IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IOWA LEAGUE OF CITIES,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Appeal No. 11-3412

PETITIONER'S MOTION TO SUPPLEMENT THE APPENDIX TO ITS OPENING BRIEF

For the reasons set forth below, Petitioner, the Iowa League of Cities ("the League"), hereby moves to supplement the Appendix it filed in support of its opening brief.[1]

1. On March 12, 2012, the League filed its Opening Brief on the merits of the petition currently before this Court. Among other supporting documents, this Brief was accompanied by an Appendix of records related to the issues being considered by the Court. On June 14, 2012, the League filed its Reply Brief and supplemented its Appendix with records that a federal district court ordered Respondent, United States Environmental Protection Agency ("EPA" or "the Agency"), to produce to League counsel in Freedom of Information Act ("FOIA") litigation.

[1] To the extent this Court grants the League's Motion and allows Petitioner to supplement its appendix, true and correct copies of the supplemental records have been attached as Exhibits 1 and 2 to this Motion.

2. On November 13, 2012, this Court heard oral argument on this matter. During this argument, both the League and EPA were provided opportunity to argue their respective positions, respond to arguments of the opposing party, and answer any questions posed by the panel of judges selected to hear the case. While most of the discussion focused on issues highlighted in the earlier briefing, on a few occasions, argument addressed issues relating to current federal and state implementation activities of the new regulatory requirements at issue. As it concerns this Motion, the League notes the following examples:

(a) League counsel was asked whether EPA had issued any objections to the regulated community (in Iowa or otherwise) incorporating the positions in the challenged guidance letter;

(b) Counsel from both sides discussed how states such as Iowa should reasonably interpret the challenged letters; and

(c) Implying that the Agency was not implementing the regulatory mandates announced in the challenged guidance letters, EPA counsel stated that treat peak flow processes (such as ACTIFLO) were at the heart of ongoing deliberations and that a modified form of treatment was being evaluated for legality under the bypass rule.

3. While the League counsel responded to these questions as accurately as possible, the fact of the matter is that the League was not the best entity to confirm the ongoing state program impact of EPA's new regulatory interpretations and discharge prohibitions. The states, themselves, are the parties best able to confirm whether (a) they have issued orders to the regulated community based on

the challenged letters, (b) they have interpreted the challenged letters as *de facto* prohibitions on the regulatory practices discussed therein, and (c) whether EPA has issued any objections to the states consistent with the regulatory positions espoused within the letters.

4. In an effort to ensure that the League counsel's representations were accurate, following the oral argument, the League discussed these issues with Iowa Department of Natural Resources ("IDNR") and the Kansas Department of Health and Environment ("KDHE"). Following these discussions, the League's counsel received two letters: one from IDNR (Ex. 1) and one from KDHE (Ex. 2). Both of these letters detail the harm to the regulated community associated with EPA's directives and how, as the result of EPA's current implementation of these mandates, the agencies are unable to issue and approve the historically-allowed treatment techniques at issue. For instance, the IDNR letter confirmed that EPA's new rule interpretations are "currently limiting the wastewater facility designs considered approvable by IDNR for communities subject to enforcement orders ..." Moreover, the KDHE letter explains how it has already received objection letters from EPA on the bypass rule/ACTIFLO issue, and how this objection has adversely impacted the permitting program in the state of Kansas. On this issue, the KDHE letter unambiguously contradicts the statements (or inferences) of EPA

counsel at oral argument, which provided that EPA was not currently enforcing the new bypass rule interpretation.

5. While supplementing the record at this juncture is unusual, it is not prohibited. *Dakota Indus. v. Dakota Sportswear*, 988 F.2d 61, 63-64 (8th Cir. 1993) ("Generally, an appellate court cannot consider evidence that was not contained in the record below. However, this rule is not etched in stone.") ("We make no general holding as to when an appellate court can consider evidence not contained in the record below, but find that in this case the interests of justice require that we do so."). In the end, this Court should supplement the appendix, if doing so is in the "interests of justice." *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970) ("when the interests of justice demand it, an appellate court may order the record of a case enlarged.").

6. In some cases, additional evidence is admitted for consideration following oral argument. *Burton v. Richmond*, 370 F.3d 723, 728 (8th Cir. 2004) ("Subsequent to oral argument, plaintiffs supplemented the record and provided this Court with an order from the Cole County Circuit Court that referred to plaintiffs as within the legal custody of DFS."); *United States v. Blade*, 336 F.3d 754, 760 (8th Cir. 2003) ("When the issue was discussed extensively at oral argument, appellant's counsel was granted leave to supplement the record with the lab report."); *Federal Land Bank v. Gibbs*, 809 F.2d 493, 496 (8th Cir. 1987)

(reviewing non-record information submitted to the Court following oral argument); *see also Superior Seafoods, Inc. v. Hanft Fride, P.A.*, 2012 U.S. App. LEXIS 14506, *16 (8th Cir. July 16, 2012) (allowing expansion of the record per court request); *Francois v. Immigration and Naturalization Service*, 283 F.3d 926, 931 (8th Cir. 2002) (same).

