Iowa League of Cities v. EPA
8th Circuit Decision

NACWA National Clean Water Law Seminar
San Antonio, TX

Gary B. Cohen
Hall & Associates
Washington, D.C.
November 22, 2013

Background

- 2005-2008 EPA develops internal policies to regulate wet weather flows more stringently:
  - Blending prohibition
  - Bacteria mixing zone prohibition
- Impact on municipal entities:
  - Larger treatment plants
  - Detention basins
  - Greater I/I reduction
  - More MS4 communities regulated
  - Compliance virtually impossible for CSO/stormwater

How Did EPA Enforce This?

- Threatened and/or sent states NPDES objection letters
- Federal and state consent decrees
- Email and informal correspondence
- LTCPs
- TMDL development

2010 Case

- EPA Represents:

  "[T]he challenged documents ***do not mark the culmination of any decision-making process."***

  "Nor do the documents purport to impose new obligations on the League, its members, or any other member of the regulated community."

  "[T]he King memorandum ***merely conveys*** one EPA office director's view of a regulatory requirement to another EPA office director."

- 2010 Case Dismissed - Lack of Jurisdiction

Senator Grassley Letters to EPA

- Poses Precisely-Worded Questions to EPA Requesting the Agency's Working Law
- EPA Response Acknowledges Importance of Public Having a Clear Understanding of Applicable Requirements
- EPA Responses Supplied Definitive Answers

Court Decision Summary

711F.3d 844 (8th Cir. 2013)

- **APA Illegal Rulemaking**
  - **Blending Ban: VACATED**
  - **Bacteria Mixing Zone Ban: VACATED**
- Substantive CWA Challenge – An "Obviously precluded by the [CWA]" standard
  - **Blending Beyond EPA's CWA Authority.**

"Irreconcilable with both the secondary treatment rule and bypass rule"

- Nationwide Impact > $150 billion

What Does This Mean?

- EPA can't dictate plant design or impose internal unit process limits
- Can't prohibit mixing zones for wet weather discharges if allowed under existing rules
- Peak flow processing design is allowable
- No rule re-interpretations without public participation/APA compliance

Flavor of the Decision

- *"Orwellian Newspeak"*
- *"Tyranny of small decisions"*
- *"Eviscerated direct appellate review"*
- *"Eviscerate state discretion"*
- *"Rulemaking masquerading as explication"*
- *"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."

Why the Case So Important

- Finds EPA Letters to be illegal rulemaking under CWA Section 509
- Clarified what constitutes new "effluent limitations" and "promulgation" subject to review
- Described "due process" violation as sufficient injury for court jurisdiction
- Protected structure of Act – state primacy on WQS issues and public participation
- Maintains municipal flexibility regarding choice of technology.

"Promulgating"

- Promulgating includes agency actions that are "functionally similar" to a formal promulgation.
- Refuses to adopt EPA's suggested approach to restricting "promulgation" to requiring *Federal Register* publication.
- "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."

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."

EPA Asserts Chilling Effect on Communications

- "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*."
- EPA subsequently asserted that it could force the agency to hide its position from Congress.

