11-3412

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IOWA LEAGUE OF CITIES,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Agency Guidance Letters

THE IOWA LEAGUE OF CITIES' RESPONSE TO RESPONDENT'S PETITION FOR REHEARING EN BANC

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June 24, 2013

EPA's Petition for Rehearing is a conglomeration of dissemblance and misdirection, relying on conclusory characterizations of allegedly "conflicting" circuit court decisions and raising, for the first time, arguments that are irrelevant to EPA's purposeful decision to mandate compliance with its "*ad hoc*" permitting prohibitions.[1] EPA's description of the panel's decision as inconsistent with Supreme Court and Circuit Court precedent is incredible, as both parties' briefs presented a similar framework to find jurisdiction (*e.g.*, *Molycorp* (D.C. Cir), *Nat'l Pork Producers Council* (5th Cir.), and *Lujan* (Supreme Court)). Consequently, this Court cited much of the same controlling case law that required assessment of specific factors to determine if illegal rulemaking had occurred. That a particular illegal rulemaking case denied review on its particular facts (*Am. Paper Inst.*) illuminates nothing and certainly doesn't show that this panel's decision, given the specific facts, conflicted with another circuit court decision.

It is telling that EPA's *Bennett v. Spear* finality argument never discusses the key findings of this Court that addressed finality: (1) that EPA is mandating

[1] EPA proclaims that any promulgation on its part was "unintentional." EPA Pet. for Reh., at 1. However, the only thing "unintentional" about EPA's actions was that it got caught. *See e.g.*, EPA e-mail, at League Appx. 352 ("… Ephraim [King, *i.e.*, author of the mixing zone memo] would certainly like to say that mixing zones for bacteria are not allowed, but that absent a policy memo I think it could be hard to disapprove a mixing zone provision for bacteria that mirrored what we've said in the past in the Handbook, the TSD, and the CSO guidance…"); *see also* EPA e-mail, at League Appx. 267 ("Until the Policy is finalized, we are telling permittees that we will be applying the interpretation and approach in the 2005 draft policy."). The League was forced to reveal EPA's unlawful activity through Freedom of Information Act requests, congressional inquiry and unrefuted sworn testimony from state officials. These documents confirmed a purposeful approach to illegally amend these rules without rulemaking.

compliance with the new prohibitions as the working law of the Agency, (2) that the draft policies referenced in the letters to Senator Grassley as the basis for EPA's new position radically deviated from the published rules and EPA's historical practices, (3) that permittees and state agencies are being adversely affected by the mandates, (4) and that EPA was "delivering punches" via enforcement actions and threatening states with permit veto letters if they failed to mandate compliance with the prohibitions. These facts – and not permit issuance or Federal Register publication – control this Court's jurisdiction under 33 U.S.C. § 1369(b)(1)(E) and the finality test announced in *Bennett v. Spear*. EPA's suggested approach is simply one more attempt to "eviscerate" judicial review. Op., at n.12.

Likewise, EPA's limited authority to regulate internal wastestreams when end-of-pipe limits are not feasible is not affected by the Court's decision, as it has nothing to do with EPA's attempt to dictate facility design via the bypass and secondary treatment rules. Consequently, as there has been no demonstration that this Court's decision "badly misconstrued jurisdictional and substantive requirements," EPA's Petition for Rehearing should be denied.

I. The Court's Opinion Was Consistent with All Circuit Case Law

Despite EPA's protests to the contrary, the approach taken by this Court was consistent with previous petition cases addressing illegal rulemaking. Such a

review necessarily looks to see whether the Agency's "guidance letters have made a substantive change in the EPA's regulation." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755-756 (5th Cir. 2011); *U.S.Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) ("If an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required."); *S.D. v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) ("Where a policy statement purports to create substantive requirements, it can be a legislative rule regardless of the agency's characterization"); *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) ("If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative."). Inherently, this evaluation requires a detailed factual comparison between an agency's previously published statements and historical approach to the regulation and the current interpretation now being proclaimed by the agency.

In addition to the "before and after comparison," reviewing courts have sought to determine whether the allegedly revised rule is "binding" or "is applied in a way that it indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002); *see also Appalachian Power Co. v. EPA ("APC")*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). Among other evidence of a "binding effect," courts

will look to see whether a document or an agency action "speaks in mandatory terms" (*Gen. Elec. Co.*, 290 F.3d at 383), whether a document is considered to be controlling by the agency's headquarters (*APC*, 208 F.3d at 1021), whether an agency bases enforcement actions on the document (*id.*), and whether an action leads private parties or state permitting authorities to believe that the agency will declare permits invalid unless they comply with terms of the document. *Id.*; *CropLife Am. v. EPA*, 329 F.3d 876, 881, 883 (D.C. Cir. 2003). Finally, when a legislative rule is being challenged on its face, courts also seek some demonstration of hardship. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately … is 'ripe' for review at once ... ."); *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967) ("Where … a regulation requires an immediate and significant change in the plaintiff's conduct of their affairs with serious penalties attached to noncompliance, access to the courts … must be permitted.").

