

GENERAL, ADMINISTRATIVE, AND MISCELLANEOUS1-21. Federal Register

1. AUTHORITY. To sign and submit the documents listed below for publication in the Federal Register.
2. TO WHOM DELEGATED.

<u>Official</u>	<u>Type of Document</u>
a. Assistant Administrators Associate Administrators General Counsel Inspector General Regional Administrators Chief of Staff	<ol style="list-style-type: none"> <li>(1) Proposed and Final Rulemaking documents which correct previously published documents, make nonsubstantive changes to previously published documents, amend or change regulations without affecting their stringency, applicability, burden of compliance, or compliance costs.</li> <li>(2) Technical amendments to the list of OMB information collection request (ICR) control numbers and relevant CFR cites codified at 40 CFR Part 9.</li> </ol>
b. Assistant Administrators Associate Administrators General Counsel Inspector General Regional Administrators Chief of Staff	<ol style="list-style-type: none"> <li>(1) General Notices, including but not limited to: extension or reopening of a public comment period; public hearings; availability of publications, reports, and guidelines; receipt of test data; filings; and application, registration, or certification information.</li> <li>(2) Notices of advisory committee matters.</li> </ol>
c. Assistant Administrator for Environmental Information	Notices of information collection requests (ICRs) submitted for approval to OMB; notices of OMB approval or disapproval of ICRs.

OPTIONAL FORM 99 (7-90)

## FAX TRANSMITTAL

To	From	# of pages
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NSN 7540-01-317-7368	5099-101	GENERAL SERVICES ADMINISTRATION

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|----|---|---|
| d. | Assistant Administrator<br>for Air and Radiation<br>Regional Administrators       | Proposed State Implementation Plans,<br>including revisions and compliance<br>schedules.  |
| e. | Assistant Administrator<br>for Enforcement and<br>Compliance Assurance            | Notices listing all reviews of Environmental<br>Impact Statements for which the Agency<br>has developed written comments.   |
| f. | Regional Administrators   | Notices of Proposed and Final Rulemakings<br>under Sections 111(d) and 129(b)(2) of the<br>Clean Air Act, as amended, 42 U.S.C.<br>7411(d) and 7429(b)(2).  |
| g. | Assistant Administrator<br>for Administration and<br>Resources Management         | EPA Acquisition regulations which<br>implement or supplement the Federal<br>Acquisition Regulations (48 CFR chapter 1),<br>including the display of OMB ICR control<br>numbers in a table (codified at 48 C.F.R.<br>Chapter 15) See 40 U.S.C. 486(c). |
| h. | Assistant Administrator<br>for Prevention,<br>Pesticides, and<br>Toxic Substances | Notices acknowledging receipt for<br>premanufacture notices, as required by<br>Section 5(d)(2) of the Toxic Substances<br>Control Act, in accordance with 40 CFR,<br>Part 720.20.   |
| i. | Assistant Administrator<br>for Environmental<br>Information                       | EPA proposed and final rules which exempt<br>systems of records from the requirements<br>of certain provisions of the Privacy Act<br>pursuant to Section 552a (j) and (k) of the<br>Privacy Act.  |

3. LIMITATIONS.

- a. Officials who are delegated authority under this delegation are responsible for ensuring compliance with all current regulatory statutes, executive orders, and presidential memoranda, including but not limited to, the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), Paperwork Reduction Act (44 U.S.C. 3501 et. seq.),

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Unfunded Mandates Reform Act (Pub. Law 104-4), Congressional Review Act (5 U.S.C. 801-808), the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note), Executive Order 12866 (Regulatory Planning and Review), Executive Order 12875 (Intergovernmental Consultation), Executive Order 13045 (Children's Health Protection), Executive Order 13084 (Consultation with Tribal Governments), and Presidential Memorandum on Plain Language (June 1, 1998). Documents signed by the above officials must be submitted to the Federal Register Officer in the Office of Environmental Information, who is responsible for verifying the documents comply with all regulatory requirements prior to releasing the documents to the Office of Federal Register for publication.

- b. The Administrator reserves the authority to sign Advance Notices of Proposed Rulemaking (excepting those pursuant to Section 4(a) and (b) of the Toxic Substances Control Act) and Notices of Intent to Issue Rulemaking.

4. REDELEGATION AUTHORITY.

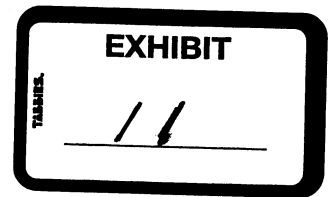
- a. Authority to issue documents listed in 2.a (1), 2.d, and 2.f, may be redelegated to the Deputies of the officials listed in those paragraphs, and it may not be redelegated further;
- b. Authority to issue documents listed in 2.a (2) may be redelegated to the Staff Office Director Level, or equivalent, within the Office of the Administrator, as well as to the Division Director level, or equivalent, in all other specified offices; and it may not be redelegated further;
- c. Authority to issue documents listed in 2.b may be redelegated to the Staff Office Director level, or equivalent, within the Office of the Administrator as well as to the Division Director level, or equivalent in the other respective offices, and 2.b(2) may be further redelegated to Designated Federal Officers for Agency advisory committees; and this authority may not be redelegated further;
- d. Authority to issue documents listed in 2.c may be redelegated to the Division Director level, or equivalent, and it may not be redelegated further;
- e. Authority to issue documents listed in 2.e may be redelegated to the Office Director level, or equivalent, and it may not be redelegated further;

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- f. Authority to issue documents listed in 2.g may be redelegated to the Director, Office of Acquisition Management, and it may not be redelegated further;
- g. Authority to send notices listed in 2.h may be redelegated to the Division Director level, or equivalent, and it may not be redelegated further. The authority to determine that more specific information is in the public's interest may be delegated to the Office Director level, or equivalent, and it may not be redelegated further; and
- h. Authority to issue documents listed in 2.i may be redelegated to the Deputy Assistant Administrator for Environmental Information and it may not be redelegated further.

5. ADDITIONAL REFERENCES. There may be statute-specific delegations which involve the delegation of signature authority for Federal Register notices. Refer to the specific statute to determine if a statute-specific delegation applies.





IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL	)	
AUTHORITIES ASSOCIATION, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1-02-01361 (HHK)
	)	
CHRISTINE TODD WHITMAN,	)	
Administrator, U.S. Environmental	)	
Protection Agency, <i>et al.</i>	)	
	)	
Defendants.	)	

**EPA'S RESPONSES TO PLAINTIFFS'  
FIRST REQUESTS FOR ADMISSIONS**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants Christine Todd Whitman, Administrator, United States Environmental Protection Agency et al. (collectively "EPA") hereby responds to Plaintiffs' First Set of Requests for Admissions.

**PRELIMINARY STATEMENT**

Discovery in connection with the matters alleged in the Complaint is continuing and the responses set forth below are based only on currently available information. EPA reserves the right to amend or supplement the responses if different or additional information is subsequently discovered, or if there are changes in the relevance, significance, or applicability of information currently known.

**GENERAL OBJECTIONS**

1. EPA objects to the Requests to the extent that their terms are vague, ambiguous, unclear, or overbroad.
2. EPA objects to the Requests to the extent that they are unduly burdensome

and oppressive.

3. EPA objects to the Requests to the extent that they seek admissions not relevant to the claim or defense of any party.

4. EPA objects to the Requests to the extent that they require unreasonable inquiry and review of information that is unknown or not readily obtainable by them in light of the facts and circumstances of this case.

5. EPA objects to each of the Requests to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, the pre-decisional/deliberative process privilege, governmental law enforcement privilege, confidential settlement privilege, or any other applicable privilege or exemptions from disclosure.

6. EPA objects to each of the Requests to the extent that they relate only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

#### **RESPONSES TO REQUESTS FOR ADMISSION**

Without waiving the general objections enumerated above, and asserting each such general and specific objection for the responses set forth below as if fully stated therein, defendants respond to the Requests as follows:

##### **Request for Admission No. 1**

A municipal facility is not required to utilize biological treatment either in whole or in part to meet secondary treatment requirements under 40 C.F.R. Part 133.

**Response to No. 1:**

EPA objects to Request for Admission No. 1 on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 2**

The requirements under the NPDES regulations for municipalities that use non-biological treatment to meet permit limits are the same exact requirements for facilities that use biological treatment to meet permit limits.

**Response to No. 2**

EPA objects to Request for Admission No. 2 on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 3**

Use of physical/chemical treatment processes, such as Actiflo, to treat municipal wastewater is not restricted by any federal regulation.

**Response to No. 3**

EPA objects to Request for Admission No. 3 on the grounds that it requests that EPA admit a pure conclusion of law. EPA further objects to this request as not calculated to lead to the discovery of admissible evidence to the extent that it seeks EPA's interpretation of federal regulations under statutes other than the Clean Water Act which are not at issue in this case.

**Request for Admission No. 4**

The Clean Water Act, as interpreted by EPA, does not authorize EPA to dictate municipal treatment plant design.

**Response to No. 4**

EPA objects to Request for Admission No. 4 on the grounds that it requests that admit a pure conclusion of law.

### **Request for Admission No. 5**

The Clean Water Act authorizes permittees to select the most cost-effective approach as long as applicable discharge requirements are achieved.

### **Response to No. 5**

EPA objects to Request for Admission No. 5 on the grounds that it requests that EPA admit a pure conclusion of law.

### **Request for Admission No. 6**

EPA has issued NPDES permits that do not require biological treatment of all flows entering a publicly owned treatment works.

### **Response to No. 6**

EPA admits that it has issued NPDES permits that do not require biological treatment of all flows entering a publicly owned treatment works (POTW) when certain other conditions are met or when certain other criteria apply.

### **Request for Admission No. 7**

In developing the secondary treatment rule and its amendments, EPA did not determine that secondary treatment requirements must be applied to weak intermittent SSO flows.

### **Response to No. 7**

EPA objects to this Request on the grounds that the term “weak intermittent SSO flows” is undefined, and as used in the context of this Request, vague, ambiguous and unclear. EPA further objects to this Request on the grounds that what constitutes a “determin[ation]” made in the course of “developing the secondary treatment rule and its amendments” is vague, ambiguous and unclear. Consequently, this request cannot be meaningfully answered, and on that basis, is denied.

EPA notes that it promulgated the secondary treatment rule and subsequently amended it in the Federal Register at 38 Fed. Reg. 22,298 (Aug. 17, 1973), 41 Fed. Reg.

30,786 (July 26, 1976), 42 Fed. Reg. 54,664 (Oct. 7, 1977), 49 Fed. Reg. 36,986 (Sept. 20, 1984), and 50 Fed. Reg. 23,382 (June 3, 1985). These requirements and EPA's discussion of these requirements as set forth in such Federal Register notices speak for themselves.

#### **Request for Admission No. 8**

EPA has adopted no rules under the Clean Water Act that require one hundred percent of all municipal wastewater flows entering a publicly owned treatment works to receive biological treatment.

#### **Response to No. 8**

EPA objects to Request for Admission No. 8 on the grounds that it requests that EPA admit a pure conclusion of law.

#### **Request for Admission No. 9**

EPA Headquarters, Office of Wastewater Management (hereinafter "OWM") has issued correspondence specifying that NPDES authorities may authorize blending in NPDES permits.

#### **Response to No. 9**

Denied. EPA admits that an Acting Assistant Administrator, EPA Office of Water, and the current Assistant Administrator, have sent correspondence in response to Congressional and other inquiries in which the subject of blending has been addressed. EPA admits that in such correspondence, the Assistant Administrator has generally stated that EPA is in the process of developing guidance addressing the circumstances under which NPDES authorities may approve blending in NPDES permits and the circumstances under which blending would be a prohibited bypass. See, e.g., March 7, 2001, Letter from Diane Regas to the Honorable Bill Frist; September 12, 2002, Letter from G. Tracy Mehan, III to the Honorable Doug Ose.

EPA admits that in the March 7, 2001, Letter from Diane Regas to the Honorable

William Frist (“the Frist Letter”), the EPA Headquarters Office of Water provided an indication of its then “current thinking” (as of March 7, 2001), as to the circumstances under which NPDES permitting authorities might approve blending in NPDES permits, as well as the circumstances under which blending would be a prohibited bypass.

The Frist letter indicated that EPA Headquarters Office of Water believed that NPDES authorities have considerable flexibility through the permitting process to account for different peak flow scenarios that are consistent with generally accepted good engineering practices and criteria for long-term design. In addition, the letter indicated that the Office of Water believed that peak wet weather discharges from POTWs that are comprised of effluent routed around biological treatment units together with the effluent from the biological units prior to discharge could be approved in an NPDES permit where principles listed in the letter were followed.

The Frist Letter speaks for itself and is the best evidence of its contents. Among other things, the Office of Water stated in the Frist Letter that “We believe that peak wet weather discharges from POTWs that are comprised of effluent routed around biological treatment units together with the effluent from the biological units prior to discharge could be approved in an NPDES permit” where certain identified criteria was followed. The Office of Water further stated that “Peak wet weather flows that are routed around the biological treatment units of the POTW that do not meet the [identified] criteria . . . are considered prohibited bypasses under the bypass regulation at 40 CFR 122.41(m) unless they otherwise meet the criteria provided in the bypass regulation.”

#### **Request for Admission No. 10**

OWM has issued correspondence or guidance specifying that blending or slipstreaming are not prohibited under the federal bypass regulation.

