



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

APR - 2 2014

OFFICE OF WATER

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

Dear Mr. Kirk:

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

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

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

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

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

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

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

Sincerely,

A handwritten signature in dark ink, appearing to read "Nancy K Stoner", with a stylized flourish at the end.

Nancy K Stoner
Acting Assistant Administrator