Consistent with this well-established precedent, this Court made the following findings to confirm that it had jurisdiction to review EPA's actions:

- The challenged guidance letters specify EPA's definitive settled position and/or working law on three regulations, 40 C.F.R. §§ 122.44(d), 122.41(m), and Part 133. (Op., at 34-39).[2]

[2] As EPA concedes, both the regional offices and the state agencies must abide by the existing rules. EPA Pet. for Reh., at n.3. Further, the regulated community is subject to criminal penalties for knowingly violating the existing rules. 33 U.S.C. § 1319(c)(2). It was for these reasons that Senator Grassley inquired as to the inconsistency between EPA's statements to this Court in the League's prior petition case distancing itself from the internal policy documents and

- EPA changed its interpretation of existing regulations. EPA's historical interpretation and implementation of the rules at issue, as evidenced by regulatory preamble, EPA published guidance, and related Agency correspondence, were inconsistent with the positions set forth in the challenged guidance letters and policy memoranda. (Op., at 34-39).

- EPA directed state officials to issue permits consistent with the requirements specified in the challenged guidance or face permit vetoes. (Op., at 19-21).[3]

- The issues are not fact-specific as EPA's new regulatory prohibitions do not vary "based on each applicant's specific factual circumstance[s]." (Op., at 24-25).

- League members are forced to immediately choose between constructing less costly facilities or far more costly processes to meet EPA's new mandates. (Op., at 25).

- The new prohibitions impose more restrictive compliance responsibilities. (Op., at 28-29, 38).

While EPA "respectfully disagrees" with these factual findings (EPA Pet. for Reh., at 6), neither its original filings nor its rehearing request provided a shred

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the positions being told to the Iowa Department of Natural Resources. In response to Senator Grassley, EPA "fessed up" that it was, in fact, prohibiting mixing zones and mandating compliance with the draft policy that prohibited blending. In fact, in this case, EPA even represented that these prohibitions reflected "longstanding" Agency policy and the "existing regulatory requirements." Op., at 2, 8. This is why, in part, the Court described EPA's posture as "Orwellian Newspeak," "dissembl[ing]," and "belated back-pedaling." Op., at 20, 21, and 25.

[3] On this issue, the League would also note the two letters from state agencies (Iowa and Kansas) that were supplied to the Court after oral argument as well as the recently released letter from EPA Region 5 to the Wisconsin Department of Natural Resources confirming that EPA was demanding immediate compliance with the new rule interpretations. For the Court's convenience, these letters, which were originally provided to the Court on Dec. 21, 2012 (Entry 3987764) and June 13, 2013 (Entry 4044974), have been resubmitted as attachments to this response. *See* Exs. 1-3.

of objective evidence to contradict these findings.[4] Moreover, EPA's petition for rehearing didn't provide a single case holding that informal (illegal) promulgations are not immediately reviewable given such findings.

In support of rehearing, EPA alleged a conflict with *Am. Paper Inst. v. EPA ("API")*, 882 F.2d 287 (7th Cir. 1989). EPA Pet. for Reh., at 9. However, the factual circumstances of *API*, which EPA ignores, are not even remotely similar to this case. In *API*, the Regional office (as opposed to the EPA Headquarters) issued a guidance document explaining how it "might react" in future proposals. *Id*. The "policy" at issue was not applied to any permittee (*id.*); it did not "demand any change in conduct" (*id.*); and, there was no indication "how (or even whether) it would affect any plant." *Id.* at 290. Consequently, the court denied review as (1) the region had no authority to issue any type of rule (only EPA Headquarters has such authority) and (2) the document had no "legal effect."

Conversely, in the instant case, the Court found that, *inter alia*, (1) EPA Headquarters imposed the rule changes at issue, (2) EPA demanded that the states must adhere to the new requirements or face a permit veto, (3) there was a significant and immediate impact on the regulated community, and (4) the mandates were "irreconcilable" with the duly adopted NPDES rules. As EPA's

[4] EPA's disagreement with the Court's findings does not support a request for rehearing *en banc*. *See United States v. Samuels*, 808 F.2d 1298, 1300 (8th Cir. 1987) ("*En bancs* . . . should be ordered only when consideration by the full court is necessary to secure or maintain uniformity of our decision or when the proceeding involves a question of exceptional importance.").

actions in this appeal have "bite" and "control" permit holders (as well as state agencies) "to do something they would rather not," EPA's claim that this Court's decision conflicts with *API* is meritless. *Id.*, at 289. Different facts, of course, justify different results under applicable the legal standard.

II. EPA's Review at the Time of Permitting Arguments Are Misleading and Irrelevant

Throughout EPA's Petition for Rehearing (and earlier briefs), EPA suggests that the new regulatory mandates may be reviewed only at the time of permitting. *See e.g.*, EPA Pet. for Reh., at 9-10. Putting aside that rehearing *en banc* is not a forum for rearguing issues, EPA does not provide any permit specific facts, the statutory provision, or a single case supporting this self-serving legal theory.

