

EPA Response To 8th Circ. Ruling Invites Legal Trouble

By **Sean McLernon**

Law360, New York (December 03, 2013, 7:01 PM ET) -- The U.S. Environmental Protection Agency's decision to limit an Eighth Circuit ruling on wastewater treatment to the court's jurisdiction rather than issuing a nationwide policy has outraged municipal water agencies determined to fight permit restrictions in court, a battle experts say they are well-positioned to win.

The appeals court ruling is nearly nine months old, but the EPA remained quiet about its application until the agency's acting assistant administrator for water, Nancy Stoner, confirmed last month that the EPA believes the decision only applies in the Eighth Circuit and that the agency will evaluate permits in other parts of the country on a case-by-case basis.

It's a position that leaves cities across the country crying foul. Barnes & Thornburg LLP partner Fredric P. Andes, who represents several communities that want the EPA to apply the Eighth Circuit's decision consistently across the country, said municipalities are poised for a lengthy legal tussle.

"It seems like the EPA [is] going to treat it as if they have authority to restrict this," Andes said. "If that's really the case, we will be fighting this in myriad cases around the country for years."

The Eighth Circuit ruled in March that the EPA did not have the authority to reject certain permits for bacteria mixing zones, regardless of state standards.

The appeals court said the agency illegally altered regulations on "blending," a process where sewage facilities can treat large influxes of stormwater by channeling them through different routes. The EPA is obligated to engage in notice and comment periods if it wants to change the policy, according to the decision.

Following the ruling, Andes had heard informally from various officials at the agency that the EPA was not going to apply the ruling nationwide. When the Barnes & Thornburg partner saw Stoner speak at a National Association of Clean Water Agencies conference last month, he asked her about the agency's position on the Eighth Circuit ruling.

Stoner's answer led NACWA, the National League of Cities, the U.S. Conference of Mayors and other groups to petition the EPA to apply the decision uniformly across the country. If the EPA refuses to alter its stance, the cities and counties will file suit with the Eighth Circuit decision in hand.

“Communities are not going to accept these restrictions,” Andes said. “They are going to fight them, and they will have case law on their side.”

The EPA's case-by-case policy is costly and inefficient, according to Beveridge & Diamond PC principal Karen M. Hansen. Cities that have their permits held up by the EPA won't be able to build infrastructure and take other steps to resolve some of the environmental issues that the EPA is concerned about.

Inconsistent application of federal water policy also goes against the spirit of the Clean Water Act. The EPA's own regulations reflect the stance that one circuit court decision is intended to be binding for everyone, according to Hansen.

“One of the things that is disturbing to a lot of people about the EPA's decision is that it really contradicts the Clean Water Act itself, where Congress expressly granted the circuit courts jurisdiction to review nationally applicable [National Pollutant Discharge Elimination System] standards for the purpose of establishing national uniformity,” Hansen said.

The EPA hasn't supplied any justification for such a limited application of the appeals court's decision, giving municipalities an even stronger position to challenge the agency, according to Andes.

“There's nothing about this case that is specific to Iowa or specific to the Eighth Circuit,” Andes said. “There is no excuse to only apply the decision in the Eighth Circuit.”

Part of the problem is the EPA seems unsure of how to proceed following the appeals court ruling. The agency issued an interpretation of its own regulations that it believed was correct but was shot down by the Eighth Circuit. Mayer Brown LLP partner Kevin Desharnais said it looks like the agency hasn't really formulated a response strategy.

The EPA still has its eye on its long-term policy goals but is obligated to treat the permit applicants fairly and equally, Desharnais said.

“They are going to have to listen to what the regulated community is saying,” Desharnais said. “There is a broad base of affected sources here, and there has to be some consistency in how they are treated.”

The agency's current position certainly suggests that different municipalities will be treated differently. While Eighth Circuit cities have new legal clarity if they have permits on hold, the rest of the country remains in limbo.

“If you are in Florida or Texas or Connecticut or any of these other states, this case does nothing, according to EPA's interpretation,” Hansen said.

There are logistical problems with the agency's position as well. In EPA Region 5, for example, Minnesota is in the Eighth Circuit and the rest of the region is not. Border municipalities like cities straddling Illinois and Iowa will also have to deal with confusion.

“They should just admit they lost and implement the decision on a national basis like they usually do,” Andes said of the EPA.

If the EPA continues without a nationwide policy, litigation will likely drag on for years, he said.

“You are going to have a mish-mosh of different decisions from different courts,” Andes said. “This could ultimately end up before the Supreme Court.”

NACWA and the other municipal groups are ultimately hoping to avoid the trouble by persuading the EPA to bite the bullet and apply the ruling consistently throughout the country.

“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,” the groups said in their letter to the EPA. “It is time to put that confusion and conflict to rest.”

An EPA representative was not immediately available for comment Tuesday.

--Editing by Jeremy Barker and Philip Shea.

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