGUMENT

I. EPA's letters of April 2 and June 18, 2014 are not "final" agency action.

The Center's petition should be dismissed because the challenged letters do not constitute reviewable "final" EPA action.

A. Under a straightforward application of the controlling test, the letters lack finality.

Although the term "final" does not expressly appear in the Act's judicial review provision, 33 U.S.C. § 1369(b)(1), courts of appeals have dismissed petitions for review under that provision for lack of finality. *See Cababa Riverkeeper v. EPA*, 806 F.3d 1079, 1081-82 (11th Cir. 2015); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 754-56 (5th Cir. 2011); *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004). *But see Iowa League*, 711 F.3d at 862-63 & n.12; *supra* p. 9. This persuasive authority accords with this Court's jurisprudence that where a statute provides for judicial review of agency action (as the CWA does), that statute necessarily carries with it the longstanding requirement of administrative law that the action must be "final" to be reviewable. *See Carter/Mondale Presidential Comm.*, 711 F.2d at 284 n.9.

Finality is a two-part test. “An agency action is final only if it is *both* ‘the consummation of the agency’s decisionmaking process’ *and* a decision by which ‘rights or obligations have been determined’ or from which ‘legal consequences will flow.’” *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

Under any straightforward application of that test, finality is lacking here. EPA’s letters of April 2 and June 18, 2014, do not consummate any relevant agency process. The Center does not allege, for example, that any of its members’ permit applications have been denied or administratively resolved in an adverse manner. To the contrary, according to the inquiring organizations, EPA has not resolved pertinent “objections to NPDES permits.” Nov. 2013 Inquiry at 2 [Pet’r Appx. 5]. Thus, the challenged letters are not final under the first part of the test.

Moreover, EPA’s correspondence adjudicates nothing and lacks finality under the second part of the test. The letters themselves do not create any legally-binding rights or obligations, nor could they provide any basis for enforcement. Only a final permit decision or regulation could do that.

In this respect, this case is strikingly similar to *National Mining*, where this Court dismissed a challenge to an Act guidance document, applying the principle that finality is lacking where the agency “merely explains how [it] will enforce a statute or regulation – in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule.” 758 F.3d at 252. The Court

held that the guidance at issue, standing alone, lacked such legal consequences and thus lacked finality. *See id.* at 250-53. The Court explained that although “the Final Guidance may signal likely future permit denials by EPA,” “those permit denials can be challenged at that time, and EPA will not be able to rely on the Final Guidance in defending a permit denial.” *Id.* at 252. *See also id.* at 253 (“The question is not whether judicial review will be available but rather whether judicial review is available *now*.”).

Here, the challenged EPA letters are even narrower and more tentative than the guidance at issue in *National Mining*. In the challenged letters, EPA merely summarized *Iowa League* and made the unremarkable statement that it applies in the Eighth Circuit. EPA did not resolve or address whether and to what extent Agency officials may on a case-by-case basis, outside the Eighth Circuit, follow *Iowa League*. *Cf. Independent Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (EPA letter articulating legal interpretation “was purely informational in nature; it imposed no obligations and denied no relief”).

But even if EPA had indicated what it may do in a *future* final permit decision – for example, after EPA objects to and subsequently assumes decision-making with respect to a particular discharge permit, or after EPA issues a permit as the permitting authority itself – an aggrieved party may challenge any such decision at that time. As explained in *National Mining*, judicial review will test the validity of any such final

permit decision based on its fidelity to the CWA, applicable regulations, and the administrative record – not the letters.

B. Finality is also lacking because EPA has not made the decision the Center alleges that it has made.

Finality is lacking for an additional reason: the entire premise of not only the Center's claims but also its invocation of the Court's limited subject-matter jurisdiction is incorrect. Specifically, the Center alleges that as "memorialized in letters signed on April 2, 2014, and June 18, 2014," EPA made an "unequivocal decision" "to limit the [*Iowa League*] ruling to Eighth Circuit states and, thereby, approve and/or pre-promulgate the rule modifications that were vacated by the Eighth Circuit." Pet'r Br. 1, 4, 9. *See also, e.g., id.* at 40 ("EPA (in consultation with DOJ) purposefully decided to continue imposition of the vacated regulatory prohibitions on all permittees outside of the Eighth Circuit."). But neither in the challenged letters nor elsewhere has EPA completed any decision-making as to whether and to what extent to follow *Iowa League* outside the Eighth Circuit. EPA has instead saved those questions for future permitting review or issuance.

1. The challenged letters and other parts of the record show that EPA did not make such a decision.

The four corners of the challenged letters and other portions of the record reflect that there has been no "unequivocal decision" by EPA as alleged by the Center. EPA's letters of April 2 and June 18, 2014, contain the unremarkable statement of law that "[t]he Eighth Circuit's decision applies as binding precedent in

the Eighth Circuit.” Apr. 2014 Response at 1 [Pet’r Appx. 1]; June 2014 Response at 1 [Pet’r Appx. 3]. Neither letter states that EPA will “only” apply *Iowa League* within the Eighth Circuit. The omission of that word is significant and was not an oversight; the November 26, 2013 inquiring letter states: “We . . . understand based on recent public comments from EPA officials that the Agency believes the decision to have binding legal effect *only* in the 8th Circuit.” Nov. 2013 Inquiry at 2 (emphasis added) [Pet’r Appx. 5]. If EPA had intended to confirm the inquiring organizations’ understanding, it would have used the word “only.”

Contrary to the Center’s presumption that EPA “thereby” decided to apply the Act or its regulations outside the Eighth Circuit in a manner contrary to *Iowa League* (Pet’r Br. 1), the challenged letters do not relay any post-*Iowa League* position of the Agency outside the Eighth Circuit respecting blending, secondary treatment, bacterial mixing zones, or any other issue addressed in *Iowa League*. EPA *did* state that *Iowa League* did not vacate and could not have vacated the “bypass” regulation, 40 C.F.R. § 122.41, because it was subject to review and upheld by this Court in *NRDC 1987*. But the Center places no significance on that unremarkable statement of law.

