November 26, 2013

The Honorable Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Need for Nationwide Consistency on Implementation of the 8th Circuit's Iowa League of Cities Decision

Dear Administrator McCarthy,

As you are aware, on March 25, 2013, the 8th Circuit Court of Appeals issued a ruling in *Iowa League of Cities v. EPA* (Docket No. 11-3412) that vacated, on procedural and substantive grounds, the unadopted legislative rules set forth in two U.S. Environmental Protection Agency (EPA) guidance letters. The decision addressed EPA's reinterpretation and enforcement of three key federal rules (bypass rule, Secondary Treatment rule and Water Quality-Based Permitting rule) that apply nationwide.

Specifically, the Court held that EPA's prohibition of bacteria mixing zones in primary contact recreation waters, regardless of the degree of possible health risks, unlawfully eliminated state discretion to utilize such mixing zones and, therefore, constituted a revised rule that did not go through the proper rulemaking procedures under the Administrative Procedure Act (APA). The Court also found that EPA's blending prohibition, which restricted how municipalities could design facilities to address peak flow processing (thereby reducing CSO and SSO discharges or system backups), exceeded the Agency's statutory authority under the Clean Water Act (CWA) and was inconsistent with both EPA's secondary treatment rule and bypass rule (711 F.3d 844 (8th Cir. 2013)).

We understand that even though this decision came down more than seven months ago and was never stayed, clarification requests regarding the implementation of this decision have gone unanswered and EPA has yet to withdraw its prior objections to NPDES permits based on these now vacated policies. We also understand based on recent public comments from EPA officials that the Agency believes the decision to have binding legal effect only in the 8th circuit and that it will be applied to permittees elsewhere in the country on a case-by-case basis. We would note that Congress expressly granted the circuit courts original jurisdiction to review the NPDES regulations at issue under Section 509 of the CWA to ensure nationwide uniformity and that EPA regulations provide for only one circuit to render an opinion on a petition for review. Consequently, we believe there is no legal basis to assert that the 8th Circuit decision does not apply nationwide.

In closing, the Agency's attempt to modify nationally applicable NPDES rules without undertaking a rulemaking was struck down in no uncertain terms. The issues in this case have been causing delay and confusion for municipal entities throughout the country in addressing wet weather compliance and have greatly increased local costs, unnecessarily. For example, even by its own estimates, the municipal cost implication of implementing just one of these rule interpretations was estimated by EPA to exceed $150 billion nationwide, with similar extraordinary costs associated with the other provisions. It is time to put that confusion and conflict to rest. Accordingly, we respectfully request confirmation that EPA will apply the *Iowa League of Cities* decision uniformly across the country and so advise its Regions and delegated States.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Clarence E. Anthony
Executive Director
National League of Cities

Matthew D. Chase
Executive Director
National Association of Counties

Chuck Thompson
Executive Director and General Council
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Ken Kirk
Executive Director
National Association of Clean Water Agencies