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

REPLY BRIEF FOR PETITIONER

Oral argument requested but not yet scheduled

JOHN C. HALL
D.C. Cir. #44296
GARY B. COHEN
D.C. Cir. #49377
PHILIP D. ROSENMAN
D.C. Cir. #55525
Hall & Associates
Attorneys for Petitioner
1620 I Street, NW, Suite 701
Washington, DC 20006
Telephone: (202) 463-1166
Facsimile: (202) 463-4207

March 21, 2016

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS i

II. TABLE OF AUTHORITIES iii

III. GLOSSARY vi

IV. INTRODUCTION 1

V. ARGUMENT 1

A. EPA Concedes It Rendered a Final Decision Rejecting Nationwide Applicability of the ILOC Ruling 2

i. EPA admits or ignores critical facts confirming its decision 2

ii. EPA's letters confirm the Agency's decision 5

iii. EPA's "case-by-case" approach is a decision that ILOC is not binding 6

iv. EPA's decision has immediate consequences 7

v. Testimony of counsel cannot refute the facts that demonstrate the "finality" or "binding effect" of EPA's decision 10

vi. EPA's permit review/veto authority is highly coercive 12

B. Jurisdiction Has Been Established 14

i. ILOC rejected EPA's remaining jurisdictional arguments 15

ii. Statute dictates immediate review 17

iii. EPA identifies no case-specific variables to justify deferring review 18

C. EPA's Nonacquiescence Argument Is Meritless 20

i. EPA concedes that Congress barred nonacquiescence 20

ii. EPA's "sole" petitioner argument does not bear scrutiny 22

iii. EPA confirmed that its regulations apply uniformly nationwide 23

D. *ILOC* Was Not Wrongly Decided ……………………………………......24

i. The relevant statutory and regulatory history remain uncontested ……………………………………………...…24

ii. EPA's reliance on this Court's ruling in NRDC is completely mistaken………………………………………………………..26

iii. EPA's focus on the APA finality test is a strawman……………….28

E. EPA Skewed the Record……………………………………………….29

VI. <u>CONCLUSION</u> …………………………………………………...29

VII. <u>CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE, AND TYPE STYLE REQUIREMENTS</u>………………...31

II. TABLE OF AUTHORITIES[1]

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) ………………………………….. 9

**Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983) ……………………………………………………………………….. 24

Alt v. EPA, 979 F. Supp. 2d 701 (N.D.W.Va. 2013) ……………………………. 21

Am. Tel. & Tel. Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992) ……………………. 21

**Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) …………….. 11

Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437 (7th Cir. 1994) …… 21

Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207 (D.C. Cir. 2007) ……….. 18

**Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986) ……………………. 11

Chi. Lawyers' Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) …………………………………………………… 6

Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) ……………………………………………………………………….. 21

**Croplife Am. v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) …………………………… 4

Fund for Animals v. Williams, 245 F.Supp.2d 49 (D.D.C. 2003) ………………. 29

**Gen. Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) …………………… 11, 18

Goldstrike Mines, Inc. v. Browner, 215 F.3d 45 (D.C. Cir. 2000) ……………….. 5

Indep. Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248 (D.C. Cir. 1996) ……... 21

**Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) ……………………...

……….. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 19, 23, 24, 25, 26, 27, 28, 29

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) ……………………..…. 9, 18

[1] Authorities upon which CRR chiefly relies are denoted with asterisks (*).

**Mobil Oil Corp. v. EPA,* 35 F.3d 579 (D.C. Cir. 1994) 24

Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8 (D.C. Cir. 2005) 14

Nat'l Indep. Meat Packers Ass'n v. EPA, 566 F.2d 41 (8th Cir. 1977) 21

Nat'l Mining Ass'n ("NMA") v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014) 16

NRDC v. EPA, 643 F.3d 311 (D.C. Cir. 2011) 23

**NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) (*"NRDC II"*) 26, 27

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (U.S. 2015) 16

Pub. Serv. Co. v. EPA, 949 F.2d 1063 (10th Cir. 1991) 28

Reckitt Benckiser, Inc. v. EPA, 613 F.3d 1131 (D.C. Cir. 2010) 18

Sackett v. EPA, 132 S. Ct. 1367 (2012) 14

Shays v. FEC, 424 F. Supp. 2d 100 (D.D.C. 2006) 7

Tex. Mun. Power Agnecy v. EPA, 836 F.2d 1482 (5th Cir. 1988) 27

United States v. Mendoza, 464 U.S. 154 (1984) 21

Statutes/Regulations

28 U.S.C. § 2112(a) 20, 22

*33 U.S.C. §1369(b)(1)(E), CWA § 509(b)(1)(E) ... 1, 8, 14, 16, 17, 20, 21, 22, 23

*40 C.F.R. § 122.41(m) 8, 13, 23, 25

*40 C.F.R. § 122.44(d) 23

40 C.F.R. § 122.45(h) 28

*40 C.F.R. Part 133 23

Miscellaneous

43 Fed. Reg. 37078 (Aug. 21, 1978) 19

Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m) – No. 3, March 6, 1975 17

Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies,* 98 Yale L.J. 679 (1989) 21

III. 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.

"MPUA" - The Missouri Public Utility Alliance; a not-for-profit service organization that represents municipally-owned electric, natural gas, water,

wastewater and broadband utilities working together for the benefit of their customers.

"*NJDEP*" – New Jersey Department of Environmental Protection; an agency of the state of New Jersey that, among other responsibilities, administers EPA's NPDES program in the state.

"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.

"Wis.DNR" – Wisconsin Department of Natural Resources; an agency of the state of Wisconsin that seeks to preserve, protect, manage and maintain the natural resources of the state, whose responsibilities include administering EPA's NPDES program in the state

"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.

IV. INTRODUCTION

This case confirms that EPA has taken illegal rulemaking to a whole new level of impropriety. After being found guilty of promulgating procedurally deficient and *ultra vires* legislative rules, EPA, with DOJ's assistance, determined that it could continue to impose the vacated rule amendments outside of the Eighth Circuit. To compound matters, EPA has done its very best to cloak its decision to avoid judicial scrutiny. This purposefully orchestrated scheme is quite possibly the most extreme instance of administrative abuse in the annals of EPA history, deserving of the harshest possible judicial rebuke.

