14-1150

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

CENTER FOR REGULATORY REASONABLENESS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

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PETITIONER'S THIRD MOTION TO SUPPLEMENT ITS APPENDIX AND TO REQUEST CONSIDERATION OF SANCTIONS

Oral argument requested but not yet scheduled

//s// John C. Hall
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Petitioner, Center for Regulatory Reasonableness ("CRR"), submits this Third Motion to Supplement its Appendix, again seeking this Court to accept, and evaluate, the attached additional agency records that clearly document EPA's decision to disregard the *Iowa League of Cities* decision outside of the Eighth Circuit (*i.e.*, non-acquiescence to the Clean Water Act § 509(b) decision). (*See*, Attachment A – "Relevant Documents for Showing EPA Decision Timeline and DOJ Involvement in Non-Acquiescence Scheme that Avoids Judicial Review."). This filing has been discussed with opposing counsel, who, at the time of filing, has not indicated whether the Agency will oppose this motion.

Since the commencement of this litigation, Petitioner has averred that EPA: (1) rendered *a decision to non-acquiesce* regarding the Eighth Circuit's ruling in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) ("*ILOC*") (vacating several illegal amendments to the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") rules, and declaring EPA's "blending" prohibition to exceed its statutory authority); (2) decided it would *continue to impose the illegal rule amendments* (*e.g.*, "blending" prohibition) outside of the Eighth Circuit (re-creating more restrictive NPDES rules in those states); and, (3) *actively enforced that position* since announcing the decision verbally in November 2013 and again in writing in April and June 2014.

EPA, for its part, has repeatedly denied rendering any such decision or undertaking any enforcement of such position. In a relentless effort to have this Petition dismissed, the Agency, by its counsel, informed this Court on numerous occasions that no final decision has been rendered and that EPA views the applicability of the *ILOC* ruling – outside the Eighth Circuit – on a "case by case" basis. The Agency has also claimed that no records of such alleged decision exist, other than the two letters that CRR attached to its Petition for Review.[1]

Given the Agency's litigation posturing, Petitioner has been forced to use other means, the Freedom of Information Act ("FOIA"), 5 U.S.C. §551. *et seq*., to reveal EPA's full decision-making record. Subsequently, several prior motions were filed with this Court to admit records as they became available.[2]

The recently obtained documents, which CRR seeks to add to the Petition's administrative record, confirm, beyond any reasonable doubt, that CRR's factual account of EPA's actions is completely accurate. The documents show that the EPA and DOJ counsel in this matter were, in fact, the architects of the non-acquiescence strategy and recommendation to avoid written public disclosure of

[1] A good reference regarding the procedural history of the CRR Petition is found at, *Petitioner's Motion to Supplement the Administrative Record,* [Document: 01217671180], at 6 – 9 (January 31, 2015).

[2] See, *Petitioner's Motion To Supplement Its Appendix* [Document: 1604989], at 1-2 (March 21, 2016), for a summary of prior steps to file necessary additional materials to produce a complete record.

that regulatory decision. The new Agency documents show that EPA's entire litigation position – with counsel from the Department of Justice acting as "co-architects" – was a sham, with the evident hope of avoiding any meaningful judicial review of the "non-acquiescence" decision.

Petitioner respectfully requests that this Court accept these documents into the administrative record of this matter to avoid the occurrence of a "fraud on the court," that EPA sought to create by providing a truncated record and claims that no other related decision documents existed. Petitioner also reiterates its prior request that this Court consider appropriate sanctions on government counsel that knowingly and consistently sought to (1) conceal the relevant EPA records confirming the Agency's decision; and, (2) mislead the Court regarding the actions of EPA (and DOJ) in creating the scheme to continue imposing the illegal rule amendments that were vacated by the Eighth Circuit while attempting to avoid judicial review

ARGUMENT

It is respectfully asserted that EPA, with the direct assistance and direction of its Justice Department legal counsel, cannot be permitted to unilaterally withhold agency records that establish the "working law" of the Agency, for the express purpose of avoiding the legal consequences of its behavior, including

thwarting judicial review.[3] This Court has shown little patience with other EPA attempts to deflect the impact of adverse Circuit Court decisions, via non-acquiescence and subvert judicial review via claims of "case by case" decision making. *See, e.g., Nat'l Envtl. Dev. Ass'n v. Clean Air Project*, 752 F.3d 999, 1003 (D.C. Cir. 2014) ("*NEDACAP*") (Rejecting EPA's "case by case" description and finding: "The Directive is a final agency action because it sets forth EPA's binding and enforceable policy regarding permit determinations."). As in *NEDACAP*, the new documents offered by Petitioner demonstrate conclusively that an EPA non-acquiescence decision was made regarding continued imposition of the vacated rule modifications in NPDES permit and enforcement actions outside the Eighth Circuit's jurisdiction, in flagrant disregard of several federal statutes, such as the Administrative Procedure Act ("APA") and Section 509(b) of the CWA, as well as basic notions of fairness and due process.[4] Consequently, EPA's non-acquiescence decision in this matter should also be soundly rejected.

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[3] A similar pattern of such EPA activity was addressed and rejected by the Eighth Circuit. See *ILOC* at 711 F.3d 860-872.

[4] EPA's strategy in *NEDACAP* rested on closely parallel facts to those here. Among other things, the *Summit* Directive there employs virtually identical language to that used in the EPA Desk Statement, and the other documents CRR now requests be made part of the administrative record: *i.e.*, ". . . EPA does not intend to change its longstanding practice []" and, "EPA will continue to make source determinations on a case-by-case basis[.]" *Id.*, at 1003. EPA continues to stubbornly insist that it can avoid the impact of court decisions that it does not like by couching its regulatory decision in similar "case-by-case" language, and here,

I. Legal Authority Supports Record Supplementation

The obdurate behavior of EPA has caused Petitioner to file three requests to supplement the administrative record. Petitioner need not repeat its prior extensive legal analyses regarding record supplementation that have already been submitted to the Court.[5] It is appropriate, however, to repeat, from these prior filings, the words of EPA and DOJ counsel where they refused to identify, and objected to admitting, any other agency documents as part of the administrative record in this matter:

> EPA has explained that an administrative record is "the set of non-deliberative documents that the decision-maker considered, directly or indirectly (e.g., through staff) in making the final decision. AR Guidance at 4. This definition is supported by case law. *See, E.g., Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971)….Because EPA did not regard the letters to reflect any substantive decision-making, it did not contemporaneously develop a record. (EPA's Opposition to Petitioner's Motion to Supplement the Administrative Record [Document 1537684], at 12)
>
> "To overcome the strong presumption of regularity to which an agency is entitled, a plaintiff must put forth concrete evidence that the documents it seeks to "add" to the record were actually before decisionmakers." *Marcum v. Salazar,* 751 F. Supp. 2d 74, 78 (D.D.C. 2010); *Id*. at 14.

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by attempting to hide documents that confirm the Agency's intent to enforce two different regulatory schemes, depending on geographic location.

[5] Please see Court docket numbers 1535311, 1619583, and 604994.

> As an initial matter, the Center's argument is premised on an unsupported reading of the challenged letters. The letters do not address and EPA has not elsewhere decided, whether and to what extent the Agency will follow *Iowa League* outside the Eighth Circuit. …The Center cannot expand the record simply by claiming that EPA made a decision – a decision that the Agency denies making and which is not reflected on the face of the letters in question. *Id*. at 15-16.

The records recently obtained by Petitioner from its FOIA activity, and which form the basis of this Motion, were all Agency records which were: (1) developed by EPA and DOJ staff as the basis for rendering EPA's non-acquiescence decision; (2) transmitted to regional and state NPDES program managers as the working law of the Agency; (3) provided to senior management as the legal position the Agency would implement post-*ILOC* in permitting and enforcement; and/or, (4) intended to serve as the underlying basis of the Agency's two letters attached to the Petition for Review, as well as the public announcements of senior agency managers that occurred on November 13, 2013, November 20, 2013, and April 6, 2014. In a word, these are precisely the type of documents EPA's own "AR Record Guidance" specified must be in the administrative record "…documents that the decision-maker considered directly or indirectly (through staff) in making the final decision". *Supra*, at 5. EPA hid these records and falsely claimed that they were "deliberative" to avoid disclosing the decision that

had been rendered based on the advice of the DOJ and EPA attorneys in this matter: Andrew Doyle and Richard Witt.[6] (See, Exs.73, 78, 85).

II. New FOIA-Based Factual Information

a. Jaw-dropping new information is provided by EPA

Since filing its last record supplement, Petitioner's efforts consisted of sending FOIA requests to DOJ and EPA regarding: (1) the decision to non-acquiesce (as part of the decision to not seek Supreme Court review of the Eighth Circuit's *ILOC v. EPA* ruling); and, (2) records that were developed by EPA regarding the "Desk Statement", which clearly stated that EPA would continue to impose the vacated rules outside of the Eighth Circuit. The "Desk Statement" and related documents were filed with the Court on June 15, 2016. *See*, Petitioner's Motion to Supplement the Appendix Based on New Evidence (Docket No. 1619583). EPA has, for its part, once again denied that the documents confirmed any final agency decision or how to proceed on permitting outside of the Eighth

[6] Pursuant to FOIA, Section 552(a)(2) mandates Agency disclosure of "statements of policy that and interpretations that have been adopted by the Agency and are not published in the Federal Register" as well as "instructions to staff that affect a member of the public." *See also*, *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 153-54 (1975) (Reasons which supply the basis for adopted policy constitute the "working law" of an agency). Finally, the working law of the agency is never "predecisional" and must always be disclosed.to the public; secret law is never tolerated. *NLRB v. Sears, Roebuck & Co*., 421 U.S., at 153-54; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (1980).

Circuit. *See* EPA Response in Opposition to CRR's Motion to Supplement [Docket No. 1622555], at 9.

In response to this latest round of FOIA requests, EPA identified a series of new documents spanning from April 2013 to April 2014. Consistent with its prior FOIA response approach, the Agency once again heavily redacted any information that would have revealed that the Agency had rendered the decision that is the central issue of this litigation. However, EPA's response and document release allowed access to a number of unredacted records that formulated and communicated its non-acquiescence decision throughout the Agency. The now available information confirms the depth of the deception EPA had sought to create, with DOJ's assistance, in filings before this court. The "jaw-dropping" information that was provided confirmed the following:

- DOJ and EPA carefully coordinated the decision to non-acquiesce in August – October 2013 and the implementation of that decision in ongoing enforcement cases in January 2014. (Exs. 74 to 79, 87)[7]
- DOJ advised EPA that it should avoid putting the decision in writing, as that would likely trigger another round of judicial review. (Ex. 78, highlighted)

[7] The FOIA records confirm that DOJ consistently received copies of EPA's emails detailing the status and strategy that the parties agreed should be implemented. The EPA and DOJ attorneys on this case were the ones who developed the "non-acquiescence" strategy and counselled the Agency to avoid putting the decision in writing. The full set of the relevant email correspondence and timeline of Agency decision-making is presented in Attachment A hereto.

- EPA briefed the highest Agency officials regarding the approved OW/OECA/DOJ/OCG[8] non-acquiescence decision as part of the strategy for responding to the November 2013 municipal group letter challenging EPA's verbally announced position (including the Deputy Assistant Administrator, Robert Perciasepe). (Ex. 86, 88)
- In advance of responding to the municipal group letter in February 2014, EPA-OW completed a detailed "strategy" for nationwide implementation of the decision to continue imposing the vacated requirements and that outside the Eighth Circuit, blending is *always* considered an illegal bypass. (Ex. 88)
- The Regional Offices' further actions were carefully coordinated to ensure national uniformity of the decision to continue imposing the vacated rules outside of the jurisdiction of the Eighth Circuit. (Exs. 83 and 84)

Thus, contrary to the Agency's claim that the the April and June 2014 EPA letters and other agency documents do not reflect a nationwide non-acquiescence decision (*supra*, at 6), the wording of the two letters carefully mirrored the wording and recommended approaches outlined in the various briefing sheets and strategy

[8] OW-Office of Water; OECA –Office of Enforcement and Compliance Assurance; DOJ – Department of Justice; OGC – Office of General Counsel

documents developed by EPA staff to implement the non-acquiescence decision, prior to the issuance of the 2014 letters.[9]

b. Unequivocal confirmation that EPA rendered a final agency decision

The fact and scope of EPA's non-acquiescence decision is precisely stated in the "talking points" prepared for EPA Deputy Administrator Robert Perciasepe in December 2013:

> - *The Eighth Circuit's opinion is inconsistent with EPA's long-standing interpretation of the Clean Water Act, the bypass rule and the secondary treatment standard as prohibiting the routing of waste streams around secondary treatment units and subsequently blending the partially treated wastewater back in with treated flows.* ***EPA's position is that blending is a bypass and can only be justified upon a demonstration of "no feasible alternatives."***
> - ***EPA has determined*** that the *Iowa League of Cities'* interpretation of blending and bypass is binding within the Eighth Circuit. Outside the Eighth Circuit***, EPA will continue to apply the bypass rule consistent with the Agency's existing interpretation of its regulations.***

[9] Based on these new EPA records, the Agency's repeated averments that: "The letters do not address and EPA has not elsewhere decided, whether and to what extent the Agency will follow *Iowa League* outside the Eighth Circuit. …The Center cannot expand the record simply by claiming that EPA made a decision – a decision that the Agency denies making and which is not reflected on the face of the letters in question," were plainly attempts to mislead counsel, and this Court. EPA's Opposition to Petitioner's Motion to Supplement the Administrative Record [Document 1537684], at 15-16. Both EPA and DOJ attorneys on this matter knew the statements were false as both were centrally involved in formulating the Agency's permitting/non-acquiescence position in response to *ILOC* (Ex. 78, 85, 87).

