EPA, Attorneys Say Eighth Circuit Ruling Could Affect Legislative, Executive Exchanges

Tuesday, May 14, 2013
from Daily Environment Report™

By Amena H. Saiyid

The Environmental Protection Agency, as well as private-sector attorneys, say a federal appeals court ruling against the agency's wastewater treatment policies on the basis of an exchange with a U.S. senator could have a "chilling effect" on candid exchanges between the legislative and executive branches.

The "Panel Decision raises serious concerns about the Judiciary's review of informal communications between the Executive and Legislative branches of government ... . EPA and other agencies must have the ability to respond clearly and promptly to congressional inquiries," the agency told the U.S. Court of Appeals for the Eighth Circuit.

EPA asked the full Eighth Circuit on May 9 to rehear a ruling issued March 25 by a three-judge panel. It said the appeals court ought to grant en banc hearing because the panel misconstrued correspondence between EPA and a member of Congress on wastewater treatment processes as binding regulations (*Iowa League of Cities v. EPA,* 8th Cir., No. 11-3412, *rehearing petition* 5/9/2013; 91 DER A-41, 5/10/13).

At issue are two letters EPA sent to Sen. Charles Grassley (R-Iowa) in June 2011 and September 2011. The three-judge panel for the Eighth Circuit declared the two letters regarding wastewater treatment processes as "procedurally invalid" because they imposed requirements on utilities without going through the notice-and-comment procedures of a rulemaking.

The June 2011 letter articulated EPA's position on "mixing zones" of high pollutant concentrations created in receiving waters immediately below points of wastewater discharges, while the September 2011 letter spelled out the agency's policy on blending of partially treated and treated wastewater by a utility during heavy rains prior to discharge.

The letters to Grassley were based on 2005 draft guidance for blending and final 2008 memorandum on mixing zones. The agency essentially barred use of mixing zones in waters designated for primary contact recreation. EPA also prohibited the practice of blending by terming it a "bypass," or intentional diversion, that is forbidden unless there is "no feasible alternative."

'Chilling Effect' on EPA Exchanges With Congress

At least two environmental attorneys familiar with EPA's petition for rehearing said they believe the ruling could have a "chilling effect" on the agency's exchanges with Congress.

"If EPA can be sued every time it answers a congressional inquiry, there will be no end to litigation," said Patrick Parenteau, Vermont Law School professor who specializes in the Clean Water Act.

Brian Glass, a partner in Bryn Mawr, Pa.-based Warren Glass, told BNA there was "some logic in EPA's argument."

"Candid exchanges are important because they can inform the legislative process. You don't want to chill those communications," Glass said.

At the same time, Glass said he understood the frustration experienced by the publicly owned treatment works (POTW) that is reluctant to apply for a permit that either contemplates a mixing zone in a water used for primary recreation or blending its wastewater at its plant.

Not Final Agency Action

"I can understand why POTW operators would want EPA to undertake a rulemaking so everyone has an opportunity to be heard," he said.

He said the Eight Circuit ruling, and EPA's subsequent rehearing petition, raised both "interesting and important" questions concerning policy statements about regulation. Complicating the matter further was that EPA articulated these policy statements in letters sent to a sitting member of Congress, he said. The policy statements in the letters were seen as imposing regulations.

Parenteau, however, said EPA's response to Grassley was not a "final agency action" under the Administrative Procedure Act. "It does not establish any binding requirements on third parties, and EPA has made it clear there are many more steps to be taken before any final decision is made on the treatment technologies that Senator Grassley was asking about," Parenteau said.

Letters Impose Binding Regulations

Steve Jones, a partner with Seattle-based Marten Law, disagreed with the way EPA has characterized its correspondence. Jones said EPA has attempted to downplay the legal effect of its letters by saying they were not "final" and that the agency had not sent the letters with the intent that they be binding.

However, Jones said, "as noted by the Eighth Circuit panel, the language EPA used was definitive, e.g., 'mixing zones . . . should not be permitted.' This was why the panel found that EPA's June 2011 letters reflected 'binding policy with respect to bacteria mixing zones' because it 'speaks in mandatory terms.' "

Also agreeing with Jones was Nathan Gardner-Andrews, general counsel for the National Association of Clean Water Agencies, which represents publicly owned wastewater treatment plants.

"NACWA is not surprised EPA has requested rehearing, but strongly disagrees with EPA's continued belief that it can regulate internal wet weather treatment plant processes such as blending if effluent limitations are met at the final point of discharge," Gardner-Andrews told BNA in a email.

Gardner-Andrews did not address EPA's claims that the Eighth Circuit's ruling conflicted with other circuit court rulings. Instead, he said, "NACWA believes the original ruling was entirely correct on the substantive Clean Water Act issue, and agrees that EPA exceeded its statutory authority in trying to apply secondary treatment standards to flows within the plant."

Larry Levine, senior attorney with Natural Resources Defense Council, told BNA that EPA's bypass rule at 40 C.F.R. pt. 122.41(m) was in "play" in this ruling. Levine said the bypass rule was designed to restrict dilution of wet weather flows by not only sewage treatment plants, but all sort of industrial discharges. "Treatment is the means of meeting end-of-pipe effluent limitations, not dilution," he added.