14-1150

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Respondent Agency's Promulgations and Approvals of Effluent Limitations and Other Limitations

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BRIEF FOR PETITIONER

Oral argument requested but not yet scheduled

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. and Circuit Rule 26.1, counsel for Petitioner, Center for Regulatory Reasonableness ("CRR"), certifies as follows:

CRR is a multi-sector coalition of municipal and industrial entities from across the United States established under Title 29 of the D.C. Code. CRR has no parent companies and there are no other publicly-held companies that have a 10% or greater ownership interest in CRR. CRR has no outstanding shares or debt securities in the hands of the public.

CRR was created to address the full range of Clean Water Act ("CWA") compliance, permitting, and regulatory issues facing regulated entities. CRR is dedicated to ensuring that regulatory requirements applicable to such entities (1) are based on sound scientific information, (2) allow for flexible implementation, (3) require attainable, cost-effective compliance options, and (4) are imposed after full consideration of public comments regarding the need for and efficacy of such requirements. Most, if not all, of CRR's members operate under National Pollutant Discharge Elimination System ("NPDES") permits issued pursuant to § 402 of the CWA, 33 U.S.C. § 1342.

II. CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioner, Center for Regulatory Reasonableness ("CRR"), certifies as follows:

a. Parties

- *Petitioner*, CRR, is a coalition of municipal and industrial entities from across the United States. CRR is dedicated to ensuring that regulatory requirements applicable to its members are (1) based on sound scientific information, (2) allow for flexible implementation, (3) require attainable, cost-effective compliance options, and (4) are imposed after full consideration of public comments regarding the need for and efficacy of such requirements.

- *Respondent* is the United States Environmental Protection Agency ("EPA" or "the Agency").

- At present, no *amici* have filed regarding their intent to participate in this case.

- At present, there are no *intervenors* in this case.

b. Ruling Under Review

This petition seeks review of EPA's promulgations and approvals of effluent limitations and other limitations reflected, in part, by two EPA letters dated April 2, 2014, and June 18, 2014. *See* Exs. 1 & 2 (Appx., at 1-3). Specifically, CRR is challenging EPA's decision to re-promulgate and approve the continued imposition

of the regulatory prohibitions that were vacated by the Eighth Circuit Court of Appeals in *Iowa League of Cities ("ILOC") v. EPA*, 711 F.3d 844 (8th Cir. 2013) *rehrg. denied* (July 11, 2013) outside of the Eighth Circuit. EPA's re-promulgations and re-approvals represent a dramatic departure from the formally adopted bypass rule (40 C.F.R. § 122.41(m)), secondary treatment rule (40 C.F.R. Part 133), and water quality-based permitting regulation (40 C.F.R. § 122.44(d)).

c. Related Cases

In *ILOC*, the Eighth Circuit reviewed and vacated EPA's illegal modifications (*e.g.*, nationwide prohibitions of certain activities) to the same rules – the bypass rule, secondary treatment rule, and water quality-based permitting regulation. EPA's subsequent decision to continue imposition of the vacated rule modifications on permittees in all states outside of the Eighth Circuit is the subject matter of this case.

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V. GLOSSARY

"ACTIFLO"- A non-biological wastewater treatment process which uses ballasted flocculation to aggregate and settle out suspended solids; given its efficacy for treating a high volume of water in a short amount of time, often used to handle peak flows at wastewater treatment facility.

"APA" - Administrative Procedure Act; 5 U.S.C. §§ 551 *et seq.*; the United States federal statute that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations.

"CRR" or "the Center" – The Center for Regulatory Reasonableness; the Petitioner in this appeal.

"CSO" – Combined Sewer Overflow; overflows (normally during periods of heavy rainfall or snowmelt) from sewers that are designed to collect rainwater runoff, domestic sewage, and industrial wastewater in the same pipe.

"CWA" or "the Act" – The Clean Water Act; 33 U.S.C. §§ 1251 *et seq.*; the primary federal law in the United States governing water pollution.

"DOJ" – The Department of Justice; is a federal executive department of the U.S. government, responsible for the enforcement of the law and administration of justice in the United States

"EPA" or "the Agency" – United States Environmental Protection Agency; the Respondent in this appeal.

"EAB" – Environmental Appeals Board; the final Agency decisionmaker on administrative appeals under all major environmental statutes that EPA administers.

"ILOC" – The Eighth Circuit's decision in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013);

"the League" – Iowa League of Cities, the petitioner in the Eighth Circuit's *ILOC* decision.

"NPDES" – National Pollutant Discharge Elimination System; a permit program that regulates point sources that discharge pollutants into waters of the United States.

"*POTW*" – Publicly Owned Treatment Works; a term used in the United States for a sewage treatment plant that is owned, and operated, by a government agency.

"*SSO*" – Sanitary Sewer Overflow; overflows from sewer systems that are meant to collect and transport sewage to a publicly owned treatment works.

"*TMDL*" – Total Maximum Daily Load; a regulatory term in the U.S. Clean Water Act, describing a value of the maximum amount of a pollutant that a body of water can receive while still meeting water quality standards.

"*WWTF*" – Wastewater Treatment Facility; a facility designed to convert wastewater - which is water no longer needed or suitable for its most recent use - into an effluent that can be either returned to the water cycle with minimal environmental issues or reused.

VI. JURISDICTIONAL STATEMENT

CRR's petition challenges the lawfulness of EPA's decision to limit the *ILOC* ruling to Eighth Circuit states and, thereby, approve and/or re-promulgate the rule modifications that were vacated by the Eighth Circuit. As with most unlawful rulemaking cases, the jurisdictional issues are intertwined with the merits.[2]

A. The Regulations at Issue Are Subject to CWA § 509(b)(1)(E) Review

Section 509 of the CWA grants the Circuit Courts of Appeals exclusive original jurisdiction to review specific EPA "actions" – formal or informal:

> Review of the Administrator's action: … (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, … may be had by any interested person in the Circuit Court of Appeals of the United States … Any such application shall be made within 120 days from the date of such determination, approval, promulgation ...

CWA § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E) (*see* Statutory/Regulatory Addendum, at 1). The EPA actions at issue involve unlawful modifications of nationally-applicable regulations originally adopted pursuant to CWA § 301 and previously reviewed pursuant to CWA § 509(b)(1)(E). *See Am. Iron and Steel Inst. v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997) ("*AISI*") (reviewing 40 C.F.R. § 122.44(d); *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) ("*NRDC II*") (reviewing

[2] *See, e.g.*, *GE v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002) ("[H]aving held that the case is ripe for review and that the Guidance Document is a 'rule' for purposes of the TSCA, it is clear that GE must prevail on the merits."); *see also Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 226 (D.C. Cir. 2007).

40 C.F.R. § 122.41(m) - bypass regulation); *Maier, et al., v. EPA*, 114 F.3d 1032 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1014 (1997) (reviewing 40 C.F.R. §§ 133.100 *et seq.* – secondary treatment rule). *A fortiori*, amendments to these rules are subject to the same exclusive review authority. *See ILOC*, 711 F.3d at 866 ("[W]e find that the contested letters involve 'effluent or other limitations.' The EPA's position that bacteria mixing zones in waters 'designated for primary contact recreation . . . should not be permitted' is a restriction that directly affects the concentration of discharge from a point source and therefore is an effluent limitation. The rule regarding the use of blending is an 'other limitation' because, as in *VEPCO*, it restricts the discretion of municipal sewer treatment plants in structuring their facilities.") (internal citations omitted); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755-756 (5th Cir. 2011) (informal "guidance letters" are reviewable under CWA § 509(b)(1)(E) if they substantively change existing regulations).

Accordingly, EPA's decision to (1) approve the continued imposition of rule modifications that were previously reviewed (and vacated) under § 509(b)(1)(E), (2) enforce more restrictive regulatory requirements based on the permittee's geographic location, and/or (3) re-promulgate the vacated rule modifications, is reviewable in this Court under § 509(b)(1)(E).

B. EPA's Actions Are Promulgations and/or Approvals

Under CWA § 509(b)(1)(E), EPA actions that constitute a "promulgation" or an "approval" of "effluent limitations or other limitations" are reviewable in the Circuit Courts of Appeals. To be a "promulgation," the "ultimate focus" is whether the action has "binding effect on private parties or the agency." *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements (here, of 42 U.S.C. § 7607 (d)) by labeling a major substantive legal addition to a rule a mere interpretation."). Likewise, the *ILOC* court held that "agency actions that are 'functionally similar' to a formal promulgation" are reviewable under CWA § 509(b)(1)(E). *See ILOC*, 711 F.3d at 862. In this case, EPA has "approved" (or "re-promulgated") the continued imposition of the vacated rule amendments outside of the Eighth Circuit. For these reasons, CWA § 509(b)(1)(E) review is appropriate.[3]

[3] This Court has also vacated numerous "informal" EPA rule amendments. *See, e.g.*, *NRDC v. EPA*, 643 F.3d 311, 320-321 (D.C. Cir. 2011) (EPA guidance document was held to be an illegal legislative rule amendment); *CropLife Am. v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) (vacating an EPA press release and letter that constituted a dramatic change in established regulatory regime); *GE v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (EPA guidance document constituted the "promulgation of a rule" because it purported to bind permit applicants and EPA with the force of law); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (EPA guidance document mandating broader sufficiency review and permit monitoring vacated because EPA did not comply with rulemaking procedures); *Ciba Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986) (series of agency actions culminating

C. EPA's Actions Are Final and Have a "Binding Effect"

As discussed (*infra*, at 23-28), EPA's decision to continue imposition of the vacated regulatory prohibitions is confirmed by (1) EPA's written and verbal announcements (Exs. 1 & 2 (Appx., at 1-3) and Exs. 43-45 (Appx., at 282-313)), (2) the inquiries that followed EPA's verbal announcements and prompted EPA's written announcements (Exs. 3 & 4 (Appx., at 4-8)), (3) EPA's directives to permitting and enforcement personnel (*see* Exs. 41-42 (Appx., at 267-281)), and (4) EPA's actions on state and federally-issued permits (*see* Exs. 48, 49, 52 (Appx., at 333-347, 361-366)); *see also* Affidavits of Kinder (Standing Addendum, at 149-150), Hall (Standing Addendum, at 151-158), Pocci (Standing Addendum, at 84-89). These documents confirm EPA's "working law" regarding the precedential scope of the *ILOC* ruling and its decision to continue to impose the regulatory prohibitions vacated therein.[4] Because EPA's unequivocal decision "marks the consummation of the agency's decision making process" and is not

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in a "final letter" was a reviewable substantive revision to EPA's rules); *Her Majesty the Queen v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990) (letters from EPA describing Headquarters' position on regulatory requirements found reviewable).

[4] In previous filings with this Court, EPA has argued that the *ILOC* ruling (and the revised rules vacated therein) will be applied at permitting on a "case-by-case" basis outside the Eighth Circuit (*see, e.g.*, Doc. No. #1515269, EPA MTD, at 16, 17, 20). This statement confirms EPA still regards the vacated rule amendments as legally applicable outside the Eighth Circuit. Any EPA decision to impose the vacated categorical prohibitions, even on a "case-by-case" basis, is still the application of illegal rule amendments.

"tentative or interlocutory" in any manner, it satisfies the first prong of *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997).