Ex. 86 (Emphasis supplied).

EPA's February 21, 2014 Strategy Document further explained what was meant by "case by case" decision-making with regard to municipal entities outside of the Eighth Circuit:

> ***Direction to take inside 8th Circuit:*** *Permits for POTWs that blend must:*
> - *Have a bypass provision that is at least as stringent as EPA's regulations at 40 CFR 122.41(m),*
> - *Clearly identify the treatment train that will be used during dry and wet weather,*
> - *Will not have internal permit limitations (unless end-of-pipe effluent limits are impracticable),*
> - *Require monitoring to yield data that is representative of the monitored activity (see 122.48(b)) (permits should clearly specify end-of-pipe compliance monitoring during wet weather),*
> - *Provide percent removal requirements according to the secondary treatment regulations, and*
> - *Meet water quality standards.*
>
> ***Direction to take outside 8th Circuit:*** ***EPA would continue to apply its historic interpretation, that bypasses are prohibited by the CWA unless a NPDES permittee can meet all of the following criteria****:*
> - *The bypass was "unavoidable to prevent loss of life, personal injury or severe property damage";*
> - *There were no "feasible alternatives" to the bypass, and*
> - *The permittee must have submitted notice of the bypass to the director of the permitting authority.*
>
> ***On a case-by-case basis, a permittee will be considered to be implementing all feasible alternatives if it is implementing an adequate CMOM program, including an acceptable I/I program, is in compliance with pretreatment requirements, and for any bypass around secondary treatment****:*
> - *There is side stream treatment that meets an acceptable level of treatment (e.g., significant solids removal);*

> o *The recombined flow meets effluent limits, utilizing representative monitoring during dry and wet weather; and,*
> o *Flows to the secondary treatment units are maximized.*
> *Note: There was general agreement at the 2010 workshop on this approach to blending. …*
> ***Communicating our Strategy**: We could respond to the US Conference of Mayor, et al letter by summarizing this strategy or we could send a memo to the regions.*

Ex. 88 (Emphasis supplied.)

The unequivocal message from these, and other new record documents, is that EPA intentionally adopted the approach that outside the Eighth Circuit, blending remains classified as a prohibited bypass that is subject to *a no feasible alternatives* demonstration. The new documents confirm that EPA rendered a reviewable final Agency decision to continue to implement the rule revisions that were vacated by the Eighth Circuit in *ILOC v. EPA*. The record also confirmed that, as in *NEDACAP*, EPA created a more restrictive regulatory scheme for all municipal entities outside of the Eighth Circuit, in clear violation of the CWA Section 509(b)(1) requirement for national uniformity. The fact that EPA, with its legal counsel, has created a scheme to "keep everything secret" (Ex. 78) simply underscores the degree of distain EPA has for adverse judicial decisions that conflict with its desired regulatory approach. However, as this Court said in *NEDACAP*, "The doctrine of intercircuit nonacquiesence does not allow EPA to ignore the plain language of its own regulations." 752 F.3d, at 1011. Certainly, ignoring the "plain language" of the CWA to ensure a uniform nationwide NPDES

program fits within this same concern, particularly given the heavy financial cost arbitrarily re-established by EPA on municipal governments, outside of the Eighth Circuit.[10]

III. Request for Consideration of Sanctions

These latest records confirm, beyond any reasonable doubt, that EPA's attempt to convince the Court that no decision had been rendered, and that "case by case" meant that EPA had not rendered a decision to continue to implement the vacated blending prohibition, was a complete and utter sham.[11] The EPA records – well known to counsel in this matter - directly state that the Agency will continue to implement precisely the same rule interpretation that was vacated by the Eighth Circuit (a declaration that blending is always a bypass subject to a *no*

[10] In *NEDACAP*, 799 F.3d, at 1003, this Court stated its concern that EPA's "*Summit* Directive creates a standard that gives facilities located in the Sixth Circuit a competitive advantage. It therefore causes competitive injury to Petitioner's members located outside of the Sixth Circuit." Municipal members of CRR, and nationwide, also suffer the threat of serious economic impact given the high costs to meet the alleged "longstanding" EPA requirements, while communities within the Eighth Circuit alone enjoy the economic benefits of the vacated rules in the *ILOC* case. Not only are direct, construction-related costs at issue for these communities, as implementation of the "longstanding" EPA requirements leave them subject to greater risk of needless permit enforcement from states, EPA, and, potentially, citizen suits.

[11] After discovering the existence of the "Desk Statement", Petitioner previously notified this Court of the bad faith and lack of candor demonstrated by EPA, and its legal counsel, further requesting that appropriate sanctions be investigated and imposed. *See, Petitioner's Reply in Support of Its Motion to Have Court Consider Additional Argument and Supplement the Appendix Based on New Evidence* (July 7, 2016) [Docket No. 1623659].

feasible alternative demonstration). In fact, as with the Eighth Circuit case, there are no "case by case" facts that would allow blending to be permitted as anything other than a bypass that must be eliminated, if feasible. *ILOC*, 711 F.3d at 877-878.

The inter-agency correspondence clearly confirms that DOJ and EPA carefully concocted the scheme to continue to impose the illegal rule amendments in all permit and enforcement actions outside of the Eighth Circuit. This conspiratorial activity can be readily seen in the document, Attachment A: "Relevant Documents for Showing EPA Decision Timeline and DOJ Involvement in Non-Acquiescence Scheme that Avoids Judicial Review." Based on the advice of DOJ counsel, any release of written documentation of EPA's decision was to be avoided, as that would be certain to trigger another round of judicial review (not something EPA or DOJ relished, given this Court's adverse *NEDACAP* decision).

(Ex. 78, text highlighted).[12] EPA and DOJ plainly hid these records from this Court to avoid undercutting their arguments that jurisdiction was lacking.[13]

EPA repeatedly (and illegally) sought to prevent this Court's, and the public's, access to the decision records (*i.e.*, the "working law" of the agency)[14] under FOIA by claiming, that the "deliberative process" and "attorney-client" privilege applied – knowing full well those assertions were also a sham. However, the now released records confirm that EPA, with DOJ assistance, had unequivocally determined in the October and November 2013 timeframe that the Agency would refuse, in all permit and enforcement matters, to follow the *ILOC* decision outside the Eighth Circuit (claiming that the decision was "wrongfully decided"). EPA was concerned that if it appealed to the Supreme Court and lost

[12] One of the proffered documents, in fact, is a single sheet showing emails by and between Justice Department and EPA regarding the *NEDACAP* D.C. Circuit decision. *See* Ex. 89. While redacted, it is likely that the email contents warn of the dangers of the "case-by-case" discretion approach taken by EPA for both the *NEDACAP* and *post-ILOC* circumstances. EPA must surely be told to be careful now, given the direction of this Court and the Agency's fear of "more litigation."

[13] Litigation should not become a game of "hide the peanut" to avoid probing judicial scrutiny of the type for which this Court is known. *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 530 (D.C. Cir. 1982).

[14] *See*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975); *Bowen v. New York*, 476 U.S. 467, 481 (1986) *citing City of New York v. Heckler*, 742 F.2d 729, 738 (2nd Cir. 1984) (citations omitted) (finding that the government's arguments for dismissal could not prevail on account of "secretive conduct" and "clandestine policy" that were "uncovered only in the course of [] litigation").

again, the Agency's ability to ignore the ruling outside the Eighth Circuit would be undercut. (Ex. 76, highlighted).

In summary, as shown by a full accounting of the documents and transmittal emails, legal counsel in this matter were centrally involved in each step, including: (1) being well aware of, and assisting in creating, the scheme to disregard the Eighth Circuit decision, in derogation of CWA Section 509 regulatory review process that designed to ensure national uniformity of applicable NPDES rules; (2) undermining the judicial review process by actively seeking to conceal the relevant records from this Court, and Petitioner, confirming the existence of the a final agency decision; and (3) creating a new "story" about "case by case" decision-making in the permit process to feign regulatory flexibility and conceal the existence of the conclusive decision EPA actually had rendered.

Petitioner respectfully requests that this Court review and, under its several sanctioning authorities, including Rule 46(c) of the Fed. R. App. P. and the recognized "inherent power" of courts to deal with litigation abuses and bad faith conduct, investigate the conduct of counsel here.[15] The apparent scope of ethical violations created is astonishing and fits securely within applicable standards for imposition of sanctions (*e.g.*, "conduct unbecoming a member of the bar," or "bad

[15] *See, e.g., Chambers v. Nasco, Inc.*, 501 U.S. 32, 46 (1991).

faith" or "perpetrating a fraud on the court").[16] As this Court has said on more than one occasion, "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." *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992), (cited in *NEDACAP*, 752 F.3d, at 1010). EPA refused to take either step and its counsel should not be rewarded for their efforts in creating an alternate regulatory universe that shuts out the public, does real economic harm on a nationwide basis, and makes shambles of regular order in the judicial process. We therefore ask this Court to investigate the matter and, as appropriate, consider the imposition of sanctions, consistent with appropriate opportunity for counsel to be heard.

Respectfully Submitted,

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[16] Problems with Justice Department candor have arisen in several recent cases; *see, e.g., United States v. NorCal Tea Party Patriots (In re United States)*, 817 F.3d 953, 965 (6th Cir. 2016); *Texas v. United States*, No. B-14-254, 2016 U.S. Dist. LEXIS 79546, at *37-39 (S.D. Tex. May 19, 2016).

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2016, I caused a copy of **Petitioner's Third Motion to Supplement its Appendix and to Request Consideration of Sanctions** 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.

/s/ John C. Hall
John C. Hall

Attorney for Petitioner
Counsel for the Center for Regulatory Reasonableness

Attachment A - Relevant Documents for Showing EPA Decision Timeline and DOJ Involvement in Non-Acquiescence Scheme that Avoids Judicial Review

I. DOJ/EPA Evaluating how to reverse/limit *ILOC* Ruling (April-July 2013)

April 19, 2013 – DOJ Attorney J. Lipschulz cc. A. Doyle informs EPA non-acquiescence is possible option on the *ILOC* decision, notes that this position is preliminary, but still needs concurrence from DOJ (ENRD) management. (Supp. Appx. Ex. 73) (Full email is repeated in Supp. Appx. Ex. 78)

May 9, 2013 – EPA seeks *en banc* review asserting decision not consistent with federal bypass rule and 1987 D.C. Circuit Court decision in *NRDC v. EPA.* (Supp. Appx. Ex. 62)

July 10, 2013 – Rehearing *en banc* denied.

July 31 – August 7, 2013 – OGC informs OW that the request for appeal the Supreme Court is due by August 20, 2013. EPA seeks a decision on whether it should petition the Supreme Court and distributes options concerning the pros and cons of seeking a Writ of Certiorari; including the ability of the Agency to limit the decision to the Eighth Circuit. (Supp. Appx. Exs. 74, 75)

August 9-13, 2013 – EPA Staff (OW/OGC) request emergency meeting with AA for Water (Nancy Stoner) on DOJ Request for Cert.; Option Paper is transmitted including Option 3 – no appeal, assert nonacquiesce outside 8th Circuit. Memorandum explains that non-acquiescence means continue to apply the EPA rule interpretations vacated by the 8th Circuit, outside of the 8th Circuit (*i.e.*, blending is always a bypass subject to a no feasible alternative test). (Supp. Appx. Ex. 76)

II. EPA Chooses Non- Acquiescence to Limit Decision and Continue to Implement Rule Interpretations Vacated by 8th Circuit (August-September 2013)

August 13, 2013 – AA for Water Nancy Stoner decides not to Appeal and chooses Option 3 – non-acquiescence – staff are told to inform regional offices of decision and develop permit implementation memorandum (Note – EPA is still withholding records of this decision though follow up actions all implement non-acquiescence decision.)

