

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Iowa League of Cities,

Petitioner,

v.

United States Environmental
Protection Agency,

Respondent.

No. 11-3412

**RESPONDENT EPA'S OPPOSITION TO PETITIONER'S
POST-ARGUMENT MOTION TO SUPPLEMENT THE RECORD**

In this case, the Iowa League of Cities' petitions for review of two letters that the United States Environmental Protection Agency (EPA) sent to Senator Charles Grassley. In the League's view, EPA's letters are final regulations reviewable in this Court under 33 U.S.C.

§ 1369(b)(1)(E), because they impose the sort of binding "limitation[s]" on the League's members that are subject to review under that section.

In February 2012 – well before either party filed its merits brief – EPA filed the certified index identifying the entire administrative record for its letters to the Senator. The League did not move to

supplement the record at that time. Instead, the League waited for nearly a year – until after the case was fully briefed and argued – to solicit letters from the States of Kansas and Iowa about the impacts that EPA’s letters are supposedly having in those States. Neither Kansas nor Iowa joined this lawsuit or sought leave to participate as *amici curiae*. Their decisions in this respect make sense, given EPA’s representation that the views expressed in the challenged letters “*are not binding on any State permitting authority . . .*” EPA Br. at 23 (emphasis added).

The League now states that its counsel recently provided Kansas and Iowa officials with his “summary of what transpired during the oral argument.” See League’s Motion to Supplement at 16 (Declaration of John C. Hall, ¶ 3). Based only on that summary, the States agreed to provide the letters that are the subject of the League’s motion to supplement. That motion should be denied.

ARGUMENT

Although not entirely clear, it appears that the League wishes to use the new Kansas and Iowa letters to buttress its jurisdictional arguments, *i.e.*, to show that EPA’s letters to Senator Grassley are

being treated in practice as “final agency action” and binding regulations. However, a regulation must be so characterized on its face, *see, e.g., Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999), and the allegedly coercive effect in practice of a document that is not binding on its face is not enough to make it “final” in contexts such as those presented here. *See, e.g., Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427–28 (D.C. Cir. 2004) (Roberts, J.). Accordingly, the new letters commissioned by the League, which post-date the challenged EPA letters by well over a year, are wholly irrelevant to the jurisdictional questions and should not be considered by the Court.

Alternatively, if the League is suggesting that the new letters are relevant to the *merits* of its challenge to the EPA letters, that assertion is incorrect as well. Even if the Court were to accept the League’s theory that EPA’s letters to the Senator are binding regulations, judicial review of the merits of those “regulations” must be limited to the administrative record compiled by the agency at the time of the challenged decision, unless the League establishes that this is such an “extraordinary case” that the limitations that ordinarily govern judicial

review of agency action should not apply. The League has failed to carry that heavy burden.

In any event, the League's new arguments based on the Kansas and Iowa letters are incorrect and irrelevant, and, in fact, serve only to underscore why, in the statutory and regulatory context presented here, the challenged EPA letters themselves are neither "final agency action" nor regulations reviewable in this Court.

A. The League has failed to carry its heavy burden to show that EPA's certified record requires supplementation.

The general principle that judges review administrative actions based on the administrative record compiled by the agency is well established, *see, e.g., South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, 803 (8th Cir. 2005), as is the fact that such record consists of "(1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16(a). *See also* 28 U.S.C. § 2112(b). Rule 30(a)(1), in turn, limits the contents of an appendix to various "parts of the *record*" Fed. R. App. P. 30(a)(1) (emphasis added).

The agency's certified administrative record, "not some new record made initially in the reviewing court," is the "focal point" for judicial

review. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Adding materials to the record that *post-date* the challenged action, as the League is attempting to do here, is especially improper. See *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (“[t]o review more than the information before the Secretary at the time she made her decision risks our requiring administrators to be prescient”) (citing *American Petroleum Inst. v. Costle*, 609 F.2d 20, 23 (D.C. Cir. 1979)). “The very narrow exceptions to this rule ‘apply only under extraordinary circumstances’ in which a strong showing can be made that the record is so incomplete as to preclude effective judicial review or that there is clear bad faith or improper behavior.” *South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, 803 (8th Cir. 2005). No such extraordinary circumstances are present here.