As it pertains to the second prong of *Bennett v. Spear*, EPA's decision has "determined" the "rights or obligations" of CRR's members and presents immediate "legal consequences." *Id.*; *see also infra*, at 37-39 (detailed discussion of harm including increased compliance costs, preclusion of certain treatment techniques, risks of noncompliance, etc.). The "binding effect" of EPA's actions is further supported by the fact that both permittees and state permitting agencies have been directed by EPA, under threat of permit veto (*see* 33 U.S.C. § 1342(d)(2)), to impose the vacated regulatory requirements in permitting actions.[5] *See, e.g.*, NJDEP Response to Comments (Exs. 48, 49 (Appx., at 333-347)); Kinder Affidavit (Standing Addendum, at 149-150). Furthermore, EPA has refused to withdraw objections based on the vacated regulatory prohibitions. *See, e.g.*, Cerqua Affidavit (Standing Addendum, at 130-135); Messinger Affidavit (Standing Addendum, at 101-107). EPA employed the same coercive tactics in the *ILOC* matter. *See* Ex. 19, Iowa Department of Natural Resources Affidavit, at ¶5 (Appx., at 126). Such "conform or else" mandates have routinely satisfied the

[5] For the 46 approved NPDES states, draft permits must be submitted to EPA for review before they can be issued by the states. 33 U.S.C. § 1342(b). As part of this review, EPA has the authority to object or veto any state-issued permit. 33 U.S.C. § 1342(d)(2). A permit veto threat is a powerful cudgel by which EPA may effectuate regulatory changes without undergoing notice and comment rulemaking and, potentially, avoiding judicial review.

Bennett v. Spear finality test "if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences…" *GE*, 290 F.3d at 383 *citing* 41 DUKE L.J. at 1328-29.[6]

Accordingly, EPA's decision to continue imposition of the vacated legislative rule revisions (creating different requirements for permittees in different parts of the country) is a final reviewable action under *Bennett v. Spear* and a "promulgation" or "approval" under § 509(b)(1)(E).

D. CRR's Challenge Is Ripe for Review

CRR's challenge is ripe for several reasons. First, under the plain language of § 509(b)(1)(E), EPA's promulgations and approvals are required to be reviewed immediately.[7] In general, Congress designed the statute to preclude challenges from being filed in the subsequent NPDES permitting process. *See NRDC v. EPA*, 859 F.2d 156, 167 (D.C. Cir. 1988) ("the congressional provision for judicial review, 33 U.S.C. § 1369(b), evinces a strong will that it occur at the time of promulgation…. and bars a party from making at the time of enforcement claims

[6] *See also Appalachian Power*, 208 F.3d at 1021 ("if [a document] leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'").

[7] CWA § 509(b)(1)(E) has a 120-day statute of limitations and "[s]tatutory time limits on petitions for review of agency actions are jurisdictional in nature such that if the challenge is brought after the statutory time limit, we are powerless to review the agency's action. … The statutory time limitations have been strictly enforced." *Texas Mun. Power Agency v. EPA*, 799 F.2d 173, 174 (5th Cir. 1986).

that it could have brought at the time of promulgation."). Second, as in *Reckitt Benckiser, Inc. v. EPA*, 613 F.3d 1131, 1137 (D.C. Cir. 2010), this matter is ripe because EPA did not justify its decision to limit the *ILOC* ruling "on the basis of specific facts" or any particular permit application. *See also ILOC*, 711 F.3d at 867-868 ("In this case, we are not wading into the abstract because the disagreements before us are quite concrete. … Because such inquiries do not implicate contingent factual circumstances, this controversy is ripe for our review.").

Third, CRR's challenges present "purely legal issues" such as whether EPA, once again, unlawfully amended legislative rules and/or whether EPA may continue to implement previously vacated rules without undertaking rulemaking. Such purely legal issues are presumptively ripe for review.[8] Fourth, procedural attacks regarding an agency's failure to undertake notice and comment rulemaking before amending legislative rules can be raised immediately. *Lujan*, 504 U.S. 555, n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

[8] *See Cement Kiln*, 493 F.3d at 215 ("purely legal claim … is presumptively reviewable."); *GE*, 290 F.3d at 380 ("[W]hether the Guidance Document is a legislative rule is largely a legal, not a factual question, …").

Finally, because EPA's latest action – *again* – forces CRR members to either (1) immediately alter their conduct to avoid the threat of enforcement, or (2) risk building projects with treatment processes that EPA now classifies unlawful (*infra*, at 37-38), immediate review is proper. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[A] substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately … is 'ripe' for review at once ... ."); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977) (finding immediate pre-enforcement review of regulation proper); *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) ("[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review....").

Consequently, EPA's decision to continue imposing the rule amendments vacated in *ILOC* outside of the Eighth Circuit is ripe for review. *ILOC*, 711 F.3d at 868 ("In this case, we are not wading into the abstract because the disagreements before us are quite concrete.").

E. CRR's Petition Is Timely

CWA § 509(b)(1)(E) establishes a 120-day statute of limitations for petitions beginning on the "date of such determination, approval, promulgation, issuance or denial." By regulation, this 120-day period begins two weeks after a document is

signed. *See* 40 C.F.R. § 23.2. The EPA decision affirming that it would continue to apply the vacated rule amendments was memorialized in letters signed on April 2, 2014, and June 18, 2014. *See* Exs. 1 & 2 (Appx., at 1-3). Therefore, by regulation, the timeframe for calculating the 120-day period starts on April 16, 2014, and July 1, 2014. This action was filed on August 12, 2014, within the 120-day time limit specified by § 509(b)(1)(E).

F. CRR Is "Interested" and Has Article III Standing to Bring this Suit

CRR refers the Court to the separate "Standing" section set forth in this brief mandated by Circuit Rule 28(a)(7). *Infra*, at 37-39. As detailed in its corporate disclosure statement, CRR is a trade association that resides, is incorporated, and transacts business in Washington, D.C. *See* Hall Affidavit, at ¶¶2-4 (Standing Addendum, at 151-152). As CRR independently and through its members is "interested" in this litigation, venue is proper. *See* 33 U.S.C. § 1369(b)(1).

VII. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **Did EPA render a decision to continue application of the rule amendments vacated by *ILOC* in states outside of the Eighth Circuit?**

2. **Under the CWA's judicial review structure, does the Eighth Circuit's *ILOC* decision apply nationally and, therefore, control this Court's review?**

3. **By its actions, did EPA, once again, approve or promulgate legislative rule amendments regarding 40 C.F.R. § 122.44(d)(1)(ii), 40 C.F.R. § 122.41(m) and 40 C.F.R. §§ 133.100 *et seq.* for states outside of the Eighth Circuit?**

4. **Has EPA subjected the new/revised regulatory mandates to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*?**

5. **Are EPA's new/revised regulatory mandates consistent with EPA's scope of authority under the Clean Water Act?**

   (a) Does EPA have authority to set different secondary treatment and NPDES rules requirements based on geographic location?

   (b) Does EPA have authority to limit adverse § 509(b)(1)(E) decisions to the jurisdiction boundaries of the circuit rendering the decision?

   (c) By its action, did EPA, once again, exceed statutory authority by amending its rules to require the imposition of secondary treatment limits on internal treatment units?

** Note: CRR directs the Court to its separately filed Addendum containing the pertinent statutes and regulations that govern this Petition.

VIII. STATEMENT OF THE CASE

The following represents the relevant regulatory, procedural, and factual background of EPA's decision to continue to impose the regulatory prohibitions vacated in the *ILOC* ruling.[9]

A. Relevant Statutory and Regulatory Provisions

The CWA regulates categories of "point sources" by establishing "effluent limitations"[10] or "other requirements" that facilities must meet when seeking to "discharge" to "waters of the US." *Maier, et al., v. EPA*, 114 F.3d 1032 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1014 (1997). Nationally applicable effluent limitations for "classes and categories of point sources" (commonly known as categorical guidelines) must be met by point sources regardless of location. *See id.*, *E.I. du Pont de Nemours & Co.*, 430 U.S. at 112; 33 U.S.C. § 1314. EPA also promulgated rules to uniformly implement categorical guidelines in individual permits. *See* 40 C.F.R. 125.3 (Statutory/Regulatory Addendum, at 17). All NPDES permits must be in accordance with nationally applicable permitting rules. *See* 40 C.F.R. § 123.25.

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[9] For further regulatory and statutory background, *see ILOC*, 711 F.3d at 855-860.

[10] The CWA defines "effluent limitation" to mean "any restriction established by a State or the Administrator on *quantities, rates, and concentrations* of chemical, physical, biological, and other constituents which are *discharged from point sources into navigable waters*…." 33 U.S.C. § 1362(11) (emphasis added).

EPA has long recognized that it is not allowed to specify how a treatment plant may be designed to meet applicable effluent limitations:

> The Congressional history demonstrates that EPA is not to prescribe any technologies. *** Therefore, it is not within authority of the Regional Administrator to define particular treatment methods.

Ex. 9 (Appx., at 36-37), *In the Matter of the National Pollutant Discharge Elimination System Permit for Blue Plains Sewage Treatment Plant*, Decision of the [EPA] General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 33 (October 21, 1975); *accord AISI*, 115 F.3d at 996; *Rybachek v. EPA*, 904 F.2d 1276, 1298 (9th Cir. 1990); *NRDC*, 859 F.2d at 170.

1. Secondary treatment rule

"Secondary treatment" is the applicable technology-based effluent limitation for publicly owned treatment works ("POTWs"). 33 U.S.C. § 1314(d)(1); 40 C.F.R. §§ 133 *et seq*; Statutory/Regulatory Addendum, at 6, 8-10. The regulation defines the final effluent quality applicable to the entire POTW's discharge. *See* 48 Fed. Reg. 52258, 52259 (Nov. 16, 1983) ("[T]he current secondary treatment regulation itself does not address the type of technology used to achieve secondary treatment requirements."); *see also ILOC*, 711 F.3d at 856 ("The secondary treatment regulations also do not mandate the use of any specific type of

technology … .").[11] EPA has repeatedly reiterated that secondary treatment regulations do not apply to individual treatment units or internal waste streams:

> The secondary treatment regulations define performance standards for minimum levels of effluent quality. Likewise, more stringent limits are sometimes necessary to meet water quality standards. *In either case, limits almost always apply at the 'end-of the-pipe.' The regulations do not specify the type of treatment process to be used to meet secondary treatment requirements, nor do they preclude the use of nonbiological facilities.*

See, e.g., Ex. 16 (at Appx., 116-117), "Blending of Effluent at Publicly Owned Sewage Treatment Facilities," US EPA, Nov. 2003 (emphasis added) (hereafter "2003 Q&A on Blending").

2. Bypass rule

EPA has also issued other nationally-applicable regulations to assist in implementing effluent limitations in NPDES permits. The "bypass" regulation, 40 C.F.R. § 122.41(m), which was last amended in 1984, is one such example. *See* Statutory/Regulatory Addendum, at 7. As with the secondary treatment regulation, the bypass provision does not allow EPA to dictate treatment plant design:

> [T]he bypass provision merely 'piggybacks' existing requirements, it does not itself impose costs that have not already been taken into account in the development of categorical standards. *** The bypass provision does not dictate how users must comply because it does not dictate what pretreatment technology the user must install. Instead the

[11] All "effluent limitations" apply at the point of discharge into navigable waters, known as "end-of-the-pipe," unless such monitoring would be "impractical or infeasible." 40 C.F.R. § 122.45(a),(h) (Statutory/Regulatory Addendum, at 10).