CRR's Opening Brief ("CRR Brief") and this Reply confirm that this Court has jurisdiction under 33 U.S.C. §1369(b)(1)(E), CWA § 509(b)(1)(E), to review EPA's rogue actions that are clearly unlawful given the CWA's judicial review structure and requirement for national uniformity on NPDES regulations. Accordingly, the requested relief should be granted.

V. ARGUMENT

EPA's Response Brief ("EPA Response") fails to credibly refute that: (1) EPA rendered a final decision not to be bound by the *ILOC* ruling outside of the Eighth Circuit; (2) this Court has jurisdiction to review that decision; and (3) EPA's decision was unlawful on both procedural and substantive grounds. Accordingly, judgment for CRR is proper.

A. EPA Concedes It Rendered a Final Decision Rejecting Nationwide Applicability of the *ILOC* Ruling

i. EPA admits or ignores critical facts confirming its decision

Preferring to rely on wordplay, jurisdictional buzzwords, and legal conclusions, EPA's Response studiously seeks to avoid the chronology of critical Agency actions documented by CRR. In many cases, EPA simply does not respond to CRR's assertion, effectively admitting the fact. In other cases, EPA expressly admits the key fact. Either way, EPA's Response confirmed that EPA rendered a decision that (1) it is not bound by the *ILOC* decision outside of the Eighth Circuit, and (2) it continues to impose the vacated regulatory prohibitions in the NPDES process outside the Eighth Circuit.

With regard to rendering a decision, EPA admits the following:

> "The challenged letters … contain … statements of law … about how the Agency regards *Iowa League* outside the Eighth Circuit." [EPA Response, at 17]

> "EPA has shared with state regulators or regulated entities … views regarding *Iowa League*'s impact or non-impact on the application of the bypass regulation under certain circumstances." [*Id.*, at 17-18]

> "[T]he Center's members outside the Eighth Circuit face … the *possibility* that EPA may decide not to follow *Iowa League* in a future permit proceeding…." [*Id.*, at 35]

"EPA has yet to withdraw or otherwise resolve certain [pre-*ILOC*] objections to discharge permits." [*Id.*, at 36; *see also* EPA letter to Wis.DNR (Ex. 60, Supp. Appx., at 415-416)].[2, 3]

These admissions are entirely consistent with the Agency actions documented in CRR's Brief, which EPA never disputes:

- EPA arranged an Agency-wide meeting to discuss and coordinate its continued implementation of the vacated rule amendments. [CRR Brief, at 23-24].

- EPA disseminated to its Regional Offices (*i.e.,* Water Permit Division Directors) multiple documents, including a memorandum entitled "Applicability of *Iowa League* decision to EPA permitting determinations." [*Id.*, at 24-25].[4]

- High-ranking personnel from the Office of Water, Enforcement, and General Counsel repeatedly announced in national and regional forums that the *ILOC* decision is not "binding" outside the Eighth Circuit and that the Agency would continue to apply the vacated provisions on a "case-by-case" basis elsewhere. [CRR Brief, at 25-26; *see also* MPUA newsletter (Ex. 59, Supp. Appx., at 398); Bergman

---

[2] The admitted failure to withdraw the pre-*ILOC* objection letters confirms that EPA is still enforcing the vacated requirements outside of the Eighth Circuit.

[3] To address the "non-decision" arguments made in EPA's Response, CRR is supplying the Court with seven additional records confirming EPA did precisely what CRR has alleged and documented. *See* CRR Supplemental Appendix.

[4] EPA's Response coyly dissembles by claiming that it did not issue a "directive" "not to follow *Iowa League* outside of the Eighth Circuit." EPA Response, at 27. This straw man never disputes CRR's claim that (1) the decision to nonacquiesce was disseminated to Regional Offices, or (2) EPA Headquarters informed the Regional Offices that *ILOC* is "not binding." EPA's Response is replete with such verbal tap dancing.

Declaration, at ¶¶3-4 (Ex. 64, Supp. Appx., at 521-522); Witt Declaration, at ¶¶3-5 (Ex. 65, Supp. Appx., at 523-524)].[5]

- EPA's Regional Offices have been executing the "marching orders" and are still enforcing the vacated rule modifications. [CRR Brief, at 27-28; *see also* Witt Declaration, at ¶¶6-9 (Supp. Appx., at 524-525)].

Seeking to avoid judicial review, EPA counsel now labels these actions as "recommendations," "draft comments," "incomplete" and "interlocutory." However, an agency's "characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule … but the record indicates otherwise." *See Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). As EPA's Response never actually denies any of the specific factual assertions and decision timeline documented by CRR, EPA's characterizations are not credible.

Therefore, EPA's documented actions, both before and after EPA's April 2, 2014 and June 18, 2014, letters, confirm that the Agency issued and is enforcing a decision to limit the *ILOC* ruling to the Eighth Circuit.

[5] EPA characterizes the repeated senior Agency official announcements as "impertinent" and then claims that, "even if" they occurred, they were "superseded" by the subsequent letters. EPA Response, at 28. Even a casual reading confirms the letters are completely consistent with, and never refute, the public announcements. Moreover, EPA was still announcing this same position *after* it issued the April 2, 2014 letter. *See* Witt Declaration, at ¶3 (Supp. Appx., at 523-524).

ii. EPA's letters confirm the Agency's decision

EPA repeatedly claims CRR's Petition and this Court's jurisdiction are based solely on the language in EPA's letters. EPA Response, at 24-26. CRR has never taken such position.[6] Nonetheless, given the multiple public announcements that preceded issuance and the explicit, detailed inquiries to which they responded, EPA's letters confirm that a decision to nonacquiesce outside of the Eighth Circuit was made. EPA's April response acknowledged that the municipal associations' incoming letters vigorously objected to EPA not following the *ILOC* ruling nationwide. *See* Pet. Ex. A ("…you believe that there is no legal basis for EPA to assert that the decision does not apply nationwide…"). In its subsequent June response, EPA "acknowledge[d]" that the municipal associations "disagree" with the Agency's position on the precedential scope of *ILOC* but reiterated that "the Eighth's Circuit decision applies as binding precedent in the Eighth Circuit." Pet. Ex. B. In light of the concerns raised, there is no question that the "four corners" of EPA's responses confirmed a decision not to be bound by the *ILOC* decision outside of the Eighth Circuit and continued implementation of the vacated rule amendments.