#### **Response to No. 10**

Denied. OWM has not as of this date issued any final guidance specifically addressing blending or specifying that blending is not prohibited under the federal bypass regulation. EPA is currently in the process of developing guidance regarding the applicability of the bypass regulation to blending.

EPA admits that in the March 7, 2001, Letter from Diane Regas to the Honorable William Frist ("the Frist Letter"), EPA provided an indication of its then "current thinking" (as of March 7, 2001), as to the circumstances under which NPDES permitting authorities might approve blending in NPDES permits and the circumstances under which blending might be a prohibited bypass (See Response to Request for Admission No. 9). The Frist Letter speaks for itself and is the best evidence of its contents.

#### **Request for Admission No. 11**

If flow significantly above the hydraulic capacity of a biological unit at a municipal treatment facility is passed through that unit, the system may be "washed out" and the ability of that unit to effectively treat wastewater compromised for an extended period of time.

#### **Response to No. 11**

EPA objects to this request for admission on the grounds that to the extent that it is relevant to the claim or defense of any party, it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

### **Request for Admission No. 12**

EPA has approved numerous construction grants for POTWs designed to blend under peak wet weather flow conditions.

### **Response to No. 12**

EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (*i.e.*, it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

Without waiving this objection, after having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny the truth of the matters set forth in Request for Admission.

EPA admits that it is aware that EPA Region I approved at least one construction grant for a POTW plant designed to blend primary-treated and secondary-treated effluents under peak wet weather flow conditions (the POTW plant serving Lynn, MA).

EPA further admits that data submitted to EPA by a trade association representing POTWs, the Association of Metropolitan Sewerage Agencies ("AMSA"), based on a survey of its members, indicates that numerous POTWs designed to blend under peak wet weather flows received construction grants. EPA has not done any independent confirmation of this data to enable it to determine its accuracy.

### **Request for Admission No. 13**

Under the construction grants program, Subchapter II of the Clean Water Act, 33 U.S.C. § 1281 *et seq.*, and EPA's implementing regulations, blending was considered by EPA to be an approvable cost.



### **Response to No. 13**

EPA objects to Request for Admission No. 13 on the grounds that it requests that EPA admit a pure conclusion of law.

### **Request for Admission No. 14**

EPA Headquarters has never issued a public notice specifically stating that blending is prohibited at publicly owned treatment works.

### **Response to No. 14**

EPA objects to this Request on the grounds that the term “public notice” is undefined, and as used in the context of this Request, vague, ambiguous and unclear. Assuming that the term “public notice” is intended to mean a notice published in the Federal Register, EPA admits that it has not issued a Federal Register notice specifically stating that blending is prohibited at POTWs. EPA, however, admits that it has published in the Federal Register the bypass regulation. The bypass regulation generally prohibits the intentional diversion of waste streams from any portion of a treatment facility unless certain conditions exist and/or other conditions are met. EPA is currently evaluating the applicability of the bypass regulation to blending and intends to issue guidance on this issue. EPA further admits that it has previously published a notice in the Federal Register concerning the applicability of the bypass regulation to the intentional diversion of waste streams from any portion of a treatment facility, including secondary treatment units, in POTW plants serving combined storm and sanitary sewer systems. 59 Fed. Reg. 18,688, 18,693 col. 2 (Apr. 19, 1994). The Federal Register notice did not specifically distinguish between intentional diverted flows that are discharged and intentional diverted flows that are blended with undiverted flows prior to discharge.

### **Request for Admission No. 15**

Designing a treatment plant to blend under peak wet weather flow conditions has been a federally approvable design and operational mode since at least the early 1970's.

### **Response to No. 15**

EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

EPA further objects on the grounds that the phrase "federally approvable design and operational mode," as used in the context of this request, is vague, ambiguous and unclear. Consequently, this request cannot be meaningfully answered, and on that basis, is denied.

### **Request for Admission No. 16**

Hundreds of POTWs across the country are designed to blend peak wet weather flows.

### **Response to No. 16**

EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

Without waiving this objection, after having made reasonable inquiry, the

information known or readily obtainable by EPA is insufficient to enable it to admit or deny the truth of the matters set forth in Request for Admission No. 16. EPA admits that it is aware that some POTWs are designed to blend peak wet weather flows, but EPA lacks sufficient information to determine the number of such POTWs.

EPA admits that data on the numbers of POTWs that are designed to blend peak wet weather flows was provided to EPA by a trade association of POTWs, the Association of Metropolitan Sewerage Agencies ("AMSA"). This data from a 2001 survey of AMSA members indicated that 50% (of 122 survey respondents) blended primary treated effluents with secondary treated effluents, and of those 50% that blend, 70% originally were designed to blend. EPA has not done any independent confirmation of this data to enable it to determine its accuracy.

EPA further admits that it has received letters from municipal groups in several States (e.g., State-specific trade associations for POTWs) that contend that blending is a somewhat common practice for handling wet weather flows. EPA additionally admits that it has possession of a technical manual prepared by an industry trade group, the Water Environment Federation, captioned *Design of Municipal Wastewater Treatment Plants*, WEF Manual of Practice #8, (4th edition, 1998 at 3-21, 22), and that such manual indicates that blending is a somewhat common practice for handling wet weather flows.

#### **Request for Admission No. 17**

The NPDES regulations do not prohibit blending to be authorized in an NPDES permit.

#### **Response to No. 17**

EPA objects to Request for Admission No. 17 on the grounds that it requests that EPA admit a pure conclusion of law.

### **Request for Admission No. 18**

For a municipality to legally blend, the NPDES regulations do not require blending to be specifically authorized in an NPDES permit.

### **Response**

EPA objects to Request for Admission No. 18 on the grounds that it requests that EPA admit a pure conclusion of law.

### **Request for Admission No. 19**

EPA has historically interpreted the NPDES regulations to allow blending to be authorized in an NPDES permit without demonstrating compliance with the federal bypass regulation.

### **Response to No. 19**

Denied. With respect to POTW plants serving combined storm and sanitary sewer systems, EPA has previously published a notice in the Federal Register concerning the applicability of the bypass regulation to the intentional diversion of waste streams from any portion of a treatment facility, including secondary treatment units. 59 Fed. Reg. 18,688, 18,693 col. 2 (Apr. 19, 1994) ("the CSO Policy"). The CSO Policy did not specifically distinguish between intentionally diverted flows that are discharged and intentionally diverted flows that are blended with undiverted flows prior to discharge. EPA has not otherwise previously issued an interpretation specifically concerning the applicability of the bypass regulation to blending. EPA is in the process of developing national guidance on this issue.

### **Request for Admission No. 20**

The following statement set forth in the EPA memorandum of law (at page 190) submitted to the United States Court of Appeals in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987), addresses the bypass regulation and is an accurate statement:

However the regulation imposes no limits on the permittee's choice of treatment technology and therefore

does not 'dictate technology' . . . . [T]he regulation requires only that, except for 'essential maintenance,' the equipment that the permittee has selected will be operated. . . .

#### **Response to No. 20**

EPA admits in part and objects in part. EPA admits that the above statement set forth in an EPA memorandum of law submitted to the United States Court of Appeals in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987), addresses the bypass regulation. EPA objects to the request to the extent that it seeks EPA's admission that the above statement is "an accurate statement" on the grounds that it requests that EPA admit a pure conclusion of law.

#### **Request for Admission No. 21**

The following statement set forth in the EPA memorandum of law (at page 190) submitted to the United States of Court of Appeals in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987), addresses the bypass regulation and is an accurate statement:

What the Agency originally intended, and still intends, is to ensure 'proper pollution control through adequate design operation and maintenance of treatment facilities.'  
'Design' operation and maintenance are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that facilities follow those requirements. It imposes no specific design and no additional burdens on a permittee.

Emphasis in original, footnotes omitted.

#### **Response to No. 21**

EPA admits in part and objects in part. EPA admits that the above statement set forth in an EPA memorandum of law submitted to the United States Court of Appeals in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) addresses the bypass regulation. EPA objects to the request to the extent that it requests EPA's admission that the above statement is an "accurate statement" on the grounds that it requests that EPA admit a pure

conclusion of law.

**Request for Admission No. 22**

EPA Headquarters' December 21, 2001 draft memorandum entitled "NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions" indicated that blending can be authorized in an NPDES permit without triggering the bypass regulation.

**Response to No. 22**

Denied. The December 21, 2001, draft memorandum does not "indicate[]" any agency interpretations of law inasmuch as the December 21, 2001, memorandum is a draft deliberative document that was never finalized. EPA admits that the December 21, 2001, draft deliberative memorandum regarding "NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions" addressed the circumstances under which blending can be approved in an NPDES permit. The draft memorandum speaks for itself and is the best evidence of its contents.

EPA admits that the draft deliberative memorandum states, inter alia, that "peak wet weather discharges from POTWs that consist of effluent routed around biological treatment units blended together with the effluent from the biological units prior to discharge can be approved in an NPDES permit" where certain criteria are met. EPA further admits that the draft memorandum states, inter alia, that "EPA considers peak wet weather flows that are routed around the biological treatment units of the POTW that do not meet the . . . criteria listed above to be prohibited bypasses and subject to the criteria at 40 CFR 122.41(m)."

**Request for Admission No. 23**

EPA's Office of General Counsel concurred with the December 21, 2001 draft memorandum entitled "NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions" as being consistent with applicable Clean Water Act and NPDES regulatory requirements.

**Response to No. 23**

EPA objects to Request for Admission No. 23 on the grounds that it violates applicable privileges and exemptions from disclosure, including but not limited to the attorney-client, work-product and pre-decisional/deliberative process privileges.

**Request for Admission No. 24**

The following statement in the April 8, 2002 Freedom of Information Act ("FOIA") response of EPA's Office of Wastewater Management to John Hall is true:

EPA has no documents from the promulgation of the bypass provisions that indicate that the bypass rule was intended to preclude the use of blending as a wet weather flow management option.

**Response to No. 24**

EPA objects to this request on the grounds the documents related to the promulgation of the bypass provisions speak for themselves and are the best evidence of their contents. EPA further objects to Plaintiffs' request on the grounds that it is vague, ambiguous and unclear. What a particular document from the promulgation of the bypass provisions should be construed to "indicate" is not self-evident and may turn on conclusions of law. If blending reflects the "intentional diversion of waste streams from any portion of a treatment facility," then numerous documents from the promulgation of the bypass rule might be construed to "indicate" that the bypass rule was intended to preclude, at least in certain circumstances, the use of blending as a wet weather flow management option.

**Request for Admission No. 25**

The following statement in the April 5, 2002 FOIA response of EPA's Office of Wastewater Management to John Hall is true:

EPA has no documents indicating the cost impacts of prohibiting the use of blending at POTWs to manage peak wet weather flows

that were used in the development of the secondary treatment regulations or the bypass regulations.

**Response to No. 25**

EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

EPA further objects to this request because the documents used in the development of the secondary treatment regulations or the bypass regulations speak for themselves and are the best evidence of their contents. Subject to these objections, after having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny the truth of the matters set forth in the request for admission. EPA admits that after reasonable inquiry it has not as of this date located any documents from the administrative record related to the secondary treatment regulations and the bypass regulations in which EPA formally analyzed the national cost of prohibiting the use of blending. The documents within these administrative records are voluminous, and EPA's investigation of these records is continuing.

**Request for Admission No. 26**

The following statement in the April 5, 2002 FOIA response of EPA's Office of Wastewater Management to John Hall pertaining to the secondary treatment rule is true:

EPA has no documents showing that 100 percent of all flows must be processed through biological treatment.

**Response to No. 26**



EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

EPA further objects to this request inasmuch as the documents pertaining to the secondary treatment rule speak for themselves and are the best evidence of their contents.

Subject to these objections, after having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny the truth of the matters set forth in the Request for Admission. EPA admits that after having made reasonable inquiry, it has not located to date any documents in the record for the secondary treatment rule that show that 100 percent of all flows must be processed through biological treatment. The documents pertaining to the secondary treatment rule are voluminous, and EPA is continuing to investigate the matters covered by the requested admission.

#### **Request for Admission No. 27**

The following statement in the March 2, 2001 letter from Diane Regas to the Honorable George W. Gekas pertaining to the secondary treatment rule is true:

With the exception of alternative requirements for facilities eligible for treatment equivalent to secondary treatment, the secondary treatment regulations do not specify the type of treatment process that must be used to meet secondary treatment requirements nor do they preclude the use of non-biological facilities.

#### **Response to No. 27**

EPA objects to Request for Admission No. 27 on the grounds that it requests that

EPA admit a pure conclusion of law.

**Request for Admission No. 28**

The following statement in the April 5, 2002 FOIA response of EPA's Office of Wastewater Management to John Hall pertaining to the secondary treatment rule is true:

EPA allowed the use of federal funds under the Construction Grants Program to build facilities that were designed to blend effluent from primary treatment processes with effluent from biological treatment processes during peak wet weather events.

**Response to No. 28**

EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

Without waiving this objection, the request is admitted in part. EPA admits that at in at least one instance, it allowed the use of federal funds under the Construction Grants Program to build a facility that was designed to blend effluent from primary treatment processes with effluent from biological treatment processes during peak wet weather events (a facility in Lynn, MA). After having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny whether EPA routinely allowed the use of federal funds under the Construction Grants Program to build facilities that were designed to blend.

**Request for Admission No. 29**

The following statement in the April 5, 2002 FOIA response of EPA's Office of Wastewater Management to John Hall regarding the secondary treatment rule is true:

EPA did not estimate costs associated with ensuring that the biological treatment operation was sized to process all peak wet weather flows under all conditions.