> bypass provision merely requires that the user operate the technology it has chosen.

53 Fed. Reg. 40562, 40609 (Oct. 17, 1988); *ILOC*, 711 F.3d at 859 ("Like the more general secondary treatment regulations, the bypass rule does not require the use of any particular treatment method or technology."). When it defended the bypass rule before this Court in 1987, EPA reiterated that "[t]he bypass regulation only ensures that facilities follow those requirements. *It imposes no specific design and no additional burdens on the permittee.*" Ex. 15 (Appx., at 105), Excerpts from EPA Brief in *NRDC II* (emphasis added). Based on EPA's representation, this Court upheld EPA's bypass regulation, stating that "[t]he regulation thus ensures that treatment systems *chosen by the permittee* are operated as anticipated by the permit writer, that is, as they are designed to be operated and in accordance with the conditions set forth in the permit." *NRDC II*, 822 F.2d at 122 (emphasis added).

3. "Blending"

Consistent with the regulatory history of the bypass rule and secondary treatment rules, EPA allowed POTW designs that used different (non-biological) treatment processes to address peak flows (design commonly referred to as "blending").[12] For example, EPA informed the public that:

[12] The term "blending" describes a common treatment plant design where a certain level of incoming flow to a wastewater treatment plant is routed around flow-

> [T]he National Pollutant Discharge Elimination System (NPDES) regulations provide sufficient flexibility for permit writers to account for the designed-in intentional diversion of wastewater around a treatment unit *without triggering bypass* in special or unique situations when writing permits.

Ex. 25 (Appx., at 175) (emphasis added). Similarly, on March 2, 2001, EPA informed then Senate Majority Leader Frist that peak flow treatment ("blending") could be approved in NPDES permits:

> NPDES permitting authorities have considerable flexibility through the NPDES permitting process to account for different peak flow scenarios that are consistent with generally accepted good engineering practices and criteria for long-term design. As such, NPDES permitting can account for blending. *As described above, blending may be approved*.

See Ex. 28 (Appx., at 236) (emphasis added). In April 2002, EPA responded, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 as amended, that neither the bypass regulation nor the secondary treatment rule proscribed wastewater treatment plants from being designed to "blend":

> *There is no information on the record to the secondary treatment regulation that indicates that EPA considered restricting the practice of blending primary treated peak flows* with other flows receiving biological treatment as a wet weather flow management option for achieving compliance with secondary treatment limitations. [Ex. 17 (Appx., at 120)]
>
> EPA has *no documents* from the promulgation of the bypass provisions that indicate that the *bypass rule was intended to preclude*

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sensitive units (*e.g.*, nutrient removal technologies, biological treatment) after physical/chemical treatment. Prior to discharge, the two treated flows are recombined in a manner that allows the total discharge to meet the final effluent limits. *See* Ex. 16 (Appx., at 111-112), *2003 Q&A on Blending*.

> *the use of blending* as a wet weather flow management option. [Ex. 18 (Appx., at 121)]

See Exs. 17 & 18 (Appx., at 118-124), FOIA response letters dated Apr. 5, 2002 and Apr. 8, 2002 (emphasis added).[13] Similarly, in 2003, EPA published an information sheet, again confirming that utilizing non-biological peak flow processes (such as ACTIFLO[14]) *did not* constitute a "bypass":

> Is the proposed policy [allowing blending] consistent with the Clean Water Act? Yes. [Ex. 16 (Appx., at 116)]
>
> Blending of effluents at sewage treatment facilities during periods of high flow associated with wet weather is a common engineering practice across the country that is used to protect biological treatment units from damage and to prevent overflows and backups elsewhere in the system. [Ex. 16 (Appx., at 113)]

See Ex. 16, *2003 Q&A on Blending*. EPA even praised the use of such wet weather processing techniques to Congress. *See* Ex. 20 (Appx., at 134), EPA Report to Congress – Impacts and Control of CSOs and SSOs, US EPA, EPA 833-R-04-001 (Aug. 2004) ("The technologies *best suited* for treating excess wet weather flows commonly involve physical or chemical processes rather than biological processes.") (emphasis added); *ILOC*, 711 F.3d at 875 ("the record indicates" that "the reality on the ground" is "widespread use by POTWs of blending peak wet

[13] EPA's FOIA responses also confirmed that non-biological peak flow treatment operations were (1) regularly grant funded by EPA and (2) routinely employed by POTWs. Ex. 17 at 3 (Appx., at 120); Ex. 18 at 4 (Appx., at 124).

[14] ACTIFLO, a form of "ballasted flocculation," is a physical/chemical treatment. *See* Ex. 20 (at Appx., 138, 140).

weather flows" and that "blending previously had been permitted at POTWs without consideration of the bypass regulation criteria.") (internal quotations and citations omitted).

In short, the secondary treatment and bypass rules were never intended to regulate how a municipal wastewater plant may be designed and operated to process peak wet weather flows. By EPA's own admission, such a requirement would be beyond its statutory authority. *Supra*, at 12.

4. Regulations concerning bacteria mixing zones

Where technology-based requirements are not sufficient to meet applicable water quality standards at a particular discharge location, more restrictive water quality-based effluent limitations are imposed. *See* 33 U.S.C. § 1311(b)(1)(C). EPA has established rules that set forth when such water quality-based limitations are necessary and how they are to be calculated. *See* 40 C.F.R. § 122.44(d). Among other factors, 40 C.F.R. § 122.44(d) expressly allows for consideration of the available dilution at the point of discharge (*e.g.*, the amount of flow upstream of the point source) via a "mixing zone" allowance.[15] This allowance is consistent with 40 C.F.R. § 131.13, which recognizes that "[s]tates may, at their discretion, include in their State standards, policies generally affecting their application and

[15] *See* 40 C.F.R. § 122.44(d)(1)(ii) ("[T]he permitting authority shall use procedures which account for …, *where appropriate, the dilution of the effluent in the receiving water* [*i.e.*, mixing zone].") (emphasis added); Statutory/Regulatory Addendum, at 15.

implementation, such as mixing zones, low flows and variances."[16] Similarly, the Environmental Appeals Board ("EAB")[17] stated in *In the Matter of Star-Kist Caribe, Inc*., 3 EAD 172 (Apr. 16, 1990) (Ex. 13) (at Appx., at 93) that "[j]ust how stringent such limitations are, or whether limited forms of relief such as variances, *mixing zones*, and compliance schedules should be granted are purely matters of state law, which EPA has no authority to override." (emphasis added).[18]

Consistent with the discretion afforded states on mixing zones, EPA has repeatedly refused to categorically prohibit bacteria mixing zones in issuing NPDES permits. When promulgating 40 C.F.R. § 122.44(d)(1)(ii), EPA *specifically* acknowledged that the availability of a state to allow a mixing zone was not limited by this rule:

> Some commenters objected to the reference to mixing zones and requested that EPA prohibit mixing zones in this regulation. The use of mixing zones raises issues that are more appropriately addressed in

[16] As states have the primary role in establishing water quality standards (including mixing zones), "EPA's sole function… is to review those standards for approval." *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005).

[17] The EAB is "the final Agency decisionmaker on administrative appeals under all major environmental statutes that EPA administers." The Environmental Appeals Board Practice Manual, Aug. 2013, at 1, available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/388bd7f5b1b242b385257bc5004002b7/$FILE/Practice%20Manual%20August%202013.pdf.

[18] The EAB reaffirmed this longstanding EPA position in *In re Dist. of Columbia Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, 13 E.A.D. 714, 733 (EAB Mar. 19, 2008). *See* Ex. 27 (Appx., at 198),

> the state water quality standards adoption process. Therefore, EPA is not deleting the reference to mixing zones in paragraph (d)(1)(ii).

Response to Comments for 40 C.F.R. § 122.44(d), 54 Fed. Reg. 23868, 23872 (June 2, 1989). Similarly, in promulgating regulations under the Beaches Environmental Assessment and Coastal Health ("BEACH") Act, Public Law 106–284–Oct. 10, 2000, to address exposure to bacteria/pathogens in Class I (contact recreation) waters, EPA expressly declined to prohibit bacteria mixing zones:

> EPA appreciates the concerns of commentators regarding human health risks of exposure to *fecal contamination* [bacteria] within mixing zones. … *EPA is not prohibiting the application of mixing zones in the final rule in cases where they would be allowed under existing state and territorial programs*.

69 Fed. Reg. 67218, 67229 (Nov. 16, 2004) (emphasis added). Finally, with regard to permitting CSO discharges to achieve compliance with bacteria standards, EPA instructed permit writers to allow mixing zones by applying bacteria standards "at the beach or at a point of contact rather than at the end-of-pipe." Ex. 11 (Appx., at 73, 75, 78), *Guidance: Coordinating CSO Long-Term Planning with Water Quality Standard Reviews*, EPA-833-R-01-002 (Jul. 31, 2001).

EPA's regulatory history confirms that the Agency has never sought to categorically prohibit or limit a state's ability to permit bacteria mixing zones. Instead, EPA has recognized state discretion and allowed bacteria mixing zones based on site-specific circumstances (*e.g.*, no significant public health risks).

B. Summary of *ILOC* Case and Decision

In 2011, EPA's Assistant Administrator for the Office of Water provided Iowa Senator Charles Grassley with two letters conveying what EPA alleged to be the existing applicable regulatory requirements regarding blending and bacteria mixing zones. *See* Exs. 5 & 6 (Appx., at 9-12, 13-15). An association of Iowa municipalities impacted by EPA's pronouncements petitioned the Eighth Circuit Court of Appeals claiming that EPA's letters represented dramatic revisions to the Agency's published regulations. *See ILOC*, 711 F.3d 844. As outlined in Table 1, the *ILOC* petition challenged (1) EPA's application of secondary treatment limitations to internal treatment process units, (2) EPA's declaration that "blending" designs are illegal bypasses, and (3) EPA's categorical prohibition of bacteria mixing zones in primary contact recreation waters. The petition asserted that EPA's revised rule interpretations were unlawful "promulgations" under 33 U.S.C. § 1369(b)(1)(E) that had not been subjected to requisite APA rulemaking procedures (due process violations) and were beyond the scope of EPA's authority under the Clean Water Act (*ultra vires*).

(*Table 1 on following page*)

Table 1 – Summary of EPA's Revised Rule Interpretations in *ILOC*		
Rule	**Historical Interpretation**	**Revised Interpretation**
Secondary Treatment Rule – **40 C.F.R. Part 133**	Secondary treatment limitations to be applied end-of-pipe. Rule does not allow EPA to dictate treatment plant design.	Individual unit processes must meet secondary treatment plant limitations, including non-biological peak flow processes.
Bypass Rule – **40 C.F.R. § 122.41(m)**	Peak wet weather treatment designs that incorporate "blending" are not bypasses subject to the bypass rule.	"Blending" designs are unlawful bypasses subject to the bypass rule "no feasible alternatives" analysis, unless the re-routed flow independently meets secondary treatment limitations.
Bacteria Mixing Zone Regulations – **40 C.F.R. § 122.44(d) and 40 C.F.R. § 131.13**	Bacteria mixing zones may be allowed in primary contact recreation waters, subject to state discretion, and evaluation of the significance of a public health threat.	Bacteria mixing zones "should not be permitted" in primary contact recreation waters.

