CENTER FOR REGULATORY REASONABLENESS

1620 I STREET, N.W.
SUITE 701
WASHINGTON, DC 20006
TELEPHONE: 202-600-7071
FAX: 202-463-4207
www.centerforregulatoryreasonableness.org

July 6, 2017

VIA EMAIL & FIRST CLASS U.S. MAIL

Mr. E. Scott Pruitt, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Sarah Rees, Director
Office of Reg. Policy and Management
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Reconsideration of EPA Decision to Continue Imposition of NPDES Blending Prohibitions Vacated in *Iowa League of Cities v. EPA* (8th Cir. 2013)

Dear Administrator Pruitt and Director Rees:

In our prior February 6, 2017 correspondence (Attached), the Center for Regulatory Reasonableness ("CRR") asked for your assistance in resolving EPA's ongoing imposition of two unadopted NPDES permitting prohibitions in permits and enforcement actions. As noted in our follow up discussions with your Office, EPA continued to impose the *ad hoc* prohibitions despite an 8th Circuit ruling vacating the unadopted rules and finding the blending prohibition to be *ultra vires*. (See, *Iowa League of Cities ("ILOC") v. EPA*, 711 F.3d 844 (8th Cir. 2013) - hereafter *Iowa League*). The D.C. Circuit Court of Appeals recently declined to act on EPA's decision that it may continue to impose the requirements outside of the 8th Circuit, advising our organization to file actions in federal district court or at the 8th Circuit to enjoin any further imposition of these requirements. (Attachment – court ruling on *Center for Regulatory Reasonableness v. EPA*, dated February 28, 2017; rehearing *en banc* denied June 6, 2017). In light of the recent Circuit Court ruling, the Center would like to work cooperatively with your Offices to bring this matter to a final and fair resolution, consistent with the accepted "rule of law." Because the prior Administration imposed these requirements by fiat, a clarification that EPA intends to respect and follow the 8th Circuit *Iowa League of Cities* decision nationwide is all that is necessary to remedy this unfortunate situation. The following briefly presents relevant information regarding this request.

Identification of Unadopted NPDES Rule Prohibitions

The following unadopted NPDES program prohibitions are at issue:

(1) In 2011, EPA declared that any facility that had been or would be designed to process greater wet weather flows by "blending" was/would be in violation of the federal bypass regulation. Blending is a form of wastewater plant design that allows the facility to meet permit limits while processing higher flows and protecting the stability of the biological treatment process. For over 30 years prior to this announcement, EPA grant-funded and approved this type system design (See, attachment EPA's 2003 Q&A on Blending). EPA had previously informed the public that neither the bypass nor secondary treatment rule authorized EPA to dictate how a facility was designed to process wastewater flows. This unilateral regulatory change placed hundreds of communities in non-compliance, radically increased the costs of peak flow processing at all wastewater facilities, and eliminated a cost-effective option for reducing system overflows occurring in extreme weather events.

(2) In 2008, EPA issued a memorandum informing regional offices and delegated states that they should no longer authorize mixing zones for bacteria in NPDES permits, forcing more restrictive disinfection processes throughout the country and greatly increasing compliance costs for combined sewer overflow (CSO) programs and municipal stormwater control. EPA's prior position was that allowing a bacteria mixing zone was a state determination, considering site specific conditions (*e.g.*, the likelihood of active swimming uses near the outfall).

The nationwide costs associated with these two, unadopted regulatory mandates easily exceeded several hundred billion dollars. As noted in the *Iowa League* decision, EPA enforced these rule modifications by threatening to object to any state NPDES permits that failed to conform to EPA's position, issuing permit objections where these activities had been previously authorized and refusing to allow either blending or bacteria mixing zones corrective measures to address federal enforcement actions. These *ad hoc* rule revisions forced increased chemical usage, prevented communities from quickly eliminating combined and sanitary system overflows, and forced many to undertake costly biological system modifications or construct large holding basins, even though the existing facilities met their permit limitations and were protective of human health and the environment.