The record that EPA has certified instead confirms the iterative, case-by-case nature of EPA’s treatment of *Iowa League* and issues addressed therein. The incoming letters to which EPA responded reveal organizations’ understanding that EPA has made no across-the-board or generally applicable decision concerning how to apply *Iowa League* going forward outside the Eighth Circuit. In particular, the organizations

shared their understanding of – and displeasure with – the Agency’s “case-by-case” approach. Nov. 2013 Inquiry at 2 [Pet’r Appx. 5]. The organizations’ follow-up letter similarly objected to “EPA’s piecemeal approach to implementing the 8th Circuit’s ruling.” May 2014 Inquiry at 1 [Pet’r Appx. 6].

Nothing EPA wrote in response to those inquiries even purports to dispute that understanding of a non-decision. To the contrary, the challenged letters state, on their face, that EPA continues to examine the public health implications associated with blending municipal wastewater. In fact, EPA referenced a then-upcoming public forum addressing the “public health implications of various bypass and blending scenarios during wet weather events[.]” Apr. 2014 Response at 2 [Pet’r Appx. 2].

2. Extra-record materials, even if considered, do not show that EPA made such a decision.

As explained *infra* pp. 47-54, the Court’s review is properly limited to the administrative record certified by EPA. But even if the Court considers the extra-record materials relied upon by the Center, the materials do not support the Center’s contention that the challenged letters reflect final agency action.

The Center first relies on EPA’s descriptions of five documents withheld under FOIA and, based on these descriptions, the Center infers that “[e]ach of these documents . . . confirms that EPA was consummating its decision.” *See* Pet’r Br. 24; FOIA Correspondence [Pet’r Appx. 265-81]. That inference is unfounded. The withheld documents are not completed decisions. As EPA’s descriptions provide, the

withheld documents represent “[w]orking draft[s],” Pet’r Appx. 269, 276-77 (withheld documents 8 and 18), regard “[c]onference call[s],” Pet’r Appx. 281 (withheld documents 46 and 48), or embody “privilege[d]” email communications, Pet’r Appx. 278 (withheld document 27). These descriptions, contrary to the Center’s speculation, are consistent with EPA’s not having made a decision about following *Iowa League* outside the Eighth Circuit and the Agency’s expectation that it may make any such decision on a case-by-case basis.⁶

The Center similarly assumes that another FOIA-withheld document – a “[w]orking draft memorandum” dated November 5, 2013 – actually contains an intra-EPA “directive” not to follow *Iowa League* outside the Eighth Circuit and to apply the Act or its regulations in those states in a manner inconsistent with *Iowa League*. See Pet’r Br. 24-25; Pet’r Appx. 269 (withheld document number 7). That assumption is unsupported. No such directive issued. The memorandum remains a working draft

⁶ EPA’s responses to the Center’s FOIA requests do not “confirm the presence of a final decision,” contrary to the Center’s contention. Pet’r Br. 24 n.21 (citing FOIA Correspondence, Pet’r Appx. 267, 272). For ease of reference, EPA restated words used in the FOIA request, including the Center’s assertion that EPA had decided not to apply *Iowa League* beyond the Eighth Circuit. Merely restating an allegation is not a concession. See *Hall & Associates*, 77 F. Supp. 3d at 50-51 (rejecting a similar argument that EPA made a concession by restating an allegation that EPA had made a decision not to follow *Iowa League* beyond the Eighth Circuit, explaining: “[I]n the motion-to-dismiss context, EPA must accept Hall’s version of the facts”).

and has not been published within or outside the Agency, contrary to the Center's speculation.⁷

Similarly impertinent here are the newsletters, press reports, and references to talking points cited by the Center, all of which regard statements attributed to EPA officials attending a seminar on or about November 20, 2013. *See* Pet'r Br. 25-26; Pet'r Appx. 293-95, 310-13, 330. Those statements predated the challenged letters of April 2 and June 18, 2014, in which EPA stated: "The Eighth Circuit's decision applies as binding precedent in the Eighth Circuit." Apr. 2014 Response at 1 [Pet'r Appx. 1]; June 2014 Response at 1 [Pet'r Appx. 3]. In those later-in-time communications, EPA did not, as explained above, use the word "only" before the phrase "in the Eighth Circuit." Thus, the challenged letters superseded any use of the word "only" even if an EPA official used that word at the seminar. In any event, according to a press account, EPA officials did not address "how EPA would decide whether to apply the court's ruling in any particular instance." Pet'r Appx. 312. That corroborates the plain meaning of the challenged letters, the case-by-case nature of EPA's approach to *Iowa League*, and the absence of an across-the-board or generally applicable EPA decision as alleged by the Center.

⁷ The Center's reliance on *Nat'l Envtl. Dev. Ass'n Clean Air Project ("NEDACAP") v. EPA*, 752 F.3d 999 (D.C. Cir. 2014), is misplaced. Pet'r Br. 25 n.22. There, EPA transmitted throughout the Agency a memorandum that "announce[d] a new enforcement regime in response to [a] Sixth Circuit[] decision." 752 F.3d at 1007. EPA announced nothing of the sort here.

That leaves the extra-record “standing” affidavits submitted by the Center.⁸ Even accepting, at face value, the few factual averments based on personal knowledge set forth in the affidavits,⁹ they do not, as the Center insists, show “EPA’s ongoing implementation of the vacated rules” resulting from the challenged letters or any final agency action. Pet’r Br. 27. They instead indicate that EPA has either not addressed the matter at all or, at most, shared with state regulators or facilities certain views regarding *Iowa League’s* impact or non-impact on the application of the bypass regulation under certain circumstances.¹⁰ But those views are incomplete and

⁸ Affidavit of Peter Rice, Professional Engineer, of Portsmouth, NH (Aug. 20, 2015) [Pet’r Addm. 1-5]; Affidavit of E. Tupper Kinder of Portsmouth, NH (Oct. 14, 2014) [Pet’r Addm. 149-50]; Affidavit of Fredric J. Pocci of North Hudson, NJ (Aug. 25, 2015) [Pet’r Addm. 84-89]; Affidavit of Craig W. Messinger of Allentown, PA (Aug. 27, 2015) [Pet’r Addm. 101-07]; Affidavit of James Cerqua of Clairton, PA (Aug. 27, 2015) [Pet’r Addm. 130-35]; Affidavit of John C. Hall, counsel for the Center (Sept. 9, 2015) [Pet’r Addm. 151-58].

