No. 17-334

In the Supreme Court of the United States

CENTER FOR REGULATORY REASONABLENESS,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether letters in which an Environmental Protection Agency (EPA) official discussed the agency's interpretation of a judicial decision constituted actions of EPA "in approving or promulgating any effluent limitation or other limitation," 33 U.S.C. 1369(b)(1)(E), under specified sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 849 F.3d 453.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5-6) was entered on February 28, 2017. A petition for rehearing was denied on June 6, 2017 (Pet. App. 9-11). The petition for a writ of certiorari was filed on August 30, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The Act generally bars "the discharge of any pollutant by any person,"

33 U.S.C. 1311(a), unless the person "obtain[s] a permit and compl[ies] with its terms." *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted). The Act defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12), and it defines the term "navigable waters" to mean "the waters of the United States," 33 U.S.C. 1362(7).

The CWA established the National Pollutant Discharge Elimination System (NPDES) for the permitting of discharges. Under that system, States may administer their own NPDES program and issue permits for discharges of pollutants within their borders. See 33 U.S.C. 1342(b). Forty-six States currently do so. See U.S. Environmental Protection Agency, *National Pollutant Discharge Elimination System (NPDES): About NPDES*, https://www.epa.gov/npdes/about-npdes. The U.S. Environmental Protection Agency (EPA) issues NPDES permits for discharges within States that do not operate NPDES permitting programs. 33 U.S.C. 1342(a)(1). NPDES permits generally establish permissible rates, concentrations, quantities of specified constituents, and other limitations and conditions for discharges. See 33 U.S.C. 1342(a)(1) and (2); 40 C.F.R. Pts. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).

EPA promulgates rules for permits issued under the NPDES program. Pet. App. 2; see, *e.g.*, 40 C.F.R. 122.41. Under those rules, NPDES permits for publicly owned wastewater-treatment works must include technology-based effluent limitations based upon "secondary treatment" to achieve a certain degree of effluent quality.

33 U.S.C. 1311(b)(1)(B), 1314(d); see 40 C.F.R. Pt. 133. In addition, treatment facilities generally must not "bypass," or intentionally divert waste streams from, any portion of the treatment system. 40 C.F.R. 122.41(m). The permitting agency may "approve an anticipated bypass," however, if it determines that certain criteria, including a showing of "no feasible alternatives," are met. 40 C.F.R. 122.41(m)(4)(i)-(ii); see *NRDC* v. *EPA*, 822 F.2d 104, 124-126 (D.C. Cir. 1987).

Under the CWA, federal courts of appeals have exclusive jurisdiction to review challenges to certain enumerated types of EPA decisions implementing the CWA. Those include, as relevant here, EPA's "promulgati[on] [of] any effluent limitation or other limitation under section 1311," or under one of three other specified CWA provisions. 33 U.S.C. 1369(b)(1)(E).[1] A petition for review under Section 1369 generally must be filed within 120 days after the challenged agency action. 33 U.S.C. 1369(b)(1).

Final EPA actions that are reviewable under general principles of administrative law, but for which direct review in the courts of appeals is not authorized by Section 1369(b)(1), may be challenged in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704; 28 U.S.C. 1331. An APA action may be brought at any time within six years after the date of the challenged action. 28 U.S.C. 2401(a).

2. a. In 2011, EPA sent two letters to Senator Charles Grassley addressing the permissibility of "bacteria mixing zones" and "blending" of discharges at

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[1] Six other types of EPA action under the CWA are also reviewable directly in the courts of appeals, but those types of action are not at issue in this case. See 33 U.S.C. 1369(b)(1)(A)-(D), (F), and (G).

publicly owned treatment plants. See *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 857-858 (8th Cir. 2013). "A mixing zone is [an] area within a navigable water * * * in which the discharge from a point source is initially diluted." *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997) (per curiam). "Where a permitting authority has authorized a mixing zone, the permittee's compliance with applicable water quality standards is assessed at the edge of the zone," rather than elsewhere in the zone. *Ibid.*; see *Iowa League of Cities*, 711 F.3d at 857. "Blending" involves diverting a portion of peak wet-weather flows around secondary treatment units. 70 Fed. Reg. 76,014 (Dec. 22, 2005).

Senator Grassley asked EPA whether a State issuing NPDES permits for combined sewer overflows or stormwater discharges could "approve a bacteria mixing zone" in "waters designated for body contact recreation." Gov't C.A. Supp. App. 5. Senator Grassley also asked whether waste-treatment facilities could divert some waste streams from their standard secondary-treatment processes, utilize a treatment method known as ACTIFLO on those streams, and then recombine waste treated with ACTIFLO with other treatment streams "without triggering application of federal bypass or secondary treatment rule requirements." *Ibid.*; see *id.* at 7; see also *Iowa League of Cities*, 711 F.3d at 858-859.

