
**In the Supreme Court of
the United States**

CENTER FOR REGULATORY
REASONABLENESS, PETITIONER,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, RESPONDENT.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE WET WEATHER
PARTNERSHIP AS *AMICUS CURIAE*
SUPPORTING PETITIONER**

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QUESTION PRESENTED

The Eighth Circuit vacated EPA rules prohibiting mixing zones and blending for violating the Administrative Procedure Act, and EPA subsequently promulgated new rules—again without notice and comment—that mirrored the old rules’ prohibitions but introduced geographical limitations. Did the D.C. Circuit err when it treated these new rules as non-acquiescence to the Eighth Circuit’s vacation of EPA’s old rules and declined the Center for Regulatory Reasonableness’s petition on EPA’s new rules for lack of jurisdiction under 33 U.S.C. § 1391(b)(1)(E)?

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INTEREST OF *AMICUS CURIAE*¹

The Wet Weather Partnership is a nationwide association of dozens of local governments and their agencies formed in 1989 to make a positive contribution to federal laws and regulations governing the design and operation of combined and sanitary sewer systems, wastewater treatment plants, and municipal separate storm sewer systems. The Wet Weather Partnership has been dedicated to securing funding for Combined Sewer Overflow (“CSO”) control, ensuring that the CSO policy is implemented as intended, and supporting CSO control planning and implementation that is cost-effective. Municipal members of the Wet Weather Partnership operate historical CSO systems across the country. Blending is a particularly important practice for municipalities operating CSO systems, and those members that blend must comply with bacteria load and secondary treatment obligations. Thus, the Wet Weather Partnership is uniquely positioned to comment on the practical consequences of an adverse decision in this action, which in turn is relevant to explaining why the Supreme Court should hear this case and reverse the decision by the Court of Appeals for the District of Columbia.

¹ Rule 37 statement: Petitioner and Respondent separately consented to the filing of this *amicus* brief. No counsel for any party authored any of this brief; *amici* alone funded its preparation and submission.

STATEMENT

The Center for Regulatory Reasonableness (“CRR”) provides the factual and statutory background of this case in its Petition for Certiorari, so only a limited statement is provided here.

This case involves EPA’s second attempt to employ an underground regulation to curtail the use of mixing zones and blending after the Eighth Circuit vacated its first attempt. State water quality standards include policies on whether or not to allow National Pollutant Discharge Elimination System (“NPDES”) permittees to use “mixing zones” when determining compliance with discharge limits. *See Iowa League of Cities (“ILOC”) v. EPA*, 711 F.3d 844, 857 (8th Cir. 2013) (“In effect, a mixing zone allows the permit holder to create a higher concentration of pollutants in navigable waters near the immediate point of discharge, as long as the discharge is sufficiently diffused as it moves through the larger body of water. The requisite water quality criteria, then, need not be met at the end of the pipe.”).

The Clean Water Act (“CWA”) requires publicly owned treatment works (“POTWs”) to apply secondary treatment prior to discharge. 33 U.S.C. § 1311(b)(1)(B). As explained by the Eighth Circuit,

Most secondary treatment processes are biological-based, but the secondary treatment regulations do not “specify the type of treatment process to be used to meet secondary treatment requirements nor do they preclude the use of non-

biological facilities.”² At many POTWs, primary treatment capacity exceeds secondary treatment capacity. Biological-based processes in particular are sensitive to deviations in volume of flow and pollutant level. Correspondingly, during periods of rain and snow, large influxes of stormwater can overwhelm a facility’s standard biological secondary treatment processes, potentially rendering them inoperable. Blending can prevent this, by channeling a portion of “peak wet weather flows” around biological secondary treatment units and through nonbiological units, recombining that flow with its counterpart that traveled through the biological units, and then discharging the combined stream.

ILOC, 711 F.3d at 858 (quoting 68 Fed. Reg. 63,042, 63,046 (Nov. 7, 2003)).

EPA’s difficulties began with its failure to follow through and properly promulgate its new policies prohibiting mixing zones and blending. EPA recognized the need to promulgate its new rules on blending because it first published a revised policy for comment in the Federal Register in 2005. *See ILOC*,

² “Biological-based systems use microorganisms to treat incoming flows. A facility can be designed to use non-biological treatment processes, such as chemical additives or physical filtration equipment, instead of or in conjunction with biological facilities.” *ILOC*, 711 F.3d at 858 n.8.