August 15, 2013 – Staff notify regional offices of September 19, 2013 meeting to discuss *ILOC* meeting and next steps. (Supp. Appx. Ex. 42 [withheld doc. #46])

September 19, 2013 – EPA HQ holds Regional Office Conference Call on *ILOC* decision and permitting approach. (Supp. Appx. Ex. 42 [withheld doc. #48])

September 26, 2013 – OGC memorandum (Richard Witt) entitled "How Should EPA interpret the Iowa League decision?" for discussing with EPA General Counsel Avi Garbow about the Agency's non-acquiescence options after not seeking a Writ of Certiorari. It notes that a blending

prohibition is favored by staff in OECA and OW because it enables the Agency to continue current practices, dating back to the Agency's 2005 blending policy. (Supp. Appx. Ex. 77)

III. DOJ Coordinates with EPA OGC on how to Continue using the Vacated Rules while Avoiding Judicial Review (August – October 2013)

October 28-29, 2013 – Memorandum entitled "Iowa League of Cities – Next Steps", developed by DOJ (A. Doyle)/EPA OGC (R. Witt), *the attorneys on the CRR v. EPA matter*, coordinated completion of non-acquiescence "next steps" memorandum for distribution to EPA management. Memorandum explains that non-acquiescence means EPA may continue its "longstanding" (sic "vacated") rule interpretation outside the 8th Circuit. The *memorandum expressly and repeatedly states that DOJ cautions that EPA should avoid putting the decision in writing as that could trigger another round of judicial review.* (Supp. Appx. Ex. 78)

October 29, 2013 – OW(Permits) briefing sheet entitled "Moving Forward After Iowa League of Cities" on follow up actions to implement EPA non-acquiescence decision; indicating "short term action" to non-acquiescence "approach" and addressing "permit objections." (Supp. Appx. Ex. 79)

IV. EPA Completes Internal Documents describing how future Permitting is to Occur and Verbally Announces Position (November 2013 – April 2014)

Early November 2013 – EPA Office of Water (Nancy Stoner/Deborah Nagle) decide to send OGC (Steve Neugeboren) and OW staff to Region VII 4 States meeting to publically announce EPA position. EPA prepares "talking points" to announce its non-acquiescence decision. (Supp. Appx. Ex. 80)

November 13, 2013 – Region 7 Meeting EPA HQ (OGC announces to public non-acquiescence to *ILOC* decision). (Supp. Appx. Ex. 10; Supp. Appx. Ex. 59)

November 18, 2013 – OGC completes editing on "Applicability of ILOC to EPA permit determinations" memo for distribution to Regional Offices. This is likely a copy of withheld Document 1B. (Ex. #81). Nancy Stoner is provided talking points on how to address questions permitting post-*ILOC*. (Supp. Appx. Ex. 11)

November 19, 2013 – EPA OW/OGC develops "Desk Statement" based upon "Applicability of ILOC to EPA permit determinations" memorandum due to press inquiries over *ILOC* implementation position announced by EPA on November 13, 2013 at EPA Region VII meeting. (Approved by AA OECA [Giles], AA OW [Stoner], and OGC) (Supp. Appx. Ex. 68).

November 20-21, 2013 – Desk Statement is publically released; Regional Office briefing on how to use the Desk Statement and NACWA meeting where Nancy Stoner again announces that EPA has non-acquiesced and outside the 8th Circuit EPA is not bound by the *ILOC* decision. (Supp. Appx. Exs. 82, 83).

November 22, 2013 – EPA HQ agrees that the Desk Statement is final and that HQ may distribute it among State permitting offices. (Supp. Appx. Ex. 84)

November 26, 2013 – Municipal Group Letter to EPA objecting to EPA's public announcements and failure to follow *ILOC* decision nationwide. (Supp. Appx. Ex. 3)

December 3, 2013 – DOJ requests to coordinate with EPA on how to respond to the Municipal Group Letter. (Supp. Appx. Ex. 85)

December 12, 2013 – EPA develops talking points for meeting with Municipal Group that sent Nov. 26, 2013 letter for Robert Perciasepe (Deputy Administrator) – this document expressly states that EPA has determined (1) *ILOC* improperly decided, (2) blending is still a bypass outside the 8th Circuit and (3) no feasible alternative (NFA) demonstration applies outside 8th Circuit to allow blending. (Supp. Appx. Ex. 86)

January 9, 2014 – EPA OECA and DOJ coordinate the Agency's legal position of non-acquiescence within the context of future enforcement actions where blending is being classified as a bypass – the transmittal letter and the Dec. 15, 2013 memo stating the Agency's non-acquiescence decision. (Supp. Appx. Ex. 87)

February 19, 2013 – EPA distributes copy of "Strategy for Responding to Iowa League of Cities Questions" document in which Office of Water (Nagle/Stoner) and OGC (Neugeboren) specify a "case by case" approach for dischargers outside the 8th Circuit that (1) always classifies blending as a bypass and (2) requires the submission/demonstration of no feasible alternatives (NFA) to allow practice to continue. (Supp. Appx. Ex. 88)

April 2, 2014 – Municipal Letter Response singed by Nancy Stoner (language near identical to August 13, 2013 memo). (Supp. Appx. Ex. 1).

April 6, 2014 – National Fly-In Conference in Washington, D.C. – EPA (Stoner/Pollins) again announces that *ILOC* is only binding in 8th Circuit.

May 30, 2014 – DOJ emails EPA a warning of the consequences of the NEDACAP decision on non-acquiescence. (Supp. Appx. Ex. 89)

INDEX TO PETITIONER'S THIRD SUPPLEMENTAL APPENDIX

* - Denotes documents that were not included in EPA's Index to the Administrative Record.

Exhibit 73

April 19, 2013 Email from DOJ concerning EPA's ability to non-acquiesce

From: Levine, MaryEllen
To: Neugeboren, Steven; Schroer, Lee
Cc: Witt, Richard; Hall, Jessica
Subject: FW: Iowa League - nonacquiescence issue
Date: Friday, April 19, 2013 5:35:21 PM

Mary Ellen

Mary Ellen Levine
Assistant General Counsel
Water Law Office
(202) 564-5487
Ariel Rios North Rm. 7510C

From: Lipshultz, Jon (ENRD) [mailto:Jon.Lipshultz@usdoj.gov]
Sent: Friday, April 19, 2013 4:08 PM
To: Levine, MaryEllen
Cc: Doyle, Andrew (ENRD); Vaden, Christopher (ENRD); Lorenzen, Thomas (ENRD)
Subject: Iowa League - nonacquiescence issue

ATTORNEY WORK PRODUCT

Hi Mary Ellen -

[redacted]

[redacted]

I very much appreciate all your help and hard work on this case, especially in Richard's absence.

Jack cc: Andy, Chris and Tom

Exhibit 74

August 2, 2013 Email expressing Writ of Certiorari deadline

To: Giles-AA, Cynthia[Giles-AA.Cynthia@epa.gov]
Cc: Theis, Joseph[Theis.Joseph@epa.gov]; Denton, Loren[Denton.Loren@epa.gov]
From: Shinkman, Susan
Sent: Fri 8/2/2013
Subject:Fw: Need for AA Level Recommendation on Seeking Supreme Court Review of 8th Circuit Decision Vacating Congressional Letters Addressing Mixing Zones and Blending - Iowa League of Cities v. EPA
MAIL_RECEIVED
711_F_3d_844.doc

Cynthia,
We will brief you about this at our next OCE General on Thursday, August 8.
Susan

From: Neugeboren, Steven
Sent: Friday, August 02, 2013 2:15:09 PM
To: Giles-AA, Cynthia; Stoner, Nancy

Cc: Starfield, Lawrence; Kopocis, Ken; Gilinsky, Ellen; Shinkman, Susan; Chester, Steven; Pollins, Mark; Theis, Joseph; Vinch, James; Morrissey, Alan; Denton, Loren; Sawyers, Andrew; Frace, Sheila; Nagle, Deborah; Bosma, Connie; Weiss, Kevin; Witt, Richard; Levine, MaryEllen; Hall, Jessica; Southerland, Elizabeth; Wood, Robert; Matuszko, Jan; Schroer, Lee

Subject: Need for AA Level Recommendation on Seeking Supreme Court Review of 8th Circuit Decision Vacating Congressional Letters Addressing Mixing Zones and Blending - Iowa League of Cities v. EPA

Nancy and Cynthia – As you know, in March the 8th Circuit Court of Appeals issued a decision finding letters by the agency to Congress answering questions about the regulatory requirements applicable to mixing zones and blending constituted final agency action subject to judicial review and held that the position of the Agency in the letter regarding blending was inconsistent with the statute.

This week, rehearing petitions in the case were disposed of, and we now must decide whether to recommend to the Department of Justice whether to seek Supreme Court review. Our Recommendation to DOJ is due August 20th. We will work with your schedulers to set up a joint briefing for you early in the week of August 12th.

[redacted]

Below is a summary of the decision, which is attached.

If you or you staff have any questions, you can call me at 564-5488 or Richard Witt at 564-5496

Summary of the Decision

[redacted]

The Court's decision

[redacted]

Steven Neugeboren

Associate General Counsel for Water
U.S. EPA
1200 Penn Ave., NW
Washington DC 20460
202-564-5488

Exhibit 75

August 7, 2013 “Iowa League options” memo and transmittal email

From: Witt, Richard
To: Theis, Joseph; Vinch, James; Pollins, Mark; Denton, Loren; Weiss, Kevin; Neugeboren, Steven
Subject: Here"s a brief options sheet for the discussion at 2
Date: Wednesday, August 07, 2013 1:05:05 PM
Attachments: Iowa League options.docx

For your review, comments.

Option 1 – Ask for cert.

Pro – Opportunity to reverse decision with significantly adverse implications for Water Program and Enforcement Offices.

Con – Court may disagree with EPA view and in any resulting decision more directly undercut bypass regulation. Potential result may be precedent undercutting our authority to include internal waste stream limitations in the ELG context.

– A strong cert. brief suggesting how the Eighth Circuit decision conflicts with the NRDC decision may leave us stuck with our own characterization of the decision that seriously limits the bypass provision's future enforceability

Option 2 – Don't seek cert.

Pro – Can formally or informally acquiesce and thereby limit the effect of the decision to the Eighth Circuit. Court did not vacate the bypass rule, only stated that the "blending rule" (as expressed in the letters) irreconcilable with the secondary treatment regulation and bypass rule.

Con – Reasoning of the Eighth Circuit may prove persuasive to other courts.

Exhibit 76

August 13, 2013 memo entitled “Should EPA recommend that DOJ petition the Supreme Court for writ of certiorari to overturn the Eighth Circuit’s decision in Iowa League of Cities?” and transmittal email

From: Weiss, Kevin
To: Penman, Crystal
Subject: RE: Iowa League of Cities v EPA Case 8/13
Date: Tuesday, August 13, 2013 8:02:00 AM
Attachments: Option for Iowa Cities briefing revised 8 10 13 RTW.DOCX
Options v4.docx

Crystal:

Sorry these are late. I'll bring copies to the meeting.

Kevin

From: Penman, Crystal
Sent: Monday, August 12, 2013 2:34 PM
To: Weiss, Kevin
Subject: Iowa League of Cities v EPA Case 8/13

Are there any materials for Nancy on this meeting? Please advise

Issue: Should EPA recommend that DOJ petition the Supreme Court for writ of certiorari to overturn the Eighth Circuit's decision in *Iowa League of Cities*?

Standard for petition for writ of certiorari. Supreme Court Rule 10 provides that a petition for a writ of certiorari will be granted "only for compelling reasons," and describes examples of situations that may meet this standard, including:

● where a court of appeals has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or

● "decided an important question of federal law that has not been, but should be, settled by this Court."

Timing – Any petition for writ of certiorari must be filed within 90 days after denial of a petition for rehearing**.** On July 30, the court granted an Iowa League rehearing petition and motion for fees remains. Any EPA letter recommending seeking certiorari is due within 21 days (August 20) of that order.

Option 1 – Request the Department of Justice to seek c*ertiorari* on APA issue alone

Pro – Decision limits EPA's and other Federal agencies' ability to respond forthrightly to public inquiry. Reversal of determination that EPA statements without legal effect are reviewable would remove these constraints.

Con – Court may use review as occasion to opine on rule vs. guidance and further restrict Agency ability to use informal mechanism to promote compliance with its regulations.