7. As the KDHE and IDNR letters attached to this Motion discuss issues specifically raised by the judges at oral argument, were not in the League's possession prior to the oral argument, and deal with issues that are most properly answered by the states themselves, the admission of these records should be allowed "in the interests of justice." Furthermore, as these documents specifically contradict the statements (and inferences) made by EPA at oral argument, good cause exists in this instance to supplement the record with the attached state agency letters since these entities represent the most objective view of how EPA's actions are adversely affecting state permitting programs. To the extent Respondent EPA now possesses additional non-record evidence on these issues, the League would not oppose a similar motion from the Agency.

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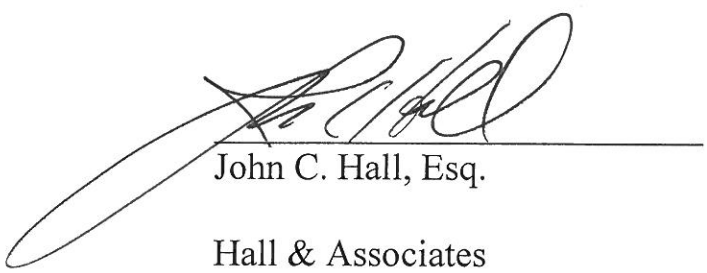
CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court for leave to supplement its Appendix with the accompanying additional records.

Respectfully submitted,



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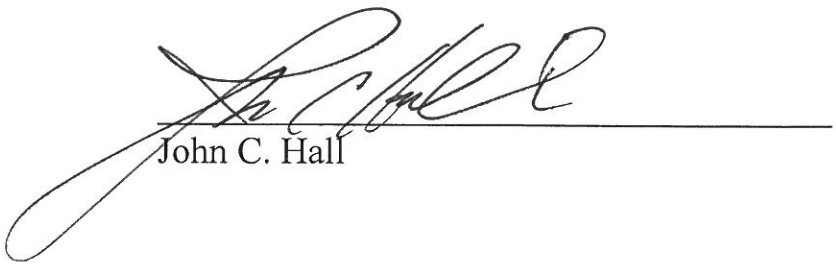
Attorney for Petitioner

Dated: December 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I electronically filed the foregoing Petitioner's Motion to Supplement the Appendix to its Opening Brief 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.



John C. Hall

EXHIBIT 1

Fields of Opportunities

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
CHUCK GIPP, DIRECTOR

December 14, 2012

John Hall
Hall & Associates
Suite 701
1620 I Street, NW
Washington, DC 2006

RE: Iowa League of Cities v. EPA, 8th Circuit Court of Appeals, No. 11-3412

Dear Mr. Hall,

The Iowa Department of Natural Resources (IDNR) is aware that oral arguments were heard on November 12, 2012 in the case of Iowa League of Cities v. EPA before the 8th Circuit of the U.S. Court of Appeals. The IDNR is interested in the outcome of this litigation and the issues raised therein because such outcome may determine the solutions available to Iowa communities to address peak wastewater flows. Current EPA positions in regard to peak flow treatment and the use of bacterial mixing zones are limiting the treatment options which the IDNR can approve for communities in Iowa.

It is our understanding that, during oral argument, the League of Cities was asked whether IDNR is currently imposing through enforcement actions either of the prohibitions dictated by the EPA letters to Senator Grassley and the associated EPA guidance. This letter is intended to provide a response to the question raised by the court.

Over the last few years, the IDNR has entered into numerous enforcement orders or actions which are designed to address excess wastewater flows. These excess flows can be related to combined sewer systems, insufficient treatment plant capacity, the need for collection system maintenance, or other related factors. Iowa communities subject to these enforcement actions include the cities of Pella, Osceola, Burlington, Ottumwa, Ames, Indianola, Washington and others. The IDNR intends to reach a long term compliance schedule agreement with Davenport, Bettendorf, Riverdale and Panorama Park in the near future.

These enforcement actions establish compliance schedules requiring the communities to take whatever actions are necessary to stop violations but do not typically dictate the exact facility designs to be used to address the underlying violations. The impact of the EPA positions in regard to peak flow treatment and the use of mixing zones occurs during the submission of proposed designs by the communities which are under order to upgrade their systems. The

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IDNR affirmatively states that the positions taken by EPA, as described in the letters to Senator Grassley, are currently limiting the wastewater facility designs considered approvable by IDNR for communities that are subject to enforcement orders to upgrade their wastewater collection and treatment systems.

