October 31, 2018

Ms. Jamie Piziali  
Water Permits Division  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

RE: EPA-HQ-OW-2018-0420; FRL-9983-12-OW

Dear Ms. Piziali,

On behalf of the nation’s cities, counties and mayors, we appreciate the opportunity to provide comments on possible approaches to updating the National Pollution Discharge Elimination System (NPDES) regulations related to the management of peak wet weather flows at Publicly Owned Treatment Works (POTWs) serving separate sanitary sewer collection systems. As the U.S. Environmental Protection Agency (EPA) evaluates changes to its NPDES regulations and seeks input on any issue related to the topic of peak flow management, we respectfully request that the agency reverse its current determination to apply the 8th Circuit Court of Appeals’ ruling in Iowa League of Cities v. EPA solely in the 8th circuit, and instead apply the ruling uniformly nationwide.

Local governments are responsible for ensuring the health, safety and welfare of their residents. Additionally, cities and counties are co-regulators with state governments, sharing responsibility for protecting America’s water resources and ensuring our communities have clean, safe water. As part of these responsibilities, local governments own and operate POTWs, also known as wastewater facilities.

Most POTWs process stormwater through their primary treatment plant before it is released. However, when there is a heavy rain event, primary treatment plants can get overwhelmed with the influx of stormwater. These primary treatment plants are designed to “overflow” the excess stormwater around the primary treatment plant to a secondary system, where the excess stormwater is treated to a lesser standard than the primary treatment plant, and then “blend” the overflow back into the water from the primary treatment plant and discharge (a process known as “blending”).
In the past decade, EPA has attempted to ban blending through guidance documents, rather than initiating a formal rulemaking process with a public comment period. EPA’s own calculation estimated that a blending ban would cost over $150 billion nationwide to implement. This cost would be borne by the units of local government that own and operate POTWs, which may or may not be able to pass the cost on to residents and local businesses.

**Costs to maintain and upgrade wastewater systems are rising rapidly**

According to the American Society of Civil Engineers 2017 Infrastructure Report Card, there are 14,748 wastewater treatment plants nationally, which provide services to nearly 240 million Americans. Additionally, there are over 800,000 miles of public sewers. Each of these systems are subject to constant upgrades and maintenance to ensure they remain functional. The cost to maintain these systems is huge. In fact, by EPA’s own estimate, $271 billion is needed for this infrastructure over the next 25 years alone. Local governments play a major role in maintaining these systems.

Referencing the most recent census data, local governments provide funding for 95 percent of all water infrastructure. Based on our city and county data, complying with federal rules and requirements is one of the costliest mandates. However, since wastewater projects are generally paid for by the users of the system, local governments and utilities have limited options to raise revenue. Local governments plan years in advance to ensure that public health is protected and that costs remain affordable for ratepayers. When additional costs are incurred, either from unexpected repairs or new federal mandates, they must be passed onto residents and businesses in the form of higher user rates. With many low- and fixed-income residents already paying a disproportionate share of their income toward water and wastewater bills, this can make water unaffordable for large segments of the population, resulting in unpaid bills and challenges at the municipal level for providing continuous service and necessary improvements.

**Need for nationwide consistency on implementation of 8th Circuit Court’s decision in Iowa League of Cities v. EPA**

In 2012, the Iowa League of Cities filed a Petition for Review in the U.S. Court of Appeals for the Eighth Circuit, challenging two letters sent to U.S. Senator Charles Grassley (R-Iowa) from EPA in 2011 on the Agency’s new policy ban on blending. The Eighth Circuit Court of Appeals ruled against EPA in the case, No. 11-3412 (8th Cir. 2013).

The Court held that EPA’s use of guidance documents to institute a policy decision to ban blending went further than EPA’s statutory authority allowed. The Court held that EPA must follow the formal rulemaking process, as laid out under the Administrative Procedure Act, which would allow impacted communities and others to submit comments on any proposed rule before the Agency could make such a far-reaching policy decision. The Court also found that EPA’s blending prohibition, which restricted how municipalities could design facilities to address peak flow processing, exceeded the Agency’s statutory authority under the Clean Water Act and was inconsistent with both EPA’s secondary treatment rule and the bypass rule.
After the ruling, in 2013, EPA stated that the decision was only binding within the jurisdiction of the Eighth Circuit (which includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota). Outside of the Eighth Circuit, EPA has attempted to ban blending on a case-by-case basis. The lack of a uniformly applied standard has caused tremendous delay and confusion for local governments and has greatly increased local costs.