The League has failed to make a “strong showing” that judicial review would be stifled but for admission of Kansas’s and Iowa’s letters. The League’s position (Br. 9) is that this case involves “purely legal issues,” and the Court already has before it the challenged EPA letters, the Agency’s certified administrative record, the pertinent statutory and regulatory provisions, and all other materials on which the

League's legal challenges (and EPA's responses thereto) are based.

Moreover, the League does not allege bad faith or improper behavior by EPA. At most, the League's motion can be read as an attempt to rebut points made by EPA's counsel at oral argument, not as justified by any bad faith or impropriety by EPA in drafting the responses to Senator Grassley's inquiries, so the narrow record-review exceptions simply are not implicated in this case.

B. The untimely letters underscore the reasons why EPA's letters to Senator Grassley are not themselves reviewable.

If the Court were inclined to evaluate Kansas's and Iowa's new letters, it should find that the former demonstrates why the challenged letters to Senator Grassley are not "final agency action" or binding regulations, and that the latter is irrelevant. Kansas's letter explains that EPA is in the midst of following the procedural process set out by Congress in 33 U.S.C. § 1342(d), and that the potential real-world impact of EPA's regulatory interpretations is currently being played out by virtue of EPA's decision to preliminarily object to the State's draft permit. As this example illustrates, the EPA letters to Senator Grassley themselves have no binding legal effect on the League or its members. Rather, the League's members can only be affected in a

concrete way after EPA or the State of Iowa issues or denies a permit. *See* 33 U.S.C. § 1369(b)(1)(F); 40 C.F.R. §§ 123.30, 123.44(h); *City of Ames v. Reilly*, 986 F.2d 253, 256 (8th Cir. 1993). At that point, the League and its members will have all the procedural rights Congress established in the Clean Water Act to challenge EPA's action, and the legal sufficiency of EPA's position will be measured by its consistency with the applicable statutory and regulatory provisions, not with its letters to Senator Grassley.¹

¹ Although Kansas has the right to follow the procedures set forth in 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44 and respond to EPA's objection, it has failed to do so, and EPA's objection thus remains pending.

In April 2008, Kansas placed on public notice a draft permit for the Lawrence Kansas wastewater treatment plant, to which EPA preliminarily objected the following month. *See* EPA's May 9, 2008 Letter (attached hereto as Exhibit 1). In November 2008, the State replaced that draft permit, *see* 27 Kan. Reg. 1727, 1734 (Nov. 20, 2008), so the objection discussed in the State's letter is moot. EPA issued an interim objection to the revised draft permit, requesting information on several issues, including an ACTIFLO® unit described in the permit that would bypass the Lawrence facility's secondary-treatment units, and whether the criteria set forth at 40 C.F.R. § 122.41(m)(4)(i)(B) for an approved anticipated bypass would be satisfied. *See* EPA's December 18, 2008 Letter (attached hereto as Exhibit 2). EPA thus requested that the State provide information to help the Agency determine whether the regulatory criteria for approving this diversion had been met. Despite repeated requests of both the State and the City

Iowa's letter states that EPA's letters to Senator Grassley has led the State to limit the wastewater facility designs that it will approve for communities subject to enforcement orders. The State's letter adds nothing to the League's cause, as it says that these "enforcement orders" were issued "[o]ver the past few years" but fails to provide a single example of an action that the State has taken, *after* EPA sent the challenged letters to Senator Grassley, based on a position that EPA allegedly articulated for the first time in those letters.

of Lawrence, EPA has never been provided with the information it requested in 2008. *See id.* (EPA requesting that the State provide "a narrative explanation and schedule of KDHE's [Kansas Department of Health & Environment's] plans to evaluate" whether the "requirements of 40 C.F.R. [§] 122.41(m)" will be met); *see also* EPA's December 10, 2009 Letter (attached hereto as Exhibit 3) (noting that neither KDHE nor the City had provided EPA the requested information regarding the no-feasible-alternatives test set forth at 40 C.F.R. § 122.41(m)).