**Response to No. 29**

EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

Without waiving this objection, after having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny the truth of the matters set forth in the request for admission. EPA admits that after reasonable inquiry it has not as of this date located any documents in the record for the secondary treatment rule that provide an estimate of costs associated with ensuring that biological treatment is sized to process all peak wet weather flows under all conditions. The documents pertaining to the secondary treatment rule are voluminous, and EPA is continuing to investigate the matters covered by the requested admission.

**Request for Admission No. 30**

The following statement in the April 5, 2002 FOIA response of EPA's Office of Wastewater Management to John Hall is true:

There is no information on the record to the secondary treatment regulation that indicates that EPA considered restricting the practice of blending primary treated peak flows with other flows receiving biological treatment as a wet weather flow management option for achieving compliance with secondary treatment limitations.

### **Response to No. 30**

EPA objects to this request for admission to the extent that it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

Without waiving this objection, after having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny the truth of the matters set forth in the request for admission. EPA admits that after reasonable inquiry it has not as of this date located any information within the record to the secondary treatment regulation that EPA specifically considered restricting the practice of blending primary treated peak flows with other flows receiving biological treatment as a wet weather flow management option for achieving compliance with secondary treatment limitations. The documents pertaining to the secondary treatment rule are voluminous, and EPA is continuing to investigate the matters covered by the requested admission.

### **Request for Admission No. 31**

The following statement in the March 12, 1997 letter from James Pendergast, EPA Headquarters Office of Water, Permits Division, to Lial Tischler, is true:

[T]he National Pollutant Discharge Elimination System (NPDES) regulations provide sufficient flexibility for permit writers to account for the designed-in intentional diversion of wastewater around a treatment unit without triggering bypass in special or unique situations when writing permits.

### **Response to No. 31**

EPA objects to this request to the extent that it requests that EPA admit pure conclusions of law. EPA further objects to this request on the grounds that the terms “sufficient flexibility,” “designed-in intentional diversion” and “special or unique situations,” as used in this request, are vague, ambiguous and unclear. Consequently, this request cannot be meaningfully answered, and on that basis, is denied.

### **Request for Admission No. 32**

In 1999, both the EPA Headquarters Office of Wastewater Management and Office of General Counsel concurred with the EPA Region V draft response to the State of Indiana that stated:

U.S. EPA believes that the answer to IDEM’s question is “yes,” provided the permit application explicitly describes the circumstances during which the rerouting/ recombination would occur and the permit contains provisions explicitly recognizing those circumstances. U.S. EPA’s position is based upon the fact that “bypass” is defined as “the intentional diversion of wastes streams from any portion of the treatment facility,” 40 CFR 122.41(m)(1)(i). The question of what constitutes a permittee’s “treatment facility” is one that can be answered by the permittee in its permit application. See 40 CFR 122.21(f)(7). A permittee can describe in its permit application that the “treatment facility” is designed and constructed for the purpose of providing treatment necessary to comply with NPDES permit effluent limitations is one designed to provide differential treatment of wastestreams during peak flow conditions (*i.e.*, it is designed to provide only primary treatment to certain flows during peak flow conditions). If the permit writer includes in the permit an explicit recognition of this differential treatment, and if the treatment facility is operated in accordance with the treatment facility’s design for providing treatment during peak flow conditions, any rerouting/recombination that occurs during such conditions would not constitute a diversion from the ‘treatment facility,’ and so would not constitute a ‘bypass.’

### **Response to No. 32**

EPA objects to Request for Admission No. 32 on the grounds that it violates applicable privileges and exemptions from disclosure, including but not limited to the

deliberative process and attorney-client privileges.

**Request for Admission No. 33**

EPA Regions III, IV, and VI have taken the position that blending is a prohibited bypass.

**Response to No. 33**

Admitted in part and denied in part. EPA admits that EPA Regions III and VI have taken the position that blending is a bypass which can be approved in a permit only under certain factual circumstances. EPA further admits that EPA Region IV has taken the position that blending does not constitute a bypass if there is a permitted internal outfall, and otherwise is a bypass that can be approved in a permit only under certain factual circumstances. The request for admission is otherwise denied. EPA notes that all EPA regions evaluate NPDES permits involving blended flows on a case-by-case basis.

**Request for Admission No. 34**

EPA Regions other than Regions III, IV, and VI have authorized blending in NPDES permits or have allowed their approved NPDES States to authorize blending.

**Response to No. 34**

Admitted in part and denied in part. EPA admits that there have been specific cases where EPA Regions (other than EPA Regions III, IV and VI) have not objected to permits prepared by authorized NPDES States in which blending was authorized. There have also been specific cases where EPA Regions (other than III, IV and VI) have objected to permits prepared by authorized NPDES States in which blending was authorized.

EPA further admits that EPA Region I has issued an NPDES permit that authorized blending in an NPDES permit for a POTW plant serving Lynn, MA, which has a combined storm and sanitary sewer collection system. After having made

reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny whether EPA Regions other than Region I have authorized blending in NPDES permits.

**Request for Admission No. 35**

EPA Regions III, IV, and VI objected to draft or preliminary NPDES permits or vetoed State issued permits that would allow blending.

**Response to No. 35**

EPA objects to the request as vague, ambiguous and unclear in that it is unclear whether (1) the request seeks an admission that EPA Regions III, IV, and VI have objected to or vetoed permits specifically on the basis of proposed blending, or (2) seeks an admission that EPA Regions III, IV and VI have objected on any grounds to permits that would allow blending. Assuming that the request is intended to seek an admission of the former, EPA admits that EPA Regions III, IV, and VI have objected, in part or whole, to some draft or preliminary NPDES permits that would allow blending. EPA Regions III, IV and VI have also not objected to some draft or preliminary NPDES permits that would allow blending.

**Request for Admission No. 36**

In enforcement actions, EPA Regions III, IV, and VI have stated that blending is a prohibited bypass (subject to a no feasible alternatives test under the bypass regulation).

**Response to No. 36**

Admitted in part and denied in part. EPA admits that the Department of Justice on behalf of EPA has stated in settlement communications regarding enforcement actions involving POTWs in Region III that blending is a prohibited bypass (subject to a no feasible alternatives test under the bypass regulation). EPA further admits that an attorney within EPA Region III and an official in EPA Region VI have stated in

communications regarding enforcement actions that blending is a prohibited bypass.

After having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny whether EPA Regions III and VI have otherwise stated in an enforcement action that blending is a prohibited bypass (subject to a no feasible alternatives test under the bypass regulation). EPA denies that EPA Region IV has stated in an enforcement action that blending is a prohibited bypass (subject to a no feasible alternatives test under the bypass regulation).

**Request for Admission No. 37**

EPA Regions III, IV, and VI lead private parties to believe that permits must prohibit blending (subject to a no-feasible alternatives test under the bypass regulation).

**Response to No. 37**

EPA objects to this Request on the grounds that the phrase “lead private parties to believe that permits must prohibit blending,” as used in this request, is vague, ambiguous and unclear. Consequently, this request cannot be meaningfully answered, and on that basis, is denied. Without waiving this objection, EPA admits that EPA Regions III and VI have taken the position that blending is a bypass that can be approved in a permit only under certain factual circumstances. EPA further admits that EPA Region IV has taken the position that blending does not constitute a bypass if there is a permitted internal outfall, and otherwise is a bypass that can be approved in a permit only under certain factual circumstances.

**Request for Admission No. 38**

EPA Regions III, IV, and VI lead State permitting agencies to believe that EPA will object to or veto a State NPDES permit unless blending is prohibited (subject to the bypass defense).

**Response to No. 38**



EPA objects to the phrase “lead State permitting agencies to believe” as vague, ambiguous and unclear. EPA further objects to this Request on the grounds that the phrase “EPA will object to or veto a State NPDES permit unless blending is prohibited (subject to the bypass defense)” as used in the context of this request, is vague, ambiguous and unclear. Consequently, this request cannot be meaningfully answered, and on that basis is denied. Without waiving these objections, EPA admits that EPA Regions III and VI have taken the position that blending is a bypass which can be approved in a permit only under certain factual circumstances. EPA further admits that EPA Region IV has taken the position that blending does not constitute a bypass if there is a permitted internal outfall, and otherwise is a bypass that can be approved in a permit only under certain factual circumstances.

#### **Request for Admission No. 39**

As of the date of the filing of the Complaint in this lawsuit, EPA Regions III, IV, and VI will not authorize nor allow their approved NPDES States to authorize blending in a municipal NPDES permit unless the bypass criteria set forth in 40 C.F.R. § 122.41(m)(4)(A) through 122.41(m)(4)(C) are met.

#### **Response to No. 39**

Denied. EPA admits that EPA Regions III and VI have taken the position that blending is a bypass which can be approved in a permit only under certain factual circumstances. EPA admits that EPA Region IV has taken the position that blending does not constitute a bypass if there is a permitted internal outfall, and otherwise is a bypass that can be approved in a permit under certain factual circumstances.

#### **Request for Admission No. 40**

EPA Region IV has been informed by the State of Tennessee that the appeals of NPDES permits by Tennessee municipalities are currently stayed pending EPA clarification of whether blending can be approved in NPDES permits.

**Response to No. 40**

Admitted.

**Request for Admission No. 41**

If blending is not allowed in NPDES permits, Tennessee municipalities which are currently authorized to blend and are in one hundred percent compliance with end-of-pipe effluent limitations will need to expend additional resources to achieve the same level of effluent limitation compliance currently being achieved with blending.

**Response to No. 41**

EPA objects to this request for admission on the grounds that to the extent that it is relevant to the claim or defense of any party, it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (*i.e.*, it relates solely to whether alleged EPA rules are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court. EPA further objects to the term "end-of-pipe effluent limitations" as vague, ambiguous and unclear.

**Request for Admission No. 42**

Little Rock has been threatened with criminal sanctions by the federal government and has received notice(s) of violation from EPA Region VI due to its use of blending.

**Response to No. 42**

Denied. EPA admits that the EPA Houston area office (Criminal Investigation Division) in Houston, Texas, began a criminal investigation based on suspected criminal violations by the Little Rock Wastewater Utility related to bypasses of its secondary treatment system. EPA and the U.S. Attorney's Office in Little Rock, Arkansas then afforded managers of the Little Rock Wastewater Utility the opportunity to explain their

actions and decisions. At no time during this investigation was the Little Rock Wastewater Utility “threatened.” EPA is not aware of any administrative or judicial “notice of violation” issued by EPA Region VI to Little Rock Wastewater Utility due to its use of blending.

**Request for Admission No. 43**

EPA Region VI has informed Little Rock that blending is prohibited unless authorized as a bypass.

**Response to No. 43**

Denied.

**Request for Admission No. 44**

EPA has initiated a study to determine the national costs associated with a prohibition on blending.

**Response to No. 44**

Admitted in part. EPA admits that EPA staff did some preliminary work on the cost impacts of a prohibition on blending in 2001. That work has been suspended and no final document was produced. EPA denies that it is currently studying the national costs associated with a prohibition on blending.

**Request for Admission No. 45**

The bypass regulation merely piggybacks existing requirements; it does not itself impose costs that have not already been taken into account in the development of effluent guidelines.

**Response to No. 45**

EPA objects to Request for Admission No. 45 on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 46**

The bypass regulation is not a *de facto* effluent limitation.

**Response to No. 46**

EPA objects to Request for Admission No. 46 on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 47**

The bypass regulation does not dictate how users must comply because it does not dictate what treatment technology the user must install.

**Response to No. 47**

EPA objects to the Request on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 48**

The bypass regulation does not dictate that a specific treatment technology be employed; instead, the regulation requires that a system be operated as designed.

**Response to 48**

EPA objects to the Request on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 49**

Any variation in effluent limits accounted for and recognized in an NPDES permit which allows a facility to dispense with some unit processes under certain conditions is not considered bypassing.

**Response to No. 49**

EPA objects to the Request on the grounds that it requests that EPA admit a pure conclusion of law. EPA further objects to this Request on the grounds that is vague, ambiguous, and unclear. Consequently, this request cannot be meaningfully answered, and on that basis is denied.

**Request for Admission No. 50**

Where peak flows approach or exceed the design capacity of a treatment plant,

such flows can adversely affect treatment efficiency.

**Response to No. 50**

EPA objects to this request for admission on the grounds that to the extent that it is relevant to the claim or defense of any party, it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates to whether alleged EPA actions are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

**Request for Admission No. 51**

Peak flows that approach or exceed design capacity of a biological activated sludge unit can lead to the “wash out” of the biological mass necessary for treatment.

**Response to No. 51**

EPA objects to this request for admission on the grounds that to the extent that it is relevant to the claim or defense of any party, it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates to whether alleged EPA actions are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

**Request for Admission No. 52**

Peak flows that approach or exceed design capacity of a biological activated sludge unit can result in treatment efficiencies being lowered for weeks or longer.

**Response to No. 52**

EPA objects to this request for admission on the grounds that to the extent that it



is relevant to the claim or defense of any party, it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates to whether alleged EPA actions are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

**Request for Admission No. 53**

A design and operational option routinely employed by publicly owned treatment works to handle peak wet weather flows includes utilizing the full capacity of the biological treatment unit and providing primary treatment for additional flows where primary treatment capacity exceeds the capacity of the biological treatment unit. In such case, excess flows receiving primary treatment may be recombined with the effluent from the biological units, disinfected, and discharged.