As the agency moves forward with a potential rulemaking effort, we ask that you put to rest the confusion and conflict that EPA’s 2013 interpretation has caused our local governments. **Accordingly, we respectfully request that EPA apply the Iowa League of Cities decision uniformly across the country.**

On behalf of the nation’s cities, counties and mayors, thank you for considering the local government perspective on this important issue. If you have any questions, please contact us: Carolyn Berndt (NLC) at 202-626-3101 or Berndt@nlc.org; Julie Ufner (NACo) at 202-942-4269 or jufner@naco.org; or Judy Sheahan (USCM) at 202-861-6775 or jsheahan@usmayors.org.

Sincerely,

Clarence E. Anthony  
CEO and Executive Director  
National League of Cities

Matthew D. Chase  
Executive Director  
National Association of Counties

Tom Cochran  
CEO and Executive Director  
U.S. Conference of Mayor
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 8th Circuit’s Iowa League of Cities Decision

Dear Administrator McCarthy,

As you are aware, on March 25, 2013, the 8th 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 procedures 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)).

We understand that even though this decision came down more than seven months ago and was never stayed, clarification requests regarding the implementation of this decision have gone unanswered and EPA has yet to withdraw its prior objections to NPDES permits based on these now vacated policies. We also understand based on recent public comments from EPA officials that the Agency believes the decision to have binding legal effect only in the 8th circuit and that it will be applied to permittees elsewhere in the country on a case-by-case basis. We would note that Congress expressly granted the circuit courts original jurisdiction to review the NPDES regulations at issue under Section 509 of the CWA to ensure nationwide uniformity and that EPA regulations provide for only one circuit to render an opinion on a petition for review. Consequently, we believe there is no legal basis to assert that the 8th Circuit decision does not apply nationwide.

In closing, the Agency’s attempt to modify nationally applicable NPDES rules without undertaking a rulemaking was struck down in no uncertain terms. The issues in this case have been causing delay and confusion for municipal entities throughout the country in addressing wet weather compliance and have greatly increased local costs, unnecessarily. For example, even by its own estimates, the municipal cost implication of implementing just one of these rule interpretations was estimated by EPA to exceed $150 billion nationwide, with similar extraordinary costs associated with the other provisions. It is time to put that confusion and conflict to rest. Accordingly, we respectfully request confirmation that EPA will apply the Iowa League of Cities decision uniformly across the country and so advise its Regions and delegated States.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Clarence E. Anthony
Executive Director
National League of Cities

Matthew D. Chase
Executive Director
National Association of Counties

Chuck Thompson
Executive Director and General Council
International Municipal Lawyers Association

Ken Kirk
Executive Director
National Association of Clean Water Agencies
Mr. Clarence E. Anthony  
National League of Cities  
1301 Pennsylvania Avenue  
Washington, D.C. 20004

Dear Mr. Anthony:

Thank you for your November 26, 2013, letter to Administrator McCarthy. In your letter, you raised concerns about how the Environmental Protection Agency is responding to the decision in Iowa League of Cities v. EPA (711 F.3d 844 (8th Cir. 2013)). In addition, you indicated that you believe that there is no legal basis for EPA to assert that the decision does not apply nationwide and request that the EPA apply the Iowa League of Cities decision uniformly across the country.

In the Iowa League of Cities decision, the Eighth Circuit reviewed two EPA letters regarding two subjects under the Clean Water Act. The first area addressed in the decision was the EPA’s policy view that bacteria mixing zones “should not be permitted” in waters designated for primary contact recreation. The second area addressed the issue of blending and the specific question of whether a facility that uses a physical/chemical treatment process, such as ACTIFLO, to treat flows that are diverted around biological treatment units during wet weather events is subject to a “no feasible alternatives” demonstration under the bypass provision at 40 CFR 122.41(m). The court determined that the letters constituted legislative rules and vacated the letter’s “rules” because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act.