⁹ The affidavits are replete with legal conclusions and statements that are not based on personal knowledge. Those portions should be disregarded. *Cf.* Fed. R. Civ. P. 56(c)(4) (“An affidavit . . . must be made on personal knowledge [and] set out facts that would be admissible in evidence[.]”).

¹⁰ *See* Rice Aff. § 7 [Pet’r Addm. 3]; Kinder Aff. §§ 5-6 [Pet’r Addm. 150]; Pocci Aff. § 6 [Pet’r Addm. 86]; Messinger Aff. §§ 14, 17, 21 [Pet’r Addm. 104-06]; Cerqua Aff. §§ 11-12 [Pet’r Addm. 133-34]; Hall Aff. § 11-12 [Pet’r Addm. 154-55]. Two document sets cited by the Center are to the same (non) effect. Pet’r Br. 27-28, citing Pet’r Appx. 337, 339, 361-66. The first set, on its face, is a “draft comment.” Pet’r Appx. 361. The second set regards information and “recommendations” transmitted by EPA on October 9, 2014, to a New Jersey permit agency that the permits in question must reflect the “regulatory requirements for a bypass in 40 C.F.R. § 122.41(m).” Pet’r Appx. 341. EPA paraphrased the cited regulation, which provides at the outset, for example, that “[t]he following conditions apply to all

Cont.

interlocutory on their face; noticeably absent is any allegation that any referenced permit proceeding has ended. The averments instead confirm that permit proceedings remain pending or, if concluded, did not aggrieve the permittee. *See, e.g.,* Rice Aff. § 8 (“If Portsmouth were forced to implement a non-blending approach”) [Pet’r Addm. 4]; Pocci Aff. § 7 (“If NHSA were forced to implement a non-blending approach”) [Pet’r Addm. 87]. Only if EPA takes final action in issuing or denying a discharge permit, either as the original permitting authority or as a result of EPA’s having objected to a proposed state-issued permit, could any discharger be forced not to blend. Of course, at the conclusion of any such permit proceeding, the affected permittee will have full rights to judicial review of any *actual* regulatory decision reflected in the final permit.

II. EPA did not approve or promulgate an effluent or other limitation.

The Center’s petition is also jurisdictionally infirm because EPA’s letters of April 2 and June 18, 2014, are otherwise beyond the scope of the Act’s judicial review provision. Under that provision, as pertinent here, “[r]eview of the [EPA] Administrator’s action . . . in approving or promulgating any effluent limitation or

NPDES permits.” 40 C.F.R. § 122.41. After receiving EPA’s recommendations, the state agency wrote what appears to be its understanding that “EPA has determined that [*Iowa League*] is only applicable in the 8th Circuit.” Pet’r Appx. 339. Any such understanding is incorrect, and in fact the only cited source for it is EPA’s recommendations, *id.*, which said nothing about *Iowa League*. EPA’s recommendations merely restated the requirements of 40 C.F.R. § 122.41(m). Thus, the state agency’s comments are not reasonably attributable to EPA, and they do not support the Center.

other limitation . . . may be had by any interested person in the Circuit Court of Appeals of the United States[.]” 33 U.S.C. § 1369(b)(1). But EPA did not approve or promulgate anything, much less an effluent or other cognizable limitation.

Nothing in the letters concerning *Iowa League* resembles an “approv[al].” “[A]pproving” generally refers to EPA’s role in reviewing a tangible and discrete state submission under the Act. *See generally* 40 C.F.R. § 122.44(d)(1)(vii)(B) (referencing a discharge’s “available wasteload allocation . . . prepared by the State and *approved* by EPA”) (emphasis added). The letters challenged by the Center here, by contrast, reflect an informal dialogue between EPA and organizations, not the approval or disapproval of any particular state submission.

Neither the Act nor its regulations define “promulgating.” In the absence of such a definition, this Court has customarily given “‘promulgation’ . . . its ‘ordinary meaning’ – i.e., publication in the *Federal Register*.” *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997) (citations omitted). Indeed, as then-Judge Scalia observed, “[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents ‘having general applicability *and legal effect*[.]’” *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (quoting 44 U.S.C. § 1510 (1982)). *See also* 33 U.S.C. § 1314(b) (directing EPA to “publish . . . regulations . . . for effluent limitations” under certain circumstances). More recent decisions generally address three criteria, including not only publication but “the Agency’s own

characterization of the action” and “whether the action has binding effects on private parties or on the agency.” *General Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004). *See also Mohycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999); *Am. Portland*, 101 F.3d at 776.