The explanation for this "over sight" is simple. First, such a limitation on review would render 33 U.S.C. § 1369(b)(1)(E) meaningless. As Congress expressly granted Circuit Courts immediate review over EPA promulgations and approvals of regulations governing effluent limitations separately from EPA's issuance or denial of a permit, review is proper.[5] Op., at 13. Second, the Court confirmed that EPA's actions have imposed "immediate" hardship in advance of

[5] As noted by the Supreme Court, EPA's construction could "produce the truly perverse situation in which the Court of Appeals would review numerous individual actions issuing or denying permits [under § 509(b)(1)(F), but would have no power of direct review of the basic regulations governing those individual actions." *E. I. Du Pont De Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977); *see also NRDC v. EPA ("NRDC III")*, 859 F.2d 156,167 (D.C. Cir. 1988) (CWA § 509(b)(1) "evinces a strong will that [judicial review] occur at the time of promulgation."). The D.C. Circuit also specifically rejected this "review at permitting" argument. *APC*, 208 F.3d at n.18.

permitting, both procedural and substantive in nature. *Id.* at 25 ("League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money."). In such cases, immediate review of a regulation must be permitted. *Lujan*, 497 U.S. at 891 ("a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately … is 'ripe' for review at once ....").[6] Finally, EPA's approach will continue to allow EPA to use its threats of veto authority to strong-arm states and communities into compliance with the illegal rule revisions in the 46 states where EPA does not issue permits, including Iowa. Op., at n.4; 24-26 (citing *Sackett v. EPA*, 566 U.S. Slip Op. at 9-10 (March 21, 2012) ("[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review....")). EPA's suggestion to "wait until permitting" is simply another attempt to "eviscerate" judicial review and, therefore, should not be countenanced.[7]

[6] "Procedural attacks," such as failure to adhere to APA notice and comment requirements, "need not await the test of time and can be reviewed immediately." *Nat'l Indus. Constructors, Inc. v. Occupat'l Safety & Health Rev. Comm.*, 583 F.2d 1048 (8th Cir. 1978); Op., at 29-30.

[7] EPA's reliance on *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) for the proposition that "EPA's veto of NPDES permit [is] reviewable" is disingenuous. EPA Pet. for Reh., at 9 n.10. *Crown Simpson* specifically noted that the decision was based upon the preexisting law and did not consider the impact of the 1977 amendments. 445 U.S. at 197 n.2. Subsequent case law, including this Circuit's, specifically notes that federal court review of an EPA objection or veto of a State NPDES permit is no longer available. *City of Ames v. Reilly*, 986 F.2d 253 (8th Cir. 1993); *see also Champion Internat'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988).

III. The Court's Decision Addressed All Finality Concerns

EPA also claims that the Court's decision failed to apply the finality test announced in *Bennett v. Spear*, 520 U.S. 154 (1997). Under this test, to be final and reviewable, (1) the action must be the consummation of decisionmaking and (2) the action must determine "rights and obligations" or have "legal consequences." *Id.*, at 177-178. Even a casual review of the opinion would reveal that all of the components of the *Bennett v. Spear* finality test were addressed by the Court's analysis of "promulgation" and "ripeness." Op., at n.12. Accordingly, EPA's claim that "finality" issues were not addressed is baseless.

For instance, the Court found EPA's actions to be "binding," "mandatory," and "concrete." *Id.* at 17-18, 21. Moreover, as EPA repeatedly represented that the positions espoused were "existing" and "longstanding" (*see, e.g., Id.* at 2, 8), there was nothing tentative about EPA's decision making. *Id*, at 18-21, 24-25. As such, the first prong of the *Bennett v. Spear* finality test was satisfied. Similarly, the Court found (and EPA never denied) that EPA ordered states to comply with the new rule interpretations or face consequences and that, therefore, these mandates had a "binding effect." *Id.* The Court also found that, as result of these directives, it was reasonable for state agencies and permittees to understand that if they proposed projects inconsistent with the EPA's new mandates, the projects would be blocked, leaving them in ongoing noncompliance and with a project and

design that was wasted. *Id.* Such findings clearly constitute the "legal consequences" necessary to satisfy the second prong of the *Bennett v. Spear* finality standard. Therefore, EPA's claim that the decision disregarded the longstanding principle of limiting judicial review to 'final' agency actions is just form over substance.

IV. The Form of the Promulgation Is Irrelevant

EPA repeatedly suggests that Federal Register publication should be determinative of whether judicial review is to be granted. *See, e.g.*, EPA Pet. for Reh., at 7-9. However, once again, EPA did not provide citation to any decision that has ever ruled that formal promulgation in the Federal Register is a prerequisite for judicial review of illegal rulemaking.[8] EPA's lack of legal authority on this point comes as no surprise as illegal rulemaking could never be challenged if Federal Register publication was required. *See Lujan*, 504 U.S. at 572 n.7 (procedural challenges are reviewed immediately).