711 F.3d at 860 (*citing* 70 Fed. Reg. 76,013 (Dec. 22, 2005)). As of 2010, EPA was still requesting comments on its new position. *Id.* at 860 (*citing* 75 Fed. Reg. 30,395, 30,401 (June 1, 2010)).

In 2011, EPA decided that “mixing zones should not be permitted where they may endanger critical areas, such as recreational areas.” *Id.* at 857–58. This prohibition on bacteria mixing zones required bacteria standards to be met at end-of pipe, even for stormwater and CSO discharges.³ Around that time, EPA also decided that its new blending policy was that secondary treatment must use biological treatment, and non-biological secondary treatment for treating peak wet weather flows constituted an illegal bypass. *Id.* at 860. EPA neither announced its final decisions prohibiting mixing zones and blending, nor provided any notice for public comment. Instead, it disclosed its newly adopted rules in two letters (the “2011 Letters”) sent to Sen. Grassley. *Id.* at 874–76.

In *Iowa League of Cities v. EPA*, the League convinced the Eighth Circuit of the unlawfulness of EPA’s new rules described in EPA’s 2011 Letters. *Id.* at 878. The Eighth Circuit vacated EPA’s new rules banning mixing zones and blending for failing to

³ Combined Sewer Overflows (“CSOs”) are the discharge of wastewater and stormwater from a combined sewer system directly into a river, stream, lake, or ocean. A combined sewer system collects both sanitary waste and stormwater into a single sewer pipe system. *See, e.g.*, CWA § 402(q), 33 U.S.C. § 1342(q). The municipal members of the Wet Weather Partnership all operate historical CSO systems.

comply with the notice-and-comment requirements of the Administrative Procedure Act (“APA”). *Id.* at 875–76. The Eighth Circuit also vacated EPA’s new blending rule for “exceeding the EPA’s statutory authority” “insofar as [it] imposes secondary treatment regulations on flows within facilities.” *Id.* at 878. EPA concedes that it did not appeal this decision to this Court. *See* Br. for Resp’t in Opp’n to Pet. for Rev. of Letters dated April 2 and June 18, 2014 from the U.S. EPA (“EPA Br.”) at 13 n.5.

After *ILOC*, EPA made statements indicating its intent to resurrect the vacated rules prohibiting mixing zones and blending outside the Eighth Circuit. *See Ctr. for Regulatory Reasonableness (“CRR”) v. EPA*, 849 F.3d 453, 454 (D.C. Cir. 2017). On April 2, 2014, EPA responded to an inquiry from industry leaders about its intentions to limit *ILOC*’s effect to the Eighth Circuit. *See* Apr. 2014 Response [Pet’r Appx. 2]. EPA described *ILOC* as being limited to “two EPA letters regarding two subjects under the Clean Water Act.” *Id.* at 1. EPA also explained that *ILOC* “did not and could not have vacated the bypass regulation at 40 C.F.R. § 122.41.” *Id.* EPA suggested that *ILOC* “vacated only the letters at issue in the case.” *Id.* at 2.

The D.C. Circuit rejected CRR’s petition to review EPA’s 2014 Letter for lack of jurisdiction based on EPA’s non-acquiescence argument. *See CRR*, 849 F.3d at 454. Specifically, that Court held

We need not determine whether EPA’s non-acquiescence statement constitutes a ‘promulgation’ because EPA’s non-acquiescence statement does not announce an effluent or other limit on

discharge of pollutants. The non-acquiescence statement merely articulates how EPA will interpret the Eighth Circuit’s decision. Therefore, to the extent the Center wants to directly challenge EPA’s non-acquiescence statement, it must follow the usual path of suing in district court under the Administrative Procedure Act, assuming other reviewability criteria are satisfied.

Id. (citing 5 U.S.C. § 702-04; 28 U.S.C. § 1331).

CRR filed its petition for certiorari on August 30, 2017. On November 2, 2017, the Supreme Court called for EPA to provide a response by December 13, 2017, making this *amicus curiae* brief timely if filed on or before December 4, 2017.