CONCLUSION

The League's motion to supplement should be denied.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
United States Department of Justice

s/ Adam J. Katz _____

Dated: January 9, 2013

ADAM J. KATZ
Assistant United States Attorney
United States Attorney's Office
Northern District of New York
445 Broadway, Room 218
Albany, New York 12207

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Adam J. Katz



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

8 MAY 2008

Mr. Karl Mueldener, Director
Bureau of Water
Kansas Department of Health
and Environment
1000 SW Jackson Street, Suite 420
Topeka, KS 66612-1367

Re: General and Interim Objection for Lawrence, Kansas, Wastewater Treatment Plant (WWTP) Draft Permit

Dear Mr. Mueldener:

The Environmental Protection Agency (EPA) Region 7 received the draft National Pollutant Discharge Elimination System (NPDES) permit for the Lawrence, Kansas, WWTP on April 11, 2008 (permit number M-KS31-I001, EPA permit number KS0038644).

The draft Lawrence permit describes three (3) outfalls of relevance to this letter. Outfall 001A1 is the main treatment plant discharge and effluent sampling point. The main treatment plant has a design capacity of 25 million gallons per day (MGD). Outfall 001B1 is effluent from a wet weather Sanitary Sewer Overflow (SSO) system, or extraneous flow basins (EFBs). This EFB system has a design discharge capacity of 40 MGD from the SSO system. Outfall 001X1 is described as the combination of the effluent from the main treatment plant (Outfall 001A1) and the EFBs (Outfall 001B1).

The EPA understands that the receiving water for the Lawrence facility is the Kansas river, which is designated for special aquatic life use, domestic water supply, food procurement, groundwater recharge, industrial water supply, irrigation and livestock watering and primary contact "b" recreation. This portion of the Kansas river also has a Total Maximum Daily Load (TMDL) in place to address the ongoing threat of fecal coliform/E. coli at levels above the criteria for the designated use(s).

General Objection

Pursuant to 40 CFR § 123.44(a)(1), EPA reserves the right to take 90 days to supply specific grounds for a permit objection, notwithstanding any shorter period specified in the Memorandum of Agreement, when a general objection is filed within the review period specified in the Memorandum of Agreement. Based on EPA's review of the draft permit and supporting information, EPA is hereby making a general objection to the terms of the draft permit, pursuant to 40 CFR § 123.44(a)(1), based on the following issues:



1. Outfall 001X1 does not set forth limits for Biological Oxygen Demand and Total Suspended Solids which comply with the secondary treatment standards set forth at 40 CFR § 133. The appropriate Secondary Treatment Standards (STS) for discharges from the EFBs are found at 40 CFR § 133.102, which are applicable, unless the conditions for “special consideration” found at 40 CFR § 133.103 are satisfied (see EPA’s outstanding objection to the Johnson County, Nelson Facility, permit).
2. The limit for bacteria for Outfall 001X1 is only expressed in terms of the compliance with the criteria for the Primary Contact Recreational “b” designated use for the winter season (November through March), but there is no limit expressed that complies with the criteria for the summer season for this designated use (April through October), which is 200 fecal coliform colonies per 100/milliliters (ml) (or alternatively, 262 E. coli colonies per 100/ml).
3. The design of the EFB system (Outfall 001B1) for the Lawrence facility appears to be a designed diversion of sewage from the main treatment plant, or a “bypass,” without having satisfied the criteria for a bypass in the federal regulations at 40 CFR § 122.41(m). At 40 CFR § 122.41(m)(4), it is clearly stated that bypasses are prohibited unless (1) necessary to prevent loss of life, injury or property damage; (2) there are no feasible alternatives; and (3) proper notice is given.
4. Other issues pertaining to compliance with technology based requirements and water quality standards.