In letter responses, EPA stated that bacteria mixing zones in waters designated for "primary contact recreation * * * should not be permitted because they could result in significant human health risks." Pet. C.A. App. 10; see *Iowa League of Cities*, 711 F.3d at 858. EPA stated that the use of ACTIFLO would "continue to [be] explore[d]," but that, based on data EPA had reviewed,

ACTIFLO "systems that do not include a biological component[] do not provide treatment necessary to meet the minimum requirements provided in the * * * regulations." Pet. C.A. App. 14; see *Iowa League of Cities*, 711 F.3d at 860.

b. An association of publicly owned treatment works in Iowa filed suit in the Eighth Circuit, seeking to challenge EPA's 2011 policy letters on the ground that they set forth new rules that were inconsistent with the CWA and the APA. See *Iowa League of Cities*, 711 F.3d at 860. The court of appeals concluded that it had jurisdiction because the letters constituted EPA action "promulgating any effluent limitation or other limitation" under the relevant provisions of the CWA, 33 U.S.C. 1369(b)(1)(E). See *Iowa League of Cities*, 711 F.3d at 863. Based on the EPA letters' subject matter and use of mandatory statements, the court concluded that the letters had a "binding effect on regulated entities." *Ibid.*; see *id.* at 861-865.

On the merits, the Eighth Circuit held that EPA's letters announced "legislative rules" because they "[e]xpand[ed] the footprint of [existing] regulation[s] by imposing new requirements." *Iowa League of Cities*, 711 F.3d at 873. As a result, the court held that the rules could lawfully be promulgated only through notice-and-comment rulemaking procedures. *Id.* at 876. The court of appeals also stated that EPA's "blending rule" exceeded its statutory authority "insofar as [it] imposes secondary treatment regulations on flows within facilities." *Id.* at 877-878. The court did not conclude that the "new mixing zone rule" that the court found had been promulgated in EPA's letters would exceed EPA's statutory authority. *Id.* at 877.

3. a. In November 2013, municipal and industrial associations wrote a letter to EPA setting forth the groups' interpretation of the Eighth Circuit's decision in *Iowa League of Cities*. The groups "request[ed] confirmation that EPA will apply the *Iowa League of Cities* decision uniformly across the country and so advise its Regions and delegated States." Pet. C.A. App. 5.

In April 2014, an EPA official sent a letter response, stating that *Iowa League of Cities* "applies as binding precedent in the Eighth Circuit," but that the decision did not vacate a bypass regulation previously upheld by the D.C. Circuit that is set forth at 40 C.F.R. 122.41. Pet. C.A. App. 1-2. The official also stated that EPA was "planning to hold a forum" in summer 2014 to "ask questions about the public health implications of various bypass and blending scenarios during wet weather events." *Id.* at 2.

In May 2014, the associations wrote to EPA again, stating that "[i]t is our position that EPA has made a policy choice to limit application of the 8th Circuit's decision," and asking EPA to justify that approach. Pet. C.A. App. 6. The letter also discussed member groups' participation in the upcoming public health forum. *Id.* at 7. In June 2014, an EPA official sent a letter response. That letter stated that the official "acknowledge[d] that [the groups] disagree with" her prior letter "that articulated that the [Eighth Circuit's] decision applies as binding precedent in the Eighth Circuit," before providing additional information about the upcoming public health forum. *Id*. at 3.

b. In August 2014, petitioner filed suit in the D.C. Circuit, seeking judicial review of EPA's 2014 letters responding to queries from municipal and industry

groups. See Pet. C.A. Pet. for Review. Petitioner asserted that the court could exercise jurisdiction under Section 1369(b)(1)(E) because the letters had "modified NPDES rules and program requirements without rulemaking." *Id.* at 2.

c. The court of appeals dismissed petitioner's challenge for lack of jurisdiction. Pet. App. 1-4. The court described the challenged letters as containing "statements indicating that [EPA] would not acquiesce in or follow the Eighth Circuit's decision" in *Iowa League of Cities* "outside of that circuit." *Id.* at 2. The court concluded that the letters did not fall within the class of EPA actions that are reviewable in the courts of appeals under Section 1369(b)(1)(E). *Id.* at 3.