Option 2 – Request the Department of Justice to seek *certiorari* on blending issue

Pro – Opportunity to reverse decision with significantly adverse implications for Water Program and Enforcement Offices.

- Grant of cert. could limit additional litigation in other Regions

Con – Court may disagree with EPA's view and adopt an interpretation of the statute that more directly undercuts the bypass regulation as well as the Agency's authority to regulate internal waste streams in the context of permitting and effluent limitations guidelines (e.g., as in the case of discharges from construction sites and an ongoing rulemaking establishing effluent guidelines for the power industry).

– In order to maximize our likelihood of the Court granting review, we would need to adopt a broad reading of the decision's implications outside the 8th Circuit, which would then constitute the government's interpretation of the decision in the event the Court denies review.

Option 3 – Do not recommend that DOJ seek *certiorari*

Pro – Limits risk of additional adverse language from Supreme Court. The Agency can seek seek to avoid similar decisions on its public statements in the future by carefully drafting them to minimize the risk of such statements being found to constitute rulemaking.

- Retain flexibility to amend regulations to address bypass issue for POTWs

– Decision is not binding outside the 8th Circuit; the Agency can maintain our current position elsewhere either through issuance of a policy statement "non-acquiescing" in the decision or continuing to maintain our current position on a case-by-case basis in permitting and enforcement actions outside the 8th Circuit. Court did not vacate the bypass rule, only stated that the "blending rule" (as expressed in the letters) irreconcilable with the secondary treatment regulation and bypass rule.

Con – Stuck with cloud on our ability to communicate with members of the public or Congress without fear of running afoul of rulemaking requirements.

- Either the Agency follows the decision nationwide and "blending" becomes a common practice, with attendant environmental consequences, or the Agency must expend significant resources to maintain its current position on a case-by-case basis in permitting and enforcement actions outside the 8th Circuit.
- – Reasoning of the Eighth Circuit may prove persuasive to other courts

Exhibit 77

Sept. 26, 2013 Draft of memo entitled “How Should EPA interpret the Iowa League decision?” with transmittal email

From: Witt, Richard
To: Weiss, Kevin
Subject: Here"s what we are using for Avi
Date: Thursday, September 26, 2013 10:34:31 AM
Attachments: Iowa League of Cities Briefing for GC.DOCX

How Should EPA interpret the *Iowa League* decision?

Issue: How to interpret the court's decision with respect to EPA's authority to regulate "blending"?

Timing: Briefings for the AAs for Water and Enforcement will held in the next few days. OMB is very interested in the Agency's position, there is a high degree of interest by stakeholders and HQ is receiving requests from the Regions for guidance.

I. Background and context

a. *Iowa League v. EPA* , 711 F.3d 844 (8th Cir. 2013), rehearing denied (July , 2013). The Eighth Circuit concluded that it had jurisdiction to review two EPA letters sent in response to inquiries from a Senator regarding certain requirements under the Clean Water Act (CWA). The court determined that the letters promulgated two new rules regarding mixing zones and "blending." The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if EPA had followed APA procedures, EPA lacked statutory authority to promulgate the new "blending rule."

b. Bypass regulation. 40 C.F.R. § 122.41(m) prohibits bypass defined as "the intentional diversion of waste streams from any portion of a treatment facility" unless certain conditions are meet, including that there are "no feasible alternatives" to the bypass.. EPA's letter explained when diversions from any portion of the treatment system at a POTW would constitute a bypass and thus be prohibited under the bypass regulation and subject to having to make a "no feasible alternatives demonstration. Here is the specific language from the letter that the court reviewed:

> **"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?**
>
> Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.4 1(m)(4). In

certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

II. Interpretations of the 8th Circuit decision

We see two possible interpretations of the Court's decision. The first interpretation below is favored by staff in OECA and OW because it enables the Agency to continue current practices, dating back to the Agency's 2005 blending policy. The impact of the decision is best framed by the following question:

Under the court's decision, if a permittee requests that its permit allow or be modified to allow blending, does the decision dictate the outcome and if so, how?

Interpretation 1 – The decision only prohibits permit writers from issuing NPDES permits that actually impose secondary treatment effluent limitations on the internal waste streams within a POTW. The bypass regulation continues to prohibit the permitting authority from allowing any diversion of flow from any portion of secondary treatment units that is blended with treated effluent and discharged in compliance with NPDES permit effluent limitations unless the conditions in 40 CFR § 122.41(m) are satisfied.

- **Legal support for this conclusion:** We would argue that the court specifically held that EPA did not have the statutory authority to "apply effluent limitations to the discharge flows from one internal treatment unit to another." The court did not invalidate the bypass rule, 40 CFR § 122.41(m), instead holding that EPA's position on blending as expressed in the letter exceeds its statutory authority. See language from the opinion highlighted in red on the Attachment.

- **Programmatic Considerations:** Permit writers can continue to issue NPDES permits requiring that all waste streams within a POTW be treated by secondary treatment units and that intentional diversions around secondary treatment units would be prohibited unless no feasible alternatives demonstrated violate the bypass rule. EPA cannot impose effluent limitations on a POTW's internal waste streams as a condition in an NPDES permit. EPA could follow the decision nationwide and therefore would avoid issue of non-acquiescence.

- **Enforcement Considerations:** EPA can continue to enforce NPDES permits that require all internal waste streams within a POTW to be treated by secondary treatment units, reject requests to modify an existing decree.

Interpretation 2 (may be applied nationally or just in Eighth Circuit) – Permit writers may no longer require permittees to comply with the conditions in the bypass rule in order to allow blending. The permit writer may only require the facility to meet secondary treatment effluent limitations at the end-of-pipe.

- **Legal support for this conclusion:**

  - While the court's rationale for finding EPA's position exceeded EPA's statutory authority was that it imposed secondary treatment on internal wastestreams, that is not the extent of its holding.
  - The facts before the court was not a position that permit writers should impose internal wastestream limits. Rather, before the court was EPA's position that the bypass regulation applies to any diversion that is not itself subject to secondary treatment. The court held that position was contrary to the statute, but interpretation #1 would allow EPA to maintain that position, restricted only by the prohibition against imposing internal effluent limitations.

●**Programmatic Considerations**: EPA cannot, through application of the bypass regulation, require that all waste streams within a POTW be treated by secondary treatment units. EPA cannot evaluate whether or not a particular diversion is a bypass by assessing whether flow is diverted to a treatment unit that provides secondary or equivalent treatment.

●**Enforcement Considerations:** EPA cannot enforce the bypass provision of NPDES permits to require all internal waste streams within a POTW to be treated by secondary treatment units.

ATTACHMENT

How the Iowa League court described the effluent guideline program and secondary treatment regulations.

If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA. *§ 1342(a)*; *40 C.F.R. § 122.41*.

The EPA has interpreted this regime as "preclud[ing] [it] from imposing any particular technology on a discharger." *In re Borden, Inc.*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 78 (Feb. 19, 1980), at *2; *see also* NPDES Permit Writers' Manual 5-14, 5-15 ("Therefore, each facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines."). The technology-based effluent limitations applicable to publicly-owned treatment works ("POTWs"), such as municipal sewer authorities, are based on a special set of rules known as the "secondary treatment" regulations. *§ 1311(b)(1)(B)*; *40 C.F.R. § 125.3(a)(1)*; *see generally 40 C.F.R. § 133.102* (describing average monthly and weekly "minimum level[s] of effluent quality attainable by secondary treatment"). The secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. *See 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983).* When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. *33 U.S.C. § 1312(a).* (footnotes omitted) *Id.* at pp. 855-56.

How the Iowa League court described the letter

During the spring of 2011, the League asked the EPA whether it could use "physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule]." The June 2011 letter responded by summarizing the EPA's 2005 proposed policy without specifically addressing how the application of that policy would impact the use of ACTIFLO or similar processes. The League sought additional clarification on whether this response meant that ACTIFLO could be used only if there were no feasible alternatives, which the September 2011 letter answered in the affirmative. According to the EPA, ACTIFLO units fail to "provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." Because ACTIFLO by itself is not considered a satisfactory secondary treatment unit, the EPA views the practice of intentionally routing flows away from a facility's traditional biological secondary treatment units and through ACTIFLO as a bypass that would only be allowed upon a showing of no feasible alternatives.

The League argues that by prohibiting the use of ACTIFLO internally, as one element of a facility's secondary treatment procedures, the EPA is effectively dictating treatment design, despite the agency's acknowledgment that the bypass rule and secondary treatment regulations do not allow for such determinations at the federal level. The League also claims that the EPA is effectively applying secondary treatment effluent limitations within a treatment facility; that is, it

is applying effluent limitations to the individual streams exiting peak flow treatment units, instead of at the end of the pipe. The EPA responds that using ACTIFLO to process peak wet weather flows diverts water from biological secondary treatment units, and therefore subjecting its use to a no-feasible-alternatives analysis comports with the plain language of the bypass rule. *Id.* at 859-60.

The court's discussion of blending

The EPA contends that the letters simply reflect an interpretation of the bypass rule, which it has been considering since 2005. *See 70 Fed. Reg. at 76,015* (describing the 2005 policy as "the Agency's interpretation" of the bypass rule). To be sure, a legislative rule is not created simply because an agency "supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993)*. Nevertheless, the EPA's new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule. Municipalities chose to use ACTIFLO and analogous blending methods as an exercise of their discretion under the bypass rule, *see 53 Fed. Reg. at 40,609*, and secondary treatment rule, *see 48 Fed. Reg. at 52,259*, to select the particular technologies they deemed best suited to achieving the applicable secondary treatment requirements. However, the September 2011 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." The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h)*. There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102*. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units "do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." If streams move around traditional biological secondary treatment processes and through a non-biological unit that "is itself a secondary treatment unit," then the system would not need to meet the restrictive no-feasible-alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged.

The court's holding on the blending rule

However, the blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits. As discussed above, the September 2011 letter applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe. The CWA permits the EPA to set "effluent limitations based upon secondary treatment." *33 U.S.C. § 1311(b)(1)(B)*. But effluent limitations are restricted to regulations governing "discharges from point sources into navigable waters." *33 U.S.C. § 1362(11)*. The EPA is authorized to administer more stringent "water quality related effluent limitations," but the CWA is clear that the object of these limitations is still the "discharges of pollutants from a point source." *33 U.S.C. § 1312(a)*. In turn, "discharge of pollutant" refers to the "addition of any pollutant to navigable waters." *§ 1362(11)*. The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so. *See also Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 996, 325 U.S. App. D.C. 76 (D.C. Cir. 1997)* ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a 'point source'; it is not authorized to regulate the pollutant levels in a facility's internal waste stream."). Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority.

V. Conclusion

For the foregoing reasons, we deny the EPA's motion to dismiss and grant the League's petition for review. We vacate both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter as procedurally invalid. Further, we vacate the blending rule as in excess of statutory authority insofar as it would impose the effluent limitations of the secondary treatment regulations internally, rather than at the point of discharge into navigable waters. We remand to the EPA for further consideration. [footnote omitted]. *Id*. at 877-78.

Exhibit 78

EPA's Oct. 29, 2013 "ILOC Next Steps" document with transmittal email

From: Doyle, Andrew (ENRD)
To: Witt, Richard
Subject: FW: Iowa League - nonacquiescence issue
Date: Monday, October 28, 2013 5:59:04 PM

Richard,

I'm not sure whether you previously saw this – I see that Jack sent it to Mary Ellen – (b) (5) attorney client

[redacted]

From: Lipshultz, Jon (ENRD)
Sent: Friday, April 19, 2013 4:08 PM
To: levine.maryellen@epamail.epa.gov
Cc: Doyle, Andrew (ENRD); Vaden, Christopher (ENRD); Lorenzen, Thomas (ENRD)
Subject: Iowa League - nonacquiescence issue

ATTORNEY WORK PRODUCT

Hi Mary Ellen -

(b) (5) attorney client

[redacted]

(b) (5) attorney client [redacted] However, if you do need anything further from us on this, feel free to call.

I very much appreciate all your help and hard work on this case, especially in Richard's absence.

Jack cc: Andy, Chris and Tom

From: Witt, Richard
To: Neugeboren, Steven; Levine, MaryEllen
Subject: Here"s a draft paper for our meeting with Avi and Brenda
Date: Tuesday, October 29, 2013 10:48:00 AM
Attachments: Next Steps pre-briefing for Avi rtw mel 10 29 13.docx

For your review. I ran an earlier version past Andy Doyle for his comments.
I know it's a little weird having the quote from Jack upfront but I thought it was better than my paraphrasing might be.