SUMMARY OF ARGUMENT

The D.C. Circuit erred in accepting EPA’s non-acquiescence argument because the Eighth Circuit had vacated the rules EPA hoped to continue asserting. In *ILOC*, the Eighth Circuit vacated EPA’s nationwide prohibition on mixing zones and blending, not merely the letters with which EPA had announced them. EPA’s 2014 Letter, therefore, announced new rules—again without following the notice-and-comment provisions of the APA—that mirrored the vacated rules prohibiting mixing zones and blending but added new geographic limitations, specifically everywhere in the United States except within the Eighth Circuit. The “doctrine of intercircuit nonacquiescence” on which EPA relied is based on articles and cases that are inapposite, discussing

agencies non-acquiescing to circuit court law in the agencies' administrative adjudications or wrongful constructions of their respective statutes, not where, as here, a court of appeals vacated an agency's rules as unlawful. The combination of the Eighth Circuit vacating EPA's old rules and EPA announcing new rules with never before disclosed geographic limits proves that EPA did not merely non-acquiesce to *ILOC* but doubled-down with new prohibitive rules.

In its opposition to CRR's appeal, EPA raised many of the same arguments it tried unsuccessfully to convince the Eighth Circuit, and this Court should vacate EPA's new rules for the same reasons provided by that court. Yet EPA's arguments before the D.C. Circuit (as well as the Eighth Circuit) are irreconcilable with arguments EPA raised in defense of the "Waters of the United States" rule, where EPA correctly pointed out that rules involving geographic limitations and secondary treatment must be decided by courts of appeals.

The D.C. Circuit also failed to consider that § 402(q) of the CWA forbids EPA from denying permittees from employing non-biological secondary treatment to prevent bypasses. *See* 33 U.S.C. § 1342(q); EPA's CSO Control Policy, 59 Fed. Reg. 18,688, 18,693–94 (Apr. 19, 1994) ("CSO Control Policy"). Thus, another reason for vacating the D.C. Circuit's ruling is that EPA's unpromulgated rule prohibiting bypasses clearly violates the CWA.

This Court should intervene because EPA's unlawfully promulgated rules prohibiting mixing zones and blending drive up sewer fees and directly impact many in the public who can least afford such increases. Moreover, EPA's unlawful promulgation

denies the public and other stakeholders the right to challenge the legality and necessity of these rules, further illustrating the need for this Court to intervene.

ARGUMENT

I. **After the Eighth Circuit’s ruling, EPA no longer had rules on mixing zones and blending on which to non-acquiesce.**

The combination of the Eighth Circuit vacating EPA’s old rules and EPA announcing new rules with specific geographic limitations establishes that EPA did not non-acquiesce to *ILOC* but promulgated new rules prohibiting mixing zones and blending in EPA’s 2014 Letter, all without complying with the notice-and-comment requirements of the APA.

A. **The Eighth Circuit struck down EPA’s unpromulgated rules prohibiting mixing zones and blending, not merely EPA’s letters announcing them.**

In its briefing to the D.C. Circuit, EPA fundamentally misconstrued the holding of Eighth Circuit, which struck down the ***binding agency policies*** described within the two EPA letters, ***not merely the letters themselves***. In 2014, EPA confirmed industry concerns about EPA’s intentions to marginalize the effect of *ILOC* outside the Eighth Circuit by suggesting that it “vacated ***only the letters at issue in the case***.” Apr. 2014 Response [Pet’r Appx. 2].

EPA's 2014 Letter misconstrued the Eighth Circuit's holding, which vacated EPA's policies relating to mixing zones and blending, not merely the letters alone. The Eighth Circuit stated the letters as presenting or reflecting new, binding *policies* on mixing zones and blending. *See ILOC*, 711 F.3d at 863, 865. EPA acknowledged that the Eighth Circuit found these new policies "[e]xpand[ed] the footprint of [existing] regulation[s] by imposing new requirements[.]" EPA Br. at 10 (*quoting ILOC*, 711 F.3d at 873). It then "vacate[d] the EPA's new rule banning bacteria mixing zones in all waters designated for primary contact recreation as promulgated 'without observance of procedure required by law.'" *ILOC*, 711 F.3d at 875 (*quoting* 5 U.S.C. § 706(2)(D)). Moreover, EPA's letter "had the effect of announcing a legislative rule with respect to blending peak wet weather flows," *see ILOC*, 711 F.3d at 876, that was, as EPA acknowledged, "irreconcilable with both the secondary treatment rule and the bypass rule," EPA Br. at 11 (*quoting ILOC*, 711 F.3d at 875). The Eighth Circuit vacated "this new rule" banning such blending, not merely the letter effecting its announcement. *Se ILOC*, 711 F.3d at 876.

