

# **Wet Weather Permitting Developments**

**How to Address Wet Weather Flows to Eliminate  
CSOs and SSOs by Implementing the  
*Iowa League of Cities Decision***

**NEWEA 2015 Annual Conference  
Boston, MA**

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# Changing Federal/State Focus on Peak Flows

- Historical focus on POTW operations, now:
  - CMOM programs for all
  - Elimination of all Sanitary Sewer Overflows
  - Elimination of all Combined Sewer Overflows
  - Maintain operations even during extreme flow events

Limited state and local resources to accomplish all of these goals

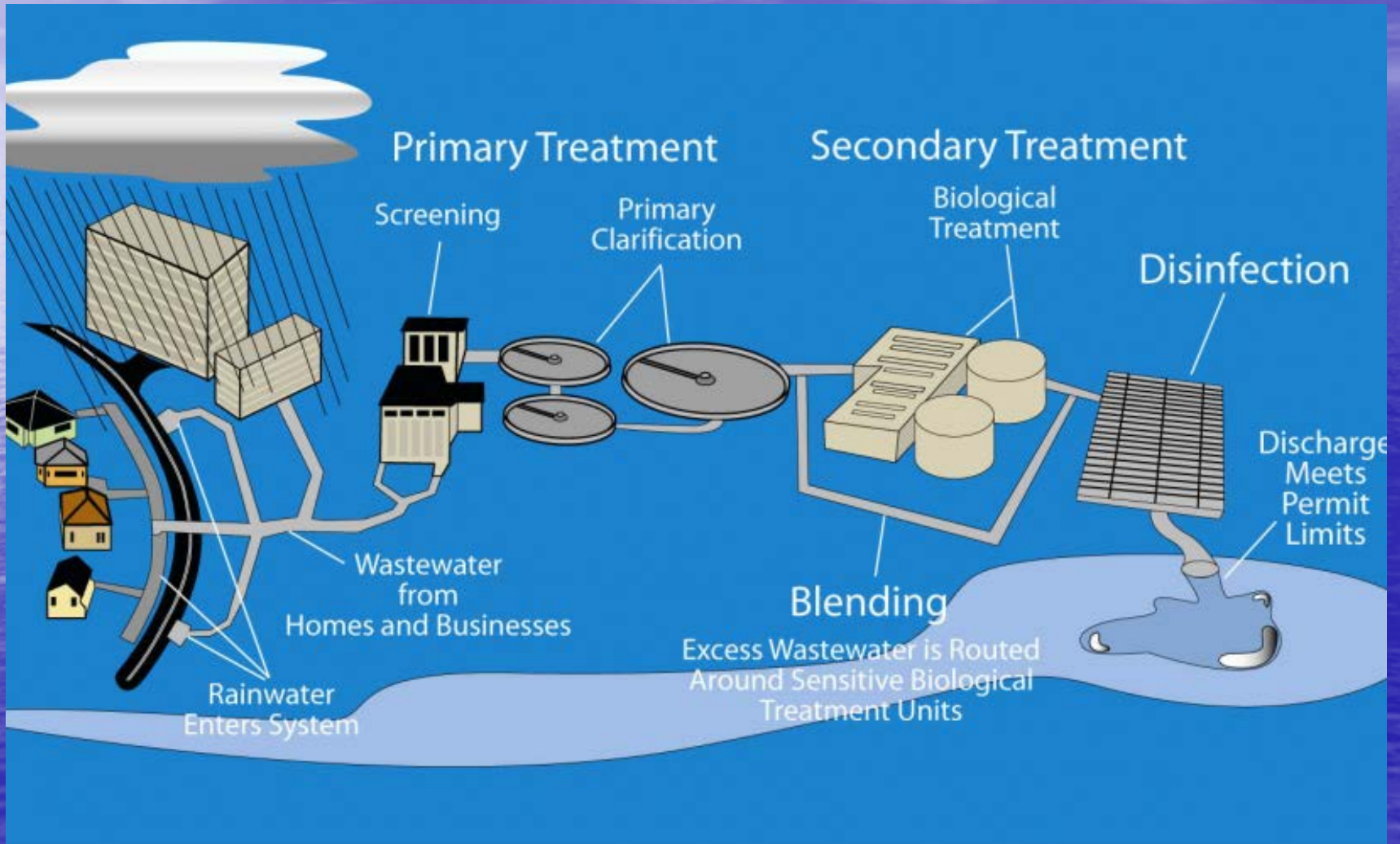


# Background

- 1972-2003 blending used nationwide; EPA grant funded
- 2005 -2008 NACWA/NRDC develop “blending is a bypass” policy for EPA; EPA issues “no bacteria mixing zones” policy
- 2006 – 2011 States pressured to change rules, deny permits
- Affected CSO LTCP, Stormwater, NPDES permits, WWTP design, SSO remedies, TMDLs