Similarly, EPA opines that this Court's opinion will, in some way, discourage federal agencies from being candid with members of Congress. Pet. for

[8] Consistent with the wealth of jurisprudence, this Court adopted a practical construction of 33 U.S.C. § 1369(b)(1)(E) and the word "promulgation." *See* Op., at 15-16 citing *Modine Mfg. Corp.*, *NRDC, Molycorp, Inc.*, and *Cement Kiln Recycling*. Under this approach, the "ultimate focus" is whether the agency action "has binding effects on private parties or on the agency." *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). Not only was *Molycorp* decided well after any decision referenced by EPA, but EPA itself has repeatedly informed this Court that the standard announced in *Molycorp* controlled. EPA Br., at 41; EPA MTD, at 7.

Reh., at 7. However, EPA's letters were more than "correspondence to an elected official." As recognized by the Court, these EPA letters affirmatively ratified rule interpretations set forth in the 2005 draft policy and the King memorandum. Op., at 35, 36. Further, the Court concluded that EPA's letters announced "mandatory" and "concrete" regulatory prohibitions that were "irreconcilable" with the existing regulations. *Id.* at 36. The fact that it took the clout of a Senator to have EPA admit what it was doing (*i.e.*, unilaterally creating new multi-billion dollar obligations, contrary to the adopted rules), has no bearing on this Court's jurisdiction and it certainly should not inure to EPA's benefit.

V. EPA's Application of Secondary Treatment Requirements to Internal Waste Streams Clearly Exceeded Statutory Authority

In advance of holding that EPA's blending prohibition exceeded the Agency's authority under the Clean Water Act ("CWA"), the Court made several key findings. First, the Court noted that neither the secondary treatment rule nor the bypass rule "require the use of any particular treatment method or technology." Op., at 10 (citing *NRDC v. EPA* ("*NRDC II*"), 822 F.2d 104, 123 (D.C. Cir. 1987)).[9] Second, the Court observed that effluent limitations are to be applied "end-of-the-pipe" unless "impractical or infeasible" to do so. *Id.* at 4-5, 38-39

[9] The Court also noted repeated instances where EPA itself recognized that the CWA does not provide authority to proscribe specific types of processes used to achieve compliance with effluent limitations. Op., at 5, 8-10, 40-41 (*In re Borden, Inc.*; NPDES Permit Writers' Manual; 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983)).

(citing 40 C.F.R. § 122.45(h)). Next, the Court determined that, under EPA's revised interpretation, secondary treatment compliance has to be achieved by individual treatment units, "*regardless of whether the end of pipe output ultimately meets secondary treatment regulations.*" *Id.*, at 38 (emphasis added). The "effect" of this interpretation, as recognized by the Court, was to "mandat[e] certain technologies as part of the secondary treatment phase." *Id.* Finally, EPA's position was exposed as a rubric to prohibit "non-biological" peak flow treatment nationwide, an action contrary to the adopted rules and regulatory history. *Id.*

Having made these initial findings, the Court ultimately ruled, via statutory evaluation, that EPA lacked authority to impose secondary treatment requirements on "the flows from one internal unit to another" and that transforming the secondary treatment rule from an "effluent requirement" to an individual "internal treatment unit" requirement is plainly not within EPA's authority. *Id.* at 41. EPA now claims, citing no contrary statutory authority, that the Court's ruling is (1) inconsistent with the D.C. Circuit's bypass rule decision in *NRDC II* that upheld EPA's authority to regulate bypasses, and (2) contrary to 40 C.F.R. § 122.45(h). EPA Pet. for Reh., at 12-15. These arguments do not show the panel's statutory assessment to be erroneous and, as EPA had every opportunity to raise these issues

during merits briefing, they should not be addressed via a rehearing.[10]

In *NRDC II*, the case claimed to "conflict" with this Court's decision, EPA assured the D.C. Circuit that the bypass rule *does not* provide a basis to dictate treatment process design or acceptable treatment technology:

> [W]hat the Agency originally intended, and still intends, is to ensure 'proper pollution control through adequate design operation and maintenance of treatment facilities.' '*Design' operation and maintenance* are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that facilities follow those requirements. *It imposes no specific design and additional burdens on the permittee.*

League Brief, Ex. 14 at Appx. 156 (excerpts from EPA Brief in *NRDC II*) (emphasis added). Based on EPA's representation, the D.C. Circuit upheld EPA's bypass regulation, stating that "[t]he regulation thus ensures that treatment systems *chosen by the permittee* are operated as anticipated by the permit writer, that is, as they are designed to be operated and in accordance with the conditions set forth in the permit." *NRDC II*, 822 F.2d at 122 (emphasis added). How the panel's decision could be "squarely at odds" with a decision that also reiterated the bypass rule *did not* allow EPA to dictate unit process selection is just more "Orwellian

[10] *United States v. Replogle*, 678 F.3d 940, 942 (8th Cir. 2012) ("Panel rehearing is not a vehicle for presenting new arguments, and we do not ordinarily consider arguments raised for the first time in a petition for rehearing."). The League's briefs extensively addressed the holdings of *NRDC II*, which EPA's responses ignored.