In vacating these two EPA policies, the manner of announcement—whether in a letter, speech, or e-mail—was irrelevant. EPA failed to satisfy the notice and comment provisions of the APA regarding its new rules banning mixing zones and blending. Thus, once the Eighth Circuit vacated EPA's new policies, EPA no longer had nationwide rules forbidding (a) biological mixing zones in all waters designated for primary contact recreation or (b) blending peak wet weather flows from biological and non-biological secondary treatment units prior to discharging the

combined stream at a facility's outfall. The D.C. Circuit thus erred when it failed to recognize the difference between vacating letters and vacating rules disclosed in letters.

When EPA's 2014 Letter announced the rebranding of its original, vacated rules prohibiting mixing zones and blending, the introduction of geographic limits to the rules' scope constituted promulgation of new rules, again without the APA's requisite notice and comment period. When a court vacates an agency's rule, it remains vacated until the agency promulgates a new rule.⁴ *See Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“[B]y vacating or rescinding the [proposed rescissions], the judgment of this court had the effect of reinstating the rules previously in force . . . , [which] cannot again be revoked without new rulemaking in accordance with” § 4 of the APA.). In a briefing in another appeal, EPA conceded this

⁴ Another option would be to appeal the original ruling to have the vacation reversed, but EPA did not attempt to do so. *See* EPA Br. at 13 n.5. This fact alone undermines EPA's argument, since there is a distinction between seeking Supreme Court review and being denied, and avoiding an appeal for fear that the Supreme Court could make the loss universal. *See Johnson v. U.S. R.R. Ret. Board*, 969 F.2d 1082, 1092 (D.C. Cir. 1992) (“When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court. The [agency] has done neither. It has not asked Congress to clarify its intentions More remarkably, it has failed to petition the Supreme Court for certiorari, even in the decisions it claims to believe were wrongly decided.”).

fact. See Proof Resp. Br. for the Resp't, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, Dkt. No. 16-1344, Doc. No. 1705333, at 21 (D.C. Cir. Nov. 20, 2017) (“[I]f this Court reviews challenges to a ‘nationally applicable regulation’ . . . and invalidates any such regulation, EPA may not regard the vacated regulation to be good law anywhere.”). From March 25, 2013, the day the Eighth Circuit vacated EPA’s illegally promulgated rules, to April 2, 2014, the day EPA resurrected the vacated rules, EPA lacked policies prohibiting mixing zones and blending outside the Eighth Circuit, including states like Ohio, Missouri, and Washington, all of which contain major cities that are members of the Wet Water Partnership. Instead of promulgating these new, geographically-limited policies for notice and comment, EPA simply announced, via the 2014 Letter, its intention to ban mixing zones and blending in some states but not others. The D.C. Circuit should have recognized EPA’s 2014 Letter for what it was: a new and distinct rule promulgation that failed to satisfy § 4 of the APA.

B. EPA cannot rely on existing regulations to excuse its failure to satisfy the APA by rebranding its original, vacated rules as new, geographically-limited rules.

EPA’s justification for announcing new, geographically-limited rules banning mixing zones and blending relies on an even more erroneous interpretation of the *ILOC* holding. In its 2014 Letter, EPA suggests that the *ILOC* decision can be ignored outside the Eighth Circuit because it “did not and could not have vacated the bypass regulation at 40 C.F.R. § 122.41.” Apr. 2014 Response [Pet’r Appx. 2].

Yet EPA acknowledged in its D.C. Circuit briefing that the Eighth Circuit’s opinion vacated not the bypass regulation, but the new rules illegally promulgated on top of the bypass regulation. Specifically, EPA quoted the Eighth Circuit’s statement that “EPA’s new blending rule is . . . irreconcilable with both the secondary treatment rule and ***the bypass rule***.” EPA Br. at 11 (*quoting ILOC*, 711 F.3d at 875; emphasis added).

EPA’s previous attempt to rely on the bypass rule is further hindered by its reliance on inapposite case law. In the 2014 Letter, EPA argued that the Eighth Circuit’s decision could not escape that circuit because the bypass rule supposedly “was reviewed and upheld by the U.S. Court of Appeals or the D.C. Circuit in *NRDC Inc. v. US EPA*, 822 F.2d 104, 126 (D.C. Cir. 1987). EPA made this point again in its D.C. Circuit briefing by implying that the Eighth Circuit’s holding that “the Act does not authorize EPA to apply secondary treatment ‘effluent limitations to the discharge of flows from one internal treatment unit to another’” contradicts *NRDC* and other opinions from the Fifth and Tenth Circuits. EPA Br. at 12 (*quoting ILOC*, 711 F.3d at 877).

