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

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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.