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Committee on Environment and Public Works, Subcommittee on Water and Wildlife

Regarding

**“Innovation and the Utilities of the Future: How Local Water Treatment Facilities are
Leading the Way to Better Manage Wastewater and Water Supplies”**

Good morning Chairman Cardin, and Members of the Subcommittee.

My name is John C. Hall. I am the President of Hall & Associates and the Director of the Center for Regulatory Reasonableness. It is a pleasure to be here today to testify before this committee on this important matter. The Center for Regulatory Reasonableness is a multi-sector municipal/industrial coalition that is dedicated to ensuring that regulatory requirements are based on sound scientific information, allow for cost-effective compliance options, and are only implemented after full consideration of the efficacy of such requirements. In particular, the Center serves as a voice for the smaller entities that are subject to the cascade of environmental regulations that have been adopted over the past decades.

My areas of expertise are environmental engineering and environmental law, with over 35 years' experience in addressing complex Clean Water Act issues for municipal and private entities across the country. In the early 1980's I worked in EPA's Advanced Treatment Review

program, to ensure federal funding of such wastewater facilities was properly justified. At that time, EPA had a direct financial interest in ensuring that the projects were necessary to protect the environment and, most importantly, cost-effective. In the private sector since then, I have addressed CWA permitting and compliance issues in 44 states and been involved in well over a dozen successful regulatory actions, resulting in the nationwide revisions of NPDES rules and water quality compliance approaches based on better scientific information and more effective regulatory approaches. While many of our early efforts to improve regulatory programs were collaborative, it is unfortunate that my more recent experiences with the Office of Water confirm that there is often little interest science or economic impacts, if they conflict with the Agency's desired regulatory agenda.

Consequently, the issue of innovation at wastewater facilities is certainly an important one, but not as important as the need to update EPA's wasteful and outdated regulatory approaches that continue to misdirect state and local resources on ineffective regulatory actions. In my view and based on 35 years' experience, it is EPA's relentless creation of new compliance requirements based on limited information, its continued imposition of unauthorized regulatory mandates, and its failure to update decades-old regulatory approaches that are the biggest impediments to true water pollution control innovation and protection of ecological resources. I would like to provide the Subcommittee with a few specific recent examples to make my point.

Federal Ban on Split Flow Treatment for Wastewater Facilities

For decades, EPA understood that wastewater facilities could be subject to large flow variations due to major rainfall events. To protect the plant operations that are sensitive to flow variation and allow the maximum flows to be safely processed, engineers designed facilities to

provide split-flow treatment combining biological and physical/chemical processes (sometimes referred to as blending). (Exhibit 1 describes a “blending design”) Historically, EPA grant-funded these designs as a cost-effective solution to maximize wet weather flow processing, protect the environment, and avoid oversizing facilities while meeting permit limits. If you will, a win-win for all concerned.

Unfortunately, this successful approach was undermined in 2006, when EPA created and began to enforce a new policy, without rulemaking, that declared these wastewater plant blending operations to be illegal, even when they meet all permit limits. EPA claimed that the existing secondary treatment and bypass rules, established 25 years earlier, mandated this action. In actuality, EPA did this to gain more leverage in enforcement actions when dealing with combined and sanitary sewer overflows.

This action was both costly and ill conceived. The nationwide cost of this new regulatory prohibition was projected by EPA itself to exceed 200 billion dollars. Moreover, forcing communities to biologically treat peak wastewater flows jeopardizes the operation of nutrient reduction facilities -- just the type of innovation many communities are seeking to implement today. This EPA-mandated “blending ban” also slowed down the ability of communities to safely eliminate untreated overflows, by eliminating a viable, cost-effective option that provided treatment and met permit limits.

In 2011, the Iowa League of Cities sued EPA, challenging this unilateral regulatory mandate. In 2013 the 8th Circuit ruled that EPA’s approach was “irreconcilable with the adopted rules” and, vacated the “policy” as an illegal rule amendment in violation of the federal Administrative Procedures Act. See, *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir 2013).

The Court also ruled that EPA was acting beyond statutory authority by attempting to dictate how communities may design facilities to meet their permit limits.