DOJ view on *Iowa League* and non-acquiesence

Here's what Jack Lipshultz at DOJ told us earlier this year about non-aquiescence in this case:

"I did a little research to follow up on our conversation regarding the degree to which EPA would be obligated to follow the substantive aspects of the Iowa League decision outside the 8th Circuit should that decision stand. The bottom line is there appears to be pretty sound support for the proposition that EPA is not bound to follow Iowa League's reasoning in agency actions that we either know would be reviewed outside the 8th Circuit (e.g., a facility-specific permit action in a different part of the country) or where the 8th Circuit is only one of many circuits that could properly hear a judicial challenge. In the latter situation, however, EPA would have to accept the risk that if the challenge in fact wound up in the 8th Circuit (e.g., through the multi-district panel process) a panel of the 8th Circuit would be bound to follow Iowa League unless and until it is overruled by the full court or the Supreme Court. I would not advise EPA to pursue nonacquiescence in actions that the agency knows to be reviewable only within the 8th Circuit. The majority of judicial decisions and legal commentary frown on such "intra-circuit" (as opposed to "inter-circuit") nonacquiescence except in very limited circumstances, and as a practical matter it would ultimately seem to serve little purpose. A good general overview of these issues can be found in Estreicher and Revesz, "Nonacquiescence by Federal Administrative Agencies," 98 Yale Law Journal 679 (Feb. 1989). And, of course, to the extent Iowa League is not changed on rehearing or cert, it is the last word on the vacatur of the Grassley Letters themselves.

At this point you should regard all this as informal, staff-level advice, and in particular, please understand that it has not been presented to or approved by the ENRD front office."

Two holdings of the case are at issue:

(1) whether EPA's statements in the letters constituted legislative rules; and

(2) the substantive holding related to blending as being ultra vires under the Act

Holding that statements are a legislative rule

Issue: Should EPA non-acquiesce outside the 8th Circuit with the court's jurisdictional conclusions that the statements on blending in the letters constituted a legislative rule? Our staff attorney at DOJ (ENRD) has recently explained that if we acquiesce in the determination that that 8th Circuit had jurisdiction to review the letter, then EPA would presumably treat the court's opinion as it would any other appellate opinion resulting from a petition for review of a CWA rule or other agency action properly within the scope of CWA section 509. That is, we would be bound by its substantive conclusions. If we don't acquiesce, then no parts of the 8th Circuit's opinion are binding outside the 8th Circuit.

Substantive Holding - We've discussed two possible alternative interpretations of the court's substantive holding that the EPA could follow within the 8th Circuit.

- **Narrow interpretation.** The court held only that EPA's "rule" exceeded its CWA authority because the rule imposed secondary treatment limitations on internal flows rather than at the end of the pipe.

- **Broader interpretation.** The court held that EPA lacks statutory authority to apply secondary treatment limitations to discharges of flow from one internal treatment unit to another. To the extent that the blending "rule" effectively imposes internal secondary treatment limitations on discharges from ACTIFLO units, rather than at the end of the pipe where streams are combined and discharged, it exceeds EPA's statutory authority.

Options?

- **The EPA may formally or informally non-acquiesce in the 8th Circuit jurisdictional determination that the EPA's letter response promulgated a rule –** DOJ staff cautions that any formal expression of non-acquiescence runs the risk of a challenge.

- **The EPA may choose not to take any formal position on the 8th Circuit's substantive conclusions –** Under this approach, EPA may continue to express its views about blending and the proper interpretation of the bypass regulation informally. DOJ cautions that, in the event, we express our views in written form that we should expect to be subject to judicial challenge like in *Iowa League*. There should be a complete record of the basis for written interpretation that includes all materials supporting our view to avoid what happened in *Iowa League*. Recall that in that case, all that the court had before it was material that supported the petitioner's view of the history of blending and the bypass regulation.

Exhibit 79

EPA's Oct. 29, 2013 "Moving Forward" action plan with transmittal email

From: Weiss, Kevin
To: Witt, Richard
Cc: Levine, MaryEllen
Subject: Meeting with Andrew today
Date: Tuesday, October 29, 2013 10:11:00 AM
Attachments: Moving Forward cover v2.docx

Richard:

Today's meeting with Andrew is to discuss potential follow up actions to address peak flow permitting issues. Here is a draft outline of what we hope to discuss.

Thanks

Kevin

Moving Forward After Iowa League of Cities

Assumptions

1. EPA interprets Iowa League of Cities to 1) prohibit the use of internal permit limits to address blending; and 2) prohibit EPA from objecting to or issuing POTW permits that authorize wet weather blending scenarios in the 8th Circuit.
2. EPA non-acquiesces in other Circuits besides the 8th Circuit

Short-Term Actions

1) Clarify response to the decision in the Eighth Circuit.

2) Clarify Non-Acquiescence approach
   a. Option 1 – Memo from HQ
   b. Option 2 – Actions (e.g. permit objections and enforcement orders) in individual Regions

3) Approve BioActiflo unit in permit (indicating bypass provision is not triggered)

Ongoing Efforts

4) Improve NPDES permits for POTWs
   a. Ensure permits have appropriate percent removal requirements
   b. Improve monitoring requirements during blending events
   c. Ensure WQBELs adequately address wet weather conditions
   d. Include additional WQBELs
   e. Include mass limits for WQBELs (including mass limits for wet weather conditions)

Long Term Actions

5) Finalize a Policy on application of the bypass provision to blending outside of the 8th Circuit
   a. Finalize 2005 draft Policy with appropriate modifications to address Iowa League decision
   b. Public notice and finalize policy

6) Improving Regulations
   a. Amend bypass regulation at 40 CFR 122.41(m)
   b. Develop comprehensive rule that addresses wet weather issues in collection system and at plant (e.g. comprehensive CMOM, SSO, bypass/blending)
   c. Amend secondary treatment regulations at 40 CFR 133
      i. Add pathogen limit
      ii. Modify percent removal requirements
   d. Develop regulation to prohibit dilution (similar to pretreatment regulations at 40 CFR 403.6(c)(5)(i)(B))
   e. Amend 122.45(d)(2) to facilitate maximum daily effluent limits for POTWs

Exhibit 80

Nov. 5, 2013 email transmitting "Draft Memorandum on Iowa League" prior to meeting with Deborah Nagle

From: Levine, MaryEllen
To: Witt, Richard
Subject: RE: Draft Iowa League memo
Date: Tuesday, November 05, 2013 3:30:09 PM
Attachments: Draft memorandum on Iowa League.docx

Some thoughts. Off to meet with Deborah Nagle . . . [redacted]

Mary Ellen

Mary Ellen Levine
Assistant General Counsel
Water Law Office
(202) 564-5487
Ariel Rios North Rm. 7510C

From: Witt, Richard
Sent: Tuesday, November 05, 2013 2:18 PM
To: Levine, MaryEllen
Subject: Draft Iowa League memo

I type "daft" instead of "draft" each time. Hmmmm.

Still steaming from my machine. [redacted]

Exhibit 81

Nov. 19, 2013 final draft of memo entitled "Applicability of ILOC to EPA permit determinations" with transmittal email

From: Vinch, James
To: Theis, Joseph; Crossland, Andy
Cc: Denton, Loren
Subject: ILOC
Date: Tuesday, November 19, 2013 12:31:46 PM
Attachments: Draft memorandum on Iowa League rtw mel 11 18 13 (2).docx

---

Here is what I was able to pry out of Kevin just now:

[redacted]

Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

MEMORANDUM

SUBJECT: Applicability of *Iowa League* decision to EPA permitting determinations

[redacted]

1. Background

In *Iowa League*, the court reviewed two EPA letters and determined that the letters had promulgated two new rules regarding mixing zones and "blending." The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if the EPA had followed APA procedures, it lacked statutory authority to promulgate the new "blending rule" concerning application of the bypass regulation in the factual circumstance described in the letters. *Iowa League v. EPA*, 711 F.3d 844 (8th Cir. 2013), rehearing denied (July 30, 2013).

The NPDES regulations require that every NPDES permit must include, either expressly or by reference, certain conditions, including a bypass condition. 40 C.F.R. § 122.41(a). With respect to bypass, the regulation provides in pertinent parts as follows:

"**(m) Bypass— (1) Definitions.** (i) *Bypass* means the intentional diversion of waste streams from any portion of a treatment facility

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice— (i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (l)(6) of this section (24-hour notice).

(4) Prohibition of bypass. (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section."

2. The Eighth Circuit's decision

a. The issue before the Eighth Circuit

The court explained the issue before it as follows.

"During the spring of 2011, the Iowa League of Cities asked the EPA whether it could use 'physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule].'" *Id.* at 859.

Here is the specific language from the September 2011 EPA letter that the court reviewed:

"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.4 1(m)(4). In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

[redacted]

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

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h).* There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102.* But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units 'do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133.' If streams move around traditional biological secondary treatment processes and through a non-biological unit that 'is itself a secondary treatment unit,' then the system would not need to meet the restrictive no-feasible-

alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged." *Id.* at 876.

c. The Eighth Circuit's decision

[redacted]

"The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so . . . . Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority." *Id.* at 877-78.

[redacted]

Formatted: Highlight

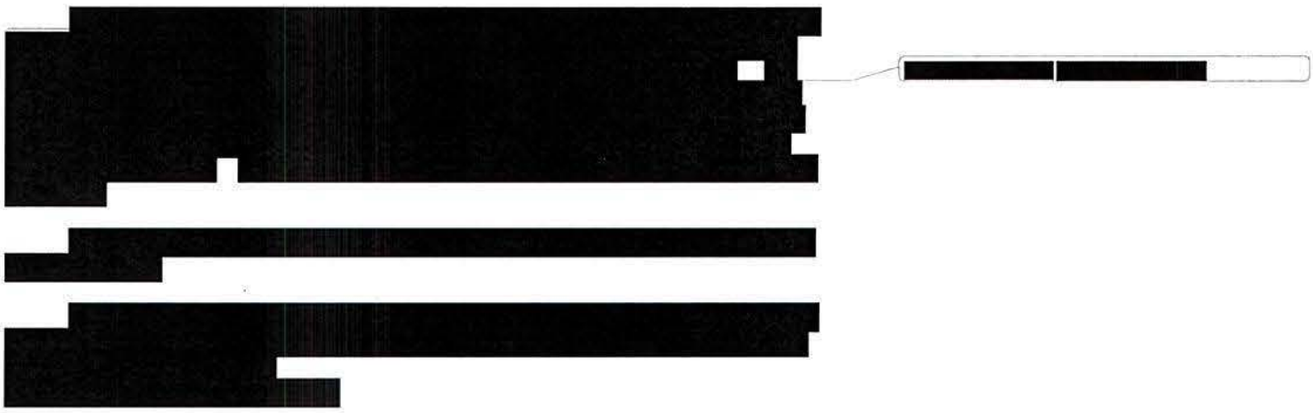

Exhibit 82

Nov. 19, 2013 EPA emails finalizing and issuing the EPA HQ Desk Statement

From: Giles-AA, Cynthia
To: Kika, Stacy
Subject: RE: draft desk statement on Iowa League
Date: Tuesday, November 19, 2013 1:04:31 PM

I am ok with this

From: Kika, Stacy
Sent: Tuesday, November 19, 2013 12:37 PM
To: Weiss, Kevin; Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

Thank you Kevin and Steven. Please let me know if there are any other concerns as the reporter is pinging me. Her hard deadline was noon ET and if we do not get anything to her soon she will write in her story that "EPA declined to comment".

Thanks,
Stacy

~~~~~~~~~~~~~~~~~~~~~~~~~~

Stacy Kika
U.S. Environmental Protection Agency
Office of Media Relations
Email: kika.stacy@epa.gov
Desk: 202.564.0906
EPA news releases on Twitter: http://twitter.com/epanews

From: Weiss, Kevin
Sent: Tuesday, November 19, 2013 12:32 PM
To: Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

We have some suggestions [redacted]

The Eighth Circuit's interpretation in *Iowa League of Cities v EPA* of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Thanks

Kevin
~~~~~~~~~~~~~~~~~~~~~~~~~~

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 12:14 PM
To: Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Weiss, Kevin; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi
Subject: draft desk statement on Iowa League

Attached is a draft statement after discussion with Kevin Weiss in OW, and review here in OGC. Please call Richard Witt at 564-5496 if you have any comments or you can email if you are o[redacted] with it. Press office needs it asap.

[redacted]

Steven Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Penn Ave., NW
Washington DC 20460
202-564-5488

From: Kika, Stacy
To: Neugeboren, Steven; Shinkman, Susan; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James; Mallory, Brenda; Garbow, Avi
Subject: RE: draft desk statement on Iowa League
Date: Tuesday, November 19, 2013 2:05:33 PM

Thank you all for your help. Here is the final statement.