While not necessary to its holding to vacate the letters as legislative rules, the court also stated that the EPA’s statement in the blending letter “severely restricts the use of ACTIFLO systems that do not include a biological component” because the EPA does not “consider[ ] them to be secondary treatment units” . . . If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.” 711 F.3d at 876. The court stated that “the September 2011 letter applies effluent limitations to a facility’s internal secondary treatment processes, rather than at the end of the pipe.” Id. at 876. Finally the court stated that “the blending rule clearly exceeds the EPA’s statutory authority and little would be gained by postponing a decision on the merits.” Id. at 877.

The Eighth Circuit’s decision applies as binding precedent in the Eighth Circuit. The court’s decision, however, did not and could not have vacated the bypass regulation at 40 C.F.R. §122.41. The bypass regulation itself was promulgated in 1984 (94 Fed. Reg. 37,990 (Sept 26, 1984)) and was subject to the exclusive jurisdiction review provision of section 509(b) of the Clean Water Act after its date of
promulgation. That rule was reviewed and upheld by the U.S Court of Appeals for the D.C. Circuit in \textit{NRDC Inc. v. US EPA}, 822 F.2d 104, 126 (D.C. Cir. 1987). The D.C. Circuit found that “[t]he agency’s adoption of a bypass regulation which incorporates two broad and sensible exceptions . . . is, in our view, reasonable and therefore lawful.” The Eighth Circuit vacated only the letters at issue in the case.

The EPA shares with you a desire to protect human health and the environment while recognizing economic constraints and feasibility concerns. To that end, the EPA is planning to hold a forum with public health experts to ask questions about the public health implications of various bypass and blending scenarios during wet weather events. The EPA believes that this public health forum will provide valuable information on how to address discharges from POTWs that, during certain wet weather events, are diverted around biological treatment units. We expect to hold this workshop in the summer of 2014.

If you have any questions, please contact Andrew Sawyers, Director of the Office of Wastewater Management, at 202-564-0748.

Sincerely,

\[signature\]

Nancy K Stoner
Acting Assistant Administrator
May 30, 2014

Ms. Nancy Stoner  
Acting Assistant Administrator  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Re: Implementation of the 8th Circuit Court of Appeals Ruling in Iowa League of Cities v. EPA (Docket No. 11-3412)

Dear Ms. Stoner:

Thank you for your response to our November 26, 2013 letter to U.S. Environmental Protection Agency (EPA) Administrator Gina McCarthy on implementation of the 8th Circuit Court of Appeals ruling in Iowa League of Cities v. EPA (Docket No. 11-3412). The issues raised in the case are critically important to our member communities, and it is essential that they clearly understand the Clean Water Act (CWA) requirements that apply to their facilities. Our organizations were disappointed by your April 2 response and believe that the EPA has unnecessarily created regulatory uncertainty regarding the practice of peak flow blending that will impose significant burdens on the nation’s communities. We request that you provide additional justification for the EPA’s decision not to apply the Iowa League of Cities decision nationwide.

It is our position that EPA has made a policy choice to limit application of the 8th Circuit’s decision – a choice we strongly disagree with and believe is legally unsupported. EPA’s decision in this instance is not simply a legal exercise; it has real consequences for and will bring real harm to communities across the country. EPA’s piecemeal approach to implementing the 8th Circuit’s ruling will only lead to a patchwork of interpretations on peak flow blending that will lead to greater confusion and result in more costly burdens for the nation’s communities. Further, the EPA’s decision in this case is contrary to the importance of consistently applying solutions throughout all the regions, which Administrator McCarthy has discussed with us, despite the fact that this case presents no exception to that principle. Applying inconsistent regulatory requirements with regard to blending – applying one set of rules to one community but a different set to another – is at odds with the 8th Circuit’s ruling and is unacceptable.
In recent years, EPA has increasingly acknowledged the burden its water-related regulations place on communities nationwide. EPA has made, and we have applauded, significant strides toward alleviating some of these pressures with the development of the Integrated Municipal Stormwater and Wastewater Planning Approach Framework in June 2012 and recent work on a new Financial Capability Assessment Framework. These frameworks are intended to provide local governments with more control over the CWA investments they must make and to sequence investments in a way that will protect the environment, at a pace that is fiscally sustainable for the community. It is essential, however, that the CWA mandates that drive these investments are rational and consistently applied to ensure that communities will have certainty over the long-term. The issue of blending continues to be an area that has suffered from inconsistency and uncertainty in the long-term. Now, with the 8th Circuit ruling, the issue of blending has again become a moving target. It simply does not make sense to have a policy on blending that will lead to utilities in neighboring states in the same EPA Region having to meet different requirements.