Given the unequivocal nature of the decision, one would have thought that would have been the end of the issue. EPA chose not to appeal the Court's ruling; then, incredibly, announced that it would continue to enforce the vacated rule amendments outside the 8th Circuit. Thus, in EPA's mind, all those outside of the 8th Circuit are still subject to the blending ban. (See Exhibit 2 showing 8th Circuit jurisdictional boundaries versus EPA Region office boundaries) Needless to say, the expenditure of resources on wastewater innovation cannot occur while this type of illegal agency action hangs over the regulated community. Communities considering innovative technologies that are very sensitive to fluctuations in wastewater volume and composition must have this issue resolved before committing to install such technologies.

EPA's Zero Collection System Leaks Policy vs Green Infrastructure

Another multi-billion dollar federal rule interpretation that is causing widespread compliance problems and confusion regarding the acceptability of innovative approaches is EPA's position that all collection system overflows are "per se" illegal, regardless of the circumstances, and must be eliminated. While it goes without saying that no one is in favor of sewage overflows, even the best operated and designed collection systems in the country will occasionally experience overflows and backups. No collection system can prevent overflows or basement back-ups when localized flooding occurs; if the system is under water, it is going to leak. EPA's position (which, like the blending ban, has never been adopted into rules) is forcing communities to design facilities to address extreme weather conditions, under the theory that someone might be swimming in the flood waters. The proliferation of hundred million-dollar

detention basins and deep tunnels which do not “fix” the underlying problem is a direct product of this type of regulatory thinking.

Of course, mandating excessive collection system improvements comes at the expense of other measures that would produce greater environmental benefits – such as green infrastructure, wetlands restoration and water reuse. Of course, these innovative measure cannot resolve flood-related collection system compliance issues. Consequently, the ability to spend resources on innovations offering greater water and wildlife benefits is at risk. Therefore, if we want such innovation we must first deal with EPA’s extreme regulatory interpretations that are impossible to achieve and unfairly keep communities under a perpetual threat of federal enforcement.

Waters of US Expansion Versus Innovative Stormwater Control

The final example of how outdated regulatory provisions will continue to misdirect resources is highlighted by EPA’s recent “Waters of the U.S.” proposal. Designating new areas to be “waters of the U.S.” is a matter of great significance, because that designation carries with it a number of “regulatory presumptions.” However, EPA’s “waters of the U.S.” proposal contained little information regarding the consequences of these well-known regulatory provisions. For example, Federal regulations indicate that all “waters of the US” must have applicable water quality standards and that such waters are presumed “fishable/swimmable,” unless detailed studies are conducted to refute the presumption. (40 CFR 131.6, 131.10). By virtue of how EPA derives “human health” criteria, such waters are also considered “drinkable.” By rule, in the absence of such state-adopted numeric standards, EPA’s high quality fishery “Goldbook” criteria are presumed necessary to protect the aquatic life that exists in such waters. See, generally 40 CFR 122.44(d) and 40 CFR Part 130 which describe that application of

numeric and narrative criteria in the NPDES/303(d) decision making process and 40 CFR 131.11 that cites to EPA's published 304(a) criteria as the basis for state criteria adoption.)

This means that existing regulations presume high quality fisheries and drinking water uses exist in the newly-designated waters (many ditches and periodically dry streams), triggering application of the full CWA regime designed to protect those uses. Consequently, unanticipated regulatory actions, restrictions on innovative practices, and adverse economic effects for local communities and businesses will result from the imbedded presumptions. The most obvious impacts include impairment designation under Section 303(d), more restrictive effluent limitations under the Section 402 NPDES program, more restrictive stormwater best management practices under Section 402(p), and further restriction of activities under Section 404 of the Act.

This designation will also adversely impact the ability to implement a number of important best management practices since, in general, waters of the US are not to be used for pollutant treatment. (40 CFR 131.10(a)). Consequently, previously authorized, cost-effective measures that could be used to slow down waters and promote nutrient assimilation may now be deemed impermissible if they increase plant growth in such waters or lower dissolved oxygen levels (which is inevitable with such best management practices). The only allowable options to "protect" such water will be far more costly and less effective upland measures.

While these existing "federal presumptions" may have been appropriate for waters that could reasonably support diverse aquatic life or drinking water uses, the continued application of such rules to marginal waters will, to a certainty, lead to broad misallocation of state and local resources. It will also prevent the use of certain innovative best management practices and

pollution trading options that could help to avoid the construction of far more costly and ecologically harmful wastewater treatment alternatives.

