Eighth Circuit Orders EPA to Obey 2013 *Iowa League of Cities* Decision on Peak Flow Blending

On December 22, the Federal Court of Appeals for the Eighth Circuit reaffirmed its 2013 Iowa League of Cities ruling that EPA lacks statutory authority to regulate flows within a POTW fence line. Instead, EPA can only regulate the actual discharge from a POTW. The case arose regarding peak flow "blending" – the routing of flows around treatment units – usually, secondary treatment. The rerouted flows are then "blended" with flows from the main treatment train, disinfected, and discharged in full compliance with NPDES permit limits.

Since the 2013 decision, EPA has respected the ruling as to sanitary systems within the Eighth Circuit but ignored the decision outside of the Eighth Circuit and as to combined sewer systems within the Eighth Circuit. The Iowa League of Cities and others petitioned the Court to enforce its prior ruling both as to combined sewer systems within the Eighth Circuit and for all other sewer systems nationwide. AquaLaw provided an affidavit in support on both the CSO issue as well as the need for the Court to apply its ruling nationwide

The court's order takes EPA to task for ignoring its prior ruling and reasserts that EPA lacks statutory authority to regulate flows within a POTW – whether sanitary or combined. However, because none of the petitioners were utilities from outside of the Eighth Circuit, the Court found a lack of standing to apply its ruling nationwide.

Here are the key paragraphs from the Court's Order:

- In 2013, we held that the Environmental Protection Agency's (the "EPA") "blending rule" was substantively defective because it "applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe." *Iowa League of Cities v. EPA*, 711 F.3d 844, 877 (8th Cir. 2013). The rule "clearly exceed[ed] the EPA's statutory authority." *Id.* In reaching that holding, we did not differentiate between combined and separate sewer systems. Now, the EPA continues to regulate blending as a prohibited bypass in the Eighth Circuit, albeit for combined sewer systems only.

- The EPA's direct violation of our prior mandate warrants mandamus relief. *See Iowa Utilities Bd. v. FCC*, 135 F.3d 535, 542 (8th Cir. 1998), *cert. …* The EPA's *sub rosa* enforcement of its blending rule and its efforts to resist making its position public appear "calculated so as to evade ordinary appellate review." *Iowa Utils. Bd.*, 135 F.3d at 542.

- Accordingly, we grant the petitioner's request for mandamus relief with respect to its challenge to the EPA's ongoing regulation of blending within the Eighth Circuit's jurisdiction. Our March 25, 2013, decision applied to regulations of blending in separate as well as combined sewer systems. The EPA is ordered to obey the court's mandate of August 7, 2013 and to cease and desist treating blending as a prohibited bypass within the Eighth Circuit "insofar as the blending rule imposes secondary treatment regulations on flows within facilities." *Iowa League of Cities*, 711 F.3d at 878.

The Eighth Circuit's ruling could be applied nationwide either through a similar pending effort in the Federal Court of Appeals for the District of Columbia or another filing. Once the ruling is applied nationwide, it will provide significant operational flexibility to members outside the Eighth Circuit in terms of peak wet weather flow management within your fence lines – while complying with all discharge permit effluent limits and conditions.