Characterizing EPA's actions as "Orwellian Newspeak," "dissemble[ing]," and "belated back-pedaling," on March 25, 2013, the Eighth Circuit vacated these unlawful rule promulgations. *See ILOC*, 711 F.3d at 865, n.16. Based on the statutory and regulatory history in the record before it, the *ILOC* Court first noted that EPA's letters constituted new or revised *legislative* rules:

> The EPA eviscerates state discretion to incorporate mixing zones into their water quality standards with respect to this type of body of

> water. In effect, the EPA has created a new effluent limitation: state permitting authorities no longer have discretion to craft policies regarding bacteria mixing zones in primary contact recreation areas. Instead, such mixing zones are governed by an effluent limitation that categorically forbids them.

Id., at 874.

> EPA's new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule.

Id., at 875.

> The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

Id., at 876.

> In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged.

Id., at 876. EPA eventually "admitted" that these new regulatory requirements had not undergone APA rulemaking procedures. *Id.*, at 855. Consequently, the court summarily vacated all of the illegal amendments. *Id.*, at 874. Finally, the *ILOC* court determined that:

> [T]he blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits. As discussed above, the September 2011 letter applies effluent limitations

> to a facility's internal secondary treatment processes, rather than at the end of the pipe. … The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so. *See also* [*AISI*, 115 F.3d at 996] ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a 'point source'; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.").

Id., at 877.

C. EPA's Post-*ILOC* Decision Actions

Following the *ILOC* decision, EPA petitioned the Eighth Circuit for rehearing *en banc*, which was denied on July 10, 2013. *See ILOC v. EPA*, 2013 U.S. App. LEXIS 14034 (8th Cir. 2013). EPA never sought Supreme Court review. Instead, the Agency spent the next several months strategizing how it could limit the effect of the *ILOC* ruling and continue to apply the vacated rule amendments. Specifically, EPA Headquarters arranged an Agency-wide conference call to discuss and coordinate its continued implementation of the vacated rule amendments. Documentation evidencing this coordination includes:[19]

- An August 15, 2013, meeting invitation entitled "Regional NPDES Program Managers' Call." [*See* Ex. 42 (Appx., at 281) (withheld doc. #46)].

[19] EPA identified these documents as responsive to a FOIA request that sought (1) the basis of its decision to limit the *ILOC* ruling, (2) any directives that were issued as a result of the decision, and (3) how the decision was to be implemented. *See* Ex. 40 (Appx., at 265-266) (Dec. 2, 2013, FOIA Request).

- The September 17, 2013, document entitled "EPA's regulatory approach following the Eighth Circuit's *Iowa League of Cities decision*" [*See* Ex. 41 (Appx., at 269) (withheld doc. #8)].

- The September 19, 2013, minutes to the NPDES Program Managers' Conference Call. [*See* Ex. 42, (Appx., at 281) (withheld doc. #48)].

- An October 28, 2013, email from DOJ to EPA Headquarters entitled "Iowa League – nonacquiescence issue." [*See* Ex. 42, (Appx., at 278) (withheld doc. #27)].[20]

- The October 29, 2013, document entitled "Iowa League of Cities: Next Steps." [*See* Ex. 42, (Appx., at 276-277) (withheld doc. #18].

Each of these documents – as reflected by the titles – confirms that EPA was consummating its decision to limit the precedential scope of the *ILOC* ruling and to continue imposition of the vacated prohibitions.[21] In early November 2013, EPA prepared its final decision document:

- The November 5, 2013, memorandum entitled "Applicability of *Iowa League* decision to EPA permitting determinations," from EPA Headquarters to all of the Regional Water Permit Division Directors. [*See* Ex. 41 (Appx., at 269) (withheld doc. #7)].

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[20] Apparently, the Department of Justice ("DOJ"), including counsel in this matter, was involved in reaching the decision to limit the *ILOC* ruling and continue imposition of the vacated rules outside of the Eighth Circuit.

[21] The EPA FOIA responses that identified these documents also confirm the presence of a final decision. *See* Ex. 41 (Appx., at 267), Partial EPA FOIA Response, at 1 ("[Y]ou limited the request to documents residing at or prepared by EPA Headquarters or used by EPA Headquarters to *render its decision*. In response I'm enclosing the following documents which are *responsive* to your request…") (emphasis added); *see also* Ex. 42 (Appx., at 272), Final EPA FOIA Response (confirming that the FOIA the request was "limited" to documents "used by EPA Headquarters to *render its decision*.") (emphasis added).

This memorandum was broadly disseminated to each of EPA's Regional offices (*i.e.*, Water Permit Division Directors) as a directive regarding the working law of the Agency, the applicability of the *ILOC* decision outside the Eighth Circuit, and the continued use of the vacated rules.[22]

D. EPA Publishes Its Decision

After finalizing and internally distributing its memorandum, EPA began to publicly announce its decision. First, the very next week, on November 13, 2013, at the annual EPA Region VII, 4-State Governmental Affairs Meeting,[23] EPA Headquarters informed the regulated community and state permitting agencies that:

> It is EPA HQ's current contention that the Court ruling will *only be binding* to the 8th Circuit States (which includes the seven states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota). Therefore, Kansas within EPA Region 7 is not included.

See Ex. 43 (Appx., at 293-295), NWEA Newsletter (emphasis added). Then, the following week, on November 20, 2013, Nancy Stoner, EPA's Acting Assistant Administrator to the Office of Water (the highest official for the Office of Water)

[22] This is precisely the sort of memorandum/directive that was vacated by this Court in *Nat'l Envtl. Dev. Ass'n Clean Air Project (NEDACAP) v. EPA*, 752 F.3d 999 (D.C. Cir. 2014). The only difference is that, in this case, EPA has repeatedly sought to prevent the public's and the Court's access to this memorandum (*e.g.*, FOIA, administrative record). *Infra*, at 29-34; *supra*, at n.19.

[23] The "Four States" meeting is a regulatory briefing that EPA Region VII sponsors with the regulated community and state permitting agencies from the four Region VII states. For the November 2013 meeting, EPA Headquarters flew out personnel specifically to inform the group of Headquarters' decision regarding *ILOC* implementation as this was the epicenter of the decision.

announced at a national municipal conference that the *ILOC* decision was not "binding" outside the Eighth Circuit and that the Agency would continue to apply the vacated provisions on a "case-by-case" basis elsewhere. *See* Exs. 44 & 45 (Appx., at 310-311, 312-313) Trade Press Reports. EPA used a "Talking Points" document to ensure consistent communication of the decision. *See* Ex. 47 (Appx., at 330), November 18, 2013 email between EPA Headquarters personnel (confirming EPA staff "armed Nancy [Stoner] with talking points on how [EPA] intend[s] to apply the Iowa League of Cities decision.").

Given EPA's repeated announcements, *five national municipal organizations* requested that EPA change its decision and:

> [c]onfirm[] that EPA will apply the *Iowa League of Cities* decision uniformly across the country and so advise its Regions and delegated States.

Ex. 3 (Appx., at 5). In April 2014, EPA declined that request and stated:

> [Y]ou indicated that you believe that there is no legal basis for EPA to assert that the decision does not apply nationwide and request that the EPA apply the *Iowa League of Cities* decision uniformly across the country. * * * The Eighth Circuit's decision applies as binding precedent in the Eighth Circuit.

Ex. 1 (Appx., at 1). The national trade organizations submitted a follow-up letter voicing disagreement with EPA's decision and stating:

> [W]e request that you provide additional justification for the decision not to apply the 8th Circuit decision on a national basis.

Ex. 4 (Appx., at 6-7). Providing no further explanation, EPA simply replied:

> I acknowledge that you disagree with my April 2, 2014, letter to you that articulated that the Eighth's Circuit [sic] decision applies as binding precedent in the Eighth Circuit.

Ex. 2 (Appx., at 3). Consequently, it was clear that EPA had rendered a decision to continue imposing the vacated regulatory prohibitions outside of the Eighth Circuit.

E. EPA Implements Its Decision

Following the *ILOC* decision, EPA continued to implement the vacated rule amendments in state and federal permit/enforcement actions across the country. *See generally* Affidavits from Portsmouth, NH (Rice) (Standing Addendum, at 1-5), North Hudson, NJ (Pocci) (Standing Addendum, at 84-89), Allentown, PA (Messinger) (Standing Addendum, at 101-107), and Clairton, PA (Cerqua) (Standing Addendum, at 130-135). Examples of EPA's ongoing implementation of the vacated rules include:

- EPA's declaration to Lawrence, Kansas (shortly after the *ILOC* ruling) that its use of ACTIFLO to process greater peak flows constitutes a bypass subject to a "no feasible alternatives" demonstration; [Hall Affidavit, at ¶11 (Standing Addendum, at 154-155); Ex. 52 (Appx., 361-366), EPA letter to KDHE]

- EPA's announcement to the City of Portsmouth, NH, that employing blending at its wastewater treatment facility would still be considered an unlawful bypass; [Rice Affidavit, at ¶¶6-7 (Standing Addendum, at 3-4); Kinder Affidavit, at ¶5 (Standing Addendum, at 150)]

- EPA's statements to the New Jersey Department of Environmental Protection that blending of CSO-related flows is an unlawful bypass under 40 C.F.R. § 122.41(m) and subject to the "no feasible

alternatives" analysis; [Pocci Affidavit, at ¶6 (Standing Addendum, at 86-87); Ex. 48, (Appx., at 337, 339) NJDEP Response to Comments]

- EPA's refusal to withdraw prior objections for the blending designs proposed by Allentown, PA, and Clairton, PA wastewater treatment facilities. [Messinger Affidavit, at ¶¶13-21 (Standing Addendum, at 104-106); Cerqua Affidavit, at ¶¶8-12 (Standing Addendum, at 132-134)]

In summary, EPA has been clear to the public and delegated state agencies – orally, in writing, and via its regulatory actions – that the Agency will continue to impose the rules vacated by *ILOC* in NPDES permitting and enforcement matters outside of the Eighth Circuit.

IX. OBJECTIONS TO EPA'S ADMINISTRATIVE RECORD

Despite their direct relevance to the petition, virtually all of the records documenting EPA's pre- and post-*ILOC* regulatory actions were omitted from EPA's Certified Index of the Administrative Record. Specifically, the Agency excluded records confirming (1) EPA's decision to continue imposing the vacated rules outside of the Eighth Circuit, (2) EPA's numerous communications of the decision to Regional program managers, and (3) EPA's subsequent enforcement of the decision across the country. EPA's Index also omitted all of the historical records reviewed by the Eighth Circuit in *ILOC*. In fact, other than the four letters appended to CRR's petition, every relevant document in EPA's possession was excluded. *See* Doc # 1534203.[24]

CRR previously explained to this Court why EPA's Index fell appallingly short of the well-established requirements governing the assembly of such indexes. *See* Doc. #s, 1535311, 1539097, 1543125, 1545887.[25] On June 8, 2015, the Court issued an Order instructing CRR to re-raise these concerns during merits briefing and include all the supplemental material in its briefs. *See* Doc #1556265. The

[24] EPA's proffered administrative record in *ILOC* was similarly deficient. However, recognizing the shortcomings of EPA's record (*ILOC*, 711 F.3d at n.13), the court repeatedly referenced supplemental information supplied by the petitioner.