Statement:

The Eighth Circuit's interpretation in Iowa League of Cities v EPA of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Stacy Kika
U.S. Environmental Protection Agency
Office of Media Relations
Email: kika.stacy@epa.gov
Desk: 202.564.0906
EPA news releases on Twitter: http://twitter.com/epanews

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 1:21 PM
To: Shinkman, Susan; Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James; Mallory, Brenda; Garbow, Avi
Subject: Re: draft desk statement on Iowa League

Just letting folks that nancy and cynthia ok'd the language so we are done.

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 1:12:11 PM
To: Shinkman, Susan; Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: Re: draft desk statement on Iowa League

[redacted]

From: Shinkman, Susan
Sent: Tuesday, November 19, 2013 1:08:33 PM
To: Neugeboren, Steven; Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph

Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

[redacted]

Thanks,
Susan

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 1:04 PM
To: Kika, Stacy; Weiss, Kevin; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: Re: draft desk statement on Iowa League

We have ow clerance so need oeca's. May be too late but I think we want to get out our views.

From: Kika, Stacy
Sent: Tuesday, November 19, 2013 12:36:49 PM
To: Weiss, Kevin; Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

Thank you Kevin and Steven. Please let me know if there are any other concerns as the reporter is pinging me. Her hard deadline was noon ET and if we do not get anything to her soon she will write in her story that "EPA declined to comment".

Thanks,
Stacy

Stacy Kika
U.S. Environmental Protection Agency
Office of Media Relations
Email: kika.stacy@epa.gov
Desk: 202.564.0906
EPA news releases on Twitter: http://twitter.com/epanews

From: Weiss, Kevin
Sent: Tuesday, November 19, 2013 12:32 PM
To: Neugeboren, Steven; Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi; Gude, Karen; Vinch, James
Subject: RE: draft desk statement on Iowa League

We have some suggestions [redacted]

The Eighth Circuit's interpretation in *Iowa League of Cities v EPA* of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Thanks

Kevin

From: Neugeboren, Steven
Sent: Tuesday, November 19, 2013 12:14 PM
To: Sawyers, Andrew; Loop, Travis; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Weiss, Kevin; Levine, MaryEllen; Witt, Richard; Gilinsky, Ellen; Kopocis, Ken; Giles-AA, Cynthia; Pollins, Mark; Theis, Joseph; Shinkman, Susan
Cc: Kika, Stacy; Senn, John; McDermott, Marna; Smith, Kristi
Subject: draft desk statement on Iowa League

Attached is a draft statement after discussion with Kevin Weiss in OW, and review here in OGC. Please call Richard Witt at 564-5496 if you have any comments or you can email if you are ok with it. Press office needs it asap.

[redacted]

Steven Neugeboren
Associate General Counsel for Water
U.S. EPA
1200 Penn Ave., NW
Washington DC 20460
202-564-5488

Exhibit 83

Minutes from EPA's Nov. 21, 2013 Branch Chief Call with transmittal email

From: Metchis, Karen

To: Metchis, Karen; Larsen, Brent; Frazer, Brian; Pitt, Brian; Trulear, Brian; Knopes, Christopher; Rathbone, Colleen; Webster, David; Smith, DavidW; Nagle, Deborah; Corb, Doug; Pabst, Douglas; MacKnight, Evelyn; Cruz, Francisco; Curtis, Glenn; Shaw, Hanh; Geliga, Jaime; Pritts, Jesse; Dunn, John; Hamilton, Karen; Obrien, Karen; Pierard, Kevin; Bose, Laura (Separated); Phillips, Laura; Farzaad, Marjan; Matthews, Mark; Nuhfer, Mark; Krudner, Maureen; Lidgard, Michael; Angelich, Michelle; Kuefler, Patrick; Surampalli, Rao; Wooster, Richard; Brown, Samuel (Separated); Jann, Stephen; Poulsom, Susan; Hill, Troy; Webb, Adelaide; Wiedeman, Allison; Letnes, Amelia; Mitschele, Becky; Rittenhouse, Bryan; Kloss, Christopher; Bosma, Connie; Stephan, Danielle; Hair, David; Clovis, Debora; Gray, Doris; Ragnauth, Elizabeth; Farris, Erika D.; Flannery-Keith, Erin; Hudiburgh, Gary; Utting, George; Schaner, Greg; Subramanian, Hema; Galavotti, Holly; Faulk, Jack; Clark, Jackie; Piziali, Jamie; Pickrel, Jan; Potent, Jeff; Chan, Jennifer; Molloy, Jennifer; Wilson, Scott; Saxena, Juhi; Jackson, June; Kelley, Kathryn; Weiss, Kevin; Boynton, King; Eby, Louis; Zobrist, Marcus; Klasen, Matthew; Billah, Mohammed; Bonnelycke, Nina; Bathersfield, Nizanna; Chumble, Prasad; Herbert, Rachel; Powell, Robert; Danesi, Robin; Brennan, Ross; Albert, Ryan; Rivera, Sandra; Hoyt, Sarita; Yager, Scott; Whitehurst, Shanika; Syed, Sharmin; Mittman, Tamara; Laverty, Tom; Kibler, Virginia; Anderson, Kate; Sanelli, Diane; Tyler, Patti; Wellesley, Sunny; Hill, Kimberly; Kent, Bruce; Fonzi, Gina; Tyler, Kip; Burgess, Karen; Lozano, VelRey; Hyatt, Marshall; Stuber, Robyn; Bromley, Eugene; Voorhees, Mark; Kaspar, Paul; Kozelka, Peter; Gregg, Caitlin; Hosch, Claudia; Kermish, Laurie; Thomas, Chris; Opie, Jodie; Sablad, Elizabeth

Subject: Monthly NPDES BC Call - Minutes for Oct and Nov

Date: Tuesday, November 26, 2013 12:23:52 PM

Attachments: BC conf call notes -11 21 13.docx
BC conf call notes - 2013-10-24.docx

BC con call notes 2013-10-24- WIP Ex. 5 DPP and not responsive;
BC conf call notes 11 21 13 WIP Ex. 5 DPP and not responsive

Attached are the minutes for both this month's NPDES BC call and October's. Please let me know if you have any corrections.

I would like some feedback as to the level of detail you prefer in the notes. Is the Nov. version to detailed? Is the October version too brief? We want these notes to be useful to you while not conveying too great a level of detail. Your suggestions are welcome.

I hope you have (or had) a great Thanksgiving!

NPDES Branch Chief Call
November 21, 2013
Minutes

Attending:

Region 2. Kate Anderson, Michele Josilo
Region 3. Brian Trulear
Region 4. Mark Nuhfer, Chris Thomas
Region 6. Claudia Hosch
Region 7. Glenn Curtis, Amy Shields, Mike Jay
Region 8. Colleen Rathbone
Region 9. Dave Smith, Elizabeth Sablad
Region 10. Mike Lidgard
HQ: Ross Brennan, Karen Metchis
On phone: Kevin Weiss

Summary of Follow-up Action Items:

1. All: Chicago Fly-in: Ross provided an update for the December 9-12 branch chiefs meeting and reminded participants about the interview process underway with SRA. To prepare for the fly-in: think about both the short and long term: the budget drivers, FY14 challenges, and the hard decisions you think you'll need to make. In addition, for the long term, think about your vision about the nature of program oversight.

2. All: Pathogen FAQ: Please send comments to Karen Metchis by Tuesday, Dec. 24, if not sooner.

3. All: TMDL Process: Dave Smith from Region 9 asked for other Regions to volunteer to beta test their TMDL Review process.

4. Kevin Weiss: Blending/Iowa League of Cities: See attached desk statement.

5. Rachel Herbert: Stormwater Rule: Rachael will report more info back to the Regions soon.

6. Colleen Rathbone: agreed to share their letter on RP issues. Participants suggested including RP and/or multidischarger variances on the issue agenda for in Chicago.

7. Karen Metchis: will schedule issue-oriented telecons (unless they are addressed at the Fly-in) on:
   a. antidegradation lawsuit in Florida
   b. multi-discharger variances
   c. RP methods (effluent variability, sufficiency of number of samples, use of the TSD approach vs. the State's approach, what constitutes a sufficient application)

HQ UPDATES:

1. **Chicago Fly-in [HQ Lead: Ross Brennan]**
   The Fly-in will run from Monday Dec. 9, 1 pm through Thursday Dec. 12, 2:30 pm
   It will be at the Hotel Union League Club, and SRA will facilitate. SRA has been interviewing each Region. These interviews will be followed by a second set of questions on structuring the agenda so we leave there with something concrete in hand.

On Nov. 21 Ross forwarded an email thread that included both Deborah Nagle's vision for the fly-in and an email from Chris Thomas describing R4's brainstorming process. **Ross said, at this point, all you need to do to prepare for the fly-in is to think about both the short and long term: the budget drivers, FY14 challenges, and the hard decisions you think you'll need to make. In addition, for the long term, think about your vision about the nature of program oversight.** Feel free to send questions or comments to either Ross Brennan or Brian Frazer on either logistics or themes.

2. **Pathogen FAQ [HQ Lead: Karen Metchis]**
Karen Metchis sent to the Regions a draft FAQ on incorporating the 2012 Recreational Water Quality Criteria into NPDES permits. **Please send comments to her by Tuesday, Dec. 24, if not sooner,** so we can finalize these for web posting in early January. We don't think that the FAQ document raises any policy issues; it is pretty straight-forward. A few issues are being held for future resolution (e.g., application to non-continuous dischargers, selection of receiving water flow, use of qPCR). Currently, HQ is working on developing an answer to the question: *What if the water body has a TMDL that is based on an older water quality standard, such as a fecal indicator, but the state adopts a new water quality standard for E. coli/enterococci?* WPD is working with OGC, OST and OWOW to develop an answer that does not undermine any portion of our programs, and will send that to the Regions to review as soon as we have an agreed-upon draft answer. Region 4 asked Karen to include Carol Baschon in this discussion thread as this is an issue in Florida, which she did.

3. **Selenium Update:** Ross reported that OST had its kickoff meeting (11/14/13) with the Selenium Criteria Workgroup, working towards an anticipated February 2014 release for public comment. OST will continue to work through its Regional and HQ contacts, after which they will reach out to States and ACWA as well. Dave Smith from Region 9 indicated they were already familiar with this, and expects something that is more stringent.

4. **TMDL Workgroup [HQ Lead: Jenny Molloy, Greg Schaner; Regional Lead: Peter Kozelka, R9]:** Jenny and Greg reported that the TMDL Workgroup is working through the conundrums of about 15 specific logistical, data, and legal authority issues. Dave Smith from Region 9 said they developed a process for reviewing TMDLs that include having a cross-program team and a checklist. He said the key is to have more cross-program collaboration. **He asked for other Regions to volunteer to beta test their process.**

REGIONAL ROUND ROBIN:

Region 2. Pass.

Region 3. Brian Trulear raised the Iowa League of Cities blending issue. He indicated that cities in Pennsylvania want guidance from EPA on how the Agency is interpreting and applying the decision. He sent Connie Bosma and Kevin Weiss a copy of a recent letter from John Hall. Kevin indicated that Steve Neugeboren has recently talked with the Region 7 states and we are continuing to talk with Nancy Stoner and Cynthia Giles to resolve this. Nancy Stoner will also be talking at a Conference for NACWA attorneys. **For the interim, until we are able to roll out a clear message, Kevin is sending the desk statement to the Regions [attached here].** Dave, Region 9, suggested that HQ check with the Regions on their actual practices.

Region 4. Mark Nuhfer reported that they are facing a slew of retirements: (Connie Kagie, Marshall Hyatt, Cheryl Espy, and one later in the year). As a result of this loss of expertise, they reorganized on October 1, shifting from a State-based program to a Sector-based program.

The Region noted that an **antidegradation lawsuit in Florida**, concerning incorporating nonpoint sources in 303(d) listing, has serious implications for our program**. We agreed to set up a longer discussion on this issue in the near future.**

Region 6. Claudia Hosch reported that she is going to Santa Fe to meet with Albuquerque State and municipal officials and developers to discuss pre-development hydrology and development rights. They have a permit that will be impacted by the outcome of this discussion.

