Water Quality Standards

Eighth Circuit Denies EPA Rehearing In Lawsuit on Blending, Mixing Zones

Iowa League of Cities v. EPA, 8th Cir., No. 11-3412, 7/10/13

Key Development: Eighth Circuit denies EPA's request to rehear decision that struck down two policies aimed at controlling pollution from wastewater treatment plants during heavy rains.

By Amena H. Saiyid

A federal appeals court July 10 denied a request to rehear a ruling by a three-judge panel that struck down two separate Environmental Protection Agency policies aimed at controlling pollution from wastewater treatment plants during heavy rains (*Iowa League of Cities v. EPA,* 8th Cir., No. 11-3412, 7/10/13).

As a result, the ruling by a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit stands unless EPA petitions the U.S. Supreme Court or decides that the ruling will be limited to the circuit, and not beyond, according to an attorney monitoring the lawsuit.

"I would expect EPA to file a petition for writ of certiorari," Brian Glass, of Bryn Mawr, Pa.-based Warren Glass, told BNA. "Supreme Court review is always a long shot, but the circuit splits that EPA identified in its petition for rehearing en banc increases the odds that any such petition would be granted."

When it petitioned the court for rehearing, EPA said the ruling by the three-judge panel in March misconstrued correspondence from the agency on wastewater treatment processes as binding regulations (44 ER 1474, 5/17/13).

At issue in the case are EPA policies that essentially banned the use of "mixing zones" at wastewater discharge points and prohibited the blending of treated and partially treated wastewater during wet weather unless the utilities could prove there was no feasible alternative.

The Iowa League of Cities specifically challenged two letters that EPA sent to Sen. Charles Grassley (R-Iowa) in June 2011 and September 2011. On behalf of the league, Grassley asked EPA to clarify the circumstances under which certain wastewater treatment processes were permitted in a number of cities in Iowa.

The three-judge panel for the Eighth Circuit declared the two letters were "procedurally invalid" because they imposed requirements on utilities without going through the notice-and-comment procedures of a rulemaking.

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

The letters were based on draft guidance for blending and final guidance on mixing zones. The agency essentially barred use of mixing zones in waters designated for primary contact recreation and prohibited the practice of blending.

When asked whether the federal government will petition the U.S. Supreme Court, the Department of Justice declined to comment.

Clean Water Agencies Cheer.

Nathan Gardner-Andrews, general counsel for the National Association of Clean Water Agencies, told BNA July 10 that the association, which represents publicly owned treatment works (POTWs), was "pleased" with the Eighth Circuit's denial of EPA's rehearing request.

"NACWA ... believes the original panel ruling was entirely correct that EPA exceeded its statutory authority in trying to limit wet weather treatment options at the plant. Peak flow treatment facilities at POTWs play an integral role in helping utilities provide maximum treatment to wet weather flows and protect water quality in an affordable manner, and this decision will preserve these important technologies."

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The Eight Circuit's order denying EPA's request for a rehearing in ***Iowa League of Cities v. EPA*** *is available at http://op.bna.com/env.nsf/r?Open=smiy-99gs2g.*