The court of appeals stated that it "need not determine whether EPA's non-acquiescence statement[s] constitute[] a 'promulgation'" within the meaning of Section 1369(b)(1)(E), because the statements did "not announce an effluent or other limit on discharge of pollutants," as Section 1369(b)(1)(E) also requires. Pet. App. 3. The court explained that, rather than announcing a limitation, the agency had "merely articulate[d] how EPA will interpret the Eighth Circuit's decision." *Ibid.* As a result, the court stated, "to the extent [petitioner] wants to directly challenge EPA's non-acquiescence statement[s], it must follow the usual path of suing in district court under the Administrative Procedure Act, assuming other reviewability criteria are satisfied." *Ibid.* The court added that, "[t]o the extent [petitioner] believes EPA is violating the Eighth Circuit's mandate," it could also "try to seek mandamus or other appropriate relief in the Eighth Circuit." *Id.* at 4.[2]

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[2] Because the court of appeals found that it lacked subject-matter jurisdiction, it did not address EPA's arguments concerning lack of

ARGUMENT

Petitioner contends (Pet. 16-32) that the court of appeals had jurisdiction under 33 U.S.C. 1369(b)(1)(E) to review two letters, written by an EPA official to municipal and industrial organizations, that discussed the agency's interpretation of a prior Eighth Circuit decision. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. There is no need to hold the petition for a writ of certiorari pending this Court's decision in *National Ass'n of Manufacturers* v. *Department of Defense*, No. 16-299 (argued Oct. 11, 2017), because agency letters that discuss the scope of a judicial decision are far afield from the agency rulemaking that is at issue in that case. Further review is not warranted.

1. Section 1369(b)(1)(E) authorizes the courts of appeals to review actions of EPA "in approving or promulgating any effluent limitation or other limitation" under specified provisions of the CWA. 33 U.S.C. 1369(b)(1)(E). The court of appeals correctly held that the EPA letters that petitioner seeks to challenge are not subject to direct appellate review under that provision. Pet. App. 3. Those letters do not impose any limitations on private parties, permit issuers, or others, but simply describe how EPA understands the Eighth Circuit's decision in *Iowa League of Cities* v. *EPA*, 711 F.3d 844 (2013). Pet. App. 3. Since an EPA official's statements interpreting a court's decision do not alter the meaning of the court's decision or bind private parties, state permit issuers, or others, such statements do not

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finality, standing, and ripeness. See Gov't C.A. Br. 21-37 (making these arguments).

alter the scope of the CWA regulatory regime—by setting limitations or otherwise.[3]

Petitioner asserts that the challenged letters amount to a "re-promulgat[ion]" of the limitations that the Eighth Circuit in *Iowa League of Cities* found EPA to have imposed. Pet. 16; see Pet. 18 (describing EPA's letters as "the functional equivalent of re-promulgating the vacated regulations"). Those characterizations reflect a misunderstanding of the EPA letters. Those letters did not purport to alter any constraints to which private parties or permit issuers are subject in the wake of *Iowa League of Cities*. And because EPA's views about the precedential effect of *Iowa League of Cities* do not alter the scope of that judicial decision, the letters likewise do not have the effect of altering the mandate of *Iowa League of Cities*.

Petitioner's reliance (Pet. 17-18) on *National Environmental Development Association's Clean Air Project* v. *EPA*, 752 F.3d 999 (D.C. Cir. 2014) (*NEDACAP*), which involved the jurisdictional provisions of the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, is also misplaced. The court in *NEDACAP* held that the CAA's jurisdictional provisions allowed appellate review of an EPA directive concerning the interpretation and implementation of air quality permitting programs in light of a judicial decision. 752 F.3d at 1003. But the court in that case had no occasion to decide whether the challenged EPA directive imposed a "limitation"—as is required

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[3] Although the court of appeals read EPA's letters as "indicating" that EPA interpreted *Iowa League of Cities* as binding only in the Eighth Circuit, Pet. App. 2, EPA stated only that it *did* regard *Iowa League of Cities* as binding in the Eighth Circuit, without addressing the more complicated question whether *Iowa League of Cities* controls in other circuits. See Pet. C.A. App. 1-3.

for review under Section 1369(b)(1)(E)—because the CAA's expansive jurisdictional provisions authorize review of certain specified acts "or any other final action of the Administrator under" the CAA. 42 U.S.C. 7607(b)(1).