EPA's Post-*Iowa League* Actions

In November 2013 EPA decided to continue implementing the vacated prohibitions outside the 8th Circuit. EPA broadly published and announced this position. (See various Attachments to February 6, 2017 letter to Adm. Pruitt and detailed filings before the D.C. Circuit in *CRR. v. EPA*). Consequently, EPA also refused to withdraw prior permit objections letters issued to various delegated state programs (e.g., Pennsylvania DEP), leaving those regulatory decisions in place, refused to respond to new requests for blending approvals as a wet weather compliance option in enforcement matters and transmitted new objections letters to state programs outside of the 8th Circuit. (See, e.g., EPA blending objection filed with New Jersey DEP in March 2015 affecting 17 CSO permits). These actions ensured that all understood that EPA's positions regarding these regulatory "requirements" remained unchanged.

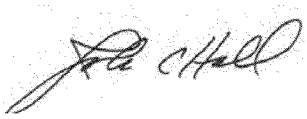
Before the D.C. Circuit, EPA sought to avoid judicial review by arguing that the Agency had not, as of yet, rendered a decision that the prohibitions would apply uniformly outside the 8th Circuit. EPA claimed it could render such a decision on a case-by-case basis. This approach ensured that communities would be uncertain whether their projects incorporating blending or bacteria mixing zones would be approved, leaving them in an untenable non-compliance situation. However, as you know, EPA does not possess authority to impose an unadopted rule under any circumstances. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) ("Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum. . . ."). Moreover, CWA Section 509 and the Act are structured to ensure national uniformity with respect to basic NPDES program rules and requirements. EPA itself reiterated this position in a recent filing with the Supreme Court. (See, Br. for the Federal Resp'ts in Opp'n Pet. For Cert. at 14-16 in *National Ass'n of Manuf. v. Dept. of Defense*)). Consequently, EPA may not impose a more restrictive NPDES rule interpretation (adopted or not) on permittees outside of the 8th Circuit. The rule of law (and the Clean Water Act itself) requires that EPA respect the 8th Circuit's Section 509 decision, nationwide.

Requested Action

Given the 8th Circuit decision and EPA's various representations to the D.C. Circuit, the only action required to resolve the matter is your Offices' determination that the *Iowa League* decision vacating the illegal rule modifications, will be followed nationwide. Such action is consistent with President Trump's commitment to ensure common sense and cost-effective environmental regulations. We look forward to meeting with you and your staff to achieve a prompt resolution of these abusive and wasteful mandates imposed by the prior Administration on municipal entities throughout the country.

Thank you for your consideration of this request.

Sincerely,



Executive Director

Attachments

CENTER FOR REGULATORY REASONABLENESS

1620 I STREET, N.W.
SUITE 701
WASHINGTON, DC 20006
TELEPHONE: 202-600-7071
FAX: 202-463-4207
www.centerforregulatoryreasonableness.org

February 6, 2017

VIA EMAIL & FIRST CLASS U.S. MAIL

Mr. E. Scott Pruitt Administrator (Designate)
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Don Benton
Mr. David Schnare
Office of Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Review of EPA Decision to Continue Imposition of NPDES Permitting Prohibitions Vacated in *Iowa League of Cities v. EPA* (8th Cir. 2013)

Dear Administrator Pruitt:

The Center for Regulatory Reasonableness ("CRR") is asking for your assistance in resolving EPA's ongoing, unlawful nationwide imposition of two unadopted NPDES permitting prohibitions in permits and enforcement actions. These 'ad hoc' Obama Administration mandates are, by EPA's own estimates, likely to impose *several hundred billion* dollars in new compliance costs. These mandates were created without rulemaking, consideration of actual environmental need, or regard for the basic structure of the Clean Water Act. That is, the prior Administration unilaterally imposed these mandates in complete disregard for the "rule of law," statutory authority and the due process rights of the regulated community. The following briefly provides salient details regarding these unlawful actions. We would look forward to an opportunity to discuss them in detail with you and your staff.