Newspeak."[11] EPA may still use the bypass provision to preclude a facility from "shutting off" treatment units or "coasting" to save money, as it originally intended. EPA Pet. For Reh., at 13. That concern, however, does not provide authority to categorically prohibit "design operations" that incorporate blending.

Likewise, the fact that 40 C.F.R. § 122.45(h) authorizes EPA to establish internal limits to ensure final effluent limit compliance in certain "exceptional" circumstances, in no way justifies (1) EPA's attempt to categorically prohibit non-biological processes such as ACTIFLO, regardless of final effluent quality, or (2) to set both effluent and internal limits. First, *Tex. Mun. Power Agency* and *Pub. Serv. Co.* (the decisions upholding 40 C.F.R. § 122.45(h)) never address such issues. Second, the rule, on its face, provides no authority for categorically requiring individual treatment units to comply with an end-of-pipe effluent limitation. Third, the D.C. Circuit decision, cited by the Court (Op., at 41), expressly rejected an identical EPA argument. *AISI*, 115 F.3d at 995. In that case, EPA argued that the CWA authorized it to enforce effluent limitations "not only at the point source but also in streams and pools that are inside the facility." *Id.* at 995. In rejecting this argument, the D.C. Circuit ruled that, although EPA had authority to require monitoring and reporting requirements for internal units, "[t]he

[11] On two subsequent occasions, the D.C. Circuit ruled, consistent with its earlier *NRDC II* decision, that EPA lacked statutory authority to dictate treatment plant design. *See NRDC III*, 859 F.2d at 170; *Am. Iron & Steel Inst. v. EPA ("AISI)*, 115 F.3d 979, 996 (D.C. Cir. 1997).

agency exceeded its authority when it sought to impose effluent limitations upon non-point-source discharges [internal operations]." *Id.* at 996. Similarly, the *AISI* court noted that, "by authorizing the EPA to impose effluent limitations only at the point source, the Congress clearly intended to allow the permittee to choose its own control strategy." *Id.*; *see also* Op., at 41.

To be sure this Court's decision does not infringe on EPA's authority to impose internal limits *on a permit specific basis* where demonstrating compliance end of pipe is "impractical" for reasons specified in 40 C.F.R. § 122.45(h). However, EPA may not use this exception to categorically prohibit blending or claim that statutory authority exists to impose secondary treatment limits on non-biological treatment units. Accordingly, EPA's request for rehearing on this issue should be denied.

VI. Conclusion

For the aforementioned reasons, the League respectfully requests that this Court deny EPA's Petition for Rehearing En Banc and/or specifically reject EPA's latest arguments contained therein.

Respectfully submitted,

/s/ John C. Hall

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Attorney for Petitioner

Dated: June 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2013, I electronically filed the foregoing Petitioner's Response to Respondent's Petition for Rehearing En Banc. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John C. Hall
Attorney for Iowa League of Cities

EXHIBIT 1

Fields of Opportunities

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
CHUCK GIPP, DIRECTOR

December 14, 2012

John Hall
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RE: Iowa League of Cities v. EPA, 8th Circuit Court of Appeals, No. 11-3412

Dear Mr. Hall,

The Iowa Department of Natural Resources (IDNR) is aware that oral arguments were heard on November 12, 2012 in the case of Iowa League of Cities v. EPA before the 8th Circuit of the U.S. Court of Appeals. The IDNR is interested in the outcome of this litigation and the issues raised therein because such outcome may determine the solutions available to Iowa communities to address peak wastewater flows. Current EPA positions in regard to peak flow treatment and the use of bacterial mixing zones are limiting the treatment options which the IDNR can approve for communities in Iowa.

It is our understanding that, during oral argument, the League of Cities was asked whether IDNR is currently imposing through enforcement actions either of the prohibitions dictated by the EPA letters to Senator Grassley and the associated EPA guidance. This letter is intended to provide a response to the question raised by the court.

Over the last few years, the IDNR has entered into numerous enforcement orders or actions which are designed to address excess wastewater flows. These excess flows can be related to combined sewer systems, insufficient treatment plant capacity, the need for collection system maintenance, or other related factors. Iowa communities subject to these enforcement actions include the cities of Pella, Osceola, Burlington, Ottumwa, Ames, Indianola, Washington and others. The IDNR intends to reach a long term compliance schedule agreement with Davenport, Bettendorf, Riverdale and Panorama Park in the near future.

These enforcement actions establish compliance schedules requiring the communities to take whatever actions are necessary to stop violations but do not typically dictate the exact facility designs to be used to address the underlying violations. The impact of the EPA positions in regard to peak flow treatment and the use of mixing zones occurs during the submission of proposed designs by the communities which are under order to upgrade their systems. The

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IDNR affirmatively states that the positions taken by EPA, as described in the letters to Senator Grassley, are currently limiting the wastewater facility designs considered approvable by IDNR for communities that are subject to enforcement orders to upgrade their wastewater collection and treatment systems.

