



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

APR - 2 2014

OFFICE OF WATER

Mr. Chuck Thompson  
International Municipal Lawyers Association  
7910 Woodmont Avenue  
Bethesda, Maryland 20814

Dear Mr. Thompson:

Thank you for your November 26, 2013, letter to Administrator McCarthy. In your letter, you raised concerns about how the Environmental Protection Agency is responding to the decision in *Iowa League of Cities v. EPA* (711 F.3d 844 (8<sup>th</sup> Cir. 2013)). In addition, you indicated that you believe that there is no legal basis for EPA to assert that the decision does not apply nationwide and request that the EPA apply the *Iowa League of Cities* decision uniformly across the country.

In the *Iowa League of Cities* decision, the Eighth Circuit reviewed two EPA letters regarding two subjects under the Clean Water Act. The first area addressed in the decision was the EPA's policy view that bacteria mixing zones "should not be permitted" in waters designated for primary contact recreation. The second area addressed the issue of blending and the specific question of whether a facility that uses a physical/ chemical treatment process, such as ACTIFLO, to treat flows that are diverted around biological treatment units during wet weather events is subject to a "no feasible alternatives" demonstration under the bypass provision at 40 CFR 122.41(m). The court determined that the letters constituted legislative rules and vacated the letter's "rules" because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act.

While not necessary to its holding to vacate the letters as legislative rules, the court also stated that the EPA's statement in the blending letter "severely restricts the use of 'ACTIFLO systems that do not include a biological component' because the EPA does not 'consider[] [them] to be secondary treatment units' . . . If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations." 711 F.3d at 876. The court stated that "the September 2011 letter applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe." *Id.* at 876. Finally the court stated that "the blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits." *Id.* at 877.

The Eighth Circuit's decision applies as binding precedent in the Eighth Circuit. The court's decision, however, did not and could not have vacated the bypass regulation at 40 C.F.R. §122.41. The bypass regulation itself was promulgated in 1984 (94 Fed. Reg. 37,990 (Sept 26, 1984)) and was subject to the exclusive jurisdiction review provision of section 509(b) of the Clean Water Act after its date of

promulgation. That rule was reviewed and upheld by the U.S Court of Appeals for the D.C. Circuit in *NRDC Inc. v. US EPA*, 822 F.2d 104, 126 (D.C. Cir. 1987). The D.C. Circuit found that “[t]he agency’s adoption of a bypass regulation which incorporates two broad and sensible exceptions . . . is, in our view, reasonable and therefore lawful.” The Eighth Circuit vacated only the letters at issue in the case.

The EPA shares with you a desire to protect human health and the environment while recognizing economic constraints and feasibility concerns. To that end, the EPA is planning to hold a forum with public health experts to ask questions about the public health implications of various bypass and blending scenarios during wet weather events. The EPA believes that this public health forum will provide valuable information on how to address discharges from POTWs that, during certain wet weather events, are diverted around biological treatment units. We expect to hold this workshop in the summer of 2014.

If you have any questions, please contact Andrew Sawyers, Director of the Office of Wastewater Management, at 202-564-0748.

Sincerely,



Nancy K Stoner  
Acting Assistant Administrator



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 18 2014

Mr. Ken Kirk  
National Association of Clean Water Agencies  
1816 Jefferson Place, NW  
Washington, D.C. 20036-2505

OFFICE OF WATER

Dear Mr. Kirk:

Thank you for your May 30, 2014, letter in which you request the Environmental Protection Agency to supplement the Agency's April 2, 2014, letter to provide additional explanation for the way the Agency is applying the decision in *Iowa League of Cities v. EPA* (711 F.3d 844 (8<sup>th</sup> Cir. 2013)). I acknowledge that you disagree with my April 2, 2014, letter to you that articulated that the Eighth's Circuit decision applies as binding precedent in the Eighth Circuit. We hope that discussions at the June experts forum on the public health impacts of blending will provide valuable information on how to address discharges from publicly owned treatment works that, during certain wet weather events, are diverted around biological treatment units. In addition, you request clarification from the EPA on the goals and desired outcomes of the experts forum on the public health impacts of blending that is scheduled for June 19 and 20, 2014.

I would like to express my deep appreciation for your strong and continued support of sustainable policies and requirements for municipal wastewater infrastructure. The EPA shares your desire to protect human health and the environment while recognizing economic constraints and feasibility concerns. Thanks to your efforts and those of many others, the nation has come a long way in improving water quality, public health and the environment since Congress enacted the Clean Water Act over 40 years ago. Much of those gains are associated with the expansion and improvement of the nation's municipal wastewater infrastructure. We know that you and the other signatories to your letter agree with the EPA that a primary goal of sewage treatment is to protect public health. In fact, improved sewage treatment has been identified as one of the ten greatest advances in the protection of public health during the 20<sup>th</sup> century. We are all proud of that collective achievement.

The June 19 and 20, 2014 experts forum provides an excellent opportunity for all of us to further our commitment to working together for the benefit of the American public since it will focus on key issues of providing public health protection in a manner that is feasible from an engineering perspective. The EPA and the National Association of Clean Water Agencies have a long history of working cooperatively on approaches to improving the public health protection provided by municipal wastewater infrastructure in ways that are technically and economically feasible. We look forward to continuing to work with you on our common goal of achieving environmental and public health protection through cooperative dialogues and active engagement.

If you have any questions, please contact Andrew Sawyers, Director of the Office of Wastewater Management, at 202-564-0748.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy K. Stoner".

Nancy K. Stoner  
Acting Assistant Administrator