Petitioner is also wrong in asserting (Pet. 20) that the D.C. Circuit erroneously "ignor[ed] the need for a promulgation analysis" and instead "simply exempt[ed] all of EPA's regulatory actions classified as 'non-acquiescence statement[s]' from Section 1369(b)(1)(E)." The court below acknowledged that Section 1369(b)(1)(E) authorizes review of "EPA-promulgated effluent or other limits on discharge of pollutants." Pet. App. 3; see 33 U.S.C. 1369(b)(1)(E) (authorizing direct court of appeals review of agency action "in approving or promulgating any effluent limitation or other limitation" under specified provisions of the CWA). As the court of appeals explained, however, it was unnecessary for the court to analyze whether EPA's issuance of letter responses qualified as a "promulgation" because the letters did "not announce an effluent or other limit on discharge of pollutants." Pet. App. 3.

Finally, petitioner contends (Pet. 23-25) that its claims are reviewable in the D.C. Circuit pursuant to Section 1369(b)(1)(E) because EPA's actions were "*ultra vires*" and petitioner's claim "stemmed from a judicial decision," Pet. 23. That argument is also unsound. Section 1369(b)(1) confers jurisdiction to review specified types of EPA action, such as actions "in approving or promulgating any effluent limitation or other limitation" under particular CWA provisions. 33 U.S.C. 1369(b)(1)(E). The Act does not authorize direct court of appeals re-

view of un-enumerated types of EPA actions simply because a litigant asserts that a particular action is *ultra vires* or foreclosed by a prior judicial decision.

FCC v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984) (cited at Pet. 24), is not to the contrary. The Court in that case found that a suit challenging certain actions by the Federal Communications Commission (FCC) as *ultra vires* should have been brought in the court of appeals pursuant to 28 U.S.C. 2342(1) and 47 U.S.C. 402(a), rather than in the district court. See 466 U.S. at 468-469. But the Court reached that result by applying the broad standards for direct appellate review set forth in those judicial-review provisions, under which "[e]xclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Courts of Appeals." *Id.* at 468. The Court in *ITT World Communications* did not suggest that a court of appeals may review EPA action outside the categories enumerated in Section 1369(b)(1) whenever a challenged action is alleged to be *ultra vires*.

2. The D.C. Circuit's dismissal of petitioner's challenge does not conflict with any decision of this Court or another court of appeals. No other court appears to have addressed whether Section 1369(b)(1)(E) authorizes direct court of appeals review of statements that simply set forth the agency's views on the scope of a prior judicial decision.

Petitioner suggests (Pet. 27-29) that the decision below conflicts with *Iowa League of Cities* because the Eighth Circuit in that case "took jurisdiction under Section 1369(b)(1)(E) to review the same exact regulatory prohibitions that are being contested in [the instant p]etition," Pet. 27. That argument is misconceived. *Iowa League of Cities* involved a challenge to 2011 EPA

policy letters that the court of appeals concluded set forth new, binding policies regarding waste-treatment facilities' use of mixing zones and blending techniques. 711 F.3d at 863-878. Petitioner is not challenging those letters. Any effort to challenge the 2011 letters in the D.C. Circuit would have been untimely, since if petitioner had wished to seek direct court of appeals review of those letters, it was required to do so "within 120 days (as another petitioner did in the Eighth Circuit)." Pet. App. 3; see 33 U.S.C. 1369(b)(1). Instead, petitioner seeks judicial review of subsequent letters that address the precedential effect of the *Iowa League of Cities* decision. And the Eighth Circuit in *Iowa League of Cities* had no occasion to decide whether Section 1369(b)(1)(E) authorizes direct court of appeals review of agency statements that simply "articulate[] how EPA will interpret" a prior judicial decision, Pet. App. 3.

3. This case would be a poor vehicle for addressing whether EPA's interpretation of a judicial decision can be reviewable under Section 1369(b)(1)(E), because the petition for review of the EPA letters at issue here fails on other grounds as well. First, EPA did not "promulgat[e]" a limitation, 33 U.S.C. 1369(b)(1)(E), through correspondence with municipal and industrial associations about EPA's interpretation of *Iowa League of Cities*. In analyzing whether particular agency action constitutes a "promulgation," courts have considered "(1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency," with the "'first two criteria ser[ving] to illuminate the third.'" *General Motors Corp.* v. *EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (citation omitted); see

Iowa League of Cities, 711 F.3d at 862 (applying the D.C. Circuit's framework). Those criteria do not support characterizing as a "promulgation" correspondence with private parties that EPA did not describe as binding or authoritative and did not publish in the Federal Register or Code of Federal Regulations.