**Response to No. 53**

EPA objects to this request to the extent that it requests that EPA admit pure conclusions of law. EPA further objects to the term “routinely employed,” as used in the context of this request, as vague, ambiguous and unclear.

EPA further objects to this request for admission on the grounds that to the extent that it is relevant to the claim or defense of any party, it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act (i.e., it relates to whether alleged EPA actions are arbitrary and capricious). Claims brought under the Administrative Procedure Act are reviewed based upon the administrative record relating to the particular agency action being challenged, not upon a new record developed in the reviewing court.

**Request for Admission No. 54**

Historically, EPA and authorized NPDES States have issued NPDES permits for emergency discharge locations such as pump stations and specifically constructed SSO

overflow devices.

**Response to No. 54**

EPA objects to the term “emergency discharge locations such as pump stations and specifically constructed SSO overflow devices” as vague, ambiguous and unclear. Subject to this objection, the request is admitted in part and denied in part. EPA admits that some States authorized to issue NPDES permits have issued permits authorizing discharges from emergency discharge locations such as pump stations and specifically constructed SSO overflow devices under certain conditions and with certain limitations and prohibitions. EPA notes that authorized States have also in some cases declined to authorize discharges in NPDES permits from emergency discharge locations.

EPA admits that EPA Regions 1, 6 and 10 have, in the past, issued permits for a small number of emergency discharge locations such as pump stations and specifically constructed SSO overflow devices under certain conditions and with certain limitations and prohibitions. NPDES permits issued by EPA Region 1 in the past for emergency discharge locations include those for POTWs serving the Town of Milton, MA and the town of Marblehead, MA. EPA Region 1's current view is that these permits were issued in error. EPA Region 1's current practice would be to identify emergency discharge locations as prohibited in an NPDES permit, and where such discharges occur, require reporting.

EPA Region 10 has issued permits in the past addressing emergency discharge locations for the POTW system serving Juneau, AK and another for South Fork Couer d'Alene Sewer District (Idaho). These permits acknowledge the existence of a constructed sanitary sewer overflow outfall; but these permits specifically prohibit discharges from that outfall.



After having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny whether EPA Regions other than EPA Regions 1, 6, and 10 have issued permits for emergency discharge locations.

EPA notes that EPA regions have also issued permits that did not authorize emergency discharges.

**Request for Admission No. 55**

The NPDES regulations do not prohibit the permitting of emergency discharges from SSOs or pump stations.

**Response to No. 55**

EPA objects to Request for Admission No. 55 on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 56**

EPA does not have the discretion to refuse to issue NPDES permits to a class of "point sources."

**Response to No. 56**

EPA objects to Request for Admission No. 56 on the grounds that it requests that EPA admit a pure conclusion of law.

**Request for Admission No. 57**

EPA Regions III and IV have taken the position that emergency outfalls at SSOs and pump stations *cannot* be permitted in an NPDES permit.

**Response to No. 57**

EPA objects to the terms "emergency outfalls at SSOs and pump stations" as used in this request, as vague, ambiguous and unclear. Assuming that the term is intended to mean "discharges into waters of the United States from locations within sanitary sewer

systems,” the request is denied. Discharges from sanitary sewer systems into waters of the United States may be authorized or approved in an NPDES permit.

**Request for Admission No. 58**

EPA Regions III and IV have taken the position that emergency outfalls at SSOs and pump stations *will not* be permitted in an NPDES permit.

**Response to No. 58**

EPA objects to the term “emergency outfalls at SSOs” as used in this request, as vague, ambiguous and unclear. Assuming that the term is intended to mean “discharges into waters of the United States from locations within sanitary sewer systems,” the request is denied. Discharges into waters of the United States from sanitary sewer systems may be authorized or approved in an NPDES permit.

**Request for Admission No. 59**

EPA Regions III and IV base enforcement actions on the discharge from an unpermitted emergency outfall (*e.g.*, SSO outfall) being a violation of the Clean Water Act unless authorized and in compliance with an NPDES permit.

**Response to No. 59**

Admitted. The Clean Water Act prohibits the discharge of pollutants into waters of the United States from point sources, including SSO outfalls, except as authorized by a NPDES permit. EPA bases enforcement actions on violations of the Act.

**Request for Admission No. 60**

EPA Regions III and IV lead private parties to believe that NPDES permits cannot permit an emergency outfall from an SSO or pump station.

**Response to No. 60**

EPA objects to this Request on the grounds that the terms “lead private parties to believe” and “emergency outfall from an SSO or pump station,” as used in this request,

are vague, ambiguous and unclear. Assuming that the term "emergency outfall from an SSO or pump station" is intended to mean "discharges into waters of the United States from locations within sanitary sewer systems," the request is denied. Discharges from sanitary sewer systems may be authorized or approved in an NPDES permit.

#### **Request for Admission No. 61**

EPA Regions III and IV lead State permitting agencies to believe that EPA will object to or veto a State NPDES permit which permits an emergency outfall from an SSO or pump station.

#### **Response to No. 61**

EPA objects to this Request on the grounds that the phrases "lead State permitting agencies to believe" and "EPA will object to or veto a State NPDES permit which permits an emergency outfall from an SSO or pump station," as used in this request, are vague, ambiguous, and unclear. Assuming that the term "emergency outfall from an SSO or pump station" is defined to mean "discharges into waters of the United States from locations within sanitary sewer systems," the request is denied. Discharges into waters of the United States from sanitary sewer systems may be authorized or approved in an NPDES permit.

#### **Request for Admission No. 62**

It is EPA's position that unless an outfall is permitted in an NPDES permit, the upset and bypass defense as set forth in 40 C.F.R. §§ 122.41(m) and (n) would not be available for discharges from that outfall.

#### **Response to No. 62**

EPA objects to Request for Admission No. 62 on the grounds that it requests that EPA admit a pure conclusion of law.

#### **Request for Admission No. 63**

The EPA Headquarters' December 21, 2001 draft memorandum entitled "NPDES

Requirements for Municipal Wastewater Treatment During Wet Weather Conditions” indicates that an NPDES permit may address an anticipated discharge from an emergency outfall that is identified and fully disclosed to the NPDES permit authority.

**Response to No. 63**

Denied. The December 21, 2001, draft memorandum does not “indicate[]” any agency interpretations of law inasmuch as the December 21, 2001, memorandum is a deliberative document that was never finalized. EPA admits that the December 21, 2001, draft memorandum regarding “NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions” addressed discharges from emergency overflow structures. The draft memorandum speaks for itself and is the best evidence of its contents. With respect to emergency overflow structures, the draft memorandum states in part that “If an anticipated discharge from an emergency outfall is identified and fully disclosed to the NPDES permit authority, and considered during the permitting process as documented in the public record consistent with the applicable NPDES regulations, EPA’s policy is that the permit should address any discharges (e.g., incorporate effluent limits or prohibit discharges) from such an outfall.”

**Request for Admission No. 64**

As of the date of the filing of the Complaint in this lawsuit, EPA Regions III and IV will not permit nor allow their approved NPDES States to permit SSO outfalls in a municipal NPDES permit unless a biological treatment plant meeting secondary treatment standards is constructed to process the SSO flows.

**Response to No. 64**

Denied.

**Request for Admission No. 65**

EPA and approved NPDES States have issued NPDES permits authorizing discharges from SSO locations wherein secondary treatment effluent limitations have not been imposed.

#### **Response to No. 65**

Admitted in part and denied in part. EPA admits that some approved NPDES States and EPA Regions 1 and 6 have in the past issued permits authorizing emergency SSO discharges wherein secondary effluent limitations have not been imposed. (See Response to Request for Admission No. 54). EPA further admits that it has issued permits from separate sanitary sewers where secondary treatment limits have not been imposed based on Clean Water Act section 301(h). After having made reasonable inquiry, the information known or readily obtainable by EPA is insufficient to enable it to admit or deny whether EPA Regions other than EPA Regions 1 and 6 have issued any such permits. EPA and approved NPDES States have also in the past declined to issue NPDES permits for emergency discharges.

#### **Request for Admission No. 66**

By letter dated March 23, 1995 from Michael B. Cook, Director, EPA Office of Wastewater Management, to Myron Knudson, Director, EPA Region VI Water Management, EPA Headquarters stated that the effluent limitations for SSO discharges should be based upon BAT/BCT.

#### **Response to No. 66**

EPA objects to Request for Admission No. 66 in that the March 23, 1995, letter from Michael B. Cook to Myron Knudson is a deliberative document that is protected from release by the deliberative process privilege.

#### **Request for Admission No. 67**

EPA Regions III and IV require that the permitting of SSOs can only be undertaken if a facility can meet secondary treatment standards.

#### **Response to No. 67**

EPA objects to the term "permitting of SSOs can only be undertaken if a facility can meet secondary treatment standards," as used in this request, as vague, ambiguous,

and unclear. Without waiving this objection, EPA admits that discharges from separate sanitary sewer systems with less than secondary treatment cannot be authorized in an NPDES permit. See National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37,370, 37,371 (“Discharges from sanitary sewer systems with less than secondary treatment are prohibited”).

**Request for Admission No. 68**

EPA Regions III and IV base enforcement actions on the interpretation that SSOs must meet secondary treatment standards.

**Response to No. 68**

Denied. Enforcement actions are brought by EPA under many statutes. Enforcement actions under Clean Water Act section 301 are based on discharges of pollutants into waters of the United States except, among other things, as authorized by an NPDES permit.

**Request for Admission No. 69**

EPA Regions III and IV lead private parties to believe that SSO permits must be based upon secondary treatment.

**Response to No. 69**

EPA objects to this Request on the grounds that the phrases “lead private parties to believe” and “SSO permits must be based upon secondary treatment,” as used in the context of this request are vague, ambiguous or unclear.” Without waiving this objection, EPA admits that discharges from separate sanitary sewer systems with less than secondary treatment cannot be authorized in an NPDES permit. See National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37,370, 37,371, col. 1 (Sep. 8, 1989) (“Discharges from sanitary sewer systems with less than secondary treatment are prohibited”).

**Request for Admission No. 70**

EPA Regions III and IV lead State permitting agencies to believe that EPA will object to or veto State NPDES permits which do not subject SSO discharges to secondary treatment.

**Response to No. 70**

EPA objects to the phrase “lead State permitting agencies to believe” as vague, ambiguous, and unclear. Subject to this objection, the request is admitted. Discharges from separate sanitary sewer systems with less than secondary treatment cannot be authorized in an NPDES permit. See National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37370, 37371 (“Discharges from sanitary sewer systems with less than secondary treatment are prohibited”).

**Request for Admission No. 71**

As of the date of the filing of the Complaint in this lawsuit, EPA Regions III and IV mandate that if SSOs are permitted, such outfalls are to meet secondary treatment standards.

**Response to No. 71**

Admitted. Discharges from separate sanitary sewer systems with less than secondary treatment cannot be authorized in an NPDES permit. See National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37370, 37371 col. 1 (“Discharges from sanitary sewer systems with less than secondary treatment are prohibited”).

**Request for Admission No. 72**

EPA Regional Administrators have not been delegated the authority by the EPA Administrator to establish rules or to otherwise impose requirements upon the regulated community different than that contained in the federal regulations.

**Response to No. 72**

EPA objects to Request for Admission No. 72 to the extent that it requests that EPA admit a pure conclusion of law. Subject to this objection, the request is denied.

EPA admits that EPA Regional Administrators have not been delegated the authority by the EPA Administrator to establish rules of national applicability under the Clean Water Act. However, EPA Regional Administrators have been delegated authority, inter alia, to issue NPDES permits and to deny applications for permits, and to object to issuance of permits by authorized NPDES States. The delegation of authority to issue NPDES permits entails the authority to impose requirements upon the regulated community that interpret and apply the CWA and implementing NPDES regulations.

Respectfully submitted,

THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment & Natural Resources Division

/s/  
\_\_\_\_\_  
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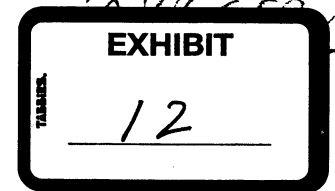
Counsel for Defendants

DATED: January 31, 2003





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460



MAR 23 1995

OFFICE OF  
WATER

MEMORANDUM

SUBJECT: NPDES Permit for Houston Wet Weather Facilities

FROM: Michael B. Cook, Director  
Office of Wastewater Management *Michael Cook*

TO: Myron Knudson, Director  
Water Management Division, Region VI

Thank you for the opportunity to review of the draft National Pollutant Discharge Elimination System (NPDES) permit and fact sheet for relief discharges from the Scott Street wet weather facilities in Houston, Texas. Your staff has developed two alternative draft final permit decision discussions, one supporting authorizing the discharges pursuant to a best available technology/best conventional technology (BAT/BCT) approach and one authorizing the discharges on the basis of the NPDES bypass regulations at 40 CFR 122.41(m). Based on my review of these materials, I request that the final permit decision discussion be modified as follows:

- 1) A BAT/BCT rational should be used instead of a bypass approach. I recognize that a number of alternative legal theories and implementation approaches (e.g. permits, enforcement) could be used to address the discharges from sanitary sewer collection systems. The Agency intends to have all possible options evaluated as part of the sanitary sewer overflow (SSO) Policy Dialogue. However, given the unique features of the Houston collection system, the desire to issue a permit quickly, our review of the merits of the bypass approach compared with the BAT/BCT approach in this case, and the timing of this action relative to the Policy Dialogue, I believe that the BAT/BCT approach should be used in the Scott Street permit.
- 2) The legal basis for the BAT/BCT analysis (e.g. application of Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 592 (D.C. Cir. 1980) to sanitary sewer collection systems) should be clearly stated.