Sincerely,

Shelli Grapp

Shelli Grapp
Bureau Chief
Water Quality Bureau

EXHIBIT 2

Division of Environment - BOW
1000 SW Jackson St. – Suite 420
Topeka, KS 66612-1367

Kansas

Phone: 785-296-5504
Fax: 785-296-0086
mtate@kdheks.gov
www.kdheks.gov

Robert Moser, MD, Secretary

Department of Health & Environment

Sam Brownback, Governor

November 27, 2012

Mr. John C. Hall
Hall & Associates
Suite 701
1620 I Street, NW
Washington, DC 20006

RE: Iowa League of Cities v. EPA, No. 11-3412

Dear Mr. Hall:

We understand that oral argument was heard in the above referenced case on November 12, 2012. The Kansas Department of Health and Environment (KDHE) has been interested in this matter for some time because the decision influences whether EPA will allow the continued use of certain peak flow treatment processes that are currently in use, and have been in use through numerous permit cycles, in our state (e.g., ACTIFLO). Like Iowa, Kansas also has a number of communities under state orders to improve their collection and treatment systems to prevent wet weather overflows of untreated sewage. Progress on resolving these conditions has been slowed due to EPA's ongoing classification of the use of peak flow treatment processes such as ACTIFLO as illegal bypasses and demands that No Feasible Alternative analyses of the collection system be conducted at each 5-year permit cycle.

We understand that, during the oral argument, EPA indicated that they are not presently enforcing the positions specified in the letters to Senator Grassley that were the basis for filing the suit and that EPA's position with regard to ACTIFLO in particular, is still under debate in the agency. Whether or not any internal debate is occurring, any statement or implication that EPA is (1) not presently enforcing the new bypass rule interpretation contained in the draft 2005 Peak Flows Policy and (2) not classifying ACTIFLO as an unlawful bypass is only partially correct. EPA has objected to, and held a permit from issuance in Kansas, however EPA has not issued the permit themselves as would be expected in the case of an objection where the state does not make the modifications EPA required.

On April 17, 2008, KDHE placed on public notice the draft wastewater permit for the Lawrence Kansas wastewater treatment plant which uses the ACTIFLO process to treat peak wet weather flows. On May 9, 2008, EPA provided a letter with their preliminary objections to the draft permit stating that the ACTIFLO system needed to be identified as an illegal bypass and the city must provide a No Feasible Alternatives analysis for its continued use. KDHE contended, and has repeatedly discussed with EPA, that the ACTIFLO process is not a plant bypass as historically defined, but is part of the city's treatment plant designed, built and operated to provide treatment of peak wet weather flows which would damage the secondary biological treatment portion of the plant. However, despite numerous discussions with KDHE and the city of Lawrence, both EPA Region VII and Headquarters have refused to allow KDHE to re-issue the Lawrence Kansas permit unless use of the ACTIFLO process is considered an illegal bypass and the city provides a No Feasible Alternatives analysis.

EPA continues to classify the treatment process as a bypass based on the draft 2005 Policy document referenced in the letters to Senator Grassley. EPA's objections to the draft permit has frozen the permitting process for this facility for over 4.5 years – almost an entire 5-year permitting cycle. In addition, EPA's classification of ACTIFLO as an illegal bypass is affecting the ability of other Kansas communities to use this cost-effective process as part of their treatment works.

While we have not chosen to intervene in this matter, we thought it was important to bring these facts to your attention.

Sincerely,

Michael Tate
Director - Bureau of Water

EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
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IOWA LEAGUE OF CITIES,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Appeal No. 11-3412

DECLARATION OF JOHN C. HALL

1. I am one of the attorneys of record for Petitioner, Iowa League of Cities ("the League"), in this matter and am a member in good standing of the District of Columbia Bar. I was admitted to practice in the Eighth Circuit Court of Appeals on August 11, 2010. I graduated law school from George Washington University and have practiced law since 1984. On November 13, 2012, I represented the League in the oral argument against Respondent, United States Environmental Protection Agency ("EPA" or "the Agency") in the above-captioned matter.

2. I submit this Declaration in support of the League's Motion to Supplement the Appendix to its Opening Brief in this matter. I have personal knowledge of the averments made in this Declaration, and if called upon to do so, I am competent to testify to all matters set forth herein.

3. Following the November 13, 2012, oral argument referenced above, I had telephone conversations with the Iowa Department of Natural Resources ("IDNR") and the Kansas Department of Health and Environment ("KDHE"). During these conversations, I provided IDNR and KDHE a summary of what transpired during the oral argument.

Specifically, I conveyed the statements of EPA counsel (a) implying that the Agency was not actively implementing the regulatory prohibitions set forth in the challenged guidance letters, and (b) concluding that state programs were not being adversely impacted as a result of the challenged EPA actions. During these calls, both state environmental agencies indicated a willingness to supply me with a letter discussing these issues raised by EPA counsel at oral argument.

4. I certify and verify that the documents identified as Exhibit A and B in the League's Motion to Supplement the Appendix to its Opening Brief are true and accurate copies of letters I received from the respective state environmental agencies. I received the December 18, 2012, IDNR letter (Ex. A) in an e-mail from IDNR sent on the same day. I received the November 27, 2012 KDHE letter (Ex. B) in US mail correspondence sent on December 3, 2012.

I declare under penalty of perjury of the laws for all relevant jurisdictions that the foregoing is true and correct to the best of my knowledge and belief.

Dated: December 21, 2012

John C. Hall