Sincerely,

Shelli Grapp

Shelli Grapp
Bureau Chief
Water Quality Bureau

EXHIBIT 2

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Kansas

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Robert Moser, MD, Secretary
Department of Health & Environment
Sam Brownback, Governor

November 27, 2012

Mr. John C. Hall
Hall & Associates
Suite 701
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Washington, DC 20006

RE: Iowa League of Cities v. EPA, No. 11-3412

Dear Mr. Hall:

We understand that oral argument was heard in the above referenced case on November 12, 2012. The Kansas Department of Health and Environment (KDHE) has been interested in this matter for some time because the decision influences whether EPA will allow the continued use of certain peak flow treatment processes that are currently in use, and have been in use through numerous permit cycles, in our state (e.g., ACTIFLO). Like Iowa, Kansas also has a number of communities under state orders to improve their collection and treatment systems to prevent wet weather overflows of untreated sewage. Progress on resolving these conditions has been slowed due to EPA's ongoing classification of the use of peak flow treatment processes such as ACTIFLO as illegal bypasses and demands that No Feasible Alternative analyses of the collection system be conducted at each 5-year permit cycle.

We understand that, during the oral argument, EPA indicated that they are not presently enforcing the positions specified in the letters to Senator Grassley that were the basis for filing the suit and that EPA's position with regard to ACTIFLO in particular, is still under debate in the agency. Whether or not any internal debate is occurring, any statement or implication that EPA is (1) not presently enforcing the new bypass rule interpretation contained in the draft 2005 Peak Flows Policy and (2) not classifying ACTIFLO as an unlawful bypass is only partially correct. EPA has objected to, and held a permit from issuance in Kansas, however EPA has not issued the permit themselves as would be expected in the case of an objection where the state does not make the modifications EPA required.

On April 17, 2008, KDHE placed on public notice the draft wastewater permit for the Lawrence Kansas wastewater treatment plant which uses the ACTIFLO process to treat peak wet weather flows. On May 9, 2008, EPA provided a letter with their preliminary objections to the draft permit stating that the ACTIFLO system needed to be identified as an illegal bypass and the city must provide a No Feasible Alternatives analysis for its continued use. KDHE contended, and has repeatedly discussed with EPA, that the ACTIFLO process is not a plant bypass as historically defined, but is part of the city's treatment plant designed, built and operated to provide treatment of peak wet weather flows which would damage the secondary biological treatment portion of the plant. However, despite numerous discussions with KDHE and the city of Lawrence, both EPA Region VII and Headquarters have refused to allow KDHE to re-issue the Lawrence Kansas permit unless use of the ACTIFLO process is considered an illegal bypass and the city provides a No Feasible Alternatives analysis.

EPA continues to classify the treatment process as a bypass based on the draft 2005 Policy document referenced in the letters to Senator Grassley. EPA's objections to the draft permit has frozen the permitting process for this facility for over 4.5 years – almost an entire 5-year permitting cycle. In addition, EPA's classification of ACTIFLO as an illegal bypass is affecting the ability of other Kansas communities to use this cost-effective process as part of their treatment works.

While we have not chosen to intervene in this matter, we thought it was important to bring these facts to your attention.

Sincerely,

Michael Tate
Director - Bureau of Water

EXHIBIT 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

JUL 31 2012

REPLY TO THE ATTENTION OF:

WN-16J

Susan Sylvester, Director
Bureau of Watershed Management
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: Proposed Administrative Rules for Sewage Collection Systems

Dear Ms. Sylvester:

The U.S. Environmental Protection Agency has reviewed the proposed revisions to the Wisconsin Administrative Code relating to the operation and maintenance of sewage collection systems. In part, Wisconsin developed the proposed revisions in an effort to address one of the seventy-five issues EPA raised by letter dated July 18, 2011. The revisions, if adopted, may constitute a revision to Wisconsin's approved National Pollutant Discharge Elimination System (NPDES) program and would need to be submitted to the EPA for approval in accordance with 40 C.F.R. § 123.62. As discussed further below, EPA believes that three of the proposed provisions are not as stringent as the federal program. Additional comments and recommendations are provided in the enclosure to this letter.

NR 205.07(1)(u)

Federal regulations include conditions to be included in all NPDES permits. One of those standard conditions is the bypass provision at 40 C.F.R. §122.41(m). Section 122.41(m) defines a "bypass" as an intentional diversion of waste streams from any portion of a treatment facility. The regulation prohibits bypasses except "[t]he 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." 40 C.F.R. § 122.41(m)(2).