Additionally, your letter references an upcoming public health forum to “ask questions about the public health implications of various bypass and blending scenarios during wet weather events.” The question of public health impacts from peak flow treatment and blending is one that has been settled, with no evidence of an increased risk to public health following blending events.

Neither the bypass nor secondary treatment rules are “health-based.” Instead, the applicable pathogen-related requirements for municipal operations come from adopted water quality standards. Looking at the potential for health impacts associated with non-biological treatment scenarios during wet weather, even when such treatment meets all applicable standards and permit limitations, is contrary to the basic structure of the CWA. Examining public health impacts in the context of technology-based standards creates an entirely new compliance standard under the CWA and will have ramifications for all communities with treated combined sewer overflow discharges and for stormwater best management practices.

Given its potential outcomes, a number of our organizations plan to participate in the upcoming forum scheduled for June 19-20, and intend to submit reports and data to support the position that there is no increased public health risk. We are concerned that the outcome of the forum may lead to regulatory overreach, and therefore, we respectfully request clarification from EPA on the goals and desired outcomes of the forum.

In closing, we request that you provide additional justification for the decision not to apply the 8th Circuit decision on a national basis. Again, failure to do so creates an inconsistent and unpredictable regulatory environment for communities and clean water utilities across the country. We further request additional information on the intended goals and desired outcomes of the planned public health forum.
Sincerely,

Tom Cochran  
CEO and Executive Director  
The U.S. Conference of Mayors

Clarence E. Anthony  
Executive Director  
National League of Cities

Matthew D. Chase  
Executive Director  
National Association of Counties

Ken Kirk  
Executive Director  
National Association of Clean Water Agencies

cc: Gina McCarthy, Administrator, EPA  
Bob Perciasepe, Deputy Administrator, EPA  
Andrew Sawyers, Office of Wastewater Management, EPA
Mr. Clarence E. Anthony  
National League of Cities  
1301 Pennsylvania Avenue, NW  
Washington, D.C. 20004

Dear Mr. Anthony:

Thank you for your May 30, 2014, letter in which you request the Environmental Protection Agency to supplement the Agency’s April 2, 2014, letter to provide additional explanation for the way the Agency is applying the decision in Iowa League of Cities v. EPA (711 F.3d 844 (8th Cir. 2013)). I acknowledge that you disagree with my April 2, 2014, letter to you that articulated that the Eighth’s Circuit decision applies as binding precedent in the Eighth Circuit. We hope that discussions at the June experts forum on the public health impacts of blending will provide valuable information on how to address discharges from publicly owned treatment works that, during certain wet weather events, are diverted around biological treatment units. In addition, you request clarification from the EPA on the goals and desired outcomes of the experts forum on the public health impacts of blending that is scheduled for June 19 and 20, 2014.

I would like to express my deep appreciation for your strong and continued support of sustainable policies and requirements for municipal wastewater infrastructure. The EPA shares your desire to protect human health and the environment while recognizing economic constraints and feasibility concerns. Thanks to your efforts and those of many others, the nation has come a long way in improving water quality, public health and the environment since Congress enacted the Clean Water Act over 40 years ago. Much of those gains are associated with the expansion and improvement of the nation’s municipal wastewater infrastructure. We know that you and the other signatories to your letter agree with the EPA that a primary goal of sewage treatment is to protect public health. In fact, improved sewage treatment has been identified as one of the ten greatest advances in the protection of public health during the 20th century. We are all proud of that collective achievement.

The June 19 and 20, 2014 experts forum provides an excellent opportunity for all of us to further our commitment to working together for the benefit of the American public since it will focus on key issues of providing public health protection in a manner that is feasible from an engineering perspective. The EPA and the National League of Cities have a long history of working cooperatively on approaches to improving the public health protection provided by municipal wastewater infrastructure in ways that are technically and economically feasible. We look forward to continuing to work with you on our common goal of achieving environmental and public health protection through cooperative dialogues and active engagement.

If you have any questions, please contact Andrew Sawyers, Director of the Office of Wastewater Management, at 202-564-0748.

Sincerely,

Nancy K. Stoner  
Acting Assistant Administrator