Interim Objection

In order to better understand the Kansas Department of Health and Environment’s (KDHE) basis for the terms of the draft Lawrence permit, EPA is also hereby requesting information in order to determine the frequency and characteristics of discharges from Outfall 001X1 (combined flows from the main plant and EFBs). Please understand that once EPA requests information on a draft permit, the period for EPA’s review and additional comment on the draft permit is continued until EPA receives the requested information. Specifically, 40 C.F.R. § 123.44(d)(2) states the following:

If this request is made within 30 days of receipt of the State submittal under Sec. 123.43 (or, in the case of a sewage sludge management program, Sec. 501.21 of this chapter), it will constitute an interim objection to the issuance of the permit, and the full period of time specified in the Memorandum of Agreement for the Regional Administrator’s review will recommence when the Regional Administrator has received such record or portions of the record;

The EPA hereby requests additional information on the following matters:

1. Since March 2004, provide the dates when the Lawrence facility discharged effluent from Outfall 001X1, which contained discharges from the EFBs.
2. For each discharge identified pursuant to question 1 above, provide all available information describing the volume of effluent for each discharge.
3. Since March 2004, provide copies of all documentation of monitoring data on the effluent from Outfall 001X1, gathered when the effluent from this outfall contained discharges from the EFBs.
4. Provide an explanation of what information was used by KDHE to ensure the discharge from Outfall 001X1 will not cause an exceedance of the criteria for the Primary Contact Recreation Class "b" designated use. If KDHE has prepared a specific mixing zone study for this draft permit, please provide EPA a copy of this study.
5. Please provide an explanation (along with all available supporting documentation) whether the EFB bypass satisfies the requirements of 40 CFR § 122.41(m)(4).
6. Please provide all available information describing Inflow and Infiltration (as defined by 40 CFR § 133.103) into the Lawrence SSO system.

Pursuant to 40 CFR § 123.29 and KAR 28-16-62(a)(1), the Lawrence permit may not be issued by KDHE until the information requested by this letter has been provided to EPA, and resolution of EPA's general objections to the Lawrence permit. Lastly, as EPA has provided KDHE a general objection, the draft permit may not be withdrawn by KDHE unless EPA withdraws its general objection. Pursuant to 40 CFR § 123.44(e), (g) and (h), if the issues outlined herein are not resolved following EPA's transmittal of a detailed explanation of the basis of the general objections, the authority to issue the Lawrence permit may transfer to EPA.

If you have questions, please contact Pradip L. Dalal, P.E., Chief, Wastewater and Infrastructure Management Branch, at 913-551-7454.

Sincerely,



William A. Spratlin
Director
Water, Wetlands and Pesticides Division



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

18 DEC 2008

Mr. Karl Mueldener, Director
Bureau of Water
Kansas Department of Health and Environment
1000 SW Jackson Street, Suite 420
Topeka, KS 66612-1367

**Re: Interim Objection for Lawrence Kansas,
Waste Water Treatment Plant Draft Permit**

Dear Mr. Mueldener:

On November 20, 2008, the Environmental Protection Agency (EPA), Region 7, received the draft National Pollutant Discharge Elimination System (NPDES) permit for the Lawrence Kansas, Waste Water Treatment Plant (WWTP), which was public noticed by the Kansas Department of Health and Environment (KDHE) on the same day. (Permit number M-KS31-I001, EPA permit number KS0038644, "Lawrence permit"). 40 C.F.R. 123.44(i) and the Memorandum of Agreement (MOA) between EPA and KDHE allows EPA to provide comments or objections to draft permits during the thirty (30) day public comment period, which concludes on December 20, 2008.

The draft Lawrence permit describes three outfalls of relevance to this letter. Outfall 001A1 is the main treatment plant discharge and effluent sampling point. The main treatment plant has a design capacity of 25 million gallons per day. Outfall 001B1 is effluent from a wet weather separate sanitary system, or "extraneous flow basin" (EFB). This EFB system has a design discharge capacity of 40 million gallons per day from the separate sanitary system. Outfall 001X1 is described as the combination of the effluent from the main treatment plant (Outfall 001A1) and the EFBs (Outfall 001B1).

EPA understands that the receiving water for the Lawrence facility is the Kansas River, which is designated for special aquatic life use, domestic water supply, food procurement, groundwater recharge, industrial water supply, irrigation and livestock watering and primary contact "b" recreation. This portion of the Kansas River also has a Total Maximum Daily Load (TMDL) in place to address the ongoing threat of bacteria (fecal coliform/E. coli) at levels above the water quality criteria to protect the designated use(s).