All other bypasses are prohibited, and the Director of the NPDES program may take enforcement action against a permittee, unless the permittee demonstrates that the bypass meets three very limiting conditions listed in 40 C.F.R. §122.41(m)(4). Section 122.41(m)(4)(ii) of the bypass regulation provides that the permitting authority may "approve" - but not "authorize" - a bypass if the Director determines, after considering its adverse effects, that the bypass will meet the three conditions, including that there are "no feasible alternatives" to the bypass such as through reductions of inflow and infiltration into the collection system or building auxiliary treatment or storage facilities. *See* 40 C.F.R. § 122.41(m)(4)(i)(B).

Proposed NR 205.07(1)(u) would "authorize" bypasses in four circumstances:

a. "Blending," *see* NR 205.07(1), Paragraph 1;
b. "Controlled diversions," *see* Paragraph 2;
c. "Other" bypasses, when the three limiting conditions at 40 C.F.R. § 122.41(m)(4) have been established, *see* Paragraph 3; and
d. "Scheduled bypasses," *see* Paragraph 4.

Proposed NR 205.07(1)(u) is inconsistent with the federal bypass regulation because it would "authorize" certain bypasses that would not be authorized under the federal bypass provision. To ensure that it is at least as stringent as the federal bypass provision, the language in proposed NR 205.07(1)(u) must be modified to only authorize a bypass which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. *See* 40 C.F.R. § 122.41(m)(2). NR 205.07(1)(u), Paragraph 2, pertaining to "Controlled Diversions," is similar to, but broader than, the limited exception to the bypass prohibition specified in 40 C.F.R. § 122.41(m)(2). Specifically, although Paragraph 2(a), like the federal regulation, limits the exception to situations where effluent limitations are not exceeded, the additional condition in Paragraph 2(c) is broader than the remainder of the federal regulation, which limits the exception to instances where the bypass "is for essential maintenance to assure efficient operation." For these reasons, proposed NR 205.07(1)(u) is inconsistent with, and is not as stringent as, 40 C.F.R. § 122.41(m).

NR 205.07(1)(u) may provide the criteria which Wisconsin will apply to evaluate when to exercise enforcement discretion; however, the criteria must be as stringent as the criteria listed under 40 C.F.R. § 122.41(m)(4)(ii) of the federal bypass provision.

NR 210.12

Proposed NR 210.12 would allow the State to authorize "blending" in a permit as long as the applicant meets numerous conditions. Proposed NR 210.03(2e) defines "blending" as "the routing of untreated or partially treated wastewater around a biological treatment process, or a portion of a biological treatment process, within a sewage treatment facility, which is then recombined with the biologically treated effluent and where the entire flow is subject to disinfection, if required by the WPDES permit, and the effluent is sampled prior to discharge."

In general, the diversion of flows around biological treatment units constitutes a bypass, unless 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, 40 C.F.R. Part 133, to be secondary treatment units. Consequently, blending must be subject to a bypass provision that is at least as stringent as 40 C.F.R. § 122.41(m), unless the diversion is routed to a treatment unit that is itself a secondary treatment unit. Proposed NR 210.12, which would authorize "blending" (the diversion of flows around biological treatment units), is therefore inconsistent with, and is not at least as stringent as, 40 C.F.R. § 122.41(m), in that it would allow for permit authorization of bypassing.

NR 210.21(1)

Section 301(b)(1)(B) of the Clean Water Act (CWA) and 40 C.F.R. §122.44(a)(1) require that NPDES permits for discharges from Publicly Owned Treatment Works (POTW) contain effluent limitations based upon secondary treatment as defined by the Administrator. The Administrator has established effluent limitations based upon secondary treatment at 40 C.F.R. Part 133.

Sanitary sewers serving a municipal sewage treatment plant are considered to be part of the POTW. Consequently, secondary effluent limitations, as well as any additional effluent limitations necessary to meet water quality standards, must be included in NPDES permits for discharges from sanitary sewer systems, whether or not those discharges occur prior to the headworks of a POTW Treatment Plant. As an alternative to including secondary effluent limitations, some state NPDES permitting authorities have chosen to prohibit discharges from sanitary sewer systems.

Proposed NR 210.21(1) provides that, "[i]n accordance with s. NR 205.07(1)(u), sanitary sewer overflows and sewage treatment facility overflows are prohibited and may not be authorized in a permit issued by the department." As previously noted, proposed NR 205.07(1)(u) is not as stringent as the federal bypass provision. In addition, it does not apply secondary and water quality limits to SSO discharges. To eliminate these problems with proposed NR 210.21(1), Wisconsin could either place secondary and water quality limitations on such overflow or prohibit overflows and delete the phrase "[i]n accordance with s. NR 205.07(1)(u)," so that the first sentence of NR 205.21(1) would read: "Sanitary sewer overflows and sewage treatment facility overflows are prohibited and may not be authorized in a permit issued by the department."

Proposed NR 210.21(1) provides that, "the department shall consider such information when determining if a permittee has met the exceptions to the prohibitions established in s. NR 205.07 (1) (u) 3. a. and b. . . ." The "exception to the prohibitions" provision in proposed NR 205.07(1)(u) is not as stringent as federal provisions for discharges from sanitary sewers. (It is inconsistent with the federal bypass requirement since the criteria listed in the federal bypass provision do not lead to an exception to the prohibition.) We suggest that this provision refer to whether the permittee has documented the facts supporting an application of enforcement discretion.