Consistent with these decisions, which did not involve the CWA, the Seventh Circuit in *American Paper Institute v. EPA*, 882 F.2d 287 (7th Cir. 1989), provided a definition and application of the term “promulgating” in dismissing a petition for review for lack of jurisdiction under 33 U.S.C. § 1369(b)(1)(E) – the same provision the Center invokes here. Judge Easterbrook explained for the court that “[p]romulgation means issuing a document with legal effect.” 882 F.2d at 288. The court acknowledged that the EPA document in *American Paper*, which set forth an “approach to regulation,” at least remotely resembled a codified rule. *Id.* Nevertheless, the court found that the document, standing alone, had no legal effect. As the Seventh Circuit explained, if and when EPA’s position as set forth in the document ever leads to the denial or modification of a permit, then judicial review may occur. *Id.* at 289. But until the completion of a proceeding with legal effect, the document is not reviewable; as the court reasoned, “telegraphing your punches is not the same as delivering them.” *Id.*

The upshot of this Court’s precedent and the Seventh Circuit’s cogent decision in *American Paper* is that while “promulgating” need not always mean publication in

the Code of Federal Regulations or the Federal Register,¹¹ publication is certainly one indication of promulgation, and at the very least, the challenged action must have binding legal effect to be reviewable as the “promulgation” of a “limitation” under 33 U.S.C. § 1369(b)(1)(E). Here, the EPA letters were never published, never characterized by the agency as establishing legal requirements, and do not have any legal effect on any POTW or purport to have any legal effect on any POTW. Instead, EPA simply shared a single, obvious legal observation about *Iowa League*, i.e., that it is binding within the Eighth Circuit. EPA did not apply that statement to any particular circumstances, nor did it commit itself to any particular conclusion as to how, if at all, *Iowa League*, would apply to any specific permit or other proceeding outside the Eighth Circuit. Nor did EPA impose or state that it was imposing any requirement on a POTW or any other facility. In short, nothing EPA stated in the letters could or will have any legal consequences on any facility.

III. The Center lacks standing.

The Center also lacks standing to pursue its claims. “To establish standing, a party must demonstrate an injury-in-fact that was caused by the defendant and that may be redressed by the court.” *Communities for a Better Env’t v. EPA*, 748 F.3d 333, 337 (D.C. Cir. 2014). The Center fails to meet even the first element. Because EPA

¹¹ See *General Elec. Co. v. EPA*, 290 F.3d 377, 381-85 (D.C. Cir. 2002) (reviewing an Agency guidance document under a statute authorizing direct appellate review of the “promulgation of a rule,” because that document, on its face, purported to bind permit applicants and the Agency with the force of law).

has not decided whether and to what extent to apply *Iowa League* outside the Eighth Circuit or what positions it will apply there concerning blending, secondary treatment, or bacteria mixing zones, *see supra* pp. 24-30, the Center cannot demonstrate that any member has been injured or is imminently threatened with injury as a result of EPA's letters of April 2 and June 18, 2014. The Center's affiants all presume – incorrectly and without personal knowledge supporting their presumption – that EPA has already made decisions. *See* Rice Aff. §§ 7, 10 [Pet'r Addm. 3-4]; Kinder Aff. §§ 5-6 [Pet'r Addm. 150]; Pocci Aff. §§ 8-9 [Pet'r Addm. 87-88]; Messinger Aff. §§ 24, 26 [Pet'r Addm. 106-07]; Cerqua Aff. §§ 13-14 [Pet'r Addm. 134-35]; Hall Aff. §§ 6-8 [Pet'r Addm. 153].

National Association of Home Builders v. EPA, 667 F.3d 6 (D.C. Cir. 2011), is instructive. There, organizations claimed injury resulting from an EPA determination, outside the context of any particular CWA permit, that reaches of Arizona's Santa Cruz River, downstream of members' properties, qualified as "traditional navigable waters."¹² The Court held that the organizations lacked standing, finding, in pertinent part, that "members face only the *possibility* of regulation, as they did before the TNW Determination: Any watercourse on their property may (or may not) turn out to be

¹² The Act generally requires permits to discharge pollutants to "waters of the United States," and such waters include streams and adjacent wetlands that have a significant nexus with traditional navigable waters downstream. *See Rapanos v. United States*, 547 U.S. 715, 780-81 (2006) (Kennedy, J., concurring).

subject to [the] CWA . . . because of a nexus (or not) with the two Santa Cruz reaches.” 667 F.3d at 13.

Similarly, here, the Center’s members outside the Eighth Circuit face only the *possibility* that EPA may decide not to follow *Iowa League* in a future CWA permit proceeding. For that matter, members face the possibility that EPA *may* follow *Iowa League* in a future proceeding or simply decline to object to a State-issued discharge permit that reflects *Iowa League*. *See supra* p. 5. Contingencies like these do not give rise to cognizable injury for purposes of standing. The Supreme Court has “repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (citations omitted).

IV. The Center’s claims are not ripe.

Still another ground compels dismissal of the Center’s petition: its claims are not ripe. “The aim of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way.” *Cohen v. United States*, 650 F.3d 717, 734 (D.C. Cir. 2011) (*en banc*) (internal quotation and citation omitted). Although ripeness and finality are similar, agency action may be final without being ripe. *See Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807-08, 812 (2003).

EPA's letters of April 2 and June 18, 2014, are not, in their current posture, fit for judicial review. The Center has not identified any final permit decision that has injured a member. To the contrary, the record indicates that EPA has yet to withdraw or otherwise resolve certain objections to discharge permits. *See* Nov. 2013 Inquiry at 2 [Pet'r Appx. 5]. Deferring judicial review until EPA renders a final permit decision that actually aggrieves or imminently threatens to injure a member of the Center would result in issues being teed up on the basis of a concrete dispute and fully-developed administrative record. Indeed, the record would presumably include comments from a permit applicant urging EPA to apply *Iowa League* or *not* to rely on the Agency's statements concerning blending, secondary treatment, or bacteria mixing zones set forth in the letters vacated in *Iowa League*. It would also likely include EPA's response to those comments.

Moreover, as previously explained, only speculation supports the Center's assumption that EPA will never apply *Iowa League* outside the Eighth Circuit. Even a claim involving purely legal issues is still not ripe for adjudication "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) (citation omitted). Until then, the ripeness doctrine prevents the Court from being entangled in academic questions. *See Nat'l Park*, 538 U.S. at 811 (rejecting argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis" because "courts would soon be overwhelmed with requests for

what essentially would be advisory opinions”). The Center is simply not entitled to an advisory opinion from this Court about the reach of *Iowa League*.