EPA has appreciated the opportunity to discuss the draft permit with KDHE and the City of Lawrence. Based on these discussions, EPA understands that KDHE has agreed that the draft permit will be revised to establish bacterial limits at Outfall 001X1 that meet the bacteria criteria for the designated use for primary contact "b" recreation.

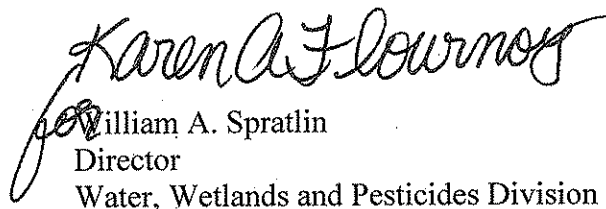
Interim Objection

In order to better understand KDHE's basis for the terms of the draft Lawrence permit, EPA requests the following information in order to determine the frequency and characteristics of discharges from Outfall 001X1 (combined flows from main plant and EFBs). Please understand that this request constitutes an interim objection according to 40 C.F.R. § 123.44(d), and, once EPA requests information on a draft permit, the period for EPA's review and additional comment on the draft permit is continued until EPA receives the requested information

1. Please provide a narrative explanation and schedule of KDHE's plans to evaluate available information to determine whether the EFB monitored at location 001B1 may be approved by the permit as a bypass, per the requirements of 40 C.F.R. 122.41(m);
2. Please provide all available information describing Inflow and Infiltration (as defined by 40 C.F.R. 133.103) into the Lawrence SSO system; and
3. Because the November 20, 2008, draft permit approves the bypass of secondary treatment through the EFB monitored at location 001B1, please provide documentation of a "no feasible alternatives analysis" that demonstrates that the EFB bypass satisfies the requirements of 40 C.F.R. 122.41(m)(4).

Pursuant to 40 C.F.R. 123.29 and KAR 28-16-62(a)(1), the Lawrence permit may not be issued by KDHE until the information requested by this letter has been provided to EPA. The Region looks forward to continuing working with KDHE and the City of Lawrence to address the above described issues. If you have questions, please contact Glenn Curtis Chief, Wastewater and Infrastructure Management Branch, at 913-551-7454.

Sincerely,


William A. Spratlin
Director
Water, Wetlands and Pesticides Division

cc: Mike Tate, KDHE

David Wagner, City of Lawrence



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

DEC 10 2009

Mr. Dave Wagner, Director
Utilities Department
City of Lawrence Utilities
City Offices
P.O. Box 708
Lawrence, KS 66044-0708

**Re: Interim Objection Response for Lawrence, Kansas
Wastewater Treatment Plant Draft Permit**

Dear Mr. Wagner:

This letter is in response to your letter dated November 4, 2009, to the Environmental Protection Agency (EPA) Region 7. Your letter provided additional information concerning the Lawrence Municipal Wastewater Treatment Facility and referenced a 2008 paper by Jim Fitzpatrick of Black and Veatch entitled, "Meeting Secondary Effluent Standards at Peaking Factors of Five and Higher." The EPA comments regarding this paper are enclosed. The EPA would like to work with the city of Lawrence (City) to resolve the outstanding objection and proposes that we have further discussion in that regard.

As previously discussed with the City and the Kansas Department of Health and Environment (KDHE), EPA's objection to the Lawrence permit is based on the fact that the City diverts or "bypasses" wet weather flows around the Lawrence treatment facility's secondary treatment units. Pursuant to 40 CFR § 122.41(m), such "bypasses" are expressly "prohibited" by the Clean Water Act (CWA). The EPA has stated that the Actiflo system is a form of an "anticipated bypass" and has invoked the requirements of 40 CFR § 122.41(m)(4).