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- 3) The technology-based requirements for discharges from sanitary sewer collection systems prior to the headworks should not be the nine minimum requirements for combined sewer systems identified in the combined sewer overflow (CSO) policy. Rather the technology-based requirements (BAT/BCT) should be based on the site-specific considerations of the system.
- 4) The decision discussion must provide a description of how BAT/BCT was determined, including a consideration of the appropriate factors specified in 40 CFR 125.3(d). In this case, BAT/BCT is represented by a performance standard (four overflows per year) and other requirements in the permit. The permit decision discussion should, among other things, explain that in determining BAT/BCT, the Agency considered all the work Houston is doing to meet the performance standard (e.g. put in relief sewers, rehab pump station, I/I work). A more detailed description of what is required in the permit and Houston's effort to address its collection system also needs to be added.
- 5) Additional language clarifying the unique characteristics of Houston's collection system needs to be added. This will minimize the precedential effect of this action. Information available to the Agency indicates that different sanitary sewer collection systems can experience significantly different characteristics. With many sanitary sewer systems, it appears that application of a BAT/BCT analysis could result in prohibiting discharges from the collection system.

Concerns with Bypass Approach - As indicated in my November 24, 1994, memorandum, I am concerned about the extension of the bypass regulatory mechanism to discharges from sanitary sewer collection systems that occur prior to the headworks. My concerns include:

- 1) The standards for bypasses, including "no feasible alternative", may be subject to misinterpretation. In fact, it appears that the "no feasible alternative" condition for bypass is being misapplied in one of the drafts of the decision discussion for the Houston permit. The draft decision discussion appears to improperly modify the inquiry from whether there were "no feasible alternatives" to bypass to "more feasible". The use of the improper substitute standards may result from the Region's concern that it may not be able to show that larger storage units are not feasible<sup>1</sup>. Without the benefit of knowing Houston's financial capability, a determination that

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<sup>1</sup> Preliminary information indicates that the construction cost for storage with a bypass frequency of once in five years is \$51 million compared to a construction cost of storage that would require a bypass frequency of four per year of \$39 million. (see "Analysis of Alternative Strategies for Permitting Relief Discharges from Municipal Storm Surge Storage Facilities" from Myron Knudson and Walter Sutton to Mike Cook and Susan Lepow, October, 1994).

there are "no feasible alternatives" to bypass in most of the situations authorized appears to be in conflict with the bypass regulation which provides that "bypass is prohibited . . . unless . . . there are no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities or *retention of untreated wastes*" (emphasis added).

- 2) The bypass provision can be used to excuse discharges that contribute to violations of State water quality standards. This approach could potentially render the application of water quality-based requirements discretionary. The draft permit discussion uses a lesser standard of considering environmental consequences to substitute for water quality-based requirements. This is inconsistent with the policy decision reflected in the CSO Control Policy which provides that when including anticipated bypasses in permits, the permitting authority should ensure that the bypass will not cause exceedances of water quality standards (see April 19, 1994, (59 FR 18694)).
- 3) The use of bypass provision for wet weather facilities is not consistent with the Agency's interpretation that bypasses are intentional diversions of waste streams from any portion of a treatment facility and that the treatment facility begins at the headworks where equalization of the waste streams takes place (see the National Combined Sewer Overflow (CSO) Control Strategy, September 8, 1989, (54 FR 37371)). This interpretation forms the basis for the Agency's approach to regulation of CSOs. An inconsistent approach in this case could undermine the Agency's ability to defend that program.

### CSO Policy

I have concerns about the comparisons in the September 29, 1994, draft fact sheet and the March 22, 1995, draft decision discussion between discharges from the Sims Bayou wet weather facilities should be required to meet technology-based requirements and combined sewer overflows. Some reviewers of the September 29, 1994, fact sheet have indicated that they interpret the fact sheet to state that the Agency will be applying the CSO Control policy directly to sanitary sewer collection systems or that sanitary sewer collection systems can be classified as combined sewer systems. While there are similarities between controls for CSOs and SSOs, there are significant inherent differences between combined sewers and separate sanitary sewers. Because combined sewers are designed to collect the majority of inflow from a drainage basin, they present much different material handling problems than separate sanitary sewers. Therefore, the technology-based controls for combined sewers do not necessarily represent the appropriate technology-based requirements for sanitary sewer collection systems. In addition, the nine-minimum controls in the CSO policy are intended to be things that can be done to the existing collection system without substantial modifications to the collection system. It is my understanding that you intend to modify the requirements to make them more applicable to separate sanitary sewer collection systems (e.g. provide a greater emphasis on inflow removal, address new development, etc.) and you intend to require, based on technology considerations, the installation of a surge tank.

Other Comments

- Page 2 of the March 22, 1995, draft decision description indicates that SSOs are "not unusual as sanitary sewer systems are not sealed systems and will be subject to rainfall events which cause flows to exceed the system capacity". This sentence should be deleted or modified to refer to the Houston system. As written, the sentence appears to imply that all sanitary sewer collection systems will have frequent overflows. However, information available to the Agency indicates that different sanitary sewer collection systems can experience significantly different characteristics. Some well designed, operated, and maintained sanitary sewer collection systems appear to have few or extremely rare wet weather SSOs.
- Broaden the discussion of the SSO policy dialogue to indicate that the Agency is considering a wide mix of activities to address SSOs, such as the development of a comprehensive national policy, guidance, guidelines, incentives, regulation changes, fostering voluntary approaches, outreach and training efforts. Clarify that when reissued, the permit will be consistent with Agency policy or guidance at the time of reissuance.

Other suggested language is attached. I look forward to the opportunity to review the next draft of the final decision discussion for the permit. If you would like to discuss these concerns further, please call me at (202) 260-5850 or have your staff call Kevin Weiss at (202) 260-9524.

Attachment

20 to 30 times per year. The area is subject to high intensity rainfall events. The 2-year 6-hour storm for the area having a peak intensity of 2.3 inches per hour and a total volume of 3.51 inches. The 5-year 6-hour storm has a peak intensity of 2.82 inches per hour with a total volume of 4.45 inches.

The Sims Bayou Service Area collection system program includes implementation of \$160 million of system improvements to control overflows. Overflows in the system (prior to the storage facility) are to be controlled up to the 5-year storm event. The improvements include:

- Upstream storage unit to store peak flows in most storms and collect a portion of the flow from larger storms (estimated cost of \$11.5 million).
- Upgrading eight existing pump stations to assure conveyance of dry and wet weather flow associated with a design 5-year storm (estimated cost of \$15 million);
- Three wet weather pump stations to receive and pump peak flows (estimated cost of \$26 million);
- New relief sewers (145,000 linear feet) in the upstream collector system to convey flows to the interceptor system designed for a 5-year storm (estimated cost of \$43 million);
- Rehabilitation of the 60 inch primary interceptor pipeline (estimated cost of \$17.5 million);
- Targeted rehabilitation of collector lines and manholes (estimated cost of \$44 million);
- Modification of downstream treatment plants to maximize utilization of peak flow treatment capacity (estimated cost of \$1.5 million); and
- [Note: identify other conditions, including requirements to remove inflow, signs, studies and monitoring]

The Region believes that implementation of this comprehensive program appropriately reflects the reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits.

The city of Houston believes these improvements will result in:

- No uncontrolled wet weather overflows for up to the 5-year storm;
- Controlled discharges from the upstream storage facility on the average of 4 times per year; and
- Improved customer service.

[FRL-8157-8]

**Public Meeting of the Sanitary Sewer  
Overflows Dialogue**

**AGENCY:** Environmental Protection  
Agency.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Environmental Protection Agency (EPA) is convening a public meeting of the Sanitary Sewer Overflows (SSOs) dialogue on March 9 and 10, 1995. The meeting has several purposes: (1) to discuss goals, objectives and desired outcomes for the SSO policy dialogue, such as ensuring national consistency and adequate municipal investment in collection system operation and maintenance; (2) to report on information needs to support an evaluation of the costs and benefits of selected policy options as well as identify other information needs associated with developing other products; (3) to provide an overview of the Agency's approach to enforcement; (4) to identify and discuss the appropriateness of nonregulatory and regulatory tools available for addressing reporting of SSOs, collection system evaluations, sewer design, collection system operation and maintenance, and system rehabilitation; and (5) to discuss how watershed concepts could be incorporated into SSO efforts. The meeting is open to the public without need for advance registration.

**DATES:** The Dialogue will be held on March 9 and 10, 1995. On the 9th, the meeting will begin at approximately 9 a.m. EST and run until about 5 p.m. On the 10th, the meeting will run from about 9 a.m. until completion.

**ADDRESSES:** The Dialogue will be held at the Sheraton Suites Hotel, 801 Asaph Street, Alexandria, VA 22314. The hotel telephone number is (703) 836-4700.

**FOR FURTHER INFORMATION CONTACT:**  
Kevin Weiss of EPA's Office of  
Wastewater Management, at (202) 260-  
9524.

Dated: February 13, 1995.

Michael Cook.

Director Office of Wastewater Management,  
Designated Federal Official.

[FR Doc. 95-4290 Filed 2-22-95; 2:45 am]

BILLING CODE 6560-60-P

**DRAFT AGENDA**  
**SANITARY SEWER OVERFLOW (SSO)**  
**POLICY DIALOGUE**  
**March 9-10, 1995**

**THURSDAY, MARCH 9**

**9:00 am**    **Introductory Session**

- Introductions
- Summary of First Meeting
- Review FACA sub-committee status
- Review groundrules
- Review Agenda

**9:30 am**    **Urban municipal wet weather policy dialogue - Overview and relationship to SSO dialogue**

**10:30 am**    **Break**

**10:45 am**    **Regulatory approaches to SSOs and regulatory framework**

- Overview of regulatory framework
- Overview of ASIWPCA survey
- Examples of different Regional/State approaches

**11:30 am**    **Discussion of EPA enforcement during policy dialogue**

→ *CAT Fed 1 1/2 hour*

**12:00 pm**    **Working Lunch**

**1:00 pm**    **Summary of white papers - Discussion of objectives**

**1:45 pm**    **Discussion of goals and time-frame for SSO Policy Dialogue**

- Present/discuss issues suggested by participants
- Identify priority issues to be discussed by Dialogue and addressed by EPA
- Develop goals for Dialogue

**2:45 pm**    **Break**

**3:00 pm**    **Discussion of Interests/Objectives with regard to priority issues**

**4:00 pm**    **Begin discussion of selected topics**

**5:00 pm**    **Adjourn**

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To <u>Ken Mackenzie</u>	From <u>Kevin Warr</u>	
Co. _____	Co. _____	
Dept. _____	Phone # _____	
Fax # _____	Fax # _____	

**FRIDAY, MARCH 10**

8:30 am Continue discussion of selected topics

10:00 am Break

10:15 am Continue discussion of selected topics

12:00 pm Lunch

1:00 pm Discussion of information collection needs, data collection effort and cost/benefit analysis

1:45 pm Topics/goals for May 18, 19 meeting

2:15 pm Wrap-up - review action items and assignments, schedule any work group conference calls

2:30 pm Adjourn

### **SUGGESTIONS FOR SELECTED TOPICS**

**Classification of SSOs for evaluating control goals** - The expectations and approaches for correcting different classes of SSOs depends on the nature and causes of the class of SSOs (e.g. chronic wet-weather SSOs, temporary and unforeseen blockages). Would a classification scheme help identify goals and expectations for SSO control?

**Identification of targeted systems** - Procedurally, how should EPA and States identify collection systems that should be targeted for improvement? Should EPA develop criteria for identifying such systems? If so, what type of criteria (e.g. performance standards) and how should it be developed? How should watershed prioritization concepts be incorporated into targeting efforts?

**Reporting** - What are the goals of SSO reporting requirements? Is guidance necessary? How should customer municipalities be addressed?

**Control Levels** - How should site-specific factors be identified and evaluated when developing reasonable control levels? ↳

**Minimum technology-based requirements** - How should minimum technology-based requirements be identified and evaluated?

**Water-quality based requirement/health based requirements** - How should EPA/States address health concerns? Are current EPA/State policies creating health concerns? How should health concerns be integrated into process?

**Operation and Maintenance requirements** - Should guidelines and targets for O&M programs be developed?



## **EPA's DRAFT GOALS FOR MARCH 9/10 MEETING**

- Provide participants with background information regarding the:
  - interim EPA enforcement policy,
  - regulatory framework, and
  - different approaches of different States/Regions.
- Clarify that EPA is interested in considering a wide mix of activities to address SSOs, such as the development of guidance, guidelines, incentives, regulation changes, fostering voluntary approaches, outreach and training efforts.
- Describe the urban municipal wet weather policy dialogue, explain the interaction with the SSO policy dialogue, and obtain input on specific topics and priorities for addressing topics.
- Provide a detailed discussion of selected topic areas. Discussions should focus on identifying the general interests (rather than position) of the different representatives.
- Obtain input on the need of different types of actions (e.g. development of guidance, guidelines, regulation changes, etc.) by EPA to address SSOs.
- Discuss both short-term and long-term information collection needs.
- Define objectives for next meeting
- Define tasks for in between meetings. Examples of tasks for in-between meetings may include:
  - developing a classification scheme for defining control goals
  - proceed with defining approach to cost-benefit analysis
  - clarify any other information collection objectives
  - reach agreement on working definitions

## SSO QUESTIONS AND ANSWERS

**1. What are the tools available to EPA to address SSOs?**

EPA is interested in considering a wide mix of activities to address SSOs, such as the development of targeted policy guidance to NPDES authorities, targeted regulatory modifications, technical guidance, technical assistance, outreach activities, workshops, symposiums, demonstration projects, training, incentives and awards.