V. Even if the Court reaches the merits, the Center incorrectly contends that the Clean Water Act requires EPA to follow *Iowa League* outside the Eighth Circuit.

Even if the Center could establish that EPA’s letters of April 2 and June 18, 2014, embody final agency action and constitute the approval or promulgation of an effluent or other limitation (which the Center cannot), and even if the Center could establish its standing and identify ripe claims (which the Center cannot), the Center’s primary merits claim fails. According to the Center, federal law mandates that EPA follow *Iowa League* beyond the boundaries of the Eighth Circuit. The Center is wrong. It would be lawful for EPA to elect not to follow *Iowa League* outside the Eighth Circuit even if, for the sake of argument, the challenged letters or other portions of the record reflect such a decision (which they do not).

The starting point is the “doctrine of intercircuit nonacquiescence,” pursuant to which a federal agency ordinarily may “refus[e] to follow, in its administrative proceedings, the case law of a court of appeals other than the one that will review the agency’s decision.” Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L. J. 679, 687 (1989) (“*Nonacquiescence*”). See *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992) (referring to an agency’s “right to refuse to acquiesce in one (or more) court of appeals’ interpretation of its statute”). At its core, the doctrine serves the robust development of law, allowing the Supreme

Court to resolve any circuit conflicts concerning the agency's administration of statutes and regulations. *See Nonacquiescence* at 764 (“To compel an agency to follow the adverse ruling of a particular court of appeals would be to give that court undue influence in the intercircuit dialogue by diminishing the opportunity for other courts of proper venue to consider, and possibly sustain, the agency's position.”). Thus, “after one circuit has disagreed with its position, an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering, in the hope that other circuits, the Supreme Court, or Congress will ultimately uphold the agency's position.” *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J., dissenting).¹³

Similarly, as a matter of judicial precedent, the decision of a single court of appeals may ordinarily only be regarded as “binding” within that circuit. *See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (*en banc*). That tradition also serves the development of law. Although circuit conflicts undermine national uniformity of federal law to some degree, they also advance, over time, the quality of decisions interpreting the law. *See generally Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 446 (7th Cir. 1994) (agencies and

¹³ *Cf. United States v. Mendoza*, 464 U.S. 154, 160 (1984) (declining to apply nonmutual collateral estoppel against the United States, in part because to hold otherwise “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue”).

courts must balance whether “it is more important that the applicable rule of law be settled” or “that it be settled right”) (Easterbrook, J., concurring) (internal quotation and citation omitted).

Assuming the Court reaches the merits here (which it should not), the pertinent question is whether Congress has, by statute, altered the foregoing doctrine and tradition in the context of a decision like *Iowa League*. Congress has not done so.

EPA acknowledges that Congress *has* made alterations under certain circumstances. A classic example is this Court’s adjudication of petitions for review of nationally applicable rules promulgated by EPA under the Clean Air Act. *See, e.g., Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132 (D.C. Cir. 2012), *aff’d in part and rev’d in part sub nom. Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). By virtue of the Clean Air Act’s judicial review provision, 42 U.S.C. § 7607(b)(1), only this Court (and the Supreme Court on *certiorari*) may resolve timely challenges to such a regulation. In those circumstances, it is evident that Congress intended that the resulting judgment be binding in all circuits and on EPA throughout the United States.

With respect to petitions for review of EPA action under the Clean Water Act, EPA further acknowledges that, although the judicial review provision of the Clean Water Act differs from the Clean Air Act in that it does not assign venue exclusively to the D.C. Circuit, *see* 33 U.S.C. § 1369(b)(1), there are circumstances in which

Congress has made alterations. Various parties may challenge nationally applicable regulations promulgated by EPA that fall within the scope of 33 U.S.C. § 1369(b)(1) by filing petitions in more than one circuit. In that scenario, 28 U.S.C. § 2112(a) allows only the lottery-winning circuit to adjudicate all petitions. *See, e.g., Nat' Pork*, 635 F.3d at 741; *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 490 (2d Cir. 2005). *See also NRDC 1987*, 822 F.2d at 108-09 (consolidation and transfer of petitions originally filed in multiple circuits pursuant to a predecessor, lottery-free version of 28 U.S.C. § 2112). Thus, for example, a petition for review originally filed in the Tenth Circuit but subject to 28 U.S.C. § 2112(a) may not be adjudicated there if a different circuit won the lottery. Those circumstances are similar to the classic Clean Air Act example provided above. By statute, Congress has specified that only one court of appeals may assess the validity of the nationally-applicable regulation or conduct other appropriate review. As such, the relief granted by the reviewing court as to the particular agency action before it is binding nationwide.¹⁴

Iowa League, however, shares little in common with the foregoing examples. It involved only one petitioner with members located in only one state. Importantly, 28 U.S.C. § 2112(a) – which forms a central part of the Center's argument (Pet'r Br. 47-48) – was never invoked and had no application in *Iowa League*.

¹⁴ Indeed, as EPA noted in one of the challenged letters here, the Eighth Circuit in *Iowa League* did not vacate and “could not have vacated the bypass regulation at 40 C.F.R. § 122.41” because “[t]hat rule was reviewed and upheld” by this Court in *NRDC 1987*. Apr. 2014 Response at 1-2 [Pet'r Appx. 1-2].

In addition, the EPA actions reviewed in *Iowa League* did not take the form of a broadly published regulation following a public notice-and-comment process and with unquestionable nationwide reach. They were instead letters to a United States Senator. They were merely intended to provide the lawmaker, in response to his inquiries on behalf of his constituents, with a summary of what the Agency believed to be the present status of certain regulatory issues.

Similarly, throughout the *Iowa League* litigation, EPA contested the invocation of the Eighth Circuit's jurisdiction. In particular, EPA argued that its letters lacked the requisite hallmarks of "finality," a longstanding requirement of administrative law that the court concluded did not apply. *See supra* p. 9. EPA also objected to the Iowa League of Cities' assertion that the letters constituted EPA "actions . . . in approving or promulgating any effluent limitation or other limitation" within the meaning of the Act's judicial review provision, 33 U.S.C. § 1369(b)(1)(E).

