

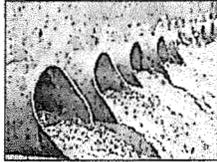
## **Bloomberg BNA** Daily Environment Report™

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### **Water Pollution**

#### **Decision on Blending, Mixing Zones to Apply Case-by-Case Outside 8th Circuit, EPA Says**



By *Amena H. Saiyid*

Nov. 20 — A decision by the U.S. Court of Appeals for the Eighth Circuit rejecting the Environmental Protection Agency's restrictive policies on wastewater discharges during heavy rainfalls will be applied outside the court's jurisdiction only on a "case-by-case basis," the acting head of the agency's water office said Nov. 20.

"Outside the Eighth Circuit, we will be looking on a case-by-case at situations in particular communities to see what makes sense," Nancy Stoner, the EPA acting assistant administrator for water, said at the National Association of Clean Water Agencies' Clean Water Act law seminar in San Antonio, Texas, that runs Nov. 20-22.

Stoner reiterated the agency's position that the decision was binding in the Eighth Circuit, which covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota (*Iowa League of Cities v. EPA*, 2013 BL 77650, 8th Cir., No. 11-3412, 3/25/13: 58 DEN A-9, 3/26/13).

"That's where it applies, and that's where we intend to implement the decision, very faithfully" she said, adding that the ruling is "not binding" outside of the Eighth Circuit.

Stoner was responding to a question by Fredric Andes, partner with the Chicago-based law firm Barnes & Thornburg LLP, who asked whether the agency would continue to enforce its blending policy, which the Eighth Circuit struck down on both procedural and substantive grounds.

#### **Policy Declared Illegal**

The court declared the EPA blending policy to be illegal under the Clean Water Act, while saying the agency's mixing zone guidance is subject to notice-and-comment.

The Eighth Circuit ruled that the EPA could not regulate wastewater treatment processes at publicly owned utilities through guidance letters—that the agency must instead undergo a formal rulemaking.

"Are you saying the Eighth Circuit states will not be implementing those requirements, but [EPA] will be implementing them everywhere else?" Andes asked.

If the EPA decides to limit the appellate ruling to the Eighth Circuit, then under Stoner's reasoning, the agency would determine on a case-by-case basis whether to bar mixing zones at wastewater discharge points in receiving waters designated for swimming, fishing or other primary contact recreational activities.

The agency also could continue on a case-by-case basis, outside the court's jurisdiction, to prohibit wastewater utilities from blending, a practice in which they route wastewater flows around the biological treatment process during heavy rains and recombine it with treated flows before it is discharged. Utilities say they have to blend in order to prevent the secondary treatment process—or biological process—from being overwhelmed by excessive flows during storms. They say the recombined discharges meet water quality standards.

#### **Reconciling With Bypass Rule**

Stoner said the agency was trying to interpret the court's decision and reconcile it with the agency's bypass rule at 40 C.F.R. Part 122.41(m).

This regulation prohibits the "intentional diversion of waste streams from any portion of a treatment facility" unless the utility can prove there are no feasible alternatives or a life-threatening situation exists.

Andes told Stoner that the outstanding legal issues surrounding the agency's blending policies could not be resolved case-by-case.

Andes later told Bloomberg BNA that the EPA's case-by-case stance is confusing.

"It's either valid, which it's not in the Eighth Circuit, or it's not valid," he said. "Once a court declares a policy is invalid that should be applied everywhere. It's weird that the policy is invalid in Missouri but valid in Illinois."

Regarding the bypass rule, Andes acknowledged that "the court didn't strike the bypass rule in its ruling, but it struck down the way EPA was implementing the bypass rule."

Andes said the EPA was attempting to narrowly interpret the court's ruling, which was pretty broad.

### **POTWs Disappointed in Position**

At the meeting, Nathan Gardner-Andrews, NACWA general counsel, told Bloomberg BNA, "NACWA is very disappointed to hear that EPA appears unwilling to apply the Iowa League of Cities decision nationwide. There is no legal basis for limiting the decision only to the Eighth Circuit, and NACWA will work vigorously to advocate for national applicability."

Brian Glass, partner with Bryn Mawr, Pa.-based Warren Glass LLP, told Bloomberg BNA in a Nov. 20 email that Stoner's remarks do not provide much guidance to publicly owned treatment works operators who are trying to determine whether to prepare a permit application that contemplates a mixing zone in waters designated for primary contact recreation, or that proposes to retrofit a wastewater treatment plant with an alternative technology, such as Actiflo, in lieu of secondary treatment.

"In fact, the announcement threatens to waste a lot of municipal resources at a time when those resources are particularly scarce," Glass wrote.

John Hall of Hall & Associates, the firm that represented the Iowa League of Cities in the Eighth Circuit case, told Bloomberg BNA that he is not aware of any other case involving the establishment or modification of nationally applicable rules that EPA attempted to restrict solely to the circuit reviewing the national rules.

"It may have done so on a permit issue, but not on nationally applicable rule," Hall said.

Hall said the judicial review provision of the Clean Water Act, under which the Iowa League of Cities challenged the EPA policies, was designed to ensure national uniformity by only allowing one decision to be rendered on national rule reviews.

Andes agreed.

"It's unusual for them to say it would only apply to the Eighth Circuit. I can't remember a situation like that," he said.

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