Yet the case law on which EPA relied is inapposite to EPA’s argument. In *ILOC*, the Eighth Circuit vacated EPA’s new rule prohibiting the blending of waste flows treated with biological and nonbiological secondary treatment prior to discharge out of a facility’s outfall. *ILOC*, 711 F.3d at 858–60, 875–78. In *NRDC*, however, the D.C. Circuit concluded that EPA had the authority to require a minimum amount of treatment of bypasses, even if an untreated bypass would not result in exceedance of a facility’s NPDES permit. 822 F.2d at 124 (CWA’s

“goals are hardly fostered by allowing dischargers to shut off their systems at will whenever they are in compliance with the requirements represented by the effluent limitations.”). In fact, the parties to *NRDC* acknowledged that “the bypass regulation does not, in fact, dictate that a specific treatment technology be employed”⁵ 822 F.2d at 123. The other cases that EPA cites in its D.C. Circuit brief are unavailing because they involve interpretation of a regulation inapplicable to POTWs. *See Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482, 1487 (5th Cir. 1988) (interpreting 40 C.F.R. § 122.45(h), which allows effluent limits within internal waste streams if “effluent limitations or standards imposed at the point of discharge are **impractical or infeasible**”) (emphasis added); *Pub. Serv. Co. v. EPA*, 949 F.2d 1063, 1064 (10th Cir. 1991) (same).

⁵ Wholesale adoption of the holding in *NRDC* would result in illogical and ill-advised actions by POTWs. For example, the D.C. Circuit acknowledged that a bypass when faced with “hydraulic flooding resulting from heavy rainfall” would be permitted, even if it exceeds effluent limitations, “if it was ‘unavoidable to prevent . . . severe property damage.’” *NRDC*, 822 F.2d at 125 (*quoting* 40 C.F.R. § 122.41(m)(4)). If this were the law, when it came to dealing with peak wet weather flows, why would facilities pay to incorporate expensive auxiliary, non-biological secondary treatment (like the ACTIFLO technology discussed in *ILOC*) to keep from exceeding effluent limitations, or even build larger biological secondary treatment, if facilities could simply claim permitted bypasses under 40 C.F.R. § 122.41(m)(4) for every big rain event?

C. Non-acquiescence applies to administrative adjudications, and EPA lacks a valid rule to continue enforcing outside the Eighth Circuit.

The D.C. Circuit’s central failure in dismissing CRR’s case was a misapplication of what EPA referred to as the “doctrine of intercourt nonacquiescence,” which is inapplicable to agencies announcing new policies in violation of the APA. According to the article on which EPA principally relies, “an agency engages in intercourt nonacquiescence when it refuses to follow, *in its administrative proceedings*, the case law of a court of appeals other than the one that will review the agency’s decision.” Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L. J. 679, 687 (1989) (“Nonacquiescence”) (emphasis added). The article further warned that “a conclusion that the nonacquiescence standards that apply in adjudication” need not “necessarily apply in rulemaking as well.” *Id.* at 747 n.317. Intercourt non-acquiescence is inapplicable to EPA’s 2014 Letter, since EPA invoked the doctrine to evade an order by the judiciary vacating an illegal rule instead of trying to convince other courts, for example, that its interpretation of a statute or (properly promulgated) regulation is correct.⁶ See EPA Br. at 38

⁶ EPA’s cited article also indicates that EPA generally does not engage in non-acquiescence and revises its regulations after losing at the court of appeals. See *Nonacquiescence* at 717 (“EPA’s general policy is to eschew relitigation of an issue that has been squarely decided against it in any circuit.”), n.201

(“Thus, ‘after one circuit has disagreed with its position, an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering, in the hope that other circuits, the Supreme Court, or Congress will ultimately uphold the agency’s position.’”) (*quoting Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J., dissenting)); *see also id.* at 37 (*quoting AT&T v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992), to describe “an agency’s ‘right to refuse to acquiesce in one (or more) court of appeals’ **interpretation of its statute**.”) (emphasis added); *Nonacquiescence* at 687 n.26 (“There is, of course, a considerable difference between recognizing that the executive should be free to ask the judiciary to change its mind and permitting the executive to refuse to comply with settled precedent.”) (citations omitted).