Given all the circumstances of *Iowa League*, there simply is no indication that Congress intended to (or did) alter default principles such that either the result or the rationale of *Iowa League* must be regarded as binding on EPA or courts outside the Eighth Circuit. Contrary to the Center's contention, Congress did not alter default principles through the "CWA's central objective of national uniformity of baseline requirements (*e.g.*, technology-based rules and NPDES rules)." Pet'r Br. 50. The examples provided by the Center refute its argument. In *Iowa League*, EPA intended to write letters communicating its views, not codify "technology-based rules and

NPDES rules.” Although the petitioner asserted, and the Eighth Circuit agreed, that the letters contained legislative rules, it does not follow that *Iowa League* must be binding throughout the United States to align with the objective of uniform baseline requirements.

Quite to the contrary, preserving EPA’s ability to invoke the doctrine of intercircuit nonacquiescence in appropriate cases outside the Eighth Circuit furthers the interests of national consistency – even if it will take time for the Supreme Court to resolve any circuit conflicts that may develop. That approach reflects tradition, not “chaos” as the Center assumes. Pet’r Br. 52.¹⁵

Thus, there is no merit to the Center’s primary argument that EPA has no lawful option but to follow *Iowa League* throughout the United States.

VI. The Center’s fallback argument fails because *Iowa League* was incorrectly decided.

Even if the Court reaches the Center’s fallback argument – which posits that if “EPA has no obligation to adhere to [*Iowa League*] outside of the Eighth Circuit, then this Court should find EPA’s re-promulgations and re-approvals unlawful for precisely the same reasons espoused by the Eighth Circuit,” Pet’r Br. 54-55 – that

¹⁵ In the merits portion of its brief, the Center (correctly) does not rely on *NEDACAP*. See *supra* p. 29 n.7 (distinguishing the Center’s different reliance on *NEDACAP*). There, the Court found that EPA had to follow a Sixth Circuit decision nationally based on the text of certain Clean Air Act regulations. As the Court held, “[t]he doctrine of intercircuit nonacquiescence does not allow EPA to ignore the plain language of its own regulations.” 752 F.3d at 1011. No comparable regulations exist under the Clean Water Act, and the Center points to none.

argument fails. There are ample grounds for EPA or this Court to disagree with *Iowa League* and reach opposite conclusions.

First and foremost, EPA's letters to Senator Grassley were not proper subjects for judicial review. From a broader perspective, such review raises serious separation-of-powers concerns. EPA and other Executive Branch agencies must have the ability to respond clearly and promptly to congressional inquiries. Where EPA has a position about existing law, it makes no sense either to force the agency to hide that position from a Member of Congress behind artificial disclaimers, or alternatively, to make the agency employ full rulemaking procedures before it answers the mail. *See generally Nat'l Pork*, 635 F.3d at 756 (dismissing challenges to EPA's congressional correspondence).

Informal agency communications also benefit the regulated community. This Court has long recognized that, although immediate review of an informal agency communication might sometimes assist private parties by clarifying their rights and obligations at an earlier point, "[t]o 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." *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) (citations omitted). EPA letters are examples of the salutary administrative practice of responding to inquiries concerning the application of an existing legal framework to particular factual

circumstances. See *American Fed'n of Gov't Employees v. O'Connor*, 747 F.2d 748, 754 (D.C. Cir. 1984) (describing such practice as a “valuable public service”). This Court and others have generally been reluctant to hold that responses to public inquiries are immediately reviewable. See *O'Connor*, 747 F.2d at 754; *Holistic Candles & Consumers Ass'n v. FDA*, 664 F.3d 940, 941-942 (D.C. Cir. 2012) (canvassing cases); *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) (counsel letter requested by regulated party was not final agency action). The Eighth Circuit, in stark contrast, declined to even apply “the longstanding requirement of administrative law that [agency] action must be ‘final’ to be reviewable.” *Supra* p. 21 (citing precedent from the D.C., First, Fifth, and Eleventh Circuits).

More narrowly, EPA’s letters to Senator Grassley – which embody the “rules” that the Center contends EPA continues to apply outside the Eighth Circuit – were not, contrary to the Eighth Circuit’s conclusion, “definitive” and “unequivocal” such that any positions set forth in them may be viewed as legislative rules with “a binding effect on regulated entities.” *Iowa League*, 711 F.3d at 863. The letters did not read like a “ukase,” in contrast to the EPA document invalidated in *Appalachian Power*, 208 F.3d at 1021-23. The letters instead provided “general considerations” on questions of blending, secondary treatment, and bacteria mixing zones – leaving EPA regions and state permitting authorities “free to consider the individual facts” on a case-by-case basis. *Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009) (citations omitted). See also *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*,

452 F.3d 798, 806-07 (D.C. Cir. 2006) (finding that an agency's policy guidelines did not establish any "binding norms or agency actions that occasion legal consequences"). Thus, the Eighth Circuit should not have reviewed the letters or found them to reflect legislative rules.

The unsoundness of concluding that EPA was required to undergo notice-and-comment rulemaking before responding to the Senator is confirmed by a recent Supreme Court decision. In *Perez v. Mortgage Bankers Association*, the Court held that an agency need not undergo notice-and-comment rulemaking when it simply issues or amends "interpretative rules," "the critical feature of [which] is that they . . . advise the public of the agency's construction of the statutes and rules which it administers." 135 S. Ct. 1199, 1204 (2015) (internal quotations and citation omitted). The letters at issue in *Iowa League*, at best, fit that description. Legislative rules, by contrast, carry additional procedural requirements because they have the "force and effect of law." *Id.* at 1203. As the Court stressed, courts have no authority to impose additional requirements on interpretative rules (or policy statements) based on their "own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 1207 (internal quotations and citation omitted).