---

[6] EPA's myopic focus in assessing whether final Agency action occurred is misplaced. *See Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48-49 (D.C. Cir. 2000) ("[F]inal agency action may result from a series of agency pronouncements rather than a single edict...").

EPA's assertion that these letters don't reflect a decision because EPA omitted the word "only" is specious. EPA Response, at 24-25. In its most basic form, EPA's argument is that, because it artfully worded its written response, such wordsmithing, alone, is sufficient to thwart judicial review. Likewise, EPA's argument ignores (a) that EPA purposefully "published"[7] its nonacquiescence decision throughout the country, and (b) the entire factual record confirming EPA's unrelenting decision to continue imposing the vacated rule revisions, which renders exclusion of the word "only" meaningless. Accordingly, EPA's wordplay argument, which mirrors its defense in *ILOC*, should be rejected. *ILOC*, 711 F.3d at 865 ("In effect, the EPA asks us to agree that when it couches an interdiction …, the prohibition is somehow transformed into something less than a prohibition. We decline to accept such Orwellian Newspeak.").[8]

iii. EPA's "case-by-case" approach is a decision that ILOC is not binding

EPA's argument regarding the word "only" fails for yet another reason. EPA has confirmed that, at a minimum, permittees are still subjected to the vacated rules on a "case by case" basis. EPA Response, at 25 ("The record that EPA has certified

---

[7] *See Chi. Lawyers' Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 694 (N.D. Ill. 2006) (relying on the Webster's definition of "publish" to mean "1a: to make generally known; 1b: to make public announcement of; 2a: to disseminate to the public…").

[8] This "non-decision" claim is also belied by EPA's Response argument that it may nonacquiesce to the Eighth Circuit decision. *See* EPA Response, at 37.

instead confirms the iterative, case-by-case nature of EPA's treatment of *Iowa League* and issues addressed therein."); *id.*, at 2, 27, 28. Put simply, EPA's decision that it may ignore the *ILOC* ruling on a case-by-case basis is indistinguishable from a decision that it is "not bound" by the *ILOC* decision nationwide.[9] Logically, EPA could not ignore *ILOC* on a "case-by-case" basis if the decision was binding nationwide. So, while EPA repeatedly points to "case-by-case" as evidence of a non-decision, these statements actually confirm that the decision challenged by CRR – EPA's determination that it is not bound by *ILOC* outside of the Eighth Circuit – did occur.[10]

iv. EPA's decision has immediate consequences

A running theme in EPA's Response is that the Agency's "case-by-case" approach can only be challenged in individual permitting matters. *See, e.g.,* EPA Response, at 17, 18, 22, 36, 53. However, this "time of permitting" argument is wrong as a matter of law because: (1) the nationally applicable rules at issue allow no "case-by-case" prohibitions or permit adjustments (*infra,* at 18-19, 23), and (2)

[9] Not only is an agency's decision to proceed on a case-by-case basis appealable, but the agency's failure to provide a reasoned explanation of such decision is "simply fatal here under hornbook administrative law." *Shays v. FEC*, 424 F. Supp. 2d 100, 116 (D.D.C. 2006).

[10] Notably, the *ILOC* decision ruled that EPA's categorical classification of blending as an in illegal bypass was *ultra vires* (*i.e.*, illegal under the CWA in *any* permit scenario). *ILOC*, 711 F.3d at 877. By applying *ILOC* on a case-by-case basis, EPA has carved itself discretionary authority to do what the statute does not allow.

CWA § 509(b)(1)(E) rulemaking matters (legal or illegal) are, by statute, reviewed immediately (*infra*, at 17, EPA's Decision of General Counsel). Beyond these fatal flaws, EPA's argument also ignores the immediate harm(s) incurred by CRR (through its members) resulting from EPA's decision. *See* Standing Addendum, Rice Affidavit, at 1-5, Pocci Affidavit, at 84-89, Messinger Affidavit, at 101-107, Cerqua Affidavit, at 130-135.

As documented by affidavits/declarations supporting CRR's brief, many of CRR's members have had *direct* interactions with EPA on the regulatory positions vacated by *ILOC* and the answer is always the same – blending is an illegal bypass subject to 40 C.F.R. § 122.41(m) and EPA will continue to object to it outside the Eighth Circuit. *See* CRR Brief, at 37-38; *see also* Witt Declaration, at ¶6 (Supp. Appx., at 524-525). Moreover, CRR's members (and others) are seeking to employ peak flow treatment processes that incorporate blending to comply with "state or federal deadlines under the CWA." CRR Brief, at 38. Accordingly, EPA's decision not to treat *ILOC* as binding nationwide will (1) force CRR's members to "alter their conduct to avoid the threat of enforcement" and/or (2) hamper CRR members' "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." *Id.* If these facilities bow to EPA's demands, they will incur the increased costs of "regulatory compliance." *Id.* If the permittees ignore EPA's

regulatory stance, they will instead commit valuable resources into "build[ing] projects with treatment processes" that EPA still classifies as illegal bypasses, as EPA has not withdrawn pre-*ILOC* decision objections. *Supra*, at 3, n.2.[11]

It is well recognized that "rights," "obligations," and "legal consequences" flow from forcing a regulated entity to choose between the risks of non-compliance and increased costs of compliance. *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 ... .").[12] However, as with CRR's averments detailing these regulatory quandaries, EPA's Response blithely ignores this jurisprudence. Accordingly, EPA's "time of permitting" argument must be rejected due to the documented immediate harm its decision exacts on CRR's members and the case law that recognizes such harm.

---

[11] CRR's Brief (at 37-39) noted that these same "concrete" and "particularized" injuries also give rise to CRR's standing. EPA's argument against standing, which is premised on a "non-decision," makes no attempt to dispute any of the specific injuries alleged by CRR and, therefore, must fall. *See* EPA Response, at 33-35.