Status of Decision

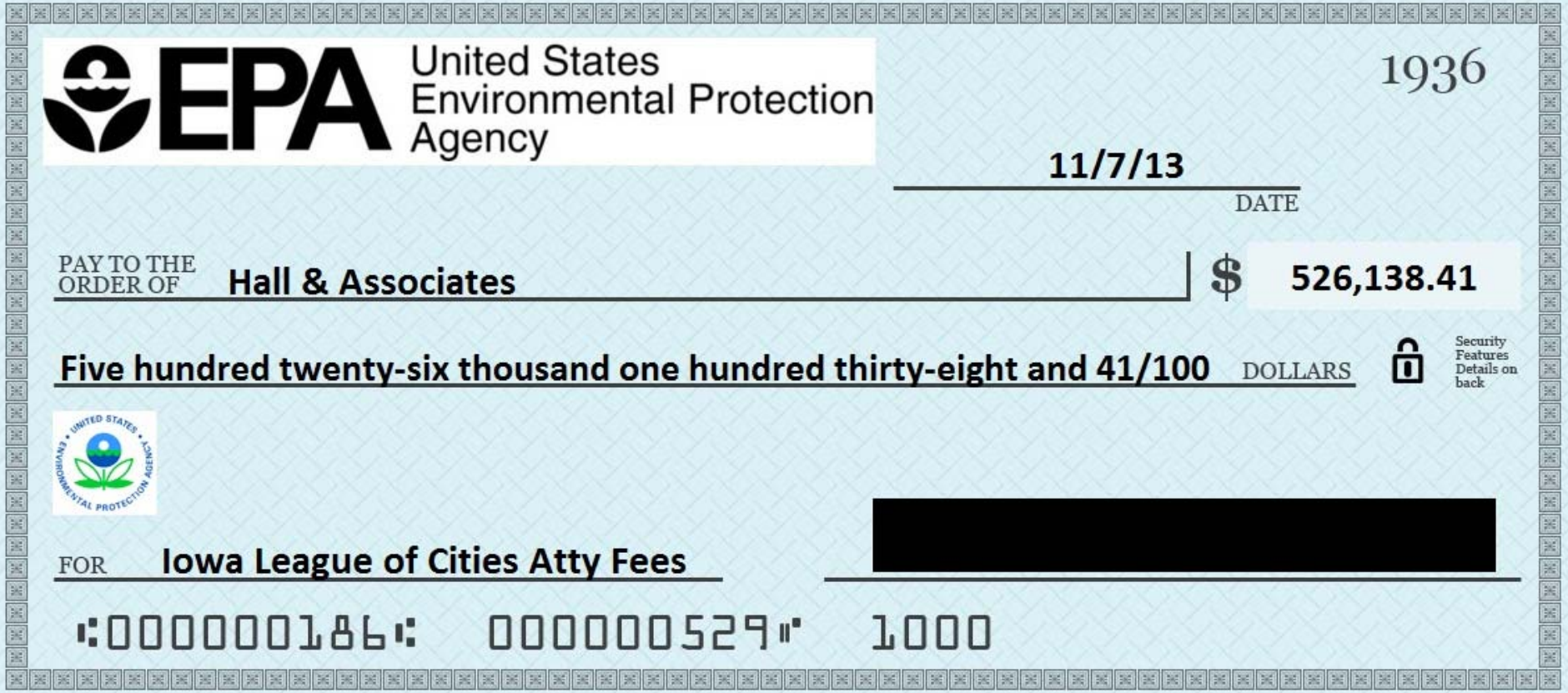
- EPA filed Petition for *en banc* review
- 7/10/13 – EPA Petition Denied
- 7/30/13 – Court reverses ruling on one issue!
- EPA Never Filed Motion for Stay of Mandate
- EPA Decides not to Petition for a writ of *certiorari* to Supreme Court?

Attorney Fees

- Original 8th Court decision denied attorney fees asserting that the League primarily vindicated its own rights - not CWA 101(a)(1).
- On motion for reconsideration awarded ILOC attorney fees since suit assisted in the proper implementation of the CWA:
  - § 101(b) – Preserve primary role of States
  - § 101(e) – Ensuring public participation

- Responding to EPA's Motion to Dismiss
- Administrative Record Issues/Clarification Order
- Merits Briefing
- Oral Argument
- Responding to EPA's Motion for *En Banc* Review
- *ILOC's* Petition for Reconsideration on Fees and Associated Briefing

They Wired Us the $!
But This is a Facsimile of What the Check Would Have Looked Like!