In this instance, United States’ immunity from the doctrine of nonmutual collateral estoppel defines the limits of what EPA could choose to ignore outside the Eighth Circuit. “Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent

(“EPA amended a regulation to conform to an adverse circuit decision even though this regulation had been upheld in other circuits.”). Moreover, the article recommends that agencies deciding to engage in non-acquiescence should “publi[sh] in the *Federal Register*, or otherwise widely disseminate, a notice of its decision to nonacquiesce including a brief statement of reasons for that decision.” *Id.* at 761. In this case, EPA gave no public notice of its change in position on non-acquiescence.

suit based on a different cause of action involving a party to the prior litigation.” *United States v. Mendoza*, 464 U.S. 154, 158 (1984). Nonmutual collateral estoppel is when one party seeks to use collateral estoppel against another where the asserting party was not a party to the earlier litigation. *See id.* In *Mendoza*, this Court held that nonmutual collateral estoppel does not apply to the United States, leaving it free to argue in one court a position that proved unsuccessful in another court. *Id.* at 162.

The United States may not ignore the Eighth Circuit’s vacation of its rules unlawfully promulgated in the 2011 Letters. In *ILOC*, the Eighth Circuit decided two issues: (1) whether the prohibitions against mixing zones and blending announced in the 2011 Letters were unlawfully promulgated rules, and (2) whether the blending prohibition rule, if promulgated, violated EPA’s statutory authority under the CWA. *ILOC*, 711 F.3d 873–78. If resolving these issues were all that the Eighth Circuit had done, EPA would have been free to argue in other circuits that nonmutual collateral estoppel cannot bind the United States on these issues. However, the Eighth Circuit, in addition to deciding those issues, also vacated EPA’s nationwide rules prohibiting mixing zones and blending as announced in the 2011 Letters. *Id.* at 875–76. Thus, while EPA could allege outside the Eighth Circuit that it may promulgate rules prohibiting mixing zones and blending, the APA required EPA to promulgate new rules to replace those the Eighth Circuit struck down. *See id.* at 873–76. The legal effect of EPA’s 2014 Letter, therefore, was to announce new rules that mirrored the vacated rules regarding mixing zones and blending but

announced new geographic limitations on where the prohibitions would be applied.

II. D.C. Circuit had jurisdiction over CRR’s petition not only for the reasons given by the Eighth Circuit in *ILOC*, but also based on EPA’s arguments in support of the “Waters of the United States” Rule.

EPA’s arguments against the D.C. Circuit’s assertion of jurisdiction are largely repetitive of the arguments rejected by the Eighth Circuit in *ILOC* and should similarly be rejected by this Court. Yet EPA’s assertion of jurisdiction in defense of its “Waters of the United States” Rule are irreconcilable with EPA’s arguments against jurisdictional in this case.

The D.C. Circuit erroneously concluded it lacked subject matter jurisdiction to review EPA’s geographically-constrained rules as announced in the 2014 Letter. Section 509(b)(1)(E) of the CWA vests courts of appeals with exclusive jurisdiction to review EPA’s “actions . . . in approving or promulgating any effluent limitation under section 1311, 1312, 1316, or 1345 of this title . . .” 33 U.S.C. § 1369(b)(1)(E). Because the 2014 Letter adopts the previously-vacated prohibitions on mixing zones and blending announced in the 2011 Letters but with new geographical limitations, the 2014 Letter constitutes promulgation of new regulations prohibiting mixing zones and blending for the same reasons they were in *ILOC*. *See* 711 F.3d at 861–65. Specifically, “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.” *Id.* at 866.

Moreover, EPA’s “rule regarding the use of blending is an ‘other limitation’ because . . . it restricts the discretion of municipal sewer treatment plants in structuring their facilities.” *Id.*