[12] *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); *ILOC*, 711 F.3d at 868 ("League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that—if these letters are in effect new legislative rules—were viable before the publication of the letters but will be rejected when the letters are applied as written.").

v. Testimony of counsel cannot refute the facts that demonstrate the "finality" or "binding effect" of EPA's decision

While acknowledging that a reviewable action "need not always mean publication in the Code of Federal Regulations or the Federal Register" (EPA Response, at 32-33), EPA launches a series of conclusory statements addressing jurisdictional facts without even a shred of record evidence or regulatory detail to support their validity. *Id.*, at 33 ("Here, the EPA letters… do not have any legal effect on any POTW…"); *see also id.*, at 22, 34, 36. Apparently, EPA is hoping that such conclusory statements will obfuscate the fact that it never actually disputed the key jurisdictional facts CRR documented that evince the "binding effect" and "rights and consequences" of EPA's decision. As noted above (*supra*, at 2-4), EPA either admitted or did not dispute that it:

- disseminated documents within the Agency announcing its decision not to be bound by *ILOC* and continued imposition of the vacated regulatory requirements outside the Eighth Circuit;

- publicly announced this decision to state agencies and the regulatory community;

- continued to threaten states that fail to conform to its positions will result in permit objections;[13] and

[13] EPA's unsupported assertion that it did not tell NJDEP that blending is still a prohibited bypass is rebuffed by the record. EPA Response at n.10. In addition to the NJDEP comment response document itself (Appx. 333-339), a New Jersey attorney confirms that EPA repeatedly stated, in permit meetings, that the *ILOC*

- has refused to withdraw any of the prior permitting objections made outside of the Eighth Circuit (*e.g.,* Clairton objection (Standing Addendum, at 132-134)).

This unrefuted record illuminates precisely why EPA's coercive actions have a "binding effect" "determine" "rights and obligations," create "legal consequences," and present an "injury-in-fact" or "hardship" to CRR and its members. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) ("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.'").[14] EPA's well-planned and repeated announcements that *ILOC* is not binding outside the Eighth Circuit and ongoing Regional Office enforcement of the vacated rule amendments certainly meet this test.

---

decision did not apply outside the Eighth Circuit and that blending was still an illegal bypass. *See* Witt Declaration, at ¶6 (Supp. Appx., at 524-525).

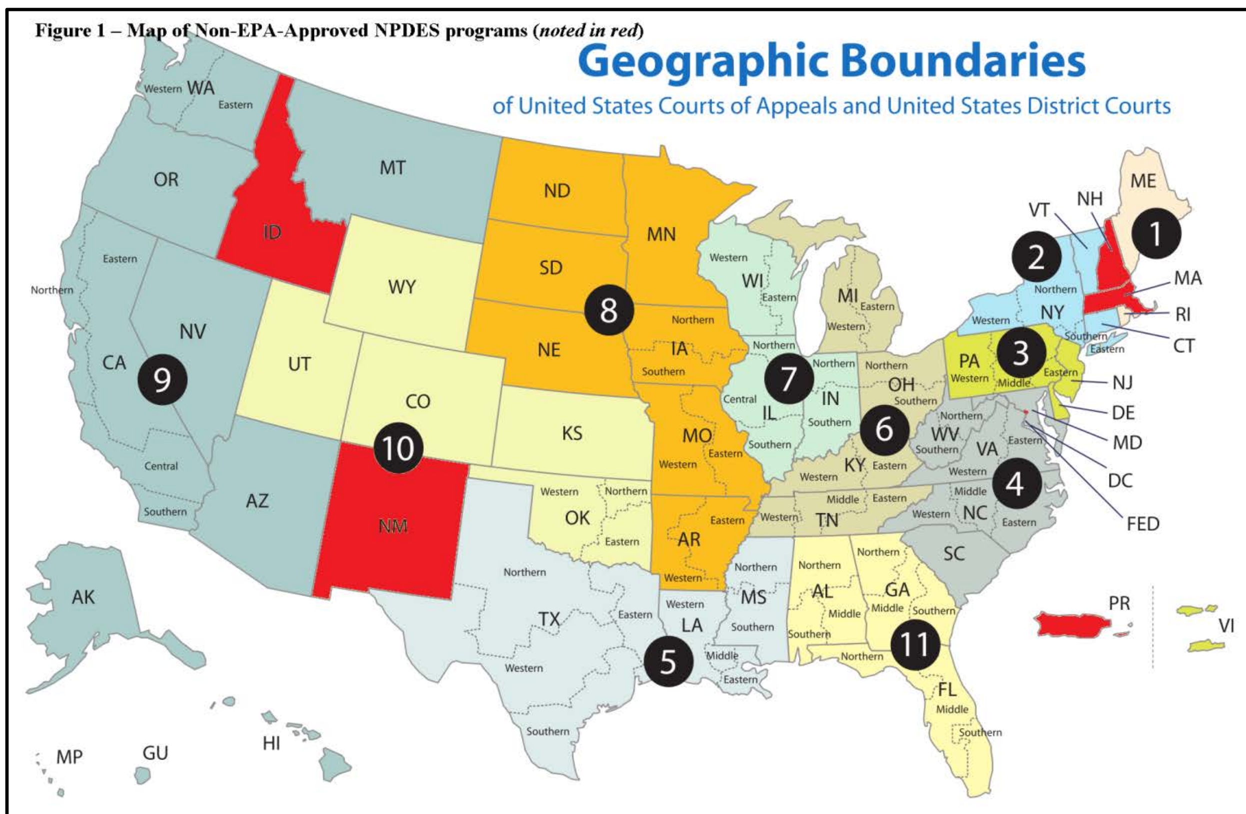
[14] *See also Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding.") (citations omitted); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-436 (D.C. Cir. 1986) (applying the Supreme Court's "flexible" and "pragmatic" approach to the "finality requirement" and finding that EPA's letter had a "direct and immediate effect" because it "unequivocally stated EPA's position on the [legal issue]…").

As EPA's arguments regarding finality and binding effect are based on conclusory legal opinions, rather than objective evidence disputing the documented facts that give rise to this Court's jurisdiction, EPA's objections should be dismissed.

vi. EPA's permit review/veto authority is highly coercive

The structure of the CWA reinforces the "binding effect" of EPA's decision. As noted in Figure 1 below, except for those colored in red, states – not EPA – are responsible for issuing NPDES permits.

Figure 1 – Map of Non-EPA-Approved NPDES programs (*noted in red*)



In such situations, as explained by EPA, states "must submit a draft or proposed permit to EPA for review." EPA Response, at 5. If a state does not

amend a permit complicit with any EPA objections (lawful or otherwise), authority to issue the permit passes to EPA. *Id.* Consequently, states seeking to avoid federal permit objections must adhere to EPA's demands. *See* 40 C.F.R. § 122.4(c) ("No permit may be issued… where the Regional Administrator has objected to issuance of the permit."). The record confirms EPA has employed such tactics with regard to *ILOC* and the regulatory prohibitions vacated therein.