Substantively, although the Eighth Circuit did not vacate the bypass regulation, *Iowa League's* reasoning conflicts with this Court's decision upholding the bypass regulation. In *NRDC 1987*, industry petitioners challenged the validity of the regulation that generally prohibits "bypass," defined as "the intentional diversion of

waste streams from any portion of a treatment facility.” 40 C.F.R. § 122.41(m)(1)(i).

On a number of grounds, this Court rejected industry’s arguments that “requiring the treatment system . . . to be operated without bypass, even where the effluent limitations are not exceeded [at the end of a pipe], is barred under a faithful discernment of Congress’ intent.” 822 F.2d at 123. The Court held, for example, that “permits may include conditions other than effluent limitations.” 822 F.2d at 124 (citing 33 U.S.C. § 1342(a)(2)). As another example, the Court concluded that “[t]he 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.” 822 F.2d at 124.

Iowa League stated that EPA’s letters, which the court regarded to be a legislative rule on blending, “clearly exceed[] the EPA’s statutory authority” “insofar as the blending rule imposes secondary treatment regulations on flows within facilities[.]” 711 F.3d at 877-78. The stated basis of the decision – that EPA lacks statutory authority to apply secondary treatment “effluent limitations to the discharge of flows from one internal treatment unit to another,” *id.* at 877 – is at odds with *NRDC 1987*. *NRDC 1987* stands for the proposition that EPA may, consistent with the CWA, prohibit bypass and require the operation of the treatment system as designed and permitted even if a POTW is discharging in compliance with end-of-pipe effluent limitations. It necessarily follows that EPA may also prohibit blending when it constitutes bypass, i.e., the intentional avoidance of secondary treatment, even

when end-of-pipe limits are met. *See also supra* pp. 12-13 (*Iowa League's* rationale also conflicts with decisions from the Fifth and Tenth Circuits).¹⁶

Thus, the Court should reject the Center's invitation for it to order EPA to follow *Iowa League* as persuasive authority outside the Eighth Circuit.

VII. The Center's motion to supplement the administrative record should be denied as moot or without merit.

The Court need not reach the Center's motions to supplement the administrative record. As explained *supra* pp. 26-30, even if the Court considers all of the extra-record materials cited by the Center, the Center's petition should be dismissed or denied. But if the Court reaches the Center's motions, they should be denied because the administrative record EPA certified is complete.

A. EPA's record is presumptively complete.

EPA's practices for compiling administrative records are described in a publicly-available guidance document. *See* EPA's Administrative Records Guidance (Sept. 2011) ("AR Guidance") at 3, available at <http://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [EPA Suppl. Appx. 11]. There, EPA explains that an administrative record is "the set of non-deliberative documents that the

¹⁶ *American Iron & Steel Institute v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997), does not support the Center or its amicus curiae, the National Association of Clean Water Agencies. That decision dealt only with water-quality based effluent limitations, not in-plant, technology-based effluent limitations. Secondary treatment requirements for POTWs are technology-based. *See* 33 U.S.C. §§ 1311(b)(1)(B), 1314(d); 40 C.F.R. § 125.3(a)(1)(i).

decision-maker considered, directly or indirectly (e.g., through staff), in making the final decision.” AR Guidance at 4 [EPA Suppl. Appx. 12]. Case law supports this definition. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (describing the administrative record as that “before the Secretary at the time he made his decision,” but cautioning that “inquiry into the mental processes of administrative decisionmakers is usually to be avoided”); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (“The administrative record includes all materials compiled by the agency that were before the agency at the time the decision was made.”) (citations and internal quotations omitted); *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (*en banc*) (refusing to supplement the record with transcript of deliberative agency proceedings); *Norris & Hirshberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947) (“[I]nternal memoranda made during the decisional process . . . are never included in a record.”).

The Agency applied that definition here, with the caveat that “EPA maintains that the letters at issue in this case are not subject to judicial review.” Certified List at 5 of 7 [EPA Suppl. Appx. 22]. Because EPA never regarded the letters to reflect any substantive decision-making, it did not contemporaneously maintain a record. *See, e.g.,* AR Guidance at 3 (“Where litigation is likely, it is . . . very important to focus on record development through the entire process of decision-making.”). The Court having decided to carry EPA’s motion to dismiss with the case and require the certification of a record, EPA effectively substituted the phrase “writing the April 2

and June 18, 2014, letters” for “making the final decision” when applying its definition of an administrative record. *See* Certified List at 5 of 7 (“the documents listed below comprise the administrative record *for the letters at issue*”) (emphasis added) [EPA Suppl. Appx. 22].

EPA having certified the record, there is a “standard presumption” of completeness. *Calloway v. Harvey*, 590 F. Supp. 2d 29, 37 (D.D.C. 2008) (citing, *inter alia*, *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)). As the Tenth Circuit has cogently explained, “the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity.” *Yuetter*, 994 F.2d at 740. *See also Overton Park*, 401 U.S. at 415 (“[T]he Secretary’s decision is entitled to a presumption of regularity.”). This Court has likewise emphasized that grounds for second-guessing an administrative record are “quite narrow and rarely invoked.” *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014).

B. The Center bears the burden of overcoming the presumption.

The Center, not EPA, bears the burden to rebut the completeness presumption and establish that the administrative record is, in fact, incomplete. “To overcome the strong presumption of regularity to which an agency is entitled, a plaintiff must put forth concrete evidence that the documents it seeks to ‘add’ to the record were actually before the decisionmakers.” *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (citation omitted). “A plaintiff cannot merely assert . . . that materials

were relevant or were before an agency when it made its decision.” *Id.* (citations omitted). Rather, the movant “must identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record.” *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006).

C. The Center has not met its burden.

The Center contends that four categories of documents are missing from EPA’s certified administrative record. The Center is wrong.