*Iowa League filed suit in 2011 to overturn EPA's mandates*

# Background - What is “Blending”?





# Mixing Zone Examples



# *Iowa League of Cities v. EPA*

- *Completely Rejected Every EPA Position in No Uncertain Terms*
- *Reaffirmed Community Due Process Rights and Ability to Select Treatment Processes*
- *Reaffirmed State Primacy on WQS*

*Major Victory for Municipal Interests*



# Take Home Message #1

- *Iowa League of Cities*' decision did the following:
  - Determined that **BLENDING PROHIBITION** was a **REVISED RULE** - procedurally improper - **VACATED!!!**
  - Determined that **BACTERIA MZ PROHIBITION** was a **REVISED RULE** – procedurally improper - **VACATED!!!**
  - Blending prohibition **SUBSTANTIVELY** improper

# EPA's Blending Prohibition Substantively Unlawful

- The EPA has interpreted the CWA regime as “preclud[ing] [it] from imposing any particular technology on a discharger.”
- “Therefore, each facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines.”

*Cities and Engineers: Plant Design is Your Call!*



# So what does ILLOC mean to you?

- EPA can't dictate plant design or impose internal unit process limits
- Peak flow processing design is allowable, pursuant to state law
- State's may approve bacteria MZs
  - Reopen state and federal orders, and schedules of compliance.
  - Amend permits, TMDLs and LTCPs

# Not So Fast!!!

- Following the ILOC decision, EPA ignores requests to respect the decision outside 8<sup>th</sup> Circuit.
- National organizations asked EPA how it would apply the decision.
- EPA's response: the decision is only binding in the 8<sup>th</sup> Circuit and will continue to apply vacated rules elsewhere.



November 26, 2013

The Honorable Gina McCarthy  
Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

RE: Need for Nationwide Consistency on Implementation of the 8<sup>th</sup> Circuit's Iowa League of Cities Decision