For instance, since the *ILOC* ruling, EPA Region 2 officials repeatedly informed permittees that use of:

> construction/operation of facilities to blend primary treated effluent and secondary treated effluent … would be considered a violation of federal law …[and] that such blending is not allowed under a permit structure and would, thus, violate federal bypass regulations.

See Witt Declaration, at ¶6 (Supp. Appx. at 524-525). Moreover, EPA communicated to NJDEP that "blending violates federal law (*i.e*., the federal bypass regulation within 40 C.F.R. § 122.41(m)), that the federal rule must be modified to lawfully allow this approach, and the *ILOC* ruling was not binding on USEPA outside of the 8th Circuit." *Id.*, at ¶8 (Supp. Appx., at 525). EPA used these same tactics to pressure delegated states prior to the *ILOC* matter. *See, e.g.,* Ex. 19, Correll Affidavit, at ¶¶5, 14, 17 (Appx., at 125-131); *see ILOC*, 711 F.3d at

860.[15] EPA's "wait until permitting" argument would impermissibly allow these coercive tactics to continue unabated. *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 . . . .").

B. Jurisdiction Has Been Established

CRR's Brief also explained that this Court possesses jurisdiction to review the petition because (1) EPA's decision concerns legislative rules that are "effluent limitations" or "other limitations" under CWA § 509(b)(1)(E) (at 1-2); (2) EPA's actions modified the adopted rules such that they are "promulgations" or "approvals" under CWA § 509(b)(1)(E) (at 3-6); (3) EPA's decision is "ripe" (at 6-8); (4) CRR's petition was timely (at 8-9); and (5) CRR, through its members, has standing (at 9, 37-39). EPA did not dispute the timeliness of CRR's Petition or that the bypass, secondary treatment, and mixing zone regulations are "effluent limitations" or "other limitations" and any amendments thereof, are subject to exclusive appellate review under § 509(b)(1)(E). EPA's remaining jurisdictional arguments are misplaced as follows.

---

[15] In *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 16 (D.C. Cir. 2005), this Court acknowledged the importance of a coercive permit program in evaluating whether agency pronouncements are binding.

i. ILOC rejected EPA's remaining jurisdictional arguments

In the *ILOC* matter, the Agency raised (and the Eighth Circuit dismissed) objections that are virtually identical to EPA's arguments in this proceeding. *See* Table 1 below.

TABLE 1 – EPA's Jurisdictional Arguments		
Jurisdictional Argument	**EPA Brief - *ILOC v. EPA* (*see* Ex. 61 (Appx., at 421-496))**	**EPA Response - *CRR v. EPA***
Finality	Letters do not show final agency action (at 28).	EPA letters are not final agency action (at 21).
Promulgation	EPA did not promulgate a rule due to (1) Agency deference in interpretation, (2) not published in Federal Register, (3) no binding effect (at 41).	EPA did not promulgate an effluent limitation (at 30).
Standing	League has failed to establish standing (at 48).	The Center lacks standing (at 33).
Ripeness	Letters are not ripe for review (at 44).	The Center's claims are not ripe (at 35).
Wait Until Permitting	Review should wait until permitting (at 47).	Review must wait until permit issued with challenged rules (at 21).
Binding Effect	Views expressed in letters are not binding rules (at 23).	Letters are not the result of administrative process bestowing legally binding requirements (at 17).
Fitness	Unfit for review since no permits issued under challenged interpretations (at 45).	Letters are not fit for review (at 36).
Hardship	League will not face immediate and direct hardship if this Court withholds review of the challenged letters (at 46).	Mere uncertainty as to validity of rule does not constitute hardship (at 36).

EPA's latest arguments are even more meritless today than they were three years ago. EPA is simply attempting to retry the *ILOC* case and game the Congressionally-enacted appellate review system. *Infra*, at 17-18. EPA waived its opportunity to appeal the *ILOC* decision, knowing that the record would not be well-received by the Supreme Court. Instead, the Agency embarked on an alternative approach to surreptitiously force compliance with *the same* regulatory positions, again, without APA rulemaking.[16]

As the harm to the regulated community remains the same, a decision by this Court is essential to stop this gross abuse of APA prerequisites, the ongoing due process violations, and the latest parade of *ultra vires* activities. The only questions before this court are: Should the Eighth Circuit ruling be enforced nationwide due

[16] The rule modifications at issue plainly address existing "legislative rules." *See supra*, at n.20. For this reason, EPA's reliance on *Perez* is misplaced. EPA Response, at 45. That decision expressly pertained to issuance of "interpretive" rules as the regulated community waived any arguments regarding illegally modified "legislative" rules. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (U.S. 2015). Similarly, the case of *Nat'l Mining Ass'n ("NMA") v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014) is inapposite. In that case, this Court found that an Enhanced Coordination Process document was consistent with the CWA and did not require APA notice and comment because it was a "procedural" rule. *Id.*, at 248-249. Additionally, the *NMA* Court found that a separate water quality guidance (a scientific document) was a "statement of policy" that was not subject to pre-enforcement review. *Id.*, at 250-53. This ruling has little bearing on the present proceeding because (a) it did not address existing legislative rules subject to CWA § 509(b)(1)(E) immediate review provision, (b) case-specific facts are not relevant to implementation of the nationally uniform legislative rules at issue, and (c) unlike here, in *NMA* there were no post-guidance events showing that "the agency has applied the [document] as if it were binding on regulated parties." *Id.*, at 253.

to the structure of the CWA appellate review procedures? Or, if the *ILOC* decision is not binding, did EPA, once again, improperly amend its legislative rules and exceed statutory authority by creating two sets of "nationally applicable" rules?

ii. Statute dictates immediate review

EPA's "wait until permitting" argument is impermissible given the statutory judicial review provision invoked in this petition. CRR Brief, at 6-8. Under CWA § 509(b)(1)(E), review of legislative rules amendments *must* occur immediately and *cannot* be brought at the time of permitting. *See* Statutory/Regulatory Addendum, at 1. As noted by EPA's *Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m) – No. 3*, 167-168, March 6, 1975:

> Congress, in enacting Section 509(b), contemplated that a potential permittee could pursue two avenues of action in connection with a permit to be issued under applicable effluent regulation. First, the potential permittee could appeal the promulgation of the regulation pursuant to Section 509(b) where the potential permittee could raise all the arguments relative to its promulgation. *It is in this action that the permittee should challenge the foundation of the Environmental Protection Agency in promulgating the applicable effluent limitation.* … [T]he permit applicant could challenge the application of the regulation to his discharge *but not the promulgated regulation itself which must be tested under the exclusive provisions of Section 509(b)(1)(E).*

See Ex. 63 (Supp. Appx., at 515-516) (emphasis added). Thus, this is the proper time and place for CRR's challenge.