[25] CRR encourages the Court to review these previous filings, which, due to page allowances herein, address the administrative record issues in greater detail.

following summarizes CRR's arguments to (1) enlarge the record with the identified supplemental documents in the Appendix, and (2) obtain the immediate release of key EPA records CRR does not currently possess.

The supplemental documents identified in CRR's Appendix belong in the record. First, many of these documents reveal EPA's (1) decision to continue implementing the vacated prohibitions, (2) internal and public dissemination of that decision, and (3) subsequent implementation of that decision. Therefore, these documents are probative to this Court's resolution of the jurisdictional issues raised by EPA (*e.g.*, promulgation or approval under CWA § 509(b)(1)(E), finality, ripeness). *See, e.g.*, EPA MTD (ECF No. 1515269), EPA MSJ Resp. ECF No. 1519930. Similarly, because EPA has repeatedly disputed the existence of a decision,[26] a fact that pertains directly to this Court's jurisdiction,[27] these documents must be evaluated. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13, (1978) ("[W]here issues arise as to jurisdiction or venue,

[26] EPA's filings have even asserted that no decision to limit application of the *ILOC* ruling was ever rendered by EPA. *See, e.g.*, ECF No. 1519930, EPA MSJ Resp., at 2-3 ("[T]he Agency did not render a decision about whether to follow *Iowa League* outside the Eighth Circuit."); *see also* ECF No. 1537684, EPA Admin. Record Resp., at 15 ("EPA has not elsewhere decided, whether and to what extent the Agency will follow *Iowa League* outside the Eighth Circuit."). CRR has a right to the records that verify or disprove the veracity of EPA counsel's unsupported testimony.

[27] *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023-1024 (D.C. Cir. 2000) (finding jurisdiction where EPA supplied the regulated community and state agencies with "marching orders" that "command," "order," "dictate," or "require").

discovery is available to ascertain the facts bearing on such issues."); *Herbert v. Nat'l. Acad. of Sci.* 974 F.2d 192, 198 (D.C. Cir. 1992) ("Ruling on a 12(b)(1) motion may be improper before plaintiff has had a chance to discover the facts necessary to establish jurisdiction.").

Second, the supplemental documents reveal that the Agency internally disseminated its decision to Regional and state officials. *See* Exs. 40-56 (Appx., at 265-376). Because these documents contain EPA's instructions regarding the "working law" of the Agency, they must be disclosed as part of the administrative record. *See also Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (documents that are alleged to be pre-decisional or otherwise privileged documents "can lose that status if [they are] adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public"); *American Mail Line, Ltd. v. Gulick* 411 F.2d 696, 703 (D.C. Cir. 1969) (when an agency relies on an intra-agency memo as the record basis for its decision, "the memorandum los[es] its intra-agency status and bec[omes] a public record.").[28] In particular, EPA's memorandum entitled

[28] *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-153 (1975) (the public is "vitally concerned" with this "working law" of an agency); *see also Coastal States Gas Corp.*, 617 F.2d at 867 ("A strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final'"); *see also* 40 C.F.R. § 25.3(c) (requiring a CWA public participation

"Applicability of *Iowa League* decision to EPA permitting determinations," (Ex. 41 (Appx., at 269) (withheld document #7)), which was sent from EPA Headquarters to all Regional Water Permit Division Directors, falls into this category of documents and, therefore, must be disclosed. This is precisely the type of memorandum that was reviewed by the Court in *NEDACAP* (*supra*, at n.22), but, to date, has not been produced by the Agency.[29] Additionally, because several of the supplemental documents (Appx., at Exs. 43-47) confirm that EPA announced its decision to the public at various forums across the country and/or was actively implementing the position, these "deliberative" documents must be disclosed. *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 75 (D.D.C. 2008) (privilege is lost once EPA discloses document to the public).

Finally, EPA's administrative record should have included all the documents, filings, and appendices that were considered by the Eighth Circuit in

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program to "keep the public informed about significant issues and proposed project or program changes as they arise" and "[t]o foster a spirit of openness and mutual trust among EPA, States, substate agencies and the public.").

[29] At a minimum, the Court should conduct an *in camera* review of this memorandum to evaluate the veracity of EPA's claims not to have made a decision (*supra*, at n.26) and to determine which documents should be provided to CRR as part of the administrative record.

rendering the *ILOC* ruling. *See* Appx., at Exs. 5-39.[30] As any EPA decision to follow or not follow the *ILOC* decision would, inherently, consider the administrative record documents in EPA's possession, EPA's failure to identify such documents in the present administrative record cannot be justified.[31]

EPA's bare record controverts established principles of administrative law. EPA does not get to flaunt these requirements simply because doing so increases its chances for avoiding judicial review. When assembling the "full record," an agency "may not, however, skew the 'record' for review in its favor by excluding from that 'record' information in its own files *which has great pertinence to the proceeding in question*." *See Envtl. Def. Fund v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978) (emphasis added); *see also Fund for Animals v. Williams*, 245 F.Supp.2d 49, 55 (D.D.C. 2003) (an agency may not exclude pertinent but unfavorable information).

Consequently, the record should include those relevant documents identified in CRR's Appendix. Moreover, CRR respectfully requests this Court to direct EPA and DOJ to produce the other key documents they have withheld from judicial

[30] This would also include relevant Federal Register notices, guidance documents, and correspondence detailing EPA's historical interpretation/application of the rules at issue.

[31] *See, e.g.*, 28 U.S.C. § 2112(b) ("The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned…").

review. If EPA refuses, CRR requests that the entirety of EPA's jurisdictional arguments be struck, as the Agency's arguments seeking to prevent judicial review of its actions may not succeed when it acts to frustrate review of the complete administrative record. *Supra*, at 30-31 (*Oppenheimer Fund*, *Inc.*, *Herbert* – must have access to records relating to jurisdiction).

X. SUMMARY OF THE ARGUMENT

There is no question that the Agency has rendered a decision to continue imposing the vacated rule amendments outside of the Eighth Circuit. As documented, this decision was disseminated to Regional Offices and delegated states, announced publicly by senior Agency officials, and is being actively enforced by EPA's Regional Offices. EPA's latest actions, sadly, exceed the levels of procedural and substantive deficiency displayed in the *ILOC* decision. Granting this Petition for Review is necessary to impose order, and the rule of law, to EPA decisionmaking.

First, as EPA has still not submitted the vacated regulatory prohibitions through notice and comment, EPA's re-promulgations *suffer from the same procedural and substantive infirmities* found by the Eighth Circuit. Second, as argued by CRR, and supported by EPA's filings to other courts, *CWA § 509(b)(1)(E) rulings apply nationwide* because only one circuit court is authorized to review such rule promulgations (procedurally infirm, or not). Thus, as EPA itself recognizes that it lacks any statutory authority to unilaterally limit a § 509(b)(1)(E) decision to the circuit court that rendered the decision, its current decision to the contrary must fall. Finally, EPA's decision *also constitutes a new promulgation* whereby the Agency would be allowed to impose different "uniform" requirements according to the location of the permittee. This new

regulatory scheme has never undergone notice and comment rulemaking and is also beyond EPA's statutory authority because the Act calls for *uniform application* of NPDES permitting rules/effluent guidelines and does not allow the Agency to impose differing minimum regulatory requirements based on geographic location.

Accordingly, this Court should (1) vacate the Agency's latest unlawful actions, and (2) enjoin EPA from imposing these unlawful requirements elsewhere.

XI. STANDING

Consistent with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000), CRR has associational standing to file its Petition for Review based on the injuries attributable to EPA's actions on CRR's members – municipal wastewater facilities located throughout the United States. As explained by the accompanying affidavits, EPA's unlawful re-promulgations and approvals of the vacated rules (1) immediately altered the "legal rights" and "obligations" of CRR members (*Bennett v. Spear*, 520 U.S. at 177-178), (2) produced immediate and ongoing "hardship" on CRR members wishing to employ the prohibited permitting options (*Abbott Labs*, 387 U.S. at 149), and (3) caused CRR members to suffer an "actual or imminent" "injury in fact" that is "concrete and particularized." *Lujan*, 504 U.S. at 560.

Similar to the impacts found in *ILOC*, these harms include, but are not limited to:

> (1) imposition of more restrictive effluent limitations and compliance requirements regarding bacteria and peak flow processing (*see* Standing Addendum, Rice Affidavit, at ¶¶7, 10 (at 3, 4), Pocci Affidavit, at ¶9 (at 88), Messinger Affidavit ¶26 (at 106));
>
> (2) increased costs of regulatory compliance (*see* Standing Addendum, Rice Affidavit, at ¶¶6, 8, 10 (at 3-4), Pocci Affidavit, at ¶¶5-9 (at 86-88), Messinger Affidavit ¶¶23, 26 (at 106-107), Cerqua Affidavit ¶10, 13 (at 133-134), Hall Affidavit ¶¶13a, 16 (at 156-157));
>
> (3) more restrictions on allowable treatment process selection, (*see* Standing Addendum, Rice Affidavit, at ¶¶5-7 (at 2-4), Pocci

Affidavit, at ¶¶4-6 (at 85-87), Cerqua Affidavit, at ¶13 (at 134), Hall Affidavit, at ¶16 (at 157));

(4) a competitive disadvantage in attracting industrial and commercial growth, (*see* Standing Addendum, Pocci Affidavit, at ¶7 (at 87), Messinger Affidavit, at ¶24 (at 106), Cerqua Affidavit, at ¶13 (at 134), Hall Affidavit, at ¶13e (at 157));

(5) hampered ability to evaluate whether and how to construct certain wastewater and stormwater facilities to achieve compliance that will not run the risk of EPA objection or penalty, (*see* Standing Addendum, Rice Affidavit, at ¶9 (at 4), Pocci Affidavit, at ¶¶8, 10 (at 87, 89), Messinger Affidavit, at ¶¶15, 21, 25 (at 105-106), Cerqua Affidavit, ¶¶12-13 (at 134), Hall Affidavit (¶12, 13c, 16 (at 155-157));

(6) impairing the timely compliance with current state or federal deadlines under the CWA (*see* Standing Addendum, Rice Affidavit, at ¶9 (at 4), Pocci Affidavit, at ¶¶8, 10 (at 87, 89), Messinger Affidavit, at ¶¶21-22 (at 105-106), Cerqua Affidavit, at ¶12 (at 134), Hall Affidavit, at ¶13e (at 156));

(7) placing CRR members in ongoing non-compliance (*see* Standing Addendum, Rice Affidavit, at ¶7 (at 3-4), Pocci Affidavit, at ¶8 (at 87-88), Messinger Affidavit, at ¶25 (at 106), Cerqua Affidavit, at ¶13 (at 134), Hall Affidavit, at ¶13b (at 156));

(8) increasing Municipal Separate Storm Sewer System ("MS4") compliance responsibilities and costs (*see* Standing Addendum, Cerqua Affidavit, at ¶14 (at 135));

(9) forcing CRR members to immediately choose between constructing cost-effective treatment designs that may be prohibited or constructing significantly more costly processes, (*see* Standing Addendum, Rice Affidavit, at ¶¶6, 7, 9 (at 3-4), Pocci Affidavit, at ¶10 (at 88-89), Messinger Affidavit, at ¶¶21, 25 (at 105-106), Cerqua Affidavit, at ¶13 (at 134)); and

(10) abrogating due process rights that should have, but did not, accompany EPA's decision to substantively modify the rules at issue.