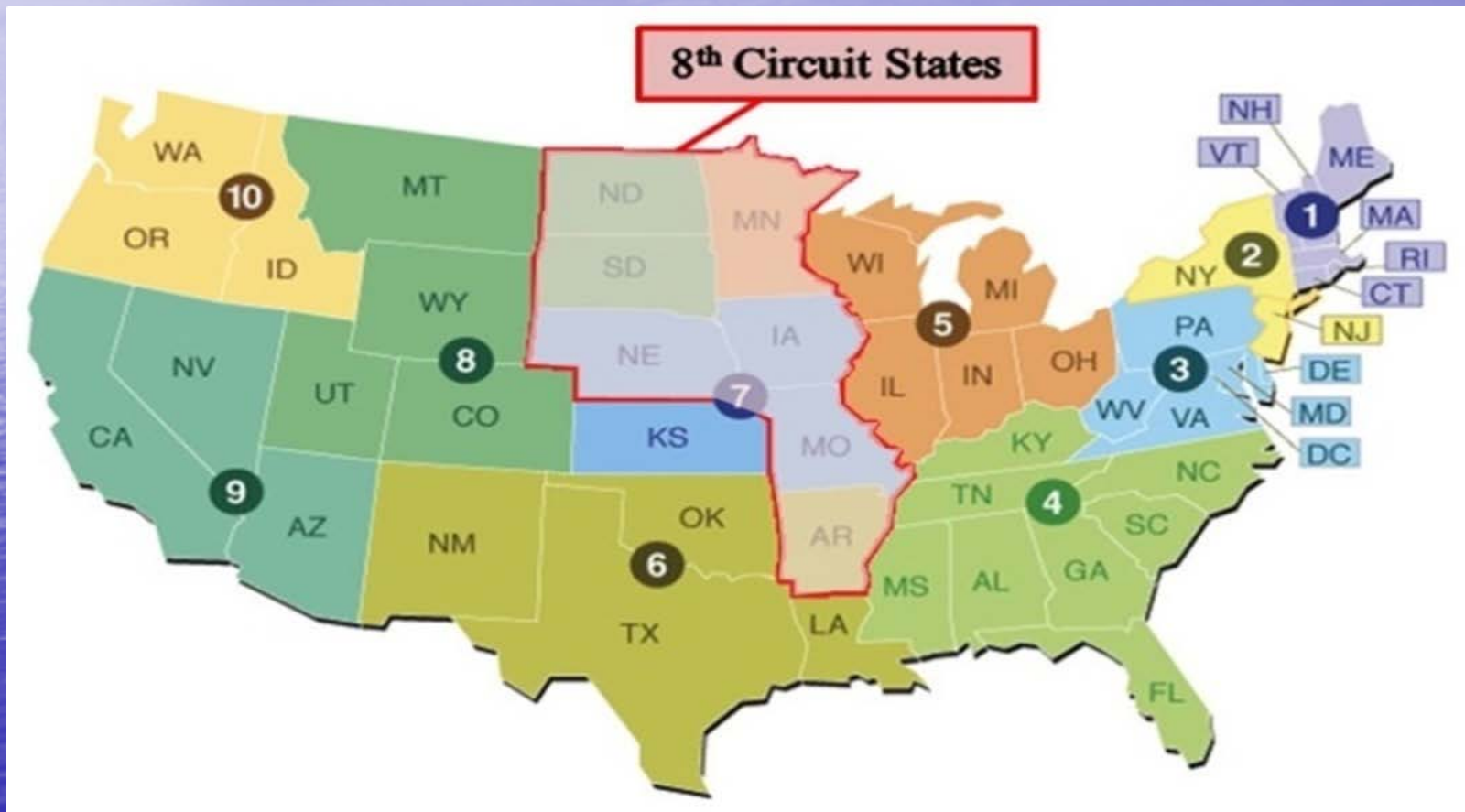
Dear Administrator McCarthy,

As you are aware, on March 25, 2013, the 8<sup>th</sup> Circuit Court of Appeals issued a ruling in *Iowa League of Cities v. EPA* (Docket No. 11-3412) that vacated, on procedural and substantive grounds, the unadopted legislative rules set forth in two U.S. Environmental Protection Agency (EPA) guidance letters. The decision addressed EPA's reinterpretation and enforcement of three key federal rules: (bypass rule, Secondary Treatment rule and Water Quality-Based Permitting rule) that apply nationwide.

Specifically, the Court held that EPA's prohibition of bacteria mixing zones in primary contact recreation waters, regardless of the degree of possible health risks, unlawfully eliminated state discretion to utilize such mixing zones and, therefore, constituted a revised rule that did not go through the proper rulemaking procedure under the Administrative Procedure Act (APA). The Court also found that EPA's blending prohibition, which restricted how municipalities could design facilities to address peak flow processing (thereby reducing CSO and SSO discharges or system backups), exceeded the Agency's statutory authority under the Clean Water Act (CWA) and was inconsistent with both EPA's secondary treatment rule and bypass rule (711 F.3d 844 (8th Cir. 2013)).



# Practical Consequences of Limiting Decision to 8<sup>th</sup> Circuit



# Take Home Message #2

- **If anyone tells you that the ILOC decision only applies in the 8<sup>th</sup> Circuit, they are wrong!!!**
  - CWA only allows single challenge to federal rules
  - Prior Circuit Court Decisions applied Nationwide
  - Just lost same argument on CAA case -NEDACAP



# Take Home Message #3

- If anyone tells you that you should accept “anticipated bypass” approval – say “no thanks.”
  - EPA claims bypasses are always permit violation; you will be agreeing to ongoing non-compliance
  - Bypass Rule NFA requirement will force you to eliminate the blend/bypass and spend more \$\$\$\$\$

# Example: Clairton, PA

- Prior to the ILOC case, Clairton sought to use blending to address elimination of CSOs and save ~ \$6 million in construction costs associated with larger activated sludge unit.
- PADEP denied the request based on EPA's position that blending was an illegal bypass.
- ILOC decision rendered just as Clairton was ready to begin construction.
- PADEP revisiting the issue to allow Clairton to use the design, at a minimum, to process CSO-related flows.



# POTW Interested in Blending?

## Next Steps

- **If you don't ask, you don't get.**
  - Join with other municipal entities to ensure nationwide implementation of the *Iowa League* decision (e.g., *D.C. Cir. Petition*, *WEF*, *Congressional Reps*).
  - Submit appropriate paperwork to EPA/State requesting revision of LTCP plans, NPDES permits, and consent decrees.

# For Further Information

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