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Water Pollution

EPA Won't Ask Supreme Court to Review Eighth Circuit Rejection of Mixing Zone Policy

Iowa League of Cities v. EPA, 2013 BL 77650, 8th Cir., No. 11-3412, 3/25/13

Key Development: EPA decides against asking the U.S. Supreme Court to review an appellate court ruling that invalidated its wastewater treatment policies during heavy rains.

Impact: Wastewater utilities say the court ruling and EPA decision not to appeal allows them to treat the discharges in a more cost-effective manner.

What's Next: EPA is expected to clarify whether the ruling will apply nationwide or just in the Eighth Circuit, where the decision was handed down.

By Amena H. Saiyid

Oct. 21 --The Environmental Protection Agency will not ask the U.S. Supreme Court to review an appeals court's rejection of agency restrictions on discharges from wastewater treatment plants during heavy rains, which had been issued as policy letters, a Justice Department spokesman said Oct. 21.

As a result, EPA no longer can bar mixing zones at wastewater discharge points in receiving waters designated for swimming, fishing or other primary contact recreational activities, unless it formally promulgates a rule. The agency also cannot bar wastewater utilities from blending partially treated and fully treated wastewater inside treatment plants.

Communities across the nation can reopen their plans to address combined sewer overflows and sanitary sewer overflows and use less costly approaches, saving billions of dollars as a result of the ruling, John C. Hall, president of the law firm Hall & Associates, told Bloomberg BNA Oct. 21. The agency's decision not to seek review means the ruling issued in March by the U.S. Court of Appeals for the Eighth Circuit stands, he added (*Iowa League of Cities v. EPA*, 2013 BL 77650, 8th Cir., No. 11-3412, 3/25/13;).

Hall was the lead counsel for the Iowa League of Cities, which successfully challenged in the Eighth Circuit the EPA wastewater treatment policies on managing wastewater flows during heavy rains.

The EPA, which DOJ represented in court, had until Oct. 28 to seek Supreme Court review, DOJ spokesman Wyn Hornbuckle said.

Although this ruling strictly applies to the jurisdiction of the Eighth Circuit, the municipally owned wastewater utilities represented by the National Association of Clean Water Agencies advocate a nationwide application of the ruling .

Sen. David Vitter (R-La.), ranking member of the Senate Environment and Public Works Committee, said in an Oct. 21 statement, "I urge the EPA to unambiguously and fairly apply the invalidation of this illegal water treatment regulation on a national level."

The Eighth Circuit in July rejected EPA's petition for a rehearing. In March, the appellate court's three-judge panel ruled that EPA needs to go through the rulemaking process to bar the use of mixing zones in receiving waters and prohibit blending of partially and fully treated wastewater inside treatment plants during heavy storms. The court also ruled that EPA exceeded its Clean Water Act authority in attempting to prohibit the practice of blending.

Policy Letters Invalidated.

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 had asked EPA to clarify the circumstances under which certain wastewater treatment processes were permitted in a number of cities in Iowa.

The panel of judges 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 court did not preclude EPA from promulgating a rule on mixing zones.

The June 2011 letter reinforced EPA's position on “mixing zones” of high pollutant concentrations 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.

Costly Compliance Averted.

Hall & Associates attorneys said compliance with the EPA blending policy alone would have cost the wastewater treatment sector an estimated \$150 billion nationwide.

Nathan Gardner-Andrews, NACWA general counsel, termed the EPA decision not to appeal “an important legal victory” for the municipal wastewater sector because it will ensure that utilities have the legal flexibility they need to safely and cost-effectively manage wet weather flows at the plant.

“NACWA is pleased EPA will not further appeal the decision, and we look forward to working with EPA to implement the ruling nationwide,” Gardner-Andrews said.

Nationwide Application.

Brian Glass, of Bryn Mawr, Pa.-based Warren Glass LLP, told Bloomberg BNA in an e-mail that the effect of the decision not to appeal will depend on whether EPA decides to limit the precedent established on its blending policies to the Eighth Circuit.

“If EPA decides to apply the precedent nationwide, then all operators of municipal sewage treatment plants will be able to utilize blending technologies at their facilities without fear that doing so might expose them to penalties under the Clean Water Act,” Glass said.

With regards to mixing zones, Glass said, “I would be reluctant to advise any facility (in the Eighth Circuit or elsewhere) to locate a discharge requiring a bacteria mixing zone in waters designated for 'primary contact recreation' until EPA decides whether or not it intends to promulgate a mixing zone rule through proper notice and comment rulemaking, an option that the Eighth Circuit did not foreclose.”

Gardner-Andrews, however, said NACWA believes the ruling applies nationwide. “EPA may take a different view. Any suggestion this is limited only to the Eighth Circuit will be met with a lot of resistance from the wastewater community,” he said.

Hall said he is waiting to see how EPA will implement the ruling.

By Amena H. Saiyid

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*The decision by the U.S. Court of Appeals for the 8th Circuit in **Iowa League of Cities v. EPA** is available at http://www.bloomberglaw.com/public/document/Iowa_League_of_Cities_v_EPA_Docket_No_1103412_8th_Cir_Nov_04_2011/4.*

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