We hope that this letter will assist Wisconsin in establishing sewage collection systems operation and maintenance rules that are at least as stringent as the federal program. If you have any questions regarding this matter, please contact me or your staff may contact John Wiemhoff at (312) 353-8546 or at wiemhoff.john@epa.gov.

Sincerely,

Tinka G. Hyde
Director, Water Division

Enclosure

cc: Duane Schuettpelz, WDNR

Enclosure

Additional Comments from USEPA regarding the State of Wisconsin's Proposed Administrative Rules for Sewage Collection Systems

1. **Criteria for Application of Enforcement Discretion**

   EPA recommends that Wisconsin establish additional provisions related to enforcement discretion in its NPDES Enforcement Management System and not in its regulations.

2. **Capacity Management, Operations and Maintenance (CMOM) provision (NR 210.23)**

   EPA is encouraged by the Capacity, Management, Operation and Maintenance (CMOM) provision in NR 210.23. By subjecting all permittees, including satellite sewage collection systems, to develop and implement CMOM programs, communities within the State of Wisconsin should be able to achieve a high level of sewage collection system performance. In January 2005, EPA developed guidance for successful CMOM programs; EPA's Guide for Evaluating CMOM Programs can be found at http://www.epa.gov/npdes/pubs/cmom_guide_for_collection_systems.pdf. This guide provides useful information that Wisconsin can use in developing a comprehensive CMOM program. The following elements could further enhance the State of Wisconsin's proposed CMOM program:

   - Customer Service – Proper communication is essential to determine the scope of complaints and concerns of sewage collection system customers. Wisconsin should consider requiring a standard operating procedure to be developed in CMOM programs for customer service and a system for tracking customer complaints, so that permitees can improve the efficiency of managing complaints and identify recurring problems. For additional information, please see Section III.C. of Chapter 3 in the CMOM guidance.
   - Budgeting – Analyzing a sewer collection system financial information is an important component of any CMOM program. Knowing the amount of funds available for sewer collection system maintenance would have a direct effect on planning any future maintenance plan, especially preventive maintenance. For additional information, please see Section IV.A. and Section V.A. of Chapter 3 in the CMOM guidance.
   - Water Quality Monitoring – While not applicable to every community, guidance for implementing a water quality monitoring program can be helpful for communities. For additional information, please see Section IV.C. of Chapter 3 in the CMOM guidance.
   - Training Program – The current proposed CMOM program specifies "appropriate training" as a component. Wisconsin should further define expectations for appropriate training. Training should include, at a minimum, a safety component for sewage collection system employees. For additional information, please see Section III.B. and IV.E. of Chapter 3 in the CMOM guidance.

- Preventive Maintenance – Preventative maintenance scheduling is an important part of any CMOM Program. Section 4.d. in the CMOM provision in the State of Wisconsin's proposed administrative rules (or guidance issued subsequent to rule adoption) can be expanded with more detail, including a description of each type of potential preventive maintenance activity. Each CMOM program should formalize a specific frequency and schedule for each preventive maintenance activity. At a minimum, Wisconsin should consider changing Section 4.d.4 to the following (added words underlined): "A description and a frequency schedule of routine preventive operation and maintenance activities such as inspections, televising, cleaning, flow monitoring, root removal, and rehabilitation." For additional information, please see Section IV.L.1., Section V, and Section VII of Chapter 3 in EPA's CMOM guidance.

3. Basement Backup Reporting

The frequency of basement backups indicates the performance of a sewage collection system. Regular reporting (more than annual) to the Wisconsin Department of Natural Resources ensures effective tracking and enables a timely response by the wastewater treatment facility. Indiana and Illinois require reporting basement backups. Reporting should include event-specific information such as, at a minimum, the information included in Wisconsin's current sanitary sewer overflow reporting procedure and indicate whether the backup was the responsibility of the municipality or the private resident. EPA suggests revisions to Section 4 of the CMOM provision and NR 210.21 Section 4 to include the above referenced basement backup reporting after each event (not strictly annual in conjunction with CMAR reporting) whether in conjunction with an SSO occurring within the proximate area of the basement backup occurrence or in the absence of an SSO occurring in the proximate area of the basement backup. EPA recommends this reporting timeframe to be consistent with the current SSO reporting requirements in Wisconsin.

4. NR 110.05(3)(c) 2. a.

Wisconsin should revise this provision or add a note to clarify that the compliance determination contemplated therein applies only for the purpose of deciding whether the State will approve a sewer extension.

5. Controlled Diversions (NR 210.13)

EPA is not able to comment on NR 210.13(2) at this time since "final effluent filters" is not defined. A clarification of the intent and meaning of this provision may impact whether such controlled diversions would be at least as stringent as the federal program.