

Iowa League of Cities v. EPA and the Nationwide Implications of Illegal Rulemaking Activities:

Where Do We Go From Here?

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Washington, D.C.
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Court Decision Summary

Blending Ban:

VACATED

Bacteria Mixing Zone Ban:

VACATED

Regulating Blending:

BEYOND EPA'S AUTHORITY

Nationwide Impact >> \$100 billion

Flavor of the Decision

- *Tyranny of small decisions*
- *Eviscerated direct appellate review*
- *Eviscerate state discretion*
- *Rulemaking masquerading as explication*
- *Irreconcilable with rules*
- *Orwellian Newspeak*
- *Dissembling*
- *Belated Backpedaling*

Hedging a concrete application of a policy within a disclaimer about hypothetical future contingencies does not insulate regulated entities from the binding nature of the obligations and similarly cannot serve to inoculate the agency from judicial review.

Definition of “Orwellian Newspeak”

- Meaning:

- propagandistic language marked by euphemism, circumlocution, and the inversion of customary meanings
- Deliberately ambiguous and contradictory language used to mislead and manipulate the public

Origin: "Newspeak", a language "designed to diminish the range of thought," in the novel 1984 by George Orwell

“Promulgating”

- Promulgating includes agency actions that are "functionally similar" to a formal promulgation
- To place any great weight on the [EPA's characterization of promulgation] potentially could permit an agency to disguise its promulgations through superficial formality, regardless of the brute force of reality
- We agree that private parties have "reasonably [been] led to believe that failure to conform will bring adverse consequences," which tends to make the document binding as a practical matter

“Effluent Limitation or Other Limitation”

- The Supreme Court has referred to effluent limitations as "direct restrictions on discharges. "
- We agree that an agency action is a "limitation" within the meaning of *section 509(b)(1)(E)* if entities subject to the CWA's permit requirements **face new restrictions** on their discretion with respect to discharges or discharge-related processes

The EPA's position that bacteria mixing zones in waters "designated for primary contact recreation . . . should not be permitted" is a restriction that directly affects the concentration of discharge from a point source and therefore is an effluent limitation.

Form Doesn't Matter

The EPA insists that as a result of finding its conduct here reviewable, there will be a chilling effect on the informal channels of communication between agencies and regulated entities. We acknowledge the great value in such modes of communication and encourage agencies to continue to utilize them. *However, when agencies veer from merely advisory statements or interpretations into binding proclamations, they become susceptible to judicial review.*

Due Process Injury Protected

Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation. *See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 316, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) ...*

Thus, the League has established an injury in fact related to the EPA's purported procedural deficiencies.

Bypass Rule

- The bypass rule "is not itself an effluent standard," but instead it "merely 'piggybacks' existing requirements."
- The rule's purpose is to "ensure that users properly operate and maintain their treatment facilities . . . by requiring incoming flows to move through the facility as it was designed to be operated" **the bypass rule does not require the use of any particular treatment method or technology.**

No Technology Mandate

- The EPA has interpreted the CWA regime as "preclud[ing] [it] from imposing any particular technology on a discharger."
- "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 secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality.

“EPA’s new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule.”

Mixing Zones

- One element of state water quality standards are policies regarding "mixing zones."
- But as one of its water quality standards, a state's policy on mixing zones remains subject to the triennial review of the EPA.

“EPA eviscerates state discretion to incorporate mixing zones into their water quality standards with respect to this type of body of water.”

The Hot Shoals No More

- If we choose to vacate solely on procedural grounds, regulated entities who have already spent considerable time crossing the hot shoals of regulatory uncertainty must continue to do so.
- 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 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.

Morals of the Story

- Shakespeare Was Right
- Eisenhower Was Right
- *The Prince* Was Right

*A New Vehicle is Needed to Protect the Interests
of Smaller Cities and Towns and their
Economies*

THE CENTER FOR REGULATORY REASONABLENESS



THE CENTER FOR REGULATORY REASONABLENESS

- Members may include cities with population <250,000
- State municipal leagues and associations
- Town, county and rural associations
- Small Engineering Firms

*We will litigate aggressively to protect their due process interests
and ensure this type of situation doesn't happen again*

CENTER FOR REGULATORY REASONABLENESS

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