1. The record before the Eighth Circuit is not the record here.

The Center contends that EPA “should have included all the documents . . . that were considered by the Eighth Circuit in rendering the [*Iowa League*] ruling.” Pet’r Br. 32-33. But the Center has not proffered any evidence that EPA officials and staff involved in writing the letters of April 2 and June 18, 2014, actually considered particular documents from the *Iowa League* record. Indeed, in the challenged letters, EPA did not cite any document unique to the *Iowa League* record.¹⁷

¹⁷ The parties have provided the Court with copies of the correspondence between Senator Grassley and EPA. EPA Suppl. Appx. 1-8; Pet’r Appx. 9-15. The Center has also lodged EPA’s “draft peak flows policy” and Compilation of Mixing Zone Documents. Pet’r Appx. 16-21, 43-69. But these are merely background materials, to provide a better understanding of *Iowa League*.

2. The record properly omits deliberative documents.

The Center erroneously seeks to supplement the record with “deliberative” documents. Pet’r Br. 30-32. The Center cannot expand the record simply by claiming that EPA made a decision – a decision that the Agency denies making and which is not reflected on the face of the challenged letters.

Further, the Center’s argument contravenes EPA’s well-supported practices for compiling administrative records. *See supra* pp. 47-49. Deliberative documents are appropriately omitted from its administrative records for at least two sound reasons. First, it is the final agency action that is the subject of review, not draft, pre-decisional deliberative materials or the views of subordinate agency officials who are not the final decisionmakers. Second, protecting those materials from judicial scrutiny advances the fundamental policy of encouraging the free flow of ideas within agencies, with agency employees not inhibited by the prospect of judicial review of their notes and internal communications. *See In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998); *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002); *see also, e.g., Madison Cnty. Bldg. & Loan Ass’n v. Fed. Home Loan Bank Bd.*, 622 F.2d 393, 395 n.3 (8th Cir. 1980) (observing that “staff memoranda and recommendations . . . used by an agency in reaching a decision” are not part of the record due to “concerns over proper agency functioning”); *Suffolk Cty. v. Sec’y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (“[R]eview of deliberative memoranda . . . is usually frowned upon[.]”). Courts

regularly reject arguments similar to the Center's here that judicial review should include deliberative materials such as initial evaluations, internal memoranda and communications, summaries, drafts, and analyses evidencing the agency's consideration. *See Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008); *Ad Hoc Metals*, 227 F. Supp. 2d at 142–43.

In addition, it is evident that this part of the Center's motions is an attempt to end-run FOIA. As noted *supra* pp. i & 16, the Center previously sought documents from EPA under FOIA. EPA responded to those requests. The Center either could have sought or actually obtained district court review of EPA's responses. *See Hall & Associates v. EPA*, 77 F. Supp. 3d 40 (D.D.C. 2014); *see also Hall & Associates v. EPA*, 1:15-cv-1055-KBJ (D.D.C.) (pending). The Center cannot use this action to obtain deliberative or other protected documents that it failed to obtain through FOIA requests and related district court litigation.

3. The record properly does not include EPA's initial public statements concerning *Iowa League*.

The Center incorrectly seeks to add documents to the record related to EPA's public communication of its "decision." Pet'r Br. 32 (citing Pet'r Appx. 282-332). Here again, the Center's allegation of an EPA decision is incorrect. Regardless, there is no reason to believe that EPA considered any such documents in writing the challenged letters. After EPA officials made remarks about *Iowa League* at a November 2013 seminar, certain organizations sought a written response from EPA

about *Iowa League*. See *supra* pp. 13 & 28. If the organizations had regarded remarks at the seminar to be relevant to their inquiry of the Agency, they could have restated them in correspondence. The organizations instead provided their understanding of EPA's post-*Iowa League* course of action, and their stated understanding is already part of EPA's certified record.

4. The record properly omits the Center's request for "implementation" documents.

Nor is there any merit to the Center's contention that EPA should have certified documents regarding "EPA's subsequent enforcement of the decision across the country." Pet'r Br. 29. In addition to the fact that there was not a "decision" as alleged by the Center, an administrative record does not contain documents dated *after* the allegedly final agency action, i.e., *after* June 18, 2014. See AR Guidance at 4, 10-11 [EPA Suppl. Appx. 12, 18-19]. Moreover, even if an EPA region decides, in the context of a specific discharge permit, not to follow *Iowa League*, any such Agency documents could constitute a separate record at the relevant time. *This* case, however, is not about any final permitting decision.

5. The Center is not entitled to discovery.

No grounds support the Center's request for the Court "to direct EPA and DOJ to produce the other key documents they have withheld from judicial review." Pet'r Br. 33-34. As previously explained, it is beyond the scope of this case for the Center to challenge EPA's withholding of documents pursuant to FOIA. Moreover,

“discovery should not be permitted on [a party’s] arbitrary and capricious claim unless [it] can demonstrate unusual circumstances justifying a departure from this general rule.” *Tex. Rural Legal Aid v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991). Unusual circumstances may include a “strong showing of bad faith or improper behavior.” *Menkes v. Dep’t of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011) (citation omitted). But the Center has made no such showing here.¹⁸

D. The Center cannot incorporate its prior arguments by reference.

The Center cannot incorporate by reference the arguments made in its motions to supplement the record. Pet’r Br. 29 n.25. On two occasions, the Court ordered the parties to include in their briefs all arguments they wish to raise concerning EPA’s motion to dismiss and the Center’s motions to supplement the administrative record. *See supra* pp. 15-16. Therefore, the Center has waived all arguments not explicitly set forth in its opening brief.

¹⁸ The Center’s request for “*in camera* review” fails for similar reasons. Pet’r Br. 32 n.29.

CONCLUSION

EPA's motion to dismiss should be granted, and the Center's petition for review should be dismissed for lack of jurisdiction. In the alternative, the petition should be denied on the merits.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,889 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Andrew J. Doyle

ANDREW J. DOYLE

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

In addition, I caused two hard copies of the foregoing brief to be served via Federal Express courier service on the following counsel of record:

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