EPA's Response also never addressed CRR's other ripeness arguments: EPA's nonacquiescence decision was not made "on the basis of specific facts"

(CRR Brief, at 7, *Reckitt Benckiser, Inc.*); CRR's petition raises "pure legal issues," such as whether EPA, once again, unlawfully amended legislative rules and/or is legally allowed to nonacquiesce (*Id.*, *Cement Kiln, GE*); EPA, again, created procedural due process violations, which are to be reviewed immediately (*Id.*, *Lujan*); deferring review will improperly force CRR members to choose between risks of non-compliance and the costs of compliance (*Id.*, at 8; *supra*, at 8-9). EPA's failure to address the controlling judicial review provision and CRR's related arguments for immediate review are further reasons for discarding EPA's "defer review until permitting" argument.

iii. EPA identifies no case-specific variables to justify deferring review

EPA's Response implies that there will be "possibilit[ies]" (EPA Response, at 35), "contingencies" (*id.*), and "speculation" (*id.*, at 36), that will need to be addressed in its "case-by-case" approach. In so doing, EPA, once again, attempts to create the fiction that a permittee's ability to employ blending and receive the benefit of bacteria mixing zones will hinge on some site-specific variables. Notably absent from EPA's argument, however, is the identification of a single case-specific variable EPA will consider to evaluate the lawfulness of such options outside of the Eighth Circuit. Necessarily, there can be no case-by-case factors when the bypass regulation "constitute[s] [part of] the permit, 'boilerplate'; [such

that] they are binding on all permittees…." *See* 43 Fed. Reg. 37078 (Aug. 21, 1978).

Moreover, as noted by the Eighth Circuit, EPA's prohibition of blending and bacteria mixing zones was not based on any case-specific variables:

> 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.

ILOC, 711 F.3d at 867-868. In explaining this conclusion, the Eighth Circuit pointed to EPA's own letters:

> Similarly, when asked if the use of "peak flow treatment processes" such as ACTIFLO would be subject to a "no feasible alternatives" demonstration, the EPA responded "Yes." The question is whether the statements are simply reminders of preexisting regulatory requirements or whether they create new regulatory obligations. Because such inquiries do not implicate contingent factual circumstances, this controversy is ripe for our review.

Id., at 868. Thus, when EPA declared in 2011 (pre-*ILOC*) that the existing rules prohibited blending and bacteria mixing zones, it did so absolutely. So, when EPA renders a decision that *ILOC* is only binding in the Eighth Circuit, allowing the Agency to maintain status quo elsewhere, it is not introducing any new case-by-case variables into its regulatory calculus. EPA is still categorically prohibiting blending and bacteria mixing zones –just not in the Eight Circuit. EPA's documented post-*ILOC* implementation of the prohibitions also confirms this approach. CRR Brief, at 27-28; *supra*, at 3-4, 13 (Witt Declaration).

C. EPA's Nonacquiescence Argument Is Meritless

CRR detailed how (1) the CWA mandates national uniformity of NPDES permitting rules with no consideration of geographic locale, and (2) the Congressionally-mandated judicial review procedures of CWA § 509(b)(1)(E) and 28 U.S.C. § 2112(a) apply to ensure uniformity regarding EPA's permitting rules by preventing more than one circuit court review after such rules are promulgated. CRR Brief, at 46-54. CRR even noted that, in a prior court filing, EPA agreed that a § 509(b)(1)(E) ruling was binding nationwide. *Id.*, at 48-49. In response, EPA agreed that (1) the rules at issue are uniform, nationally applicable requirements (EPA Response, at 4), and (2) Congress had altered its ability to nonacquiesce. *Id.*, at 39-40. However, EPA claimed that the CWA statutory scheme only precludes EPA's nonacquiescence when (a) multiple § 509(b)(1)(E) appeals are consolidated for review, or (b) formal rulemaking is challenged. *Id.*, at 40-42. This argument, which cites no apposite jurisprudence or legislative history, is specious.

i. EPA concedes that Congress barred nonacquiescence

In support of its position, EPA cites a law review article and jurisprudence that generally discuss a federal agency's ability to, in some circumstances, nonacquiesce. EPA Response, at 37-38. However, none of EPA's "authority"

addresses the CWA's judicial review scheme.[17] Moreover, EPA blithely ignores that the referenced law review article acknowledges that it is *ultra vires* to nonacquiesce where proscribed by Congress:

> [O]ur discussion addresses only cases in which the organic statute under which the agency operates does not, of its own force, command the agency to conform its administrative proceedings to the law of the circuit that will review its action. Where such a bar is present, *an agency acts ultra vires if it refuses to adhere to circuit law, and the legality of the agency's action can be decisively resolved as a matter of statutory construction.*

Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies,* 98 Yale L.J. 679, 719 (1989) (emphasis added).[18] EPA, itself, concedes that "Congress *has* made alterations under certain circumstances…" precluding the ability to nonacquiesce to CWA § 509(b)(1)(E) rulings. EPA Response, at 39-40. In those situations, EPA even acknowledges that

---

[17] None of the opinions/dissents cited by EPA in support of its argument – *Indep. Petroleum Ass'n of Am. v. Babbitt,* 92 F.3d 1248 (D.C. Cir. 1996), *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992), *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975, F.2d 871 (D.C. Cir. 1992) (en banc), *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 446 (7th Cir. 1994), *United States v. Mendoza*, 464 U.S. 154, 160 (1984) – upheld an instance of agency nonacquiescence, let alone an instance of EPA nonacquiescence under the CWA.

[18] EPA also ignored *Nat'l Indep. Meat Packers Ass'n v. EPA*, 566 F.2d 41 (8th Cir. 1977), where a circuit court refused to re-litigate a § 509(b)(1)(E) decision and EPA's own brief in *Alt v. EPA,* 979 F. Supp. 2d 701 (N.D.W.Va. 2013) whereby the Agency argued that § 509(b)(1)(E) decisions are binding nationwide.