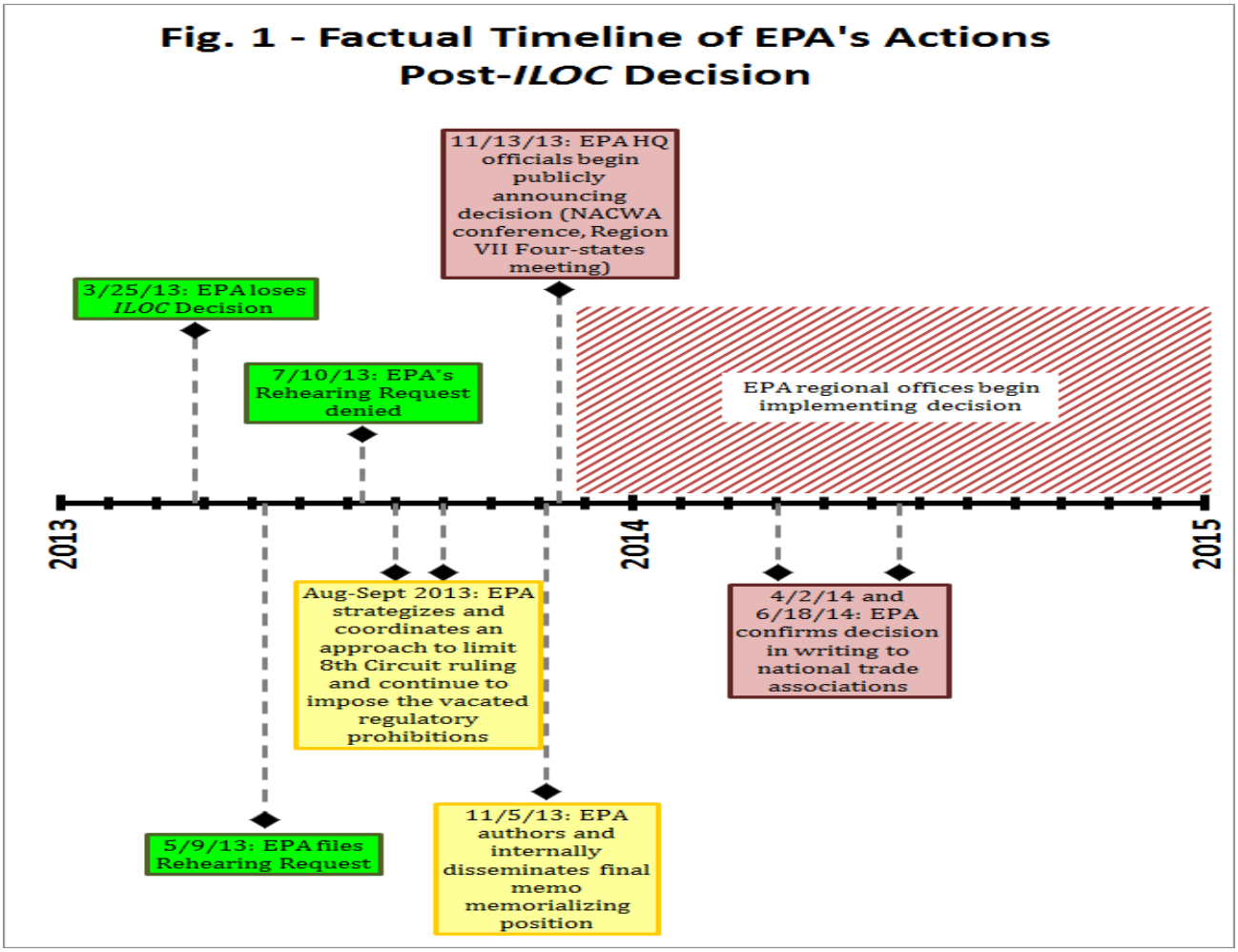
See Standing Addendum, Rice Affidavit, at ¶11 (at 5), Pocci Affidavit, at ¶10 (at 88-89), Hall Affidavit, at ¶9, 13d (at 153, 156).

As each of these injuries are "fairly traceable" to EPA's actions and would be "redressed by a favorable decision," CRR's individual members would have standing to sue on their own. *Lujan*, 504 U.S. at 560-561. However, in this matter, CRR has associational standing to represent its members because (1) "neither the claim asserted nor the relief requested" depend on the specific factual circumstances of a permit or participation of CRR's individual members, and (2) "the interests at stake in this suit are germane" to CRR's mission to ensure that CWA regulatory requirements applicable to its members are legally and technically justified. *See* Standing Addendum, Hall Affidavit, at ¶¶3-5, 19 (at 152, 157-158); *see Friends of the Earth, Inc.*, 528 U.S. at 181, *citing Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

XII. ARGUMENT

A. EPA Rendered a Reviewable Decision to Continue Imposing the Vacated Rule Modifications

As documented (*supra*, at 23-28), EPA (in consultation with DOJ) purposefully decided to continue imposition of the vacated regulatory prohibitions on all permittees outside of the Eighth Circuit.



As detailed in Figure 1, after deciding not to appeal the *ILOC* ruling to the Supreme Court, EPA internally deliberated on how to limit the precedential scope of the *ILOC* ruling moving forward. These discussions culminated in several decision documents concluding that the *ILOC* ruling was only binding in the Eighth Circuit. These documents and the decision were then disseminated by EPA Headquarters to its Regional Offices as the "working law" of the Agency. In turn, EPA began communicating its decision, both orally and in writing, to state permitting agencies and the regulated community. In accordance with EPA's directives, states and Regional offices began adhering to those instructions. CRR's appeal ensued.

This Court has subject matter jurisdiction to review EPA's decision to continue to impose the legislative rule revisions (*i.e.*, blending and mixing zone prohibitions) vacated by the Eighth Circuit. *Supra*, at 1-2. Under CWA § 509(b)(1)(E), Circuit Courts of Appeals have exclusive original jurisdiction to review promulgations and approvals of effluent limitations or other limitations. As the challenged EPA actions involve modifications to nationally-applicable regulations originally adopted pursuant to CWA § 301, previously reviewed pursuant to CWA § 509(b)(1)(E), this Court plainly possesses subject matter jurisdiction. This jurisdiction exists irrespective of the formality of the rule amendments, as this Court applies a pragmatic definition to the word

"promulgation." *Supra*, at 3 (*Molycorp, Inc.*, *Appalachian Power Co.*, *NRDC*, *CropLife Am.*, *GE*).

As argued earlier (*supra*, at 4-6 (*GE*, *Appalachian Power*)), EPA's letters convey the "working law" of the Agency, dictate how state agencies must proceed in issuing permits, and force the regulated permittees to gamble between the costs of conforming to EPA's mandates and potential noncompliance. Inasmuch, EPA's actions have a definite "binding effect" and are both "final" and a "promulgation" under applicable jurisprudence. Under CWA § 509(b)(1), such regulatory actions are to be reviewed immediately.

Finally, EPA's latest promulgations are impacting and will continue to impact CRR members in the form of increased regulatory compliance costs, inability to meet administrative orders and minimize sewage overflows, inability to employ the cost-saving regulatory techniques at issue due to risks of noncompliance and citizen suits, and the deprivation of procedural due process rights. *Supra*, at 6-8, 37-39. Therefore, EPA's decision to continue the imposition of the vacated rule amendments is reviewable by this Court under CWA § 509(b)(1)(E).

B. The Continued Imposition of the Vacated Rules Is Both Procedurally and Substantively Infirm

EPA's re-promulgation of the vacated rules, and approval of the continued imposition thereof, is unlawful for several reasons. First, despite having been

declared procedurally unlawful and vacated by the reviewing circuit court, EPA has, *again*, not subjected its revisions to the bypass rule (40 C.F.R. § 122.41(m)), secondary treatment rule (40 C.F.R. Part 133), and water quality-based permitting regulation (40 C.F.R. § 122.44(d)) to notice and comment as required by applicable jurisprudence.

Second, EPA's latest re-promulgations and re-approvals contain CWA violations above and beyond those found in *ILOC*. Specifically, EPA's regulatory actions (1) disregarded the CWA § 509(b)(1)(E) "single judicial review" provision by unilaterally declaring that such a decision lacks nationwide effect, and (2) eviscerated the central framework of the CWA (uniform national rules) by imposing differing minimum program requirements on a geographic basis.

Finally, EPA's action is unlawful for precisely the same reasons it was originally vacated by the Eighth Circuit. That is, the revised legislative rules (1) are not reflected in the adopted rules, (2) have never been subjected to APA rulemaking prerequisites, and (3) with respect to the blending prohibition, exceed statutory authority. *See ILOC*, 711 F.3d at 872-878. Since nothing has changed since the *ILOC* ruling (*e.g.*, no Federal Register publication or new pertinent statutory amendments), this Court should necessarily arrive at the same conclusion and EPA's efforts to re-litigate the *ILOC* case should be rejected.

1. Standard of review

When evaluating whether EPA has revised its legislative rules in a manner that violates the APA, this Court's review is *de novo*. *See Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 (9th Cir. 2003); *see also ILOC*, 711 F.3d at 872 ("[T]he categorization of an agency's action as a legislative or interpretative rule is largely a question of law, a *de novo* standard of review [applies]...") (internal citations omitted). Such a review determines whether the Agency's "guidance letters have made a substantive change in the EPA's regulation." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755-756 (5th Cir. 2011).[32]

A new legislative rule includes, *inter alia*, situations where an agency substantively changes or "effectively amends a prior legislative rule." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also U.S. Telecom. Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) ("[N]ew rules that work substantive changes or major substantive legal additions to prior regulations are subject to the APA's procedures.") (internal quotations and citations omitted). If the requisite "substantive change" has occurred, the

[32] *See also Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420,428 (D.C. Cir. 2004) (analyzing whether EPA letter "tread no new ground" and/or "left the world just as it found it.") citing *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 449 (D.C. Cir. 2004) (evaluating whether EPA guidance letters "reflect neither a new interpretation nor a new policy."); *Arizona Mining Ass'n v. EPA*, 708 F. Supp. 2d 33 (D.D.C. 2010) ("The EPA's letters that are the subject of this litigation are reviewable final actions only if the EPA adopted in the letters a new interpretation of any of the terms challenged by the plaintiffs.").

modifications or amendments are subject to the APA's notice and comment procedures as legislative rules. *See Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992).[33]

Additionally, if the Agency wishes to revisit or "re-promulgate" a rule after having it vacated by a court of law, it "must comply with the applicable provisions of the APA." *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584-85 (D.C. Cir. 1994); *see also Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983) (because the word "vacate" means, among other things, "to cancel or rescind" and "to make of no authority or validity," the agency must initiate new rulemaking proceedings before re-promulgating the vacated rule) *overruled on other grounds by Scarborough v. Principi*, 541 U.S. 401 (2004).

2. EPA has not submitted the vacated rules to notice and comment

In this case, it is undisputed that the Eighth Circuit previously vacated EPA's prohibition on blending and bacteria mixing zones for both procedural and substantive reasons. *Supra*, at 20-23. Moreover, it is undisputed that the challenged EPA rule revisions have never undergone APA rulemaking – either before the

[33] EPA's historical interpretation and application of a rule plays an important role in deciding whether substantive changes to existing legislative rules have occurred. *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) ("If a new agency policy represents a significant departure from long-established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment.").