This is not the first occasion in which EPA has attempted to enforce these unadopted NPDES prohibitions. Three years ago, the Eighth Circuit Court of Appeals, in the case *Iowa League of Cities ("ILOC") v. EPA*, 711 F.3d 844 (8th Cir. 2013), determined that EPA's 'ad hoc' revisions to the bypass rule (40 C.F.R. § 122.41(m)), secondary treatment rule (40 C.F.R. Part 133), and water quality-based permitting regulation (40 C.F.R. § 122.44(d)) violated the Administrative Procedure Act and were also beyond statutory authority (*i.e.*, "*ultra vires*"). The adversely impacted municipalities thought that this decision would end the controversy. However, within months of the ruling, EPA Office of Water staff (under the direction of *acting*

Assistant Administrator Nancy Stoner – a former NRDC official) worked with the Department of Justice (DOJ) to continue imposition of the vacated prohibitions outside of the Eighth Circuit.

As noted in the decision making timeline (*see* Att. 1, Timeline), EPA publicly announced its decision (on several occasions) and transmitted instructions to the regional offices and delegated states via a "desk statement" advising them to continue imposing the vacated prohibitions outside the Eighth Circuit. *See* Att. 2, Desk Statement and Att. 3, BNA Article on EPA Decision. Senior EPA management was then briefed on the decision and EPA program offices carried out the decision in permit and enforcement matters. *See*, Att. 4-6 – Post decision briefing materials and permit actions. However, the Clean Water Act does not authorize EPA to disregard the national applicability of a CWA § 509(b)(1)(E) ruling that addresses agency rulemaking or allow EPA to set non-uniform baseline NPDES program requirements. EPA itself noted this fact in various filings that sought to consolidate state challenges to EPA's "waters of the US" rulemaking. As EPA's second decision to limit the *ILOC* ruling to the Eighth Circuit compounded the illegality of its prior actions, CRR filed suit on this second decision in August 2014 on behalf of its municipal members across the country. *See CRR v. EPA*, No. 14-1150 (D.C. Cir.).

Once the matter was filed, however, in an effort to avoid judicial review of its actions, EPA repeatedly sought to convince the D.C. Circuit that it had never rendered a decision to limit the applicability of the *ILOC* ruling to the Eighth Circuit or informed regional offices that they should to continue imposition of the vacated permitting prohibitions outside of the Eighth Circuit. EPA attempted to carry out this duplicity by refusing to allow access to any of the relevant decision documents – asserting none existed. However, CRR was able to procure EPA's records that unequivocally confirmed that the Agency was misrepresenting its actions. These records also revealed that DOJ advised EPA to avoid written disclosure of its decision because it might trigger another round of judicial review. *See,* Att. 7 – OGC Next Steps Briefing. This explains why EPA failed to identify, under FOIA, even the existence of the "Desk Statement" that was transmitted in November 2013 to all regional offices and delegated states nationwide to implement the Agency's decision. To this day, many key records are still being improperly withheld under "deliberative" process claims in an attempt to avoid judicial review in this matter.

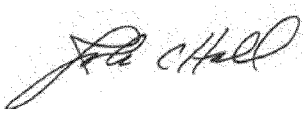
Request for Immediate Action

EPA's actions following the *Iowa League* ruling are shameful and correction of the objectively false averments made to the D.C. Circuit needs to occur. We all understand that an agency may not implement "secret law" or abuse FOIA withholding privileges to avoid judicial review, as such action undermines the basic integrity of the Agency. Because the Court has yet to render a decision, an opportunity still exists to correct the prior Administration's blatant factual misrepresentations. Specifically, CRR is asking the new Administration to clarify the record to the Court regarding whether the Agency did, in fact, (1) render a decision not to be bound by the *ILOC* ruling outside the Eighth Circuit, and (2) thereafter advised its Regional Offices to

continue imposing the permitting prohibitions vacated in *ILOC* outside the Eighth Circuit. We are certain that your review of the attached records (and others EPA is still improperly withholding) will confirm that EPA undertook these actions. Clarifying these key factual points would allow the D.C. Court, like the Eighth Circuit, to focus its attention on whether or not the Agency's ongoing imposition of the disputed permitting prohibitions, once again, constitutes an illegal regulatory action.

Thank you for your consideration of this request.

Sincerely,



Executive Director

Enclosures