Region 7. Glenn Curtis reported that in Fulton, MO the TMDL is driving a WLA below the limits of technology, and they are developing a Factor 6 variance and a new Fact Sheet. The Region is also grappling with how to deal with a multi-discharger variance (MDV) for ammonia criteria in Kansas. Region 2 had a similar experience with a MDV for mercury in NY State; there are implementation challenges. Region 9 also has MDV efforts in Oregon. **We agreed to either discuss MDVs at the Chicago Fly-in or on a longer issue telecom.**

Glen also asked about the prognosis for the Stormwater Rule. **Kevin indicated that Rachel Hebert will send out information on what is going forward in the Stormwater Rule shortly.**

Region 8. Colleen Rathbone said the Region objected to a major municipal permit in Wyoming as the permit did not include several criteria (copper, lead, cadmium) in their reasonable potential calculation. A discussion ensued with Regions 7, 4 and 2 all weighing in on the issue of RP methodology (we can't make a state use a certain method). Colleen said they were on solid ground because the permit application did not include certain data that they should have had. However, this still leaves the question about RP methods, including effluent variability, sufficiency of number of samples, use of the TSD approach vs. the State's approach, and what constitutes a sufficient application. **Colleen agreed to share their letter discussing this and Karen agreed to set up a longer telecom to explore the RP methods issue more.**

Region 9. Elizabeth Sablad indicated they received a stormwater petition. Also, The Offshore Oil permit has taken a long time to come to internal decision, one which the Coastal Commission concurred on. But, the Coastal Commission may take back their concurrence if we make changes. The next meeting is in December. There is an issue in Hawaii on use of the census threshold in an urbanized area on one of the islands. We need a consistent approach to designating urban clusters for Phase II.

Region 10. Mike Lidgard said they are issuing a draft oil and gas permit on the North Slope of Alaska, for Geotech Survey activity this summer. They are issuing the permit in parallel with the State for State waters, and are including tribal consultation.

Exhibit 84

EPA Nov. 19-22, 2013 emails confirming finality of desk statement

From:	Weiss, Kevin
To:	Webster, David; Anderson, Kate; Trulear, Brian; MacKnight, Evelyn; Thomas, Chris; Nuhfer, Mark; Pierard, Kevin; Wiemhoff, John; Kaspar, Paul; Schwab, Kay; Curtis, Glenn; Nix, Tanya; Dunn, John; Hosch, Claudia; Rathbone, Colleen; Sablad, Elizabeth; Smith, DavidW; Lidgard, Michael; Poulsom, Susan; Pitt, Brian; Angelich, Michelle
Cc:	Bosma, Connie
Subject:	Desk Statement for Iowa League of Cities
Date:	Friday, November 22, 2013 2:21:23 PM
Attachments:	Desk Statement 11-19-13.docx

From: Gude, Karen
To: Weiss, Kevin
Subject: RE: draft desk statement on Iowa League
Date: Friday, November 22, 2013 2:42:00 PM

Kevin,

It should be fine to share the statement with states and Regions.

Karen Gude
Communications Coordinator
Office of Wastewater Management, Office of Water
U.S. Environmental Protection Agency
Phone: (202) 564-9567

From: Weiss, Kevin
Sent: Friday, November 22, 2013 2:06 PM
To: Gude, Karen
Subject: FW: draft desk statement on Iowa League

From: Conger, Nick
Sent: Friday, November 22, 2013 2:00 PM
To: DeMarco, Carol; Weiss, Kevin
Cc: Vinch, James
Subject: RE: draft desk statement on Iowa League

Hi Carol,

The desk statement is ok to send to the folks in New Jersey. That's the extent of our public communications on this subject, to my knowledge. It's fair game to send to media/stakeholders.

Kevin can chime in if there's been any more recent direction.

Nick

The Eighth Circuit's interpretation in *Iowa League of Cities v EPA* of EPA's regulations relating to blending and bypass is legally binding within the Eighth Circuit. Outside of the Eighth Circuit, EPA will continue to work with States and communities with the goal of finding solutions that protect public health and the environment while recognizing economic constraints and feasibility concerns, consistent with the Agency's existing interpretation of the regulations.

Nick Conger
Communications Director
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Office: (202) 564-6287
Cell: (202) 412-2655

From: Weiss, Kevin
To: Nuhfer, Mark
Subject: RE: Desk Statement for Iowa League of Cities
Date: Friday, November 22, 2013 2:54:00 PM

It is final – [redacted]

From: Nuhfer, Mark
Sent: Friday, November 22, 2013 2:48 PM
To: Weiss, Kevin
Subject: RE: Desk Statement for Iowa League of Cities

Is this final? [redacted]

From: Weiss, Kevin
Sent: Friday, November 22, 2013 2:21 PM
To: Webster, David; Anderson, Kate; Trulear, Brian; MacKnight, Evelyn; Thomas, Chris; Nuhfer, Mark; Pierard, Kevin; Wiemhoff, John; Kaspar, Paul; Schwab, Kay; Curtis, Glenn; Nix, Tanya; Dunn, John; Hosch, Claudia; Rathbone, Colleen; Sablad, Elizabeth; Smith, DavidW; Lidgard, Michael; Poulsom, Susan; Pitt, Brian; Josilo, Michelle
Cc: Bosma, Connie
Subject: Desk Statement for Iowa League of Cities

Exhibit 85

Dec. 3, 2013 DOJ email requesting EPA coordination on how to respond to the Municipal Group Letter

From: Allen, Leslie (ENRD)
To: Vinch, James
Subject: RE: Letter on Iowa League of Cities
Date: Tuesday, December 03, 2013 5:40:55 PM

Hey Jim. I just tried to call you on this. Is EPA planning to respond, and if so how and when? And, will DOJ get to review? The conference is fast approaching, yes?

From: Vinch, James [mailto:Vinch.James@epa.gov]
Sent: Tuesday, November 26, 2013 3:36 PM
To: Allen, Leslie (ENRD)
Subject: FW: Letter on Iowa League of Cities

Leslie,

FYI attached is the newest pressure point. It will require a response from the Agency in relatively short order and will force us to clarify our message on Iowa League.

Please feel free to give me a call if you have any questions.

Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

From: Weiss, Kevin
Sent: Tuesday, November 26, 2013 2:24 PM
To: Witt, Richard; Levine, MaryEllen; Vinch, James; Theis, Joseph; Denton, Loren
Subject: Letter on Iowa League of Cities

Exhibit 86

EPA Deputy Administrator Robert Perciasepe's talking points

From:	Denton, Loren
To:	Hannon, Arnita; Cook-Shyovitz, Becky; Samy, Kevin; Pollins, Mark; Giles-AA, Cynthia; Stoner, Nancy; Nagle, Deborah; Bosma, Connie; Shinkman, Susan; Chester, Steven; Weiss, Kevin; Crossland, Andy; Sawyers, Andrew
Subject:	RE: Status: Briefing; TPs
Date:	Thursday, December 12, 2013 4:59:45 PM
Attachments:	DeputyAdministratorBriefingDec2013USCMNLCNACoDialogueMtg.docx Revised Talking Points for DAA 12 11 13 (3).docx

Attached are Bob P's talking points and a one-pager on Iowa League of Cities in case he gets a question on it.

Loren Denton
Chief, Municipal Enforcement Branch
Water Enforcement Division
U.S. EPA (2243A)
Washington, D.C. 20460
Phone: (202) 564-1148

From: Weiss, Kevin
Sent: Thursday, December 12, 2013 4:25 PM
To: Denton, Loren
Subject: FW: Status: Briefing; TPs

From: Hannon, Arnita
Sent: Thursday, December 12, 2013 3:26 PM
To: Weiss, Kevin; Crossland, Andy
Cc: Samy, Kevin; Cook-Shyovitz, Becky
Subject: Status: Briefing; TPs

Hi Guys!
Are you close to sending the Briefing and Talking Points over? Please cc Kevin Samy and Becky Cook-Shyovitz when you send this material just in case I've had to leave the office. I am also having trouble sending messages from my blackberry and just got back to my desk so really sorry about having to be a pain☺!

Thx as always,

Arnita

PS – Just got word that Nancy Sutley's schedule will prevent her from coming tomorrow fyi!

M. Arnita Hannon

Intergovernmental Liaison
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If asked about EPA's response to Iowa League of Cities:

- EPA received a letter dated November 26, 2013 from the U.S. Conference of Mayors, the National League of Cities and other organizations requesting clarification of the Agency's position on the *Iowa League of Cities* decision in the 8th Circuit Court of Appeals. EPA is currently reviewing the letter and will provide a response in the near future.

Background of Iowa League of Cities Decision

- In Iowa League of Cities v. EPA (March 25, 2013) the Eighth Circuit Court of Appeals:

  (1) vacated portions of two letters that EPA sent to Senator Grassley in response to his questions about blending and mixing zones because the letters constituted legislative rules that were promulgated without notice and comment rulemaking in violation of the APA; and

  2) held that EPA exceeded it statutory authority insofar as it imposes secondary treatment regulations on flows within treatment facilities (e.g. apply effluent limitations to the discharge of flows from one internal treatment unit to another), and thus within the Eight Circuit this decision will have practical effect of limiting how the Agency approaches blended wastestreams.

- The Eighth Circuit's opinion is inconsistent with EPA's long-standing interpretation of the Clean Water Act, the bypass rule and the secondary treatment standard as prohibiting the routing of waste streams around secondary treatment units and subsequently blending the partially treated wastewater back in with treated flows. EPA's position is that blending is a bypass and can only be justified upon a demonstration of "no feasible alternatives."

- EPA has determined that the *Iowa League of Cities'* interpretation of blending and bypass is binding within the Eighth Circuit. Outside the Eighth Circuit, EPA will continue to apply the bypass rule consistent with the Agency's existing interpretation of its regulations.

Exhibit 87

OECA Dec. 15, 2013 summary of ILOC applicability with Jan. 9, 2014 transmittal email

From: Vinch, James
To: "allen.leslie@doj.gov"
Subject: Draft Partial Outline
Date: Thursday, January 09, 2014 9:34:57 AM
Attachments: Iowa League 12.15.13.docx

Leslie,

Here is what I have so far [redacted]

Jim Vinch
Attorney
Water Enforcement Division
US Environmental Protection Agency
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Washington DC 20460
tel: (202) 564-1256
fax: (202) 564-0024

Attorney-Client Privileged/Enforcement Confidential

12.15.13 Working Draft

1. Iowa League of Cities held that EPA does not have the statutory authority to prohibit "blending" as a violation of the bypass rule, 40 C.F.R. § 122.41(m) as long as the discharges from the POTW comply with the effluent limits in its NPDES permit. This decision will be applied within the Eighth Circuit. Outside the Eighth Circuit, EPA will continue to apply its long standing interpretation of the Clean Water Act ("CWA"), its regulations and case law that "blending" does violate the bypass rule unless a POTW establishes that there are "no feasible alternatives" as set forth in 40 C.F.R. § 122.41(m)(4)(B).

2. The Clean Water Act requires that publically owned treatment works treat all wastewater streams using the technology-based standard of "secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title." 33 U.S.C. § 1311(b)(1)(B). Section 1314(a) of the CWA requires the Administrator to promulgate regulations concerning the "degree of effluent reduction attainable through the application of secondary treatment" focusing on the "amounts of constituents and chemical, physical and biological characteristics of pollutants." Although EPA lacks the authority to prescribe specific treatment technologies necessary to meet the secondary treatment standard, NRDC v. EPA, 822 F.2d 1276 (9th Cir. 1989), EPA has specified a minimum level of effluent reduction required to meet secondary treatment.

3. The secondary treatment regulations, 40 C.F.R. Part 133, sets forth the "level of effluent quality attainable through the application of secondary treatment or equivalent technology." 40 C.F.R. § 133.100. In general, the secondary treatment regulation requires that the minimum level of effluent quality attainable by secondary treatment requires the removal of the pollutants BOD, suspended solids and pH to the certain numeric levels of concentration as specified in the rule.[i] 40 C.F.R. § 133.102(a)-(c). As long as a POTW's end-of-the-pipe discharges satisfy these numeric standards, then the POTW is arguably satisfying the secondary treatment requirement. While the secondary treatment standard does not prescribe that any particular treatment technology be employed, it does identify the type of technology required in order for a treatment system to be considered "equivalent to secondary treatment."

4. **Not sure how relevant this is:** In 1981, Congress amended the CWA to allow POTWs to use certain existing technologies as "equivalent to secondary treatment" even though the discharges from the use of these technologies could not meet the effluent limits specified in 40 C.F.R. § 133.103.102(a)-(c). The legislative history suggests that this amendment was intended to minimize the need for increased treatment and construction of costly new facilities where existing treatment technologies, including "such biological treatment facilities as oxidation

ponds, lagoons and ditches and trickling filters," could provide equivalent treatment at a reduced cost. 33 U.S.C. § 1314(d)(4). See H.R. Rep. No. 97-30, 97th Cong., 1st Sess. 34-35, 73 (1981).