"the relief granted by the reviewing court as to the particular agency action before it *is binding nationwide*." *Id.*, at 40 (emphasis added).

ii. EPA's "sole" petitioner argument does not bear scrutiny

Despite acknowledging that § 509(b)(1)(E) bars nonacquiescence, EPA creates exceptions out of whole cloth: (1) where only one entity challenged EPA's action and consolidation was not required, and/or (2) where illegal rulemaking was found, but EPA disagrees with the circuit court's ruling. *Id.*, at 40-41. Once again, EPA's argument is not supported by a shred of statutory language, legislative history, or relevant jurisprudence.

First, it is absurd to think that Congress would preclude EPA from nonacquiescing to adverse rulings involving formal rulemaking, but allow EPA to nonacquiesce when the Agency is caught undertaking illegal rulemaking. Second, EPA apparently believes that the binding nature of § 509(b)(1)(E) comes from the 28 U.S.C. § 2112(a) consolidation provision. To the contrary, the binding nature of § 509(b)(1)(E) stems from the fact that, no matter how many people challenge an EPA promulgation or approval within the 120-day window, *there cannot be more than one appellate decision*. Stated differently, regardless of whether there are one, two, or a dozen petitioners in a § 509(b)(1)(E) appeal, a single circuit court renders

the review of the specific EPA promulgation or approval. *A fortiori,* the ensuing decision must be binding on the entire country as well as EPA.[19]

iii. EPA confirmed that its regulations apply uniformly nationwide

Finally, EPA conceded that the rules at issue "apply to all NPDES permits." *See* EPA Response, at 4. This short admission confirmed CRR's argument that baseline effluent limitations (40 C.F.R. Part 133) and the permitting regulations (40 C.F.R. § 122.41(m) and 40 C.F.R. § 122.44(d)) are to be applied uniformly nationwide, without consideration of geographic differences. CRR Brief, at 50-52. Thus, if there was any doubt as to Congress' intent to bar nonacquiescence of § 509(b)(1)(E) rulings, it is resolved by the fact that EPA admits that the NPDES rules at issue apply uniformly.

Accordingly, EPA's decision that it is not bound by the *ILOC* ruling and, therefore, may maintain different NPDES rules in different geographic regions is *ultra vires* and should be vacated on such grounds immediately. *See NRDC v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (where the EPA's procedurally unlawful rulemaking was "obviously preclude[d]" by the relevant enabling act, it would also be proper to consider action a party's substantive claims).

---

[19] CRR outlined the hypothetical regarding a sole petitioner (a company) that has dischargers located all over the country. CRR Brief, at 52-54. Under EPA's theory, such a company would only receive the benefit of the ruling in the circuit that decided the matter. EPA did not respond to this hypothetical, which would also apply to associations with dischargers across the country, such as CRR.

D. *ILOC* Was Not Wrongly Decided

Should the Court find that it and EPA are not bound by the *ILOC* ruling, EPA's renewed attempt to promulgate and/or approve the challenged legislative rule amendments should, again be vacated… for precisely the same reasoning used by the Eighth Circuit. It is indisputable that EPA never subjected the vacated legislative rule amendments to APA notice and comment rulemaking (either before or after *ILOC*). Therefore, EPA's regulatory prohibitions of blending and bacteria mixing zones are just as improper now as they were in *ILOC*. *See* CRR Brief, at 45 (*Mobil Oil Corp. v. EPA,* 35 F.3d 579, 584-85 (D.C. Cir. 1994); *Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983) – holding that agencies wishing to "re-promulgate" a rule after having it vacated by a court of law, "must comply with the applicable provisions of the APA.").

i. The relevant statutory and regulatory history remain uncontested

While EPA argues that *ILOC* was wrongly decided, the Agency does so without assailing any of the conclusions or analysis of the Eighth Circuit on the extensive regulatory and statutory history of the underlying rules. EPA did not even dispute that its letters to Senator Grassley conveyed radical revisions to the

Agency's published NPDES rules, which had never prohibited blending or bacteria mixing zones.[20]

CRR's Brief (at 17-19) documented that EPA went from allowing states to authorize bacteria mixing zones where there is no significant public health threat (pursuant to state discretion) to determining that bacteria mixing zones "should not be permitted." *See also ILOC*, 711 F.3d at 858-859. Similarly, prior to EPA's letters, the *ILOC* record confirmed that, under both the secondary treatment and bypass rules, a permittee was free to design and operate a treatment plant to incorporate several modes of operation (*e.g.,* wet weather blending), depending upon the conditions encountered so long as the plant met its final effluent limits. *Id.*, at 856; CRR Brief, at 14-17. EPA's letters to Senator Grassley, categorically classified such "design operations" as illegal bypasses subject to (1) the no feasible alternatives analysis of 40 C.F.R. § 122.41(m), and (2) internal wastestream limits.

Considering the detailed regulatory history, the *ILOC* court determined that EPA's new positions were radical departures from the existing published regulatory scheme that "create[d] new legal norm[s]" and were new legislative

[20] Throughout its Response, EPA characterizes the *ILOC* ruling as one that simply vacated *letters*. *See, e.g.,* EPA Response, at 1. To the contrary, the Eighth Circuit vacated the *unlawful legislative rule* amendments that were conveyed to the public *in EPA's letters. See ILOC*, 711 F.3d at 876 ("The effect of this letter is a new legislative rule"); *id.* ("Because the September 2011 letter had the effect of announcing a legislative rule…"); *id.*, at 873 n.17 ("[W]e have determined that the letters evince binding rules regarding bacteria mixing zones and blending…").

rules that were "irreconcilable with both the secondary treatment rule and the bypass rule." *ILOC*, 711 F.3d at 874. Once again, EPA's "merits" arguments make no attempt to dispute this regulatory history. In fact, EPA's Response boldly proclaims that, in rendering its latest nonacquiescence decision (*i.e.* April 2 and June 18, 2014 letters), it did not "consider[] particular documents from the *Iowa League* record," which includes the regulatory history of the rules themselves. EPA Response, at 50. It would be hard to create a more arbitrary basis for decision-making.