In summary, the place to start with innovation is to remove or modify the outdated and/or inappropriate federal rules that are presently responsible for misdirecting hundreds of billions in resources and slowing the implementation of measures that are needed to protect water and wildlife. In general, water and wildlife protection will not be accomplished by building a more sophisticated wastewater plant. It will be accomplished with innovative programs that holistically address the ecological factors that are most important for a watershed, which may or may not be pollutant reduction.

Thank you for your consideration of this testimony.

Exhibit 1

Schematic of Peak Flow Blending

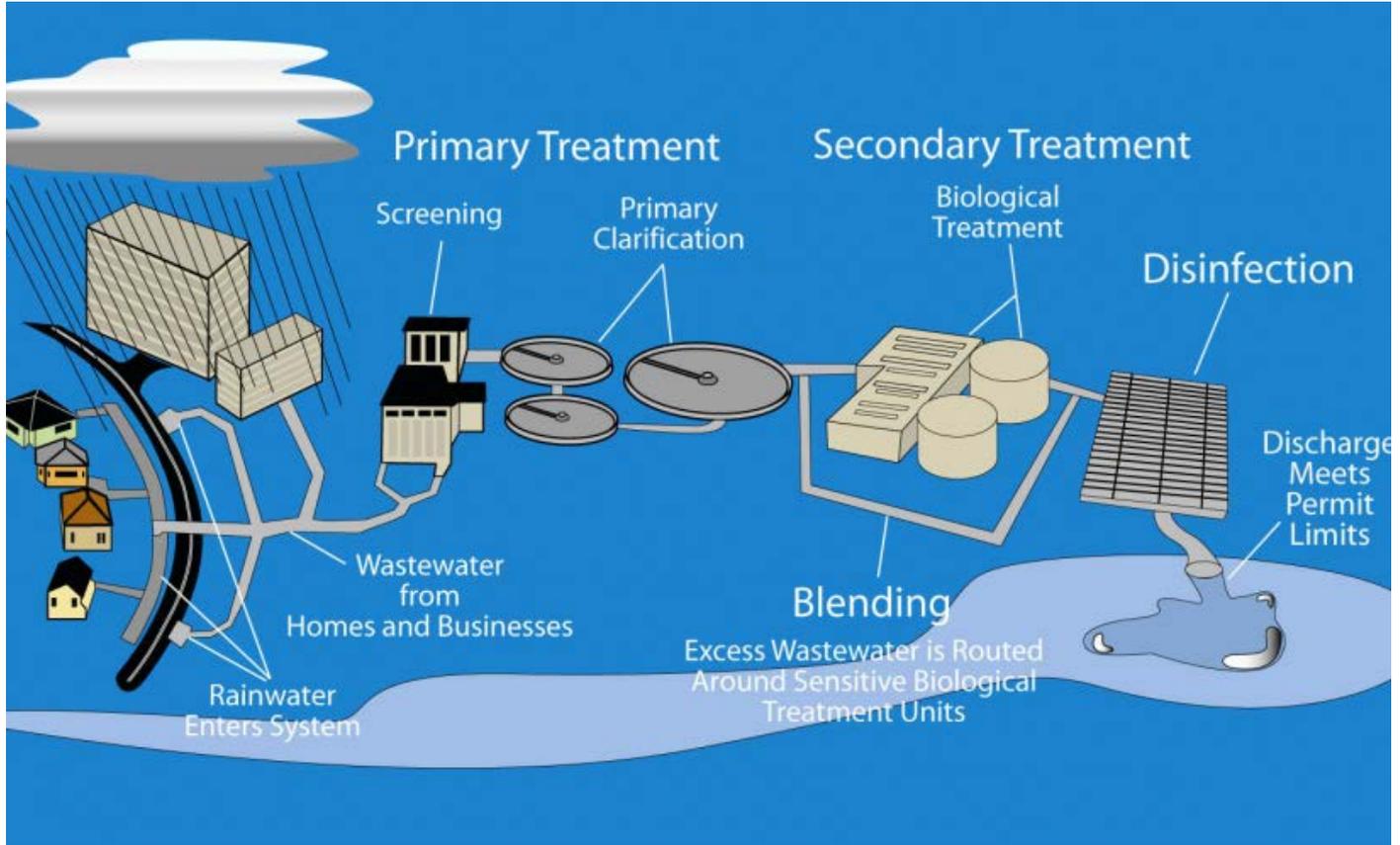


Exhibit 2

Eight Circuit Court of Appeals and EPA Regional Office Boundaries