The court of appeals lacked authority to adjudicate petitioner's challenge for other reasons as well. The EPA letters at issue here do not satisfy the requirements for final agency action. See *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (explaining that an agency action is final only if it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined or from which legal consequences will flow") (citations and internal quotation marks omitted). Review of the EPA letters would also have been unwarranted under the ripeness doctrine, which "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also * * * protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967); see *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-808 (2003). And because petitioner cannot demonstrate any actual or imminent injury from EPA's letters, it also lacks standing to pursue its current challenge. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[4]

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[4] The court of appeals stated that, "to the extent [petitioner] wants to directly challenge" the EPA letters at issue here, "it must

Finally, disagreement concerning the proper interpretation of the EPA letters at issue here makes this case a poor vehicle for considering the reviewability under Section 1369(b)(1)(E) of statements articulating an agency's views on the scope of a judicial decision. Petitioner's argument (Pet. 17-19, 27-29) that the letters are reviewable under Section 1369(b)(1)(E) depends on its interpretation of the letters as declaring that EPA did not view *Iowa League of Cities* as controlling outside the Eighth Circuit. But while the court of appeals read the letters as "indicating that [EPA] would not acquiesce in or follow" *Iowa League of Cities* "outside of [the Eighth C]ircuit," Pet. App. 2, the agency understands its own letters as recognizing that *Iowa League of Cities* is binding in the Eighth Circuit, without addressing whether the decision controls elsewhere. See Pet. C.A. App. 1-3. The threshold dispute as to the meaning of the letters makes this case an especially poor vehicle for considering the types of agency actions that are reviewable under Section 1369(b)(1)(E).

4. Petitioner suggests (Pet. 32-35) that, unless the court of appeals' decision is set aside, local governments and private entities will lack adequate opportunities to challenge EPA's implementation of the CWA in light of the *Iowa League of Cities* decision. As the court of appeals explained, however, its determination that it lacked jurisdiction under Section 1369(b)(1)(E) does not foreclose petitioner from using other channels to challenge such implementation. To the extent that EPA engages in final agency action that is reviewable under

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follow the usual path of suing in district court under the [APA], *assuming other reviewability criteria are satisfied*." Pet. App. 3 (emphasis added). For the reasons stated in the text, the EPA letters would not be reviewable under the APA.

general administrative-law principles, APA review remains available. See Pet. App. 3; but see p. 13 & note 4, *supra* (explaining why the EPA letters at issue here would not be reviewable under the APA). And, "[t]o the extent that [petitioner] believes EPA is violating the Eighth Circuit's mandate," the decision below does not prevent petitioner from "try[ing] to seek mandamus or other appropriate relief in the Eighth Circuit." Pet. App. 4.

The decision below also does not prevent a litigant from challenging any final permitting decision that the litigant regards as *ultra vires* in light of *Iowa League of Cities*. If a facility receives an NPDES permit containing limitations that the facility operator believes are foreclosed by *Iowa League of Cities*, or is denied a permit altogether, the operator may seek judicial review of the permitting decision. See 33 U.S.C. 1369(b)(1)(F) (direct court of appeals review of EPA decisions issuing or denying permits); 40 C.F.R. 123.30 (specifying that States administering the NPDES program must "provide an opportunity for judicial review in State Court of the final approval or denial of permits").

5. There is no need to hold the petition for a writ of certiorari pending this Court's decision in *National Association of Manufacturers, supra.* That case presents the question whether an EPA rule that defines the term "waters of the United States" for purposes of the CWA is reviewable in the court of appeals under Section 1369(b)(1). See Pet. at i, *National Ass'n of Mfrs., supra* (No. 16-299); Gov't Br. in Opp. at i, *National Ass'n of Mfrs., supra* (No. 16-299). The EPA rule at issue in *National Association of Manufacturers* limits the conduct of private parties and permit issuers by identifying the

categories of waters on which effluent and other limitations under the CWA will apply. The government has argued that a rule defining the geographic scope of limitations under Section 1311 establishes an "effluent limitation or other limitation under section 1311," 33 U.S.C. 1369(b)(1)(E), while the petitioners in *National Association of Manufacturers* have argued to the contrary. See Gov't Br. at 17-30, 35-49, *National Ass'n of Mfrs., supra* (No. 16-299); Pet. Br. at 28-55, *National Ass'n of Mfrs., supra* (No. 16-299). The decision below does not implicate the question presented in *National Association of Manufacturers* because the EPA letters at issue in this case do not impose any obligations on private parties, permit issuers, or others. See Pet. App. 3. Instead, they simply articulate an agency interpretation of a court of appeals decision. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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