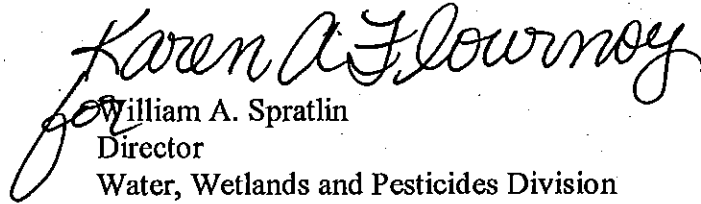
In the EPA's interim objection to the proposed November 2008 permit, EPA asked for KDHE and the City to provide specific information that would describe whether there were "no feasible alternatives" to the Actiflo system's bypass. To date, EPA has not been provided the requested information by KDHE or the City, and until this information is received, or an acceptable permit is proposed by KDHE, EPA December 2008 objection will remain outstanding. Pursuant to 40 CFR § 123.29 and KAR 28-16-62(a)(1), the Lawrence permit may not be issued by KDHE until the information requested by this letter has been provided to EPA.

The EPA would propose that a meeting be set up with KDHE and the City to further discuss this matter, in particular the City's preparation of a no feasible alternatives analysis.



Please contact Glenn Curtis, Chief, Wastewater and Infrastructure Management Branch, at 913-551-7726 to make arrangements for this meeting or if you have any questions regarding this letter.

Sincerely,


William A. Spratlin
Director
Water, Wetlands and Pesticides Division

Enclosure

cc: Aurora Shields, City of Lawrence
Karl Muldenar, KDHE
Mike Tate, KDHE

ENCLOSURE
COMMENTS TO THE FITZPATRICK PAPER

1. The paper uses volume averaging as a means to show compliance with the Code of Federal Regulations (CFR). Volume averaging is not an acceptable method to show compliance with the secondary treatment regulations found in 40 CFR § 133. Definitions for calculating the 7-day and 30-day averages are found in 40 CFR § 133.101 (a) and (b).
2. In addition, the fact that the paper relies on the Actiflo system qualifying for treatment equivalent to secondary is discussed in the 2008 paper. In order to qualify for treatment equivalent to secondary, specific criteria must be satisfied. That criteria is located in 40 CFR § 133.105, "Treatment equivalent to secondary treatment." Section 40 CFR § 133.105 references requirements established in 40 CFR § 133.101(g) "Facilities eligible for treatment equivalent to secondary treatment." Those requirements are listed below.
 - a. The BOD5 and SS effluent concentrations consistently achievable through proper operation and maintenance (Sec. 133.101(f)) of the treatment works exceed the minimum level of the effluent quality set forth in Secs. 133.102(a) and 133.102(b),
 - b. A trickling filter or waste stabilization pond is used as the principal process; and
 - c. The treatment works provide significant biological treatment of municipal wastewater.

Actiflo is not a trickling filter or waste stabilization pond which provides significant biological treatment. Accordingly, it would be EPA's interpretation that the less stringent "treatment equivalent to secondary" standards do not apply.

3. The paper cites 40 CFR § 133.103(d), which describes the requirements for less concentrated influent wastewater for separate sewers - "this regulation includes considerations for lowering the percentage removal requirements during wet weather for combined sewers or for '*less concentrated*' influent wastewater for separate sewers." The permittee must show that it satisfactorily demonstrates:
 - a. The treatment works is consistently meeting, or will consistently meet, its permit effluent concentration limits but its percent removal requirements cannot be met due to less concentrated influent wastewater,
 - b. To meet the percent removal requirements, the treatment works would have to achieve significantly more stringent limitations than would otherwise be required by the concentration-based standards, and
 - c. The less concentrated influent wastewater is not the result of excessive Inflow and Infiltration (I/I). The determination of whether the less concentrated wastewater is the result of excessive I/I will use the definition of excessive I/I in 40 CFR § 35.2005(b)(16) - "plus the additional criterion that inflow is non excessive if the total flow to the Publicly Owned Treatment Works (i.e., wastewater plus inflow plus infiltration) is less than 275 gallons per capita per day."

An I/I study has not been submitted to EPA Region 7. It is unclear if the Lawrence facility is eligible to meet the requirements listed in Section 40 CFR § 133.103(d).

