

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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June 18, 2013

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

Dear Acting Administrator Perciasepe:

We write to express our concern regarding recent efforts by the Environmental Protection Agency (EPA) to set forth new regulatory requirements, with respect to wastewater treatment processes, in two letters sent by EPA to Senator Chuck Grassley.¹ We are concerned that EPA's letters are an attempt to circumvent the notice and comment procedures of the Administrative Procedure Act (APA).² In fact, the U.S. Court of Appeals for the Eighth Circuit recently held in *Iowa League of Cities v. EPA* that both letters constituted legislative rules undertaken outside of the notice and comment procedures required by the APA.³ This is unsurprising as EPA has a history of using guidance documents, or in this case letters, to effect policy changes.⁴

However, it has come to our attention that EPA believes *Iowa League of Cities* was wrongly decided⁵ and may attempt to limit this decision to the Eighth Circuit. This position would only result in further confusion and uncertainty for regulated entities. Accordingly, we call on EPA to acknowledge its error in creating "regulations by letter" and to take greater care to abide by the APA's regulatory framework.

In *Iowa League of Cities v. EPA*, the Eighth Circuit determined that two letters from EPA to Senator Grassley regarding wastewater treatment processes were the equivalent of regulations.⁶ In this case, a number of cities in Iowa had received mixed signals from EPA about whether and under what circumstances "mixing zones"⁷ and "blending"⁸ were permitted for

¹ Annie Snider, *Appeals Court Rules for Iowa Cities in Challenge to EPA Wastewater Rules*, E&ENews PM, Mar. 27, 2013, <http://www.eenews.net/eenewspm/stories/1059978551>.

² 5 U.S.C. § 553.

³ *Iowa League of Cities v. EPA*, 711 F.3d 844, 878 (8th Cir. 2013).

⁴ GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012).

⁵ Respondent's Petition for Rehearing En Banc, *Iowa League of Cities v. EPA*, No. 11-3412 (8th Cir. May 9, 2013).

⁶ *Iowa League of Cities*, 711 F.3d at 878.

⁷ "EPA has defined mixing zones as '[a] limited area or volume of water where initial dilution of a discharge takes place and where numeric water quality criteria can be exceeded.'" See *Iowa League of Cities*, 711 F.3d at 857.

⁸ Blending is the act of channeling a portion of influent around biological secondary treatment units during wet weather events to avoid overwhelming the biological secondary treatment processes. The diverted flow passes through non-biological treatment units before it is reconstituted with the portion of influent that receives biological

wastewater treatment.⁹ These cities requested assistance from Senator Grassley in obtaining clarification from EPA.¹⁰ EPA responded in two separate letters to Senator Grassley's inquiries.¹¹

Concerned with EPA's responses, the Iowa League of Cities sought review of the two letters and argued that they effectively set forth new regulatory requirements that could not be implemented without the notice and comment procedures required by the APA.¹² The Eighth Circuit agreed and held that both letters effectively announced new regulations and that EPA violated the APA when it bypassed the notice and comment procedures.¹³ Both rules were vacated as procedurally invalid.¹⁴ We agree that EPA's apparent attempt to sidestep the APA's regulatory process in this instance is troubling.

As you know, one basic purpose of the APA is to provide a means "for public participation in the rulemaking process."¹⁵ New regulations should not be enforceable until agencies have considered public opinion and information provided by affected parties. This process promotes transparency, which is essential for good government, and results in greater accountability.¹⁶ EPA's recent attempt to promulgate new legislative rules without first going through the required notice and comment procedures undermines the law by denying interested parties the right to participate. Such actions are contrary to due process principles and the requirements of the APA. EPA should not attempt to circumvent the public participation process. Doing so jeopardizes the accountability of the regulatory system.

Additionally, the APA establishes uniform standards for conducting rulemakings to provide the predictability needed by regulated entities to make decisions.¹⁷ The system breaks down when agencies bypass these procedures and attempt to regulate via guidance documents. Nevertheless, federal agencies increasingly use guidance documents to effect substantive policy changes as regulated entities feel pressure to abide by them.¹⁸ This was the case in *Iowa League of Cities*.¹⁹ Attempting to change policy via guidance documents is not only illegal but also leads to greater uncertainty as affected parties attempt to sort through what is required and what is merely suggested. Therefore, EPA should not attempt to change policy on a whim, but instead follow the procedures set forth in the APA, thereby avoiding regulatory uncertainty.

secondary treatment. When the combined output is discharged, it must meet the same permitted effluent limitations that ordinarily apply. See *Iowa League of Cities*, 711 F.3d at 858.

⁹ *Iowa League of Cities*, 711 F.3d at 854.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 855.

¹³ *Id.* at 878.

¹⁴ *Id.*

¹⁵ Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act*, U.S. DEP'T OF JUSTICE, 9 (1947), <http://www.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf>.

¹⁶ Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 787, 790-791 (2010).

¹⁷ Clark, *supra* note 15, at 9.

¹⁸ See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007).

¹⁹ *Iowa League of Cities*, 711 F.3d at 878.

Finally, we are disappointed to learn that EPA believes that *Iowa League of Cities* was wrongly decided²⁰ and may attempt to limit this decision to the Eighth Circuit. EPA must recognize the need for transparency and predictability in the regulatory system and go through the proper administrative channels to clarify or develop new rules with respect to wastewater treatment and other activities. Compliance with the APA procedural requirements is not a matter that Congress left to EPA's discretion. EPA is required to abide by the law at all times, not merely when forced to do so by the judicial system. As such, EPA should acknowledge its error and take greater care to abide by the principles and requirements of the APA.

If you have any questions regarding this letter, please feel free to have your staff contact Laura Atcheson with the Senate Committee on Environment and Public Works at (202) 224-6176.

Sincerely,



Chuck Grassley
U.S. Senator



David Vitter
U.S. Senator

²⁰ Respondent's Petition for Rehearing En Banc, *supra* note 5.