ILOC ruling (711 F.3d at 855), or after. CRR has extensively documented that the Agency has rendered and is actively implementing a decision to continue imposing the vacated illegal rule amendments. Therefore, EPA's admitted failure to submit the re-promulgations through notice and comment rulemaking is dispositive of this case. *Supra*, at 45 (*Mobil Oil Corp., Action on Smoking & Health*).

3. EPA is unlawfully imposing more restrictive regulatory mandates based on circuit court boundaries

By virtue of its decision to continue imposing the vacated regulatory prohibitions outside of the Eighth Circuit, EPA has now also promulgated and/or approved new technology-based and NPDES rules that allow EPA to implement the previously uniform national NPDES rules and definitions of secondary treatment differently depending on the geographic locale of the permittee. These "geographic-based" rules have no legal basis, are not found in EPA's existing regulations, have never been submitted through APA rulemaking procedures, expressly contradict the CWA's judicial review provision and are contrary to the structure of the Act. Accordingly, EPA's latest action should be vacated on new statutory grounds. *See infra* at 47-52.

a. The judicial review provision of § 509(b)(1)(E) does not allow for multiple circuit court rulings of the same Agency action

Under EPA's latest legal theory, the Agency has no need to appeal an adverse § 509(b)(1)(E) decision to the Supreme Court, and risk another

unfavorable decision, if it can unilaterally do as it pleases in all the other circuits. EPA's strategy to limit the *ILOC* ruling, however, is not allowed under the CWA. The Congressionally-directed judicial review provisions under § 509(b)(1)(E) require that any review of specific Agency actions identified in the review provision can only be brought in a *single* "Circuit Court of Appeals" within 120 days of promulgation or approval. *See* Statutory/Regulatory Addendum, at 1.[34] This requirement simultaneously prevents attempts to re-litigate decisions regarding nationally-applicable rules and mandates that the reviewing circuit's decision applies nationwide.

In 1976, Congress enacted a consolidation provision to avoid multiple circuit court decisions regarding the same agency action. 28 U.S.C. § 2112(a) (1976). This provision applied to CWA cases filed under CWA § 509 and granted review to the circuit court in which the first filing occurred. *See, e.g.*, *Virginia Elec. & Power Co. v. EPA*, 655 F.2d 534, 535-536 (4th Cir. 1981) (consolidating multiple § 509(b)(1) petitions for review that were filed in the District of Columbia Circuit, the Fourth Circuit, and the Fifth Circuit); *see also NRDC v. EPA*, 673 F.2d 392, 398 (D.C. Cir. 1980) ("[28 U.S.C. § 2112(a)] does, however, indicate that judicial

[34] Petitions may only be filed after the statutory deadline when they are "based solely on grounds which arose" thereafter. *See* CWA § 509(b)(1). Even then, only one Court may render a decision on the subject matter.

challenges to 'the same order' must be heard in one court of appeals.") (*citing ACLU v. FCC*, 486 F.2d 411, 414 (D.C. Cir. 1973)).

Then, in 1988, 28 U.S.C. § 2112(a) was amended to do away with the first-filing rule (and the "race to the courthouse" phenomenon) in lieu of a random selection procedure to determine the sole reviewing circuit court. *See* Statutory/ Regulatory Addendum, at 2-3. This amendment, however, did not alter the fact that, when multiple CWA § 509(b)(1)(E) petitions are filed on the same rulemaking activity, they must be consolidated and assigned to one circuit court. *See, e.g., Nat'l Pork Producers*, 635 F.3d at 747 (consolidating multiple § 509(b)(1)(E) petitions challenging EPA's 2008 concentrated animal feeding operations rules to the Fifth Circuit under 28 U.S.C. § 2112(a)).

Having established that it is only possible for one circuit court to review an EPA action under § 509(b)(1)(E), that decision, barring an appeal to the Supreme Court, must be binding on the entire country. On this issue, EPA does not disagree. In fact, in prior litigation, EPA has stated that circuit court rulings under § 509(b)(1)(E) *are* binding across the country:

> Even if this Court had jurisdiction to review EPA's interpretation as established in the CAFO Rules and in the guidance letters, *it would nonetheless be bound to reach the same result as did the Second and Fifth Circuits.* Both of those courts reviewed EPA's Rules pursuant to the lottery system for consolidating the petitions for review challenging EPA rules. 28 U.S.C. § 2112. Under that provision, all timely challenges to a Rule are consolidated before a single court of appeals, *and the decision of that court is then binding in all circuits*.

See Ex. 58 (Appx., at 387), EPA's August 1, 2013 Memorandum in Support of X-MSJ in *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D.W.Va. 2013) (emphasis added). Certainly, the judicial review structure enacted by Congress did not intend for circuit court decisions to only be binding nationwide when EPA prevails. Just as EPA itself has argued, CWA § 509(b)(1)(E) rulings cannot be re-litigated. Therefore, the Agency does not possess authority to unilaterally countermand (or nonacquiesce to) CWA § 509(b)(1)(E) rulings.[35]

The CWA § 509(b)(1)(E) and related judicial review provisions (1) impose strict procedures for challenging EPA rulemaking actions, and (2) only allow a single circuit court to render a decision on a specific Agency promulgation (formal or informal). This statutory framework was designed to promote uniformity by ensuring that only one nationally applicable decision would be rendered at the circuit court level. For that reason, such decisions are binding nationwide if not

[35] Given the clear statutory history, there have been very few attempts to re-litigate a § 509(b)(1)(E) rulemaking decision in a sister circuit court. However, *Nat'l Indep. Meat Packers Ass'n v. EPA*, 566 F.2d 41 (8th Cir. 1977), an early CWA case, is directly on point. In that case, the Eighth Circuit dismissed a CWA § 509(b)(1)(E) petition specifically because "uniform regulation of water pollution was the primary purpose of this legislation [and] any requirements imposed by this court at variance with those already imposed by the Seventh Circuit . . . would be highly undesirable." *Id*, at 43. In deferring to the earlier Seventh Circuit decision, the *Meat Packers* court further noted that "[t]he interest in avoiding inter-circuit conflicts is especially strong when the potentially conflicting decisions would present different interpretations of federal law intended to be uniformly applied on a nationwide scale." *Id*.; *cf. Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (holding that the parties could not re-litigate the validity of an FCC rule because 11th Circuit ruling was binding).

overturned by the Supreme Court. By virtue of its regulatory actions, however, EPA asserts that it possesses authority to unilaterally restrict the effect of adverse § 509(b)(1)(E) rulings to the circuit court that rendered the ruling. Given the applicable judicial review process, EPA's actions are clearly beyond statutory authority.

b. Congress structured the Act to establish a uniform regulatory program

Beyond the judicial review provision, EPA's latest actions also violate the CWA's central objective of national uniformity of baseline requirements (*e.g.*, technology-based rules and NPDES rules). It is well recognized that Congress established a uniform nationwide regulatory permitting program under the CWA. *See Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446, 451 (4th Cir. 1977) (the "jurisdictional scheme of the [CWA], which in general leaves review of standards of nationwide applicability to the courts of appeals, thus further[s] the aim of Congress to achieve nationally uniform standards."); *see also E.I. du Pont de Nemours & Co.*, 430 U.S. at 136 (EPA authorized "to issue regulations setting forth uniform effluent limitations for categories of plants."); *Reynolds Metal Co. v. EPA***,** 760 F.2d 549, 558 (4th Cir. 1985) ("The Act expresses a congressional insistence … [for] …. the use of *uniform effluent limitations imposed on an industry-wide basis*.") (emphasis added).

Congress' objective of national uniformity also applies to secondary treatment. *See* CWA § 301(b)(1)(B) ("*All* shall meet effluent limitations based on secondary treatment.") (emphasis added); *see also* CWA § 301(e) ("Effluent limitations established… shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."); *see* Statutory/Regulatory Addendum, at 4. The Act does not allow for any consideration of geography in setting secondary treatment requirements. Likewise, in setting national municipal/ industrial effluent guidelines, CWA § 304(b)(1)(B) identified factors to consider, none of which were geographical. *See* 40 C.F.R. § 125.3(d) (not listing geographic location among factors to consider), Statutory/Regulatory Addendum, at 19-20. As noted by this Court:

> The effluent limitation guidelines contained in section 304(b) and the corresponding effluent limitations to be promulgated under section 301(b) [including secondary treatment] were intended to safeguard against industrial pressures by establishing a *uniform 'minimal level of control imposed on all sources within a category or class.'* Senator Muskie emphasized the function of the guidelines in promoting uniformity. He stated that 'the Administrator is expected to be precise in his guidelines so as to *assure that similar point sources with similar characteristics, regardless of their location* or the nature of the water into which the discharge is made, will meet similar effluent limitations.'

NRDC v. Train, 510 F.2d 692, 709-710 (D.C. Cir. 1974) (emphasis added). The national uniformity requirement also applies to the NPDES permitting regulations that implement the categorical standards:

> Section 304(b) calls for the *publication of regulations containing guidelines for effluent limitations* for classes and categories of point sources. These guidelines are intended to assist in the establishment of section 301(b) limitations *that will provide uniformity in the permit conditions* imposed on similar sources within the same category by diverse state and federal permit authorities.

Id., at 707. Clearly, EPA exceeds statutory authority when it attempts to impose different minimum regulatory requirements on a geographic basis.[36]

c. EPA' approach creates regulatory havoc

The practical consequence of allowing EPA to unilaterally ignore adverse CWA § 509(b)(1)(E) decisions is regulatory chaos. If EPA's position was valid, NPDES permittees in each of the twelve federal circuits (including the D.C. Circuit) could be subject to different federal requirements based on the flip of a coin. Specifically, if several petitioners prevailed against the Agency in a consolidated appeal, according to EPA, that decision would only apply to the petitioner who was fortunate enough to have their circuit review the matter.[37]

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[36] In reviewing the Consolidated Permitting Regulations ("CPRs") (40 C.F.R. Parts 122-124, including the bypass rule, and mixing zone regulation), this Court noted the importance of the uniformity provided by a single review. *See NRDC v. EPA*, 673 F.2d 392, 397 (D.C. Cir. 1980) ("Severing the regulations for judicial review in different courts would disserve the agency's goal of developing a unified and more efficient permitting program … * * * [T]he CPRs can be more efficiently reviewed by a single forum."); *see also NRDC v. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (the "attendant risk of inconsistent decisions initially and on appeal" exists in district courts, unlike circuit court challenges under the CWA).

[37] Such a result is even more bizarre when considering the effect it would have on an industrial/corporate permittee with facilities across the country. If EPA were

Moreover, because the ten EPA Regions and the thirteen (12 geographic) federal circuits do not overlap, the Regional offices would have different regulatory requirements for states within their jurisdiction. *See* Fig. 2.