**2. What authorities can be used to authorize discharges to waters of the United States?**

NPDES permits.

**3. Can discharges to waters of the United States that are not authorized by an NPDES permit be excused?**

The NPDES regulations do excuse bypasses from any portion of a treatment facility under certain circumstances (see 40 CFR 122.41(m)(4)). EPA interprets the bypass provision to apply to discharges that occur beyond the headworks of a treatment plant.

An NPDES authority can decide to exercise enforcement discretion by not bringing an enforcement action to address unpermitted discharges. However, this does not protect the discharger from citizen suits.

**4. What NPDES authorities are available to require reporting of SSOs?**

A permit, Section 308 information request or order, or enforcement action may require a municipality to report an SSO that discharges to waters of the United States. In addition, permit applications must be submitted for unpermitted SSOs which discharge to waters of the United States.

**5. Are customer municipalities required to report SSOs that occur in portions of the collection system that they operate?**

Reporting requirements in an NPDES permit would only apply to a customer municipality if they are listed in the permit as a copermittee.

Customer municipalities that operate a system with SSOs which discharge to waters of the United States are required to submit a permit application if the discharge is not authorized by a permit or eliminated.

A customer municipality could also be required by the Agency to report SSOs pursuant to a request for information issued under Section 308 of the CWA or in an enforcement action.

**6. Are municipalities required to report SSOs that do not discharge to waters of the United States?**

A permit, Section 308 information request or order, or enforcement action may require a municipality to report an SSO that does not discharge to waters of the United States.

**7. What technology-based requirements apply to permits for SSOs?**

The CWA does not clearly specify whether the technology-based standard for permits for SSOs would be secondary treatment or best available technology economically achievable (BAT) for toxic pollutants and pollutants which are neither toxic nor conventional pollutants and best conventional pollutant control technology (BCT) for conventional pollutants. The secondary treatment standard applies to publicly owned treatment works (POTWs). EPA has defined POTW to include "pipes, sewers, or other conveyances only if they convey wastewater to a POTW providing treatment." 40 CFR 122.2. In the CSO context, EPA has interpreted this definition to provide that secondary treatment requirements are only applicable to discharges from the POTW, not discharges from CSO outfalls that occur prior to reaching the headworks of the treatment works. This interpretation was upheld in 1980. Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 592 (D.C. Cir. 1980). EPA has not clarified whether SSOs should be addressed in a similar or different manner.

**8. Can an NPDES authority provide for schedules for complying with control measures?**

An NPDES authority can establish a compliance schedule in an Administrative Order. Similarly, compliance schedules can be established in settlement agreements and court orders. However, NPDES permits generally cannot establish schedules for compliance with technology- or water quality-based limits<sup>1</sup>.

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<sup>1</sup> State water quality standards may contain compliance schedules. In these cases, permits can contain requirements consistent with these compliance schedules.

## **POLLUTANT SOURCES ADDRESSED BY NPDES PROGRAM**

### **Legal Framework**

The NPDES program requires permits for the addition of "pollutants" from any "point source" into "waters of the United States". (see 40 CFR 122.1(b))

The term "point source" means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. The term does not include return flows from irrigated agriculture or agricultural storm water runoff. (see 40 CFR 122.2)

### **Major Classes of Sources Addressed**

In general, NPDES permits are issued for discharges to waters of the United States from the following major classes of point sources:

- Industrial process wastewater
- Mine site discharges
- Sewage treatment plants, including package plants
- Combined sewer overflows (CSOs)
- Feedlots meeting the regulatory definition of "concentrated animal feeding operation"
- Certain storm water discharges (e.g. Phase I discharges) , including:
  - Storm water discharges associated with industrial activity (over 120,000 industrial facilities)
  - Discharges from municipal separate storm sewer systems serving a population of 100,000 or more (over 800 municipalities)
  - Storm water discharges designated by the Director as significant contributors of pollutants to waters of the United States or contributing to a violation of a water quality standard
- Landfill leachate collection systems

In general, NPDES permits are not required for:

- The introduction of sewage or wastewater into a publicly owned treatment works
- Return flows from irrigated agriculture
- Agricultural storm water
- Hydromodification activities<sup>1</sup>
- Feedlots and livestock management areas that do not meet the regulatory definition of concentrated animal feeding operation
- In stream contamination
- Most natural runoff from silviculture operations

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<sup>1</sup> Discharges of dredged or fill materials into waters of the U.S. are regulated under Section 404 of the Clean Water Act.

**Other sources of pollutants often are not issued permits based on programmatic concerns:**

- Phase II storm water discharges (discharges composed entirely of storm water other than Phase I discharges)<sup>2</sup>
- Air deposition
- Functional septic systems

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<sup>2</sup> The CWA provides that permits are required for phase II storm water discharges after October 1, 1994. However, EPA intends to issue a regulation that provides permits for phase II storm water discharges are not required until 2001, unless the permitting authority requires an application due to water quality impacts. Prior to that time, EPA intends to identify in an inclusionary process phase II storm water sources that will be addressed by the phase II program.

## LEGAL FRAMEWORK FOR ADDRESSING SSOs

The CWA provides that point source discharges of pollutants to waters of the United States are prohibited unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Thus, unpermitted discharges from sanitary sewer systems, such as SSOs, which reach waters of the United States (either directly or indirectly through groundwater hydrologically connected to surface waters) violate the CWA. Similarly, SSOs into streets or other areas which drain through storm sewers to waters of the United States that are not authorized by an NPDES permit violate the CWA.

SSOs may also be permit violations if the NPDES permit for the sewage treatment plant discharges prohibits SSOs. In addition, SSOs, including those which do not discharge to waters of the United States, may result from circumstances associated with NPDES permit violations. For example, 40 CFR 122.41(e) requires that NPDES permits provide that permittees shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with permit conditions. Poor operation and maintenance practices that result in SSOs would violate such permit provisions.

The CWA provides broad authority for EPA or authorized NPDES States to require reporting of discharges. Specific reporting requirements can be established in NPDES permits. SSO discharges may be subject to reporting under permit provisions requiring reporting of non-compliance with permit provisions. For example, reporting may be required if the SSO discharge results from the permittee's failure to meet obligations under the permit to properly maintain and operate the sewer system. A SSO discharge may also be specifically identified as subject to monitoring and reporting requirements in the permit. Operators of systems with SSOs which discharge to waters of the United States and that are not authorized by an NPDES permit must either eliminate the discharge or submit a permit application (see 40 CFR 122.21(a)). In addition, EPA has broad authority under section 308 of the CWA to require additional reporting.

The CWA establishes two types of requirements for NPDES permits, technology-based and water quality-based. These requirements are met by including effluent limitations and special conditions in NPDES permits. Numeric effluent limitations establish pollutant concentration limits for effluents at the point of discharge. Section 402(a)(1) authorizes the inclusion of other types of conditions that are determined to be necessary, known as special conditions, in NPDES permits. Special conditions can include requirements for best management practices (BMPs).

The CWA does not clearly specify whether the technology-based standard for permits for SSOs would be secondary treatment or best available technology economically achievable (BAT) for toxic pollutants and pollutants which are neither toxic nor conventional pollutants and best conventional pollutant control technology (BCT) or

best practicable technology currently available (BPT) for conventional pollutants. The secondary treatment standard applies to publicly owned treatment works (POTWs). EPA has defined POTW to include "pipes, sewers, or other conveyances only if they convey wastewater to a POTW providing treatment." 40 CFR 122.2. In the CSO context, EPA has interpreted this definition to provide that secondary treatment requirements are only applicable to discharges from the POTW, not discharges from CSO outfalls that occur prior to reaching the headworks of the treatment works. This interpretation was upheld in 1980. Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 592 (D.C. Cir. 1980). EPA has not clarified whether SSOs should be addressed in a similar or different manner.

7 of 8 DOCUMENTS

FEDERAL REGISTER

VOL. 58, No. 11

Notices

ENVIRONMENTAL PROTECTION AGENCY (EPA)

[FRL-4553-6]

Combined Sewer Overflow Control Policy: Draft Guidance Availability

58 FR 4994

DATE: Tuesday, January 19, 1993

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of the draft guidance document entitled "Combined Sewer Overflow Control Policy".

DATES: Comments must be received by EPA by March 22, 1993.

ADDRESSES: Copies of this document can be obtained by writing or calling Mr. Richard Kuhlman, Office of Wastewater Enforcement and Compliance, WH-546, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 260-5828. Comments on the document should be sent to Mr. Richard Kuhlman at the above address.

FOR FURTHER INFORMATION CONTACT: Richard Kuhlman at (202) 260-5828.

SUPPLEMENTARY INFORMATION: The main purposes of the draft Policy are to elaborate on the Environmental Protection Agency's (EPA's) National Combined Sewer Overflow Control Strategy published on September 8, 1989, at 54 FR 37370, and to expedite compliance with the requirements of the Clean Water Act (CWA). While implementation of the 1989 Strategy has resulted in progress toward controlling combined sewer overflows (CSOs), significant public health and water quality risks remain.

The Policy is being developed to provide guidance to permittees with CSOs, National Pollutant Discharge Elimination System (NPDES) authorities and State water

quality standards authorities, on coordinating the planning, selection, sizing and construction of CSO controls that meet the requirements of the CWA and allow for public involvement during the decision-making process.

Contained in the Policy are provisions for developing appropriate, site-specific NPDES permit requirements for all combined sewer systems that overflow as a result of wet weather events and enforcement initiatives to require the immediate elimination of overflows that occur during dry weather, and to ensure that the remaining CWA requirements are complied with as soon as practicable.

The permitting provisions of the Policy were developed as a result of extensive input received during a negotiated policy dialogue. The negotiated dialogue was conducted by the office of Water and the Office of Water's Management Advisory Group. Representatives from State, environmental and municipal organizations participated in the negotiated dialogue.

The enforcement initiatives, including one to be initiated in 1993 on CSOs during dry weather, were developed by EPA's Office of Water and Office of Enforcement.

The major provisions of the Policy are:

CSO permittees should immediately undertake a process to accurately characterize their combined sewer system, demonstrate implementation of nine minimum controls, and develop a long-term CSO control plan. Once the long-term CSO control plan is completed, the permittee will be responsible to implement the plan's recommendations as soon as practicable;

State water quality standard (WQS) authorities should be involved in the long-term CSO control planning effort to coordinate the review and possible revision of WQS and implementation procedures on CSO-impacted waters with the development of the long-term CSO control plan;



NPDES authorities should issue/reissue permits to require immediate compliance with the technology-based and water quality-based requirements of the CWA, and after completion of the long-term CSO control plan, incorporate the following additional permit requirements — performance standards for the selected controls based on average design conditions, a post construction water quality assessment program, monitoring for compliance with WQS, and a reopener clause authorizing the NPDES authority to reopen and modify the permit if it is determined that the CSO controls fail to meet WQS or protect designated uses; and

NPDES authorities should also, as noted above, commence enforcement actions in 1993, against all CSO permittees which have CWA violations due to CSO discharges during dry weather. In addition, NPDES authorities should ensure the implementation of the nine minimum controls, noted above, and incorporate a schedule, with appropriate milestone dates, to implement the required long-term CSO control plan into a civil judicial action or administrative order. Schedules for implemen-

tation of the long-term CSO control plan may be phased based on the relative importance of adverse impacts upon which WQS and designated uses, and on a permittee's financial capability.

Notwithstanding the permitting and enforcement provisions of the Policy, permittees will be expected to comply with any CSO-related requirements in NPDES permits, consent decrees or court orders which predate the final policy.

Dated: January 4, 1993.

LaJuana S. Wilcher,

Assistant Administrator for Water.

Dated: January 5, 1993.

Herbert H. Tate, Jr.,

Assistant Administrator for Enforcement.

[FR Doc. 93-1187 Filed 1-15-93; 8:45 am]

BILLING CODE 6560-50-M



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 22 1992

Dear Colleague:

Enclosed is a Draft Combined Sewer Overflow Control Policy. A Notice of Availability, providing for a 60-day public comment period, will be published in the Federal Register in the near future.

The main purposes of the Policy are to elaborate on the Environmental Protection Agency's (EPA's) National Combined Sewer Overflow Control Strategy published on September 8, 1989, at 54 FR 37370, and to expedite compliance with the requirements of the Clean Water Act (CWA). While implementation of the 1989 Strategy has resulted in progress toward controlling combined sewer overflows (CSOs), significant public health and water quality risks remain.

The Policy is being developed to provide guidance to permittees with CSOs, National Pollutant Discharge Elimination System (NPDES) authorities and State water quality standards authorities, on coordinating the planning, selection, sizing and construction of CSO controls that meet the requirements of the CWA and allow for public involvement during the decision-making process.

Contained in the Policy are provisions for developing appropriate, site-specific NPDES permit requirements for all combined sewer systems that overflow as a result of wet weather events and enforcement initiatives to require the immediate elimination of overflows that occur during dry weather, and to ensure that the remaining CWA requirements are complied with as soon as practicable.