Therefore, if EPA is not bound by the *ILOC* ruling, these unadopted and *ultra vires* regulatory prohibitions should be vacated on the same grounds.

ii. EPA's reliance on this Court's ruling in NRDC is completely mistaken

EPA also incorrectly claims that the Eighth Circuit's decision "conflicts with this Court's decision upholding the bypass regulation" in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) (*"NRDC II"*). EPA Response, at 45. EPA also attempted to foist this argument in the Eighth Circuit and was soundly rejected. *See* Ex. 62, EPA Petition for Rehearing in *ILOC* (Supp. Appx., at 509-512). As noted in CRR's Brief (at 14), in defending the bypass rule in 1987, EPA assured the D.C. Circuit that the bypass rule *does not* regulate treatment process design or acceptable treatment technology:

> [W]hat the Agency originally intended, and still intends, is to ensure 'proper pollution control through adequate design operation and

> maintenance of treatment facilities.' '*Design' operation and maintenance* are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that facilities follow those requirements. *It imposes no specific design and additional burdens on the permittee.*

See Ex. 15, Excerpts from EPA Brief in *NRDC II* (Appx., at 105) (emphasis added). Based on EPA's representations, 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).[21] EPA's Response conveniently omitted disclosing this critical determination. In summary, EPA told this Court in 1987 that the bypass provision could not be used to dictate treatment process selection or limit the "design operation" treatment systems chosen by the permittee. That is, EPA told this Court that the regulation does not prohibit precisely what EPA is prohibiting today.

Likewise, EPA makes fleeting reference to two cases from the Fifth and Tenth Circuits as being inconsistent with *ILOC*. *See* EPA Response, at 47 (*Tex.*

---

[21] EPA's *NRDC II* argument improperly confuses "blending" with situations where a permittee "shut[s] off" treatment processes simply because it knows it can still meet "end-of-pipe limits." EPA Response, at 45-47. As EPA itself explained in 2003, blending is a widely-employed, EPA-funded, CWA-authorized approach that achieves the end-of-pipe limits determined to be protective and does not involve shutting down processes. *See* Ex. 16, EPA Q&A (Appx., at 111-117); *see also* CRR Brief, at 14-17.

Mun. Power Agnecy v. EPA, 836 F.2d 1482 (5th Cir. 1988) and *Pub. Serv. Co. v. EPA*, 949 F.2d 1063, 1065 (10th Cir. 1991)). Those cases upheld 40 C.F.R. § 122.45(h) and authorized EPA to establish internal limits only in certain "exceptional" circumstances (*e.g.*, inability to access or accurately measure final effluent quality for a given pollutant). As noted by the Eighth Circuit, EPA's blending prohibition, however, improperly transforms the secondary treatment *effluent* limits into *internal* waste stream limits for all non-biological treatment processes. *ILOC*, 711 F.3d at 877-878.

Accordingly, the jurisprudence cited by EPA is either fully consistent with the Eighth Circuit ruling or completely inapposite.

iii. EPA's focus on the APA finality test is a strawman

EPA states that the Eighth Circuit did not employ a *Bennett v. Spear* finality analysis. *See* EPA Response, at 9, 19, 44. EPA's argument presents a meaningless distinction. The "binding effect" analysis performed by the Eighth Circuit under its "promulgations" analysis was the functional equivalent of a *Bennett v. Spear* "finality" analysis. *See ILOC*, at 862, n.12 ("In this case, analyzing whether an agency pronouncement is binding evokes considerations of finality."). To this point, in confirming jurisdiction, the Eighth Circuit conducted analyses on ripeness (*id*. at 866), standing (*id*. at 867), promulgation (*id*. at 860-865), whether the rule had binding effect (*id*. at 865), fitness for review (*id*. at 866), direct or immediate

hardship (*id*. at 867), and time of permitting issue (*id*. at 866) – the complete list of *Bennett v. Spear* finality issues. Therefore, while EPA's "finality" vs. "promulgation" distinction might make for an interesting law review article, it has no material effect on this Court's jurisdiction or the validity of *ILOC*.

E. EPA Skewed the Record

EPA's Response illuminates the Agency's inherent bias in developing a record for illegal rulemaking cases. EPA Response, at 48 ("[b]ecause EPA never regarded the letters to reflect any substantive decision-making, it did not contemporaneously maintain a record."). That is, in an illegal rulemaking case, it is a *fait accompli* that no record will be provided by the defending agency. Consequently, EPA's administrative record guidance has absolutely no relevance to this proceeding and the documents submitted by CRR may be evaluated by the Court as they relate to the factual/legal issues germane to this proceeding. *See Fund for Animals v. Williams,* 245 F.Supp.2d 49, 55 (D.D.C. 2003) *abrogated on other grounds* ("The agency may not skew the record in its favor by excluding pertinent but unfavorable information.").

VI. CONCLUSION

CRR respectfully requests that the Court grant this Petition and the relief sought by CRR (including any other relief this Court deems appropriate).

Respectfully submitted,

JOHN C. HALL, ESQ.
D.C. Circuit #44926

GARY B. COHEN, ESQ.
D.C. Circuit #49377

PHILIP D. ROSENMAN, ESQ.
D.C. Circuit #55525

Attorneys for Petitioner
Hall & Associates
1620 I Street, NW, Suite 701
Washington, DC 20006
Telephone: (202) 463-1166

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

1. Petitioner's, CRR, Reply Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,990 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 Rule 32(e)(1) (*i.e.*, Caption, Table of Contents, Table of Authorities, Signature Block).

2. Petitioner's, CRR, Reply 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).

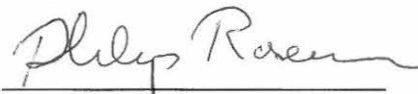
PHILIP D. ROSENMAN, ESQ.
Attorney for Petitioner
Hall & Associates
1620 I Street, NW, Suite 701
Washington, DC 20006
Telephone: (202) 463-1166

Dated: March 21, 2016

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, I caused a copy of **Petitioner's Reply Brief** to be served on all registered counsel in *Center for Regulatory Reasonableness v. United States Environmental Protection Agency*, (D.C. Cir. No. 14-1150) via the D.C. Circuit's CM/ECF system. In addition, I caused two hard copies of the foregoing Reply Brief to be served through First Class US-Mail on Respondent's Counsel of Record at the address below:

ANDREW J. DOYLE, Esq.
Environment and Natural Res. Div.
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4427
andrew.doyle@usdoj.gov



Philip D. Rosenman, Esq.

Attorney for Petitioner
Counsel for the Center for Regulatory Reasonableness