In its regulations, EPA defined "facilities eligible for treatment equivalent to secondary treatment" as those facilities that use "a trickling filter or waste stabilization pond as the principal process" and are unable to meet the removal requirements for BOD and suspended solids as set forth in 40 C.F.R. § 133.103 and that "provide significant **biological treatment** of municipal wastewater." If treatment equivalent to secondary treatment is defined as including biological treatment then it can be argued that the performance standard for standard secondary treatment must include a treatment technology that provides at least the same performance standard as provided by biological treatment. This does not necessary mean that a POTW must use a biological treatment process in its design of standard secondary treatment technology, but it must remove the same types of pollutants as is removed by biological treatment.[ii] [Pathogens are the pollutant that EPA is concerned about even though the secondary treatment rule does not include an effluent limitation for pathogens. If biological treatment is not used, the some other technology must be used to remove pathogens.]

****Another interesting point**: In the FR preamble finalizing the equivalent to secondary rule, EPA responded to a comment that some of these "equivalent facilities" have been able to meet secondary treatment standards by by-passing flows rather than treating all flows. The commenter stated that the effluent limitations under the equivalent to secondary rule should assume that the facility is treating all of the previously by-passed flows. EPA agreed that the effluent limitations must be "adjusted to account for those attainable when the by-passed flows are treated." Does this support our theory that all bypassed flows have to be treated, or is this just applicable to the equivalent to secondary rule?

5. **Bypass rule:** The bypass rule, 40 C.F.R. § 122.41(m), prohibits the intentional diversion of waste streams from any portion of a treatment facility unless the discharger can demonstrate that the bypass was "unavoidable to prevent loss of life, personal injury or severe property damage" or there were "no feasible alternatives" to the bypass. 40 C.F.R. § 122.41(m)(4). One of the primary purposes of the bypass rule is to require that "permittees operate control equipment at all times, thus obtaining the maximum pollutant reductions consistent with technology-based requirements." 49 Fed.Reg. 38,036 (Sept. 26, 1984). The bypass rule is designed to "ensure that users properly operate and maintain their treatment facilities . . . [pursuant to applicable] technology-based standards." 53 Fed. Reg. 40,562, 40,609 (Oct.17, 1988). The bypass restriction requires that all waste streams be treated through the appropriate technology-based standard even where a bypass would not result in a violation of NPDES effluent limits.

In *National Resources Defense Council v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) industry groups argued that the bypass rule does not require the continuous treatment of wastewater through the technology-based treatment process specified in an NPDES permit as long as the effluent limitations in the permit were met. In cases where effluent limits are expressed as monthly

averages (as is the case with the effluent limits based on secondary treatment), turning the treatment technology off for several days during the month would still allow a facility to meet its monthly average limit as long as it treated all the wastewater on the remaining days. The court held that, although Congress did not intend to impose a "one size fits all" technology standard:

[w]e do not agree….that "on-off" regulation constitutes a choice of treatment technologies. Since that sort of option does nothing to further the goal of exploring diverse treatment technologies, we are unpersuaded that the "on-off" decision is the sort of technological choice Congress intended to leave entirely to the discharger.

Id. at 123. Furthermore, the court reasoned,

[i]n the context of a statute which seeks the elimination of pollution, it is difficult to believe that Congress *intended* that dischargers be entitled to shut off their treatment facilities and "coast" simply because they were momentarily not in danger of violating effluent limitations. . . . In view if the Act's ambitious policies, we cannot say that the Act requires EPA to allow bypasses which are not provided for in the permit and which are unnecessary for maintenance purposes or to avoid harm to life or property. The statute'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.

Id. at 123-24.

According to the reasoning of *NRDC v. EPA*, the bypassing of the technology-based treatment process, such as secondary treatment in the context of publically owned treatment works, is prohibited even if the final effluent meets NPDES permit limits because Congress intended that full treatment be employed in order to further the goals of the CWA.

In addition, the court recognized that the bypass rule performed another valuable function in the CWA regulatory scheme. By insisting on full treatment of wastestreams though the technology-based treatment process, EPA is using the bypass regulation "as a means of minimizing the discharge of indirectly regulated pollutants." It is not always feasible or technologically possible to set an effluent limit for every pollutant that the agency has reason to regulate. For instance, some pollutants cannot be detected simply or in a cost effective manner. Therefore, in these situations EPA frequently establish effluent limits for certain pollutants which serve as "'indicators' of the probable level of the unregulated pollutants because the model treatment technology removes both." *Id*. at 125. The court upheld this "practice of indirectly regulating pollutants without promulgation of specific effluent limits under section 304…[as] unsurprising."

In fact, in the preamble to the bypass regulation itself, EPA identifies the indirect regulation of other pollutants as one of the primary purposes of the bypass rule. The preamble to the publication of the final bypass rule states that "the restriction on bypasses where permit limits are

being met is necessary for several reasons. EPA's effluent limitations guidelines and standards-setting process are predicted [sic] upon the efficient operation and maintenance of removal systems. A number of effluent limitations guidelines and standards upon which NPDES permits are based do not contain specific limitations for all of the pollutants of concern. . . . The data available to EPA show that effective control of these pollutants can be obtained by controlling the discharge of [other] pollutants" specifically regulated in the NPDES permit. . . . If bypass of treatment equipment is allowed, there is no assurance that these [unregulated] pollutants will be controlled even though those specifically limited still meet permit limitations." *Id*. at 38,037.

The preamble continues:

> Similarly, permit writers who establish permit limitations. . .generally evaluate the relevant treatment system and often decide that limitations on all pollutants of concern are not necessary. This may be because. . it is determined that the limitations on only some of the pollutants will provide adequate control of remaining pollutants so long as treatment equipment is properly operated and maintained. This eliminates the need to impose numerous pollutant limitations and corresponding monitoring requirements which are burdensome and costly to the permittee . . . . If bypasses if treatment equipment are allowed, it is possible that all pollutants of concern will not receive the level of control anticipated in the establishment of the permit limitations.

Id.

As discussed above, EPA has identified pathogens as a pollutant of concern in municpal wastewater systems. Even though pathogens are not directly regulated through NPDES permit effluent limitations (because they are difficult to measure in a cost effective manner), the effective removal of pathogens is an important characteristic of the secondary treatment process. If it is permissible to route flows around secondary treatment units during wet weather events, then the re-routed flows would likely contain high levels of pathogens, which would present a significant threat to human health and the environment. Blending would significantly undermine one of the central rationales of the bypass rule.

[i] The secondary treatment regulation defines secondary treatment as attaining an average effluent for both BOD and suspended solids of 30 mg/l in a period of 30 consecutive days, and average effluent quality of 45 mg/l for the same pollutants in a period of 7 consecutive days, and 85 percent removal of the same pollutants in a period of 30 consecutive days. The effluent levels for pH must be maintained between 6.0 and 9.0 unless certain demonstrations are made.

[ii] The counter argument is that because the equivalent to secondary standard allows discharges of higher concentrations of BOD and suspended solids than required by 40 C.F.R. 133.102, then it makes sense for the equivalent to secondary standard to require something in addition to the regular secondary treatment standard to compensate for the higher BOD and suspended solids limits allowed in the equivalent to secondary rule.

Exhibit 88

Feb. 19, 2014 *ILOC* strategy document with transmittal email

From: Weiss, Kevin
To: Clovis, Debora
Subject: FW: Final Strategy for Responding to Iowa League
Date: Wednesday, February 26, 2014 1:43:00 PM
Attachments: Strategy for Responding to Iowa League 2 19 14 draft.docx

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Debora:

Here is the strategy I mentioned that talks about the experts workshop . . . .

Kevin

From: Nagle, Deborah
Sent: Wednesday, February 19, 2014 1:56 PM
To: Weiss, Kevin; Pollins, Mark; Theis, Joseph; Denton, Loren; Vinch, James; Bosma, Connie; Witt, Richard
Subject: Re: Final Strategy for Responding to Iowa League

Good. Now let's put this w pager down and move on to the important effort of organizing a panel discussion on health impacts.

From: Weiss, Kevin
Sent: Wednesday, February 19, 2014 1:09:41 PM
To: Pollins, Mark; Theis, Joseph; Denton, Loren; Vinch, James; Nagle, Deborah; Bosma, Connie; Witt, Richard
Subject: Final Strategy for Responding to Iowa League

Here is the final version of the strategy –

Strategy for Responding to Iowa League

Direction to take inside 8th Circuit: Permits for POTWs that blend must:

- Have a bypass provision that is at least as stringent as EPA's regulations at 40 CFR 122.41(m),
- Clearly identify the treatment train that will be used during dry and wet weather,
- Will not have internal permit limitations (unless end-of-pipe effluent limits are impracticable),
- Require monitoring to yield data that is representative of the monitored activity (see 122.48(b)) (permits should clearly specify end-of-pipe compliance monitoring during wet weather),
- Provide percent removal requirements according to the secondary treatment regulations, and
- Meet water quality standards.

Direction to take outside 8th Circuit: EPA would continue to apply its historic interpretation, that bypasses are prohibited by the CWA unless a NPDES permittee can meet all of the following criteria:

- The bypass was "unavoidable to prevent loss of life, personal injury or severe property damage";
- There were no "feasible alternatives" to the bypass, and
- The permittee must have submitted notice of the bypass to the director of the permitting authority.

On a case-by-case basis, a permittee will be considered to be implementing all feasible alternatives if it is implementing an adequate CMOM program, including an acceptable I/I program, is in compliance with pretreatment requirements, and for any bypass around secondary treatment:

- There is side stream treatment that meets an acceptable level of treatment (e.g., significant solids removal);
- The recombined flow meets effluent limits, utilizing representative monitoring during dry and wet weather; and,
- Flows to the secondary treatment units are maximized.
  Note: There was general agreement at the 2010 workshop on this approach to blending.

EPA would hold a workshop with public health and engineering experts to ask questions about the public health implications of blending:

- OECA and OW would agree on questions to ask the panel of experts and would send these questions to them ahead of time. The questions would cover effluent from full secondary treatment as well as blended effluent and other discharges during peak flow events (including bypasses that are not blended) with and without side stream treatment.
- The workshop would be facilitated by a professional facilitator.
- Purpose is not to seek consensus but to solicit individual views – so it is not a FACA.

Depending on the outcome of the public health workshop, we could:

- Implement the approach that was generally supported at the 2010 workshop (see discussion above);
- We could hold another workshop of representatives from states, municipalities, NGOs, WEF, etc to review the findings from the public health experts workshop and to review the outcome of the 2010 workshop and provide individual views on the steps that should be taken in wet weather events to protect the public from inadequately treated wastewater;
- We could maintain our historic interpretation without any change; or
- Adopt one of the previous draft blending/peak flow policies.

The next step depends on the recommendations. It could be a policy or a memo to the regions.

Communicating our Strategy: We could respond to the US Conference of Mayor, et al letter by summarizing this strategy or we could send a memo to the regions.

Exhibit 89

May 30, 2014 DOJ email to EPA concerning NEDACAP decision

From: Levine, MaryEllen
To: Witt, Richard; Neugeboren, Steven; Nagle, Deborah; Sawyers, Andrew; Bosma, Connie; Weiss, Kevin; Pollins, Mark; Denton, Loren; Theis, Joseph; Vinch, James
Cc: Schramm, Daniel
Subject: FW: Adverse Decision in NEDA/CAP v. EPA (DC Cir.) (Summit guidance case)
Date: Friday, May 30, 2014 11:34:07 AM
Attachments: ENV_DEFENSE-#683387-v1-admin_su_summit_guidance_decision.PDF

OWM/OECA - [redacted]

From: Lipshultz, Jon (ENRD) [mailto:Jon.Lipshultz@usdoj.gov]
Sent: Friday, May 30, 2014 10:40 AM
To: Levine, MaryEllen; Doyle, Andrew (ENRD)
Subject: FW: Adverse Decision in NEDA/CAP v. EPA (DC Cir.) (Summit guidance case)

[redacted]

From: Lipshultz, Jon (ENRD)
Sent: Friday, May 30, 2014 10:31 AM
To: 'Schmidt, Lorie'; Vaden, Christopher (ENRD); Grishaw, Letitia (ENRD); O'Donnell, Jessica (ENRD); Hostetler, Eric (ENRD); Silverman, Steve (ENRD); Embrey, Patricia
Cc: 'kim smaczniak'
Subject: Adverse Decision in NEDA/CAP v. EPA (DC Cir.) (Summit guidance case)

[redacted]

Jack Lipshultz, Assistant Chief
Environmental Defense Section
202-514-2191