

Federal Rule Forthcoming on Blending Practices:

By Nathan E. Vassar

The EPA recently announced that it will develop a rule package likely later in 2018 regarding blending practices at wastewater treatment facilities. EPA Administrator Scott Pruitt announced that the rule will be developed later this year to clarify when such practices are permissible, and when they may fall afoul of the prohibition on bypasses. Pruitt added that the rule will balance wastewater operations with the protection of water quality and public health.

Blending practices, often during times of heavy rain events, have been subject to ongoing scrutiny since the previous presidential administration took the position that blending constituted bypasses, prohibited under 40 C.F.R. § 122.41(m) (prohibiting the intentional diversion of waste streams from any portion of a facility, except for “essential maintenance to assure efficient operation.”). Such position was challenged and overruled in 2013 in the case of *Iowa League of Cities vs. EPA*, 711 F.3d 844 (8th Cir. 2013). That decision, however, was not appealed by EPA to the U.S. Supreme Court, leaving EPA to take the stance that its policy position was only struck down in states within the Eighth Circuit (Missouri, Arkansas, Iowa, Nebraska, Minnesota, North Dakota, and South Dakota). As such, whether blending practices (and during which types of events) constitute prohibited bypasses remains uncertain in the remaining 43 states, including Texas.

Utilities’ input will be critical as EPA develops the forthcoming rule and seeks comments and input from stakeholders across the country. Existing practices should be examined, as well as input from TPDES permit holders, so that the rule reflects on-the-ground realities, including what types of maintenance needs can drive blending (falling within the bypass exceptions), and whether

additional exceptions may be warranted. The current administration has proposed the rulemaking process rather than guidance, in order to formalize a nationwide approach.

WEAT and its members should remain engaged as additional details are unveiled later this year. I am a member of a national stakeholder group through the National Association of Clean Water Agencies that will track the developments and provide updates to the regulated community. Establishing the right approach to plant operations during maintenance and storm events is critical in order to protect permit holders from later enforcement worries as well as the possibility of inconsistent application in the future.

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