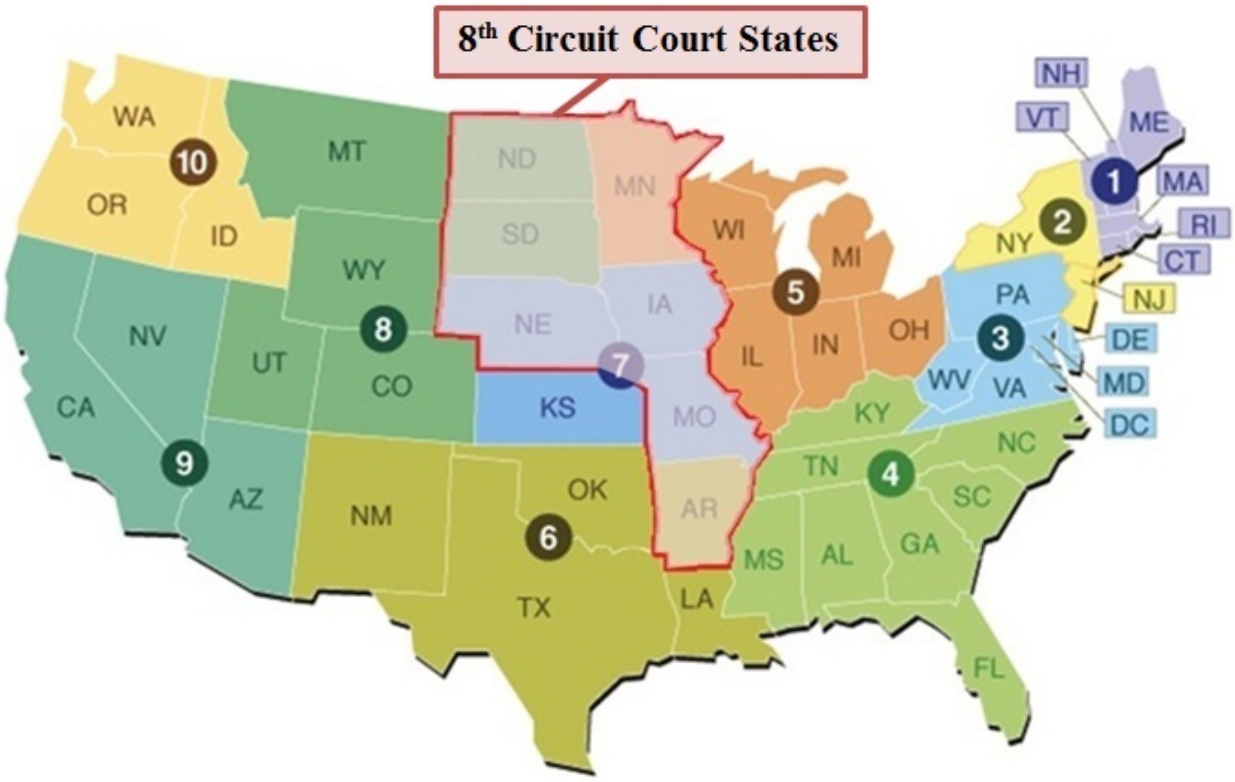

Fig. 2 - Map of EPA Regions

Case in point, EPA Region VII now only allows blending in Missouri, Iowa, and Nebraska, but not in Kansas by virtue of its location outside of the Eighth Circuit. *See* Ex. 43 (Appx., at 294), NWEA Newsletter ("It is EPA HQ's current contention that the Court ruling will only be binding to the 8th Circuit States (which includes the seven states of Arkansas, Iowa, Minnesota, Missouri,

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able to ignore § 509(b)(1)(E) decisions outside of the deciding circuit, an industrial entity would have to prevail in each of the applicable circuits to cover all of its facilities.

Nebraska, North Dakota, and South Dakota). Therefore, Kansas within EPA Region 7 is not included."). So EPA Region VII provides Kansas with different marching orders than the other three states in the Region. Such an absurd result was clearly not authorized by the CWA.

In summary, it is well settled that national uniformity for technology-based effluent limitations (*e.g.*, secondary treatment) and the permitting regulations that implement such categorical limitations (*e.g.*, bypass rule, rule concerning availability of mixing zones) is a principle objective of the Act. The CWA's judicial review provision – § 509(b)(1)(E), in conjunction with 28 U.S.C. § 2112(a) – fortified this objective. Accordingly, when a circuit court renders a § 509(b)(1)(E) decision regarding a specific EPA rulemaking action (formal or informal), that single decision applies nationally, unless overturned by the Supreme Court. Therefore, EPA's decision to restrict the applicability of the Eighth Circuit's *ILOC* ruling – a decision it could have appealed – and to continue to apply the vacated rule modifications on a permit-by-permit basis was unlawful and beyond statutory authority.

4. EPA's latest re-promulgations and approvals are unlawful for the same reasons they were vacated in ILOC

Assuming *arguendo*, the Court finds that a circuit court decision under CWA § 509(b)(1)(E) is not binding nationwide and EPA has no obligation to adhere to the *ILOC* decision 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. As the following regulation-by-regulation comparison makes clear, EPA's guidance letters approved revised regulatory requirements that are "irreconcilable" with the existing rules. Therefore, EPA's actions are, once again, procedurally and substantively unlawful.

a. EPA unlawfully modified 40 C.F.R. § 122.44(d)(1)(ii)

By renouncing the *ILOC* ruling outside of the Eighth Circuit, EPA has effectively reaffirmed and re-promulgated the bacteria mixing zone prohibition that was challenged and vacated in that appeal. *See* Ex. 5 (Appx., at 10), Enclosure to June 30, 2011, letter from EPA to Senator Grassley ("mixing zones that allow for elevated levels of bacteria… should not be permitted because they could result in significant public health risks."). As confirmed by numerous EPA documents (*supra*, at 17-19), the Agency has previously allowed states to (1) adopt water quality standard rules authorizing bacteria mixing zones and (2) establish NPDES effluent limits that account for bacteria mixing zones without objection. *ILOC*, 711 F.3d at 857 ("It is undisputed that in at least some instances, states are allowed to approve discharge permit applications that incorporate mixing zones.").

However, EPA's current position is that, outside of the Eighth Circuit, such bacteria mixing zones should still be prohibited. Such a position represents a dramatic revision to existing legislative rules. *ILOC*, 711 F.3d at 874 ("The EPA

eviscerates state discretion to incorporate mixing zones into their water quality standards with respect to this type of body of water. In effect, the EPA has created a new effluent limitation: state permitting authorities no longer have discretion to craft policies regarding bacteria mixing zones in primary contact recreation areas. Instead, such mixing zones are governed by an effluent limitation that categorically forbids them."). As virtually all waters in the country are designated as primary contact recreation, EPA's new regulatory mandate forces dischargers outside of the Eighth Circuit (even those from CSOs and stormwater sources) to meet applicable bacteria standards "end-of-pipe." Ex. 5 (Appx., at 10). EPA's action eliminates the discretion expressly afforded to states under 40 C.F.R. § 122.44(d) to allow such mixing zones. No Federal Register rulemaking preceded this dramatic regulatory shift. *Supra*, at 45-46.

b. EPA unlawfully modified 40 C.F.R. § 122.41(m) and 40 C.F.R. Part 133

By renouncing the *ILOC* ruling outside of the Eighth Circuit, EPA also reaffirmed and re-promulgated the blending prohibition that was vacated in that appeal. That is, peak flow treatment processes that incorporate a "blending" design are prohibited "bypasses" subject to a "no feasible alternatives" analysis. *See* Ex. 6 (Appx., at 14), Enclosure to September 14, 2011 letter from EPA to Senator Grassley. Moreover, EPA has reaffirmed the position that all such treatment

processes must independently comply with secondary treatment limitations to avoid being declared illegal bypasses. *Id.*

Prior to these radical rule revisions, a permittee was free to design and operate a treatment plant to incorporate several modes of operations (wet and dry weather), depending upon the conditions encountered so long as the plant met its final effluent limits. *Supra*, at 12-14. As such, peak flow treatment processes were not classified as bypasses that could only be approved under a "no feasible alternatives" analysis. *Supra*, at 14-17.[38, 39] Moreover, individual treatment processes and internal waste streams were never required to independently demonstrate compliance with secondary treatment requirements. *Id*. Finally, it is abundantly clear from the CWA statutory history, as well as EPA's historical practice, that EPA has no authority to dictate treatment plant design or impose effluent limitations on individual treatment processes inside a sewage treatment plant when final effluent quality can be easily measured. *Supra*, at 12 (*Blue Plains, AISI, Rybachek*) n.11 (40 C.F.R. § 122.45(a),(h)).

[38] The financial implications of the "no feasible alternatives" analysis are very significant. If a municipality could financially afford a viable alternative approach, it would be required to squander its municipal coffers even though it was already meeting the NPDES permit end-of-pipe effluent limitations.

[39] CRR, of course, recognizes that, if secondary treatment or other effluent limits are not being achieved, additional construction may be necessary.

Accordingly, EPA's decision to continue imposing a blending prohibition on facilities outside of the Eighth Circuit, is, once again, a complete reversal of the Agency's previously published position, including the averments made by EPA to this Court when the bypass rule was last reviewed in 1987. *Supra*, at 13-14 (EPA's statements defending adoption of the bypass rule in *NRDC II*); *compare ILOC*, 711 F.3d at 876 ("The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW … uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations."); *id.* ("[I]f POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged."). Not only is such a revised regulatory position procedurally improper, it exceeds statutory authority. *ILOC*, 711 F.3d at 877 ("The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so."); *accord supra*, at 12 (*Blue Plains*, *AISI*, *Rybachek*, *NRDC*).

Accordingly, EPA's implementation of its vacated amendments to the bypass rule, secondary treatment rule, and bacteria mixing zone rule should be

found unlawful for the same reasons found by the Eighth Circuit in *ILOC*. *See NRDC v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (after vacating on procedural grounds a court may decide substantive grounds when rule is "obviously preclude[d]" by the relevant enabling act).

C. This Court Should Make Clear That Its Vacatur Applies Nationwide

Under normal circumstances, a circuit court's ruling vacating unlawful EPA rulemaking actions should be enough. However, EPA's unprecedented actions following the *ILOC* ruling confirm that something must be done to ensure that any further implementation of the vacated rule amendments is halted. Accordingly, CRR respectfully requests that this Court clarify to EPA that it is proscribed from imposing the unlawful regulatory prohibitions anywhere in the country. Such relief could be accomplished via language in the Court's opinion or, alternatively, through the issuance of an injunction. *See Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-1410 (D.C. Cir. 1998) *superseded by statute on other grounds* (affirming district court's decision vacating rule and enjoining the Agency from applying or enforcing the vacated rule nationwide). Otherwise, EPA may treat this Circuit's decision as merely applying in the District of Columbia.

XIII. ORAL ARGUMENT

CRR, by and through undersigned counsel, hereby requests to have this Court schedule oral argument as a means to further discuss the issues and arguments central to this Petition.

XIV. CONCLUSION

CRR respectfully requests that the Court grant this Petition and issue an order that (1) requires EPA to adhere to the *ILOC* decision nationally, (2) vacates the guidance letters (and the regulatory proscriptions referenced therein) appended to this Petition, (3) enjoins EPA from any further implementation of these abusive and illegal practices, and (4) awards CRR its attorney fees associated with this litigation, as well as any other such relief as this Court deems appropriate.

Respectfully submitted,

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XV. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE, AND TYPE STYLE REQUIREMENTS

1. Petitioner's, CRR, Opening Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,776 words, as counted by Microsoft Word 2010, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and the D.C. Circuit (*i.e.*, Caption, Corporate Disclosure Statement, Certificate as to Parties, Rulings, and Related Cases, Table of Contents, Table of Authorities, Glossary, Signature Block, Statutory/Regulatory Addendum, Evidentiary Support for Standing Addendum) and all figures.

2. Petitioner's, CRR, Opening Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally-spaced typeface using Times New Roman 14-point font (Microsoft Word 2010).

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