EPA United States Environmental Protection Agency

1936

11/7/13
DATE

PAY TO THE ORDER OF Hall & Associates

$ 526,138.41

Five hundred twenty-six thousand one hundred thirty-eight and 41/100 DOLLARS

Security Features Details on back

FOR Iowa League of Cities Atty Fees

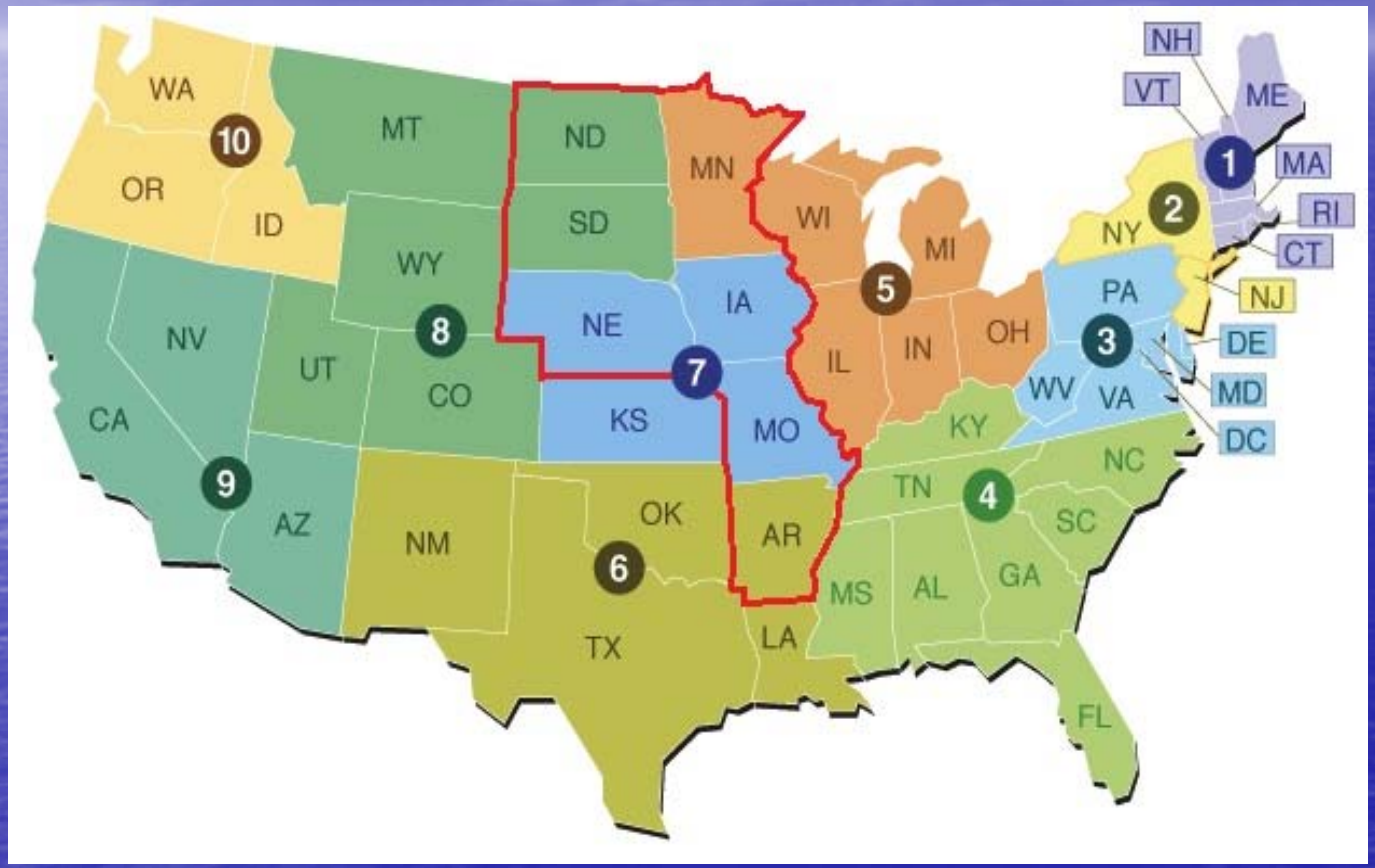
[redacted]

⑆000000186⑆ 000000529⑈ 1000

EPA Implementation of *ILOC* Decision?

- Limit Decision to 8th Circuit?
  - 4 States Meeting Last Week
  - Nancy Stoner statement Wednesday
- Coordination of Municipal Entities
- Congressional Requests
- States Being Pressured to Assert State Law Reasons?
  - Some States Indicating Intent to Implement *ILOC* approach
  - One State claiming *ILOC* does not apply outside of 8th Cir.
  - One State trying to limit scope based on State regulation.
- H&A FOIAs out to Every EPA Region/HQ
- Any More Feedback?

8Th Circuit


WA
OR
ID
MT
WY
NV
UT
CO
CA
AZ
NM
ND
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
NH
VT
ME
MA
RI
CT
NJ
DE
MD
DC
10
9
8
7
6
5
4
3
2
1

Follow up Actions Needed

- Revise misplaced state rules
- Revise state and federal orders
- Reopen the schedules of compliance
- Amend permits and LTCPs
- Approve mixing zones
- Revise the Bacteria TMDLs
- Amend impairment listings

Other Major Rule Revisions without Rulemaking

- The Iowa League case was just the "tip of the iceberg"
- Many other "informal" revisions are being WIDELY implemented:
  - Bypass rule/SSO issues
  - Use of unadopted WQS for nutrients/TMDLs
  - Affordability Guidelines

Is There a Difference?

For Additional Information

Gary B. Cohen
Hall & Associates
1620 I Street, N.W.
Washington, DC 20006
(202) 463-1166
gcohen@hall-associates.com