The Eighth Circuit correctly resolved any additional grounds against the D.C. Circuit’s jurisdiction. EPA’s suggestion that the 2014 Letter is not a “final agency action” is irrelevant for jurisdictional purposes. *See id.* at 863 n.12. EPA’s arguments that it has not yet decided whether or not to implement the policy bans or, if it does, whether to apply them on a case-by-case basis, are virtually identical to the purported discretion that remained after EPA issued the 2011 Letters. *See Sackett v. EPA*, 566 U.S. 120, 127 (2012) (“The mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final agency action nonfinal.”); *compare, e.g.,* Br. for Resp’t in Opp’n to Pet. for Rev. of Agency Letters to a Member of Congress, *ILOC v. EPA*, No. 11-3412 (8th Cir. 2012) (“EPA *ILOC* Br.”) at 47 (“The League may prefer to have this Court determine in the abstract whether EPA’s letters to the Senator set forth valid regulatory interpretations rather than ***to wait to see if or how EPA or the State ever applies those interpretations.***”) (emphasis added) *with* EPA Br. at 23 (“EPA did not resolve or address ***whether and to what extent*** Agency officials may, ***on a case-by-case basis***, outside the Eighth Circuit, follow *Iowa League*.”) (emphasis added). Moreover, the Eighth Circuit “struggle[d] to spot the surviving state discretion,” and rejected EPA’s assurances as “Orwellian Newspeak.” *ILOC*, 711 F.3d at 864–65. CRR’s claims are ripe for the reasons that *ILOC*’s claims were ripe. *Id.* at 867–68. When EPA’s arguments in this case are compared to those it raised in *ILOC*, it is clear that,

beyond defining new geographical limits, nothing has changed.

Furthermore, the arguments made by EPA in its appeal brief to this Court as to why circuit courts should have jurisdiction over the WOTUS rule also illustrate why the D.C. Circuit's denial of CRR's petition should be reversed. In its appellate brief, EPA argued for broad jurisdiction before circuit courts under § 1369(b)(1)(E), especially when EPA's actions affect the geographic scope of a rule, alters the regulatory authority of the agency, or "imposes additional restrictions on the activities of some property owners." Br. for the Fed. Resp'ts, *Nat'l Assoc. of Mfrs. v. Dep't of Def.*, No. 16-299 (2017) ("EPA WOTUS Br.") at 19 (citations omitted). For example, EPA wrote:

A rule that delineates the geographic scope of limitations promulgated under [33 U.S.C. § 1311] is thus every bit as integral to the CWA's practical effect on regulated parties as are the quantitative or qualitative requirements. In order for a regulated party to know what it is prohibited from doing, the party must know both those quantitative and qualitative requirements and the requirements' geographic scope.

Id.; see also *id.* at 20 ("To determine the extent of the 'limitations' that a particular law imposes, one must identify the geographic coverage of the law as well as the range of conduct it forbids."). EPA expressly conceded that changes in rules governing secondary treatment should be resolved in courts of appeal:

Section 1311, moreover, is clearly designed so that critical aspects of its limitations are imposed through EPA regulations that define statutory terms. Section 1311 requires the achievement of . . . effluent limitations for certain publicly owned treatment works “based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title,” 33 U.S.C. 1311(b)(1)(B). [This provision reflects] Congress’s intent that regulations defining the [term] . . . “secondary treatment” would be among the mechanisms through which the Administrator imposed limitations under Section 1311. 33 U.S.C. 1311(b)(1)(B).

Id. at 22. Continuing, EPA argued that “even if some interpretive canon counseled in favor of reading Section 1369(b)(1)(E) as reaching only effluent limitations and limitations directly related to effluent limitations, a rule setting the geographic scope of effluent limitations falls squarely within the latter category.” *Id.* at 27. And EPA acknowledged that this Court has consistently shared this view:

In each of its decisions interpreting Section 1369(b)(1), this Court has construed the provision to afford this form of expedited review to a coherent class of EPA actions, so that intertwined agency actions are routed through the same channels. The petitioners in *E.I. du Pont* argued that Section 1369(b)(1) should be interpreted to permit direct

court of appeals review of grants and denials of individual variance permits under Section 1311, but not of “effluent limitations for classes and categories of existing point sources.” In rejecting that approach, the Court explained that the petitioners’ reading of the jurisdictional provision “would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions.” . . . The Court stated that “[t]he magnitude and highly technical character of the administrative record involved with these regulations makes it almost inconceivable that Congress would have required duplicate review in the first instance by different courts.”

Id. at 35–36 (quoting *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977)).

EPA argued before the D.C. Circuit that any issues raised in its 2014 Letter should have been resolved by a district court and not the D.C. Circuit. *See* EPA Br. at 52. Yet EPA’s argument in favor of the Sixth Circuit’s jurisdiction over the WOTUS rule shows why a court of appeals should have jurisdiction over the mixing zones and blending announced in EPA’s 2014 Letter. Using EPA’s own words,

[EPA’s] reading of Section 1369(b)(1)(E) and (F) would create the type of

irrational bifurcation that the Court in *E.I. du Pont* and *Crown Simpson* sought to avoid. [EPA] would construe Section 1369(b)(1) as vesting the courts of appeals with jurisdiction to review EPA regulations setting numerical or qualitative effluent limitations, while authorizing district courts throughout the country to review regulations governing the same effluent limits' geographic scope. That bifurcation would hinder regulated parties' efforts to obtain prompt clarification of their responsibilities under the CWA. See [*Crown Simpson Pulp v. Costle*, 445 U.S. 193, 196 (1980)] (noting that Section 1369(b)(1) is designed to facilitate speedy resolution of the meaning of covered provisions)

EPA WOTUS Br. at 38.

EPA's arguments before the D.C. Circuit conflict not only existing law and the Eighth Circuit but also the arguments presented in support of the WOTUS Rule. EPA's conflicting arguments should be ignored, and EPA's new, geographically-limited rules prohibiting mixing zones and blending should be remanded for review by the D.C. Circuit.

III. Section 402(q) of the CWA prohibits EPA from denying a permittee with a combined sewer system from implementing non-biological secondary treatment as part of its blending program.

This Court should reverse the D.C. Circuit’s ruling additionally because EPA’s prohibitions on blending, as described in its 2014 Letter, are contrary to a federal statute. Section 402(q) of the CWA requires that “[e]ach permit . . . for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow [“CSO”] Control Policy signed by the Administrator on April 11, 1994” 33 U.S.C. § 1342(q)(1). EPA’s CSO Control Policy “would allow a permit to authorize a CSO-related bypass of the secondary treatment portion of the POTW treatment plant for combined sewer flows in certain identified circumstances.” CSO Control Policy at 18,693. The CSO Control Policy states that when alternatives to bypasses are considered, “*non-biological* secondary treatment” must be included in the analysis. CSO Control Policy at 18,694 (emphasis added). Thus, § 402(q) of the CWA prohibits EPA from promulgating a rule or adopting a policy that declares CSO-related blending with non-biological secondary treatment as an illegal bypass. Although this argument has not previously presented to the Eighth or D.C. Circuits, it is of sufficient importance that the Wet Weather Partnership requests that the D.C. Circuit be afforded the opportunity to reconsider its ruling.

IV. EPA's unlawful prohibitions are contributing tens of billions of dollars to the utility-paying public's detriment, while EPA denies that public their legal right to comment on these rules.

This Court should intervene because EPA is using these unlawful prohibitions on mixing zones and blending to coerce states and NPDES permittees to abandon water pollution management plans, thereby foisting tens of billions of dollars onto the utility-paying public. If EPA is allowed to continue enforcing these unlawfully promulgated rules, it will (1) prevent communities from being able to evaluate whether and how to construct certain wastewater and stormwater designs without fear of objection or penalty, (2) prevent communities from being able to timely comply with current state or federal deadlines under the CWA, and (3) force members to immediately choose between constructing cost-effective treatment designs that may be prohibited or construct significantly more costly processes.

EPA's unpromulgated policies exacerbate the burdens placed on the public by municipalities' sewer rates. It is particularly unfair that EPA would force such price increases onto the public, especially those who struggle to afford existing sewer charges, when EPA refuses to allow the public to comment on the very policies driving up those rates. The D.C. Circuit failed to recognize the true import of EPA's unlawful actions, and only this Court can correct their error.

CONCLUSION

EPA's prohibitions on blending peak stormwater flow exert a tremendous burden on the

public, yet EPA denies the public and other stakeholders the opportunity to comment on these unnecessary policies. It is patently unfair that EPA continues to operate under policies it refuses to expose to public scrutiny. Since EPA first proposed its blending policy in 2005, EPA has had every opportunity to promulgate a final rule, yet its failure to do so can only mean it knows the rule will never hold up to judicial scrutiny. The Eighth Circuit recognized EPA's practice for the unlawful prohibitions that they were and promptly vacated EPA's rules prohibiting mixing zones and blending. The D.C. Circuit failed to recognize that EPA's 2014 Letter announced new, geographically-limited rules, not merely a "non-acquiescence statement." For this reason, CRR's appeal should be remanded to the D.C. Circuit so that EPA's prohibitions on mixing zones and blending, as promulgated in the 2014 Letter, can be vacated.

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Respectfully submitted,

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