The permitting provisions of the Policy were developed as a result of extensive input received during a negotiated policy dialogue. The negotiated dialogue was conducted by the Office of Water and the Office of Water's Management Advisory Group. Representatives from State, environmental and municipal organizations participated in the negotiated dialogue.

The enforcement initiatives, including one to be initiated in 1993 on CSOs during dry weather, were developed by EPA's Office of Water and Office of Enforcement.

The major provisions of the Policy are:

**CSO permittees** should immediately undertake a process to accurately characterize their combined sewer system, demonstrate implementation of nine minimum controls, and develop a long-term CSO control plan. Once the long-term CSO control plan is completed, the permittee will be responsible to implement the plan's recommendations as soon as practicable;

**State water quality standard (WQS) authorities** should be involved in the long-term CSO control planning effort to coordinate the review and possible revision of WQS and implementation procedures on CSO-impacted waters with the development of the long-term CSO control plan;

**NPDES authorities** should issue/reissue permits to require immediate compliance with the technology-based and water quality-based requirements of the CWA, and after completion of the long-term CSO control plan, incorporate the following additional permit requirements -- performance standards for the selected controls based on average design conditions, a post construction water quality assessment program, monitoring for compliance with WQS, and a reopener clause authorizing the NPDES authority to reopen and modify the permit if it is determined that the CSO controls fail to meet WQS or protect designated uses; and

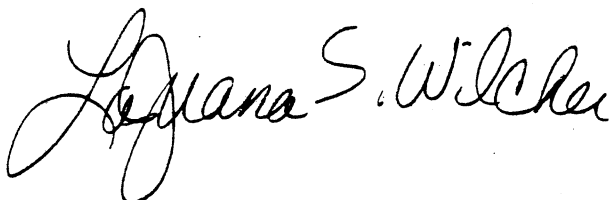
**NPDES authorities** should also, as noted above, commence enforcement actions in 1993, against all CSO permittees which have CWA violations due to CSO discharges during dry weather. In addition, NPDES authorities should ensure the implementation of the nine minimum controls, noted above, and incorporate a schedule, with appropriate milestone dates, to implement the required long-term CSO control plan into a civil judicial action or administrative order. Schedules for implementation of the long-term CSO control plan may be phased based on the relative importance of adverse impacts upon WQS and designated uses, and on a permittee's financial capability.

Notwithstanding the permitting and enforcement provisions of the Policy, permittees are expected to comply with any CSO-related requirements in NPDES permits, consent decrees or court orders which predate the Policy.

Comments on the draft Policy should be submitted to:

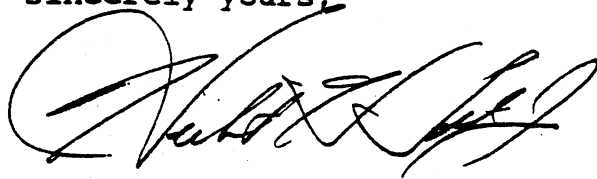
Richard Kuhlman (WH-546)  
Office of Wastewater Enforcement and Compliance  
US EPA  
401 M Street, S.W.  
Washington, D.C. 20460

If additional information is necessary, please contact  
Richard Kuhlman at (202) 260-5828.



LaJuana S. Wilcher  
Assistant Administrator  
for Water

Sincerely yours,



Herbert H. Tate, Jr.  
Assistant Administrator  
for Enforcement

Enclosure

1 DRAFT COMBINED SEWER OVERFLOW CONTROL POLICY

2 12/18/92

3 I. INTRODUCTION

4 A. Purpose

5 The main purposes of this Policy are to elaborate on EPA's  
6 National Combined Sewer Overflow Control Strategy published on  
7 September 8, 1989 at 54 FR 37370 (1989 Strategy) and to expedite  
8 compliance with the requirements of the Clean Water Act (CWA).  
9 While implementation of the 1989 Strategy has resulted in  
10 progress toward controlling combined sewer overflows (CSOs),  
11 significant water quality risks remain. CSOs consist of mixtures  
12 of sanitary sewage, industrial wastewater, and storm water  
13 runoff. CSO discharges often contain high levels of suspended  
14 solids, bacteria, heavy metals, floatables, nutrients, oxygen-  
15 demanding organic compounds, oil and grease, and other  
16 pollutants. CSO discharges can cause exceedances of water  
17 quality standards (WQS). Such exceedances may pose risks to  
18 human health, threaten aquatic life and its habitat, and impair  
19 the use and enjoyment of the Nation's waterways.

20 This Policy is intended to provide guidance to permittees  
21 with CSOs, National Pollutant Discharge Elimination System  
22 (NPDES) permitting authorities, State water quality standards  
23 authorities and enforcement authorities, in order to coordinate  
24 the planning, selection, sizing and construction of CSO controls

1 If there is support in the permit record to meet the  
2 requirements in 40 CFR Section 122.41(m)(4) as discussed  
3 below, the permitting authority may grant the permittee a  
4 generic bypass for the five-year term of the permit and  
5 would define in the permit the parameters within which a  
6 particular bypass may be allowed. If the generic bypass is  
7 granted, the permit should also provide that it will be  
8 terminated if there is a substantial change in the volume or  
9 character of pollutants being introduced to the POTW. The  
10 generic bypass provision in the permit should also make it  
11 clear that all wet weather flows passing the headworks of  
12 the POTW treatment plant will receive at least primary  
13 clarification, solids and floatables disposal and  
14 disinfection consistent with the treatment requirements in  
15 Section II.C.3.a. and any other treatment that can  
16 reasonably be provided.

17 Under EPA regulations, the intentional diversion of waste  
18 streams from any portion of a treatment facility, including  
19 secondary treatment, is a bypass. For a POTW a bypass does  
20 not refer to flows or portions of flows that are diverted  
21 from portions of the treatment system but that meet all  
22 effluent limits for the treatment plant upon recombining  
23 with non-diverted flows prior to discharge.

## SUMMARY OF STATE APPROACHES TO SEPARATE SANITARY SEWER SYSTEM OVERFLOWS (SSOs)

State	Overflow/ Bypass Reporting Required <sup>1a</sup>	Overflow/ Bypass Prohibited	Conditions for Authorized Overflow <sup>4</sup>		Type of Overflow Facility	Numeric Limits Imposed	Monitoring Required	Overflow/ Bypass Plan or Study Required
			Collection System	Treatment Facility				
REGION II								
New York	X		X			X	Effluent - Conventional parameters	Engineering Plan
REGION III								
Delaware		X						
District of Columbia		X						
Maryland	X		c		Collection system structure (e.g., pump station, constructed overflow)			
Pennsylvania		X						
Virginia <sup>5</sup>	X		c		Collection system structure (e.g., pump station, constructed overflow)			
West Virginia		X						
REGION IV								
Alabama <sup>6</sup>	X			c			Effluent - conventional parameters Effluent - acute toxicity test	
Florida	X	X						
Georgia		X						
Kentucky <sup>2</sup>	X	X						
Mississippi		X						
N. Carolina <sup>11</sup>	X	X						
S. Carolina <sup>11</sup>								
Tennessee <sup>1,2,9</sup>	X		a, b		swirl facility	Conventional limits on effluent, secondary	Effluent - conventional parameters Effluent - acute toxicity test Receiving water monitoring	Elimination Plan

## SUMMARY OF STATE APPROACHES TO SEPARATE SANITARY SEWER SYSTEM OVERFLOWS (SSOs) (continued)

State	Overflow/ Bypass Reporting Required	Overflow/ Bypass Prohibited	Conditions for Authorized Overflow		Type of Overflow Facility	Numeric Limits Imposed	Monitoring Required	Overflow/ Bypass Plan or Study Required
			Collection System	Treatment Facility				
REGION X								
Alaska		X						
Idaho		X						
Oregon <sup>a</sup>		X						I & I Reduction Plan
Washington		X						

**LEGEND**

Authorization Criteria: Refers to condition when an overflow or bypass is permitted.

- a - Flow rate to treatment plant exceeds a threshold value (e.g., X gpm, X mgd)
- b - Receiving water dilution reaches a certain threshold value (e.g., stream flow to effluent flow is X:1)
- c - Standard regulatory allowable bypass language
- d - Long term average of number of discharges per year, from wet weather facility.
- e - Total quantity of discharges per year, from wet weather facility.

**General Notes**

Many States categorized intentional and unintentional discharges of untreated or partially treated wastewater, occurring both upstream (in the collection system) and at the treatment plant, as Bypasses.

**Definitions**

Bypass means the intentional diversion of waste streams from any portion of a treatment facility (40 CFR 122.41(m)).  
Sanitary sewer overflow means the intentional or unintentional diversion of flow from the POTW before the POTW treatment plant (40 CFR 403.7(h)).

**Footnotes**

- <sup>1</sup> Warning signs required at permitted overflow/bypass outfalls, and known overflows.
- <sup>2</sup> State uses sewer extension moratorium authority as method to promote overflow elimination.
- <sup>3</sup> Overflow/Bypass authorization on temporary emergency basis.
- <sup>4</sup> Overflow/Bypass outfall listed in permit.
- <sup>5</sup> Virginia does not recognize overflowing manholes as point sources subject to NPDES. Enforcement orders are used to address chronic manhole overflows.
- <sup>6</sup> Alabama requires elimination of overflows in collection system.
- <sup>7</sup> Wisconsin allows overflow/bypass caused by wet weather flows from a storm event in excess of the 10 year/24 hour event to be exempt from prohibition, if they are specifically listed as outfalls in permit.
- <sup>8</sup> Oregon requires sewerage systems to be designed to eliminate overflow/bypass for any storm event smaller than 10 year/24 hour event.
- <sup>9</sup> Tennessee triggers enforcement action on chronic overflows/bypasses (more than 5/year).
- <sup>10</sup> The term overflows or phrase "bypasses from collection system" used in reporting requirements.
- <sup>11</sup> South Carolina does not have any specific regulations to prohibit SSOs. South Carolina Pollution Control Act addresses bypasses.



**ATTACHMENT 2**

**SUMMARY AND EXAMPLES OF BYPASS CONDITIONS CONTAINED IN NPDES  
PERMITS**

## Summary of Bypass Conditions Contained in NPDES Permits

The following is a summary of bypass conditions which were provided by the States as examples. Actual language is provided following this summary.

Facility Name	NPDES Permit No.	Bypass Monitoring	Bypass Limitation	Bypass Reporting	Conditional Bypass <sup>1</sup>
Jefferson County Commission	AL0026913	X <sup>2</sup>	X <sup>3</sup>	X	X
City of Cullman	AL0050423	X <sup>2</sup>	X <sup>3</sup>	X	X
City of Escondido	CA0107981			X <sup>4</sup>	X
Thorn Creek Basin Sanitary District	IL0027723	X <sup>5</sup>	X <sup>6</sup>	X	X
Village of Deerfield	IL0028347	X <sup>7</sup>	X <sup>7</sup>	X	X
Salt Creek Sanitary District	IL0030953	X <sup>8</sup>	X <sup>8</sup>		X
Thurmont WWTP	MD0021121	X <sup>9</sup>		X	X
City of Monroe	MI0028401	X		X	X
City of Ann Arbor, MI	MI0022217			X	X
Rogersville STP	TN0020672	X <sup>10</sup>	X <sup>10</sup>	X	X
Dayton STP	TN0020478	X <sup>11</sup>	X <sup>11</sup>	X	X
City of Richland Center	WI0020109				X
Two Harbors	MN0022250			X	X
Thief River Falls	MN0021431	X		X	X
East Grand Forks	MN0021814	X		X	X
Detroit Lakes	MN0020192			X	X
MWCC-Metro	MN0029955			X	X

<sup>1</sup>See Attachment 2 for specific bypass language used in permits for each permittee.

<sup>2</sup>Monitoring required for flow, BOD, TSS, NH<sub>3</sub>, pH.

<sup>3</sup>pH limitation only.

<sup>4</sup>Written report within 5 days for all sewer overflow events (a discharge of treated or untreated wastewater at a location not authorized by the permit). 24-hour notice of any event that results in a discharge to surface waters.

<sup>5</sup>Monitoring required for flow, CBOD<sub>5</sub>, TSS, FC, pH, TRC.

<sup>6</sup>Limitations for CBOD<sub>5</sub>, TSS, FC, pH, TRC.

<sup>7</sup>Monitoring and limitations for same parameters as IL0027723.

<sup>8</sup>Monitoring and limitations for CBOD<sub>5</sub>, TSS, FC, TRC, NH<sub>3</sub>.

<sup>9</sup>Only flow monitoring for collection system bypass.

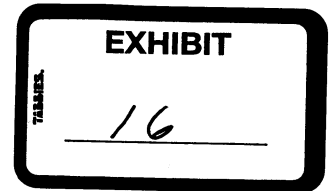
<sup>10</sup>Monitoring and limitations for BOD<sub>5</sub>, NH<sub>3</sub>, TSS, flow (mon.), stream flow (mon.), discharge ratio (mon.), FC, TRC, Settleable Solids, DO, pH. Biomonitoring (96 hour LC<sub>50</sub>) also required.

<sup>11</sup>Monitoring and limitations for CBOD<sub>5</sub>, NH<sub>3</sub>, TSS, settleable solids, DO, pH, flow (mon.), biomonitoring (48 hour LC<sub>50</sub>).



STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION  
NASHVILLE, TENNESSEE 37243-0435

DON SUNDQUIST  
GOVERNOR



MILTON H. HAMILTON, JR.  
COMMISSIONER

August 29, 2000

Ms. Suzette Denslow, Executive Director  
Tennessee Municipal League  
226 Capitol Boulevard, Suite 710  
Nashville, TN 37219-1894

Re: Resolution of Bypass Rule Implementation

Dear Ms. Denslow: *Suzette*

The Department received your letter regarding Tennessee's implementation of the federal bypass prohibition in our NPDES permits. Your letter is correct in stating that TDEC has historically allowed a flexible approach to managing wet weather flows. I believe that a flexible approach is still appropriate. However, at this point in time, that flexibility will be seen in enforcement discretion. EPA has given us very direct instruction on implementation of 40 CFR § 122.41(m). This prohibits bypass of any portion of a treatment facility other than for essential maintenance.

EPA's position is consistent across Region IV. Other states in Region IV either directly prohibit bypassing in accordance with 40 CFR § 122.41(m) or by reference to state regulation. Unlike Tennessee, these states never allowed bypasses to prevent wash outs as Tennessee did. Instead, these states addressed and continue to address instances of bypassing with enforcement discretion much like Tennessee plans to do.

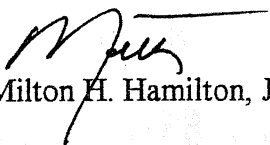
The Division of Water Pollution Control (WPC) must issue permits in accordance with state and federal regulation and under the overview of EPA, Region IV. We understand this matter to be presently under national level review. Be assured that WPC is closely following this review and does not expect to force resolution of pending permit appeals until the efforts in Washington have run their course.

Tennesseans have an expectation that municipalities will treat sewage in all conditions and hold TDEC accountable when they don't. However, I recognize that there is a balance between meeting the public's expectations and financial realities.

Ms. Suzette Denslow  
August 29, 2000  
Page: Two

I understand TML's concerns for the potential financial impact of this regulation, however I believe that TDEC's use of enforcement discretion, coupled with a focus on system maintenance, operation and management will keep the financial burden on Tennessee's municipalities and utilities within reasonable limits. I appreciate the work that TML does on behalf of Tennessee cities and see TML as a partner with TDEC in protecting Tennessee's environment. This is a difficult issue, but I believe that we can work together to find a solution that will neither unduly burden municipalities nor the environment.

Sincerely,



Milton H. Hamilton, Jr.

# Incremental costs for Bypass Elimination Based On Case Settlements and Judgements

DRAFT 02/07/03

Case Name	Region	~Service Population	Median Household Income	Description of Measures and Costs	Annualized Costs	Incremental Cost per Household (per year)
New Albany, IN	V	14,688 households	\$38,800	Additional pump station, and upgrades to the treatment plant Costs of eliminating bypass at the headworks \$20.6 mill Costs of eliminating upstream bypasses \$15.8 mill	\$1.50 mill \$1.15 mill	\$102 (0.26% of MHI) \$78 (0.20% of MHI)
Indianapolis, IN (proposed)	V	319,321 households	\$37,870	Additional roughing filters to improve secondary during wet weather, and two 30 MG earthen storage basins. Will provide an additional 100 MGD of secondary capacity and 60 MG of storage. Total cost \$66.271 mill	\$4.82 mill	\$15 (0.04% of MHI)
Toledo, OH	V	453,000	\$37,000	Upgrade headworks, add a 40 MG storage basin, add an additional secondary clarifier, and a 185 MGD ballasted flocc wet weather treatment facility. Total Cost \$157 mill	\$11.41 mill	\$76 (0.20% of MHI)
Indiana Boro, PA	III	17,275	38,800	Main interceptor upgrade (\$700,000), 2.5 MG of site/upstream storage (\$1.9 mill), and plant upgrades (\$11.4 mill), additional primary clarifier capacity (est \$1.5 mill). Total Cost \$15.5 mill	\$1.13 mill	\$196 (0.30% of MHI)

## Notes:

Where population rather than households was known, 3 people per household was assumed  
Financing was assumed to be 30 years at 6%  
O&M costs were assumed to be negligible



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

EXHIBIT

18

August 20, 1992

Mr. Peter Benet, Director  
Dept. of Highways  
299 Main St.  
Nashua, NH 03061

Re: 104(b)(3) Grant  
NPDES No. NH0100170

Dear Benet:

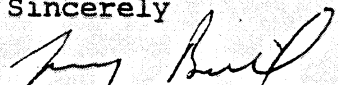
The NHDES has applied to EPA on your behalf for a 104(b)(3) grant. The grant is to be used to study maximizing the primary treatment capacity of your wastewater treatment plant in order to reduce the overflow of untreated combined wastewater during storm events.

We support the City in its efforts to reduce untreated combined sewer overflows and its willingness to undertake this study. As the study will involve bypassing the secondary treatment units during high flows, EPA will have to be informed when these events occur, as provided in Part II of your NPDES permit. A phone call to EPA within twenty-four hours followed by a letter within five days is required. EPA may waive the written report on a case by case basis, provided the oral report has been received.

We understand that the City is involved in facilities planning to develop a comprehensive long term solution to the CSOs. We will look for the results of the 104(b) study and the CSO facilities plan to help determine the best course of action for CSO abatement.

Should you have any questions, please contact Jack Healey of my staff at 617/565-2489.

Sincerely

  
Larry Brill, Chief  
Compliance Branch

cc: Ray Carter, DES



## Estimate of additional costs for POTWs if blending is not allowed

### I. CSO facilities:

- 1992 cost estimates to provide biological treatment for all CSOs (except 1 to 2 events per year) equaled \$220 billion. Most of the costs include building storage facilities for wet weather flows
- Assuming 40%-60% of the wet weather flows in combined sewer systems reach POTWs (NYC's estimates 60-80%, CSO Partnership estimates 40-70%), the 1992 estimates can be adjusted proportionally (basic technology remain the same - building storage facilities) and resulting in an estimated costs of \$88 - \$130 billion. This estimate could increase if CSO facilities implement the nine minimum controls to divert more flows to POTWs. With good operation of Real-Time controls, additional 50% of wet weather flows could reach POTWs, and therefore, the costs could increase proportionally.

### II. SSO facilities

- 1996 SSO nation control costs estimates to achieve 1 wet weather overflow in five years equal \$88 billion. This cost estimate assume reducing I/I flows about 50%, building additional storage facilities and some additional treatment capacities.
- Limited data indicate about 80 % of wet weather flows in a leaky sewer systems reach POTWs.
- Assuming 90 - 95% of wet weather flows nationwide reach POTWs, the minimum estimate for additional costs at POTWs therefore is 90-95% of the national SSO control cost estimate, or \$79 - 83 billion
- The costs estimate could be higher under existing conditions, since more wet weather flows probably reach POTWs currently without the I/I reduction assumed in the SSO control cost estimate



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

EXHIBIT

20

MAR 7 2001

OFFICE OF  
WATER

The Honorable Bill Frist  
United States Senate  
Washington, D.C. 20510

Dear Senator Frist:

Thank you for your December 18, 2000, letter requesting that the U.S. Environmental Protection Agency (EPA) provide an update on the status of our efforts to clarify National Pollutant Discharge Elimination System (NPDES) treatment requirements for discharges from publicly owned treatment works (POTWs) where peak wet weather flow is routed around biological treatment units and then blended with the effluent from the biological units prior to discharge. The Agency remains committed to providing guidance on this issue as expeditiously as possible. I would like to share our current thinking. We believe that NPDES authorities have considerable flexibility through the permitting process to account for different peak flow scenarios that are consistent with generally accepted good engineering practices and criteria for long-term design. We believe that peak wet weather discharges from POTWs that are comprised of effluent routed around biological treatment units together with the effluent from the biological units prior to discharge could be approved in an NPDES permit where all of the following principles are followed:

1. The final discharge meets effluent limitations based on the secondary treatment regulation (40 CFR Part 133) and/or any more stringent limitations necessary to meet water quality standards.
2. The NPDES permit application for the POTW provides notice of, and the permit specifically recognizes, the treatment scheme that will be used for peak flow management. The treatment scheme, including designed capacity of various units, should be consistent with generally accepted practices and design criteria, and designed to meet under the specified treatment scenario effluent limitations based on the secondary treatment regulation and/or any more stringent limitations necessary to meet water quality standards.

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3. Alternative flow routing scenarios are only used when flows exceed the capacity of storage/equalization units and biological treatment units based on generally accepted good engineering practices and criteria as defined in the permit.
4. During peak flow conditions, the treatment system chosen by the permittee is operated as it is designed to be operated and in accordance with the conditions set forth in the permit.
5. The permit contains appropriate requirements for the collection system, including at a minimum, that the permittee properly design, operate, and maintain its collection system and, for permittees that own or operate combined sewers, conditions that conform to the 1994 Combined Sewer Overflow (CSO) Control Policy.

Peak wet weather flows that are routed around the biological treatment units of the POTW that do not meet the criteria listed above are considered prohibited bypasses under the bypass regulation at 40 CFR 122.41(m) unless they otherwise meet the criteria provided in the bypass provision. Under the NPDES regulations, all NPDES permits are required to contain a prohibition on bypasses consistent with 40 CTR 122.41(m).

Additional considerations for permit writers addressing POTWs that use alternative peak flow treatment schemes include:

- A. NPDES permits should require compliance monitoring appropriate for the peak flow treatment scheme recognized in the permit for the POTW.
- B. NPDES permits should ensure that permittees develop good information to foster informed management of the collection system and treatment facility during peak wet weather flow conditions, and, where appropriate, assess potential water quality impacts and performance of treatment technologies under peak flow conditions.
- C. To the extent practicable, NPDES permit requirements for discharges of peak wet weather flows at the POTW should be developed in a manner that encourages comprehensive consideration of both the intended performance of treatment plants in the system and the collection system itself.
- D. NPDES permit conditions are clear and enforceable.

We do not intend the principles for approving routing schemes in a permit described above to address NPDES permit requirements for discharges from facilities other than POTWs, portions of flows that do not receive at least primary treatment, or the treatment of flows resulting from dry weather conditions.

As the Agency continues to develop guidance, we want to ensure that States, municipalities, environmental advocacy groups, and other interested parties have an adequate opportunity to provide data, feedback and input. To assist interested parties in providing input, EPA is developing a draft principles statement reflecting the above considerations, which will be made available for review and comment. We will provide you with a copy of the draft principles statement when it becomes available.

Your letter also requests that EPA provide answers to three questions.

- 1) **Has EPA ever provided public notice that specifically states that blending is prohibited under the bypass or secondary treatment regulations?**

While EPA has not provided specific notice that blending of waste streams is prohibited under the bypass regulation, the Agency has provided specific notice regarding the bypass provision at 40 CFR 122.41(m). The bypass provision defines bypass to mean the intentional diversion of waste streams from any portion of a treatment facility. The provision requires the permittee to operate its entire treatment facility at all times (40 FR 37998, 38036). The regulation prohibits bypass except for a bypass which does not cause effluent limitations to be exceeded, but only if the bypass is for essential maintenance to assure efficient operation. The regulation further provides that the Director of the NPDES program may take enforcement action against a permittee for bypass, unless:

- (A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- (B) There were no feasible alternatives to the bypass; and
- (C) The permittee submitted the required notices.

The Director of the NPDES program may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above. EPA complied with formal rulemaking procedures when it promulgated this regulatory provision. The bypass provision is a minimum requirement for all NPDES permits. Given the complex array of situations that can arise throughout the wastewater industry regulated by the NPDES program, EPA has not requested comment on the many specific situations that may arise under the provision, including the blending of excess (primary treated) wet weather flows with flows treated using biological processes prior to discharge.

On the specific question of diversion of wet weather flows in excess of secondary treatment capacity, the Agency did invite comment on the issue in 1992 in the context of a draft CSO Control Policy. The final 1994 CSO Control Policy does explain that, under limited circumstances, such diversions could be "approved." However, the 1994 CSO Control Policy does not specifically address blending of diverted flows.

- 2) Has EPA formally rescinded its 1992 regulatory interpretation that blending, which achieves final permit limits, is not a bypass?

EPA has not "formally rescinded" any interpretation because the Agency has not yet made a formal interpretation to sustain or rescind. In 1992, EPA proposed for public comment a regulatory interpretation that the term "bypass" not include situations where flows or portions of flows that are diverted from portions of the treatment system are recombined with non-diverted flows prior to discharge if the discharge meets all applicable effluent limits for the treatment plant. When EPA took final action on the CSO Control Policy in 1994, the final CSO Control Policy did not contain the specific language related to recombination, either in the discussion of maximizing treatment at the POTW treatment plant or elsewhere in the Policy.

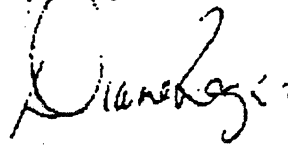
- 3) Has EPA ever completed any regulatory analysis regarding the cost impact and environmental benefits of a blending prohibition?

EPA believes that NPDES permitting authorities have considerable flexibility through the NPDES permitting process to account for different peak flow scenarios that are consistent with generally accepted good engineering practices and criteria for long-term design. As such, NPDES permitting can account for blending. As described above, blending may be approved. EPA did not conduct a formal analysis of the national costs or environmental impacts of alternative regulatory frameworks for addressing peak wet weather flows at POTWs when conducting the regulatory analyses that were applicable at the time when EPA promulgated the bypass regulation.

The Office of Wastewater Management at EPA is currently collecting information about common engineering design practices and operational procedures that are employed to manage peak wet weather flows at POTWs, including representative costs of various treatment schemes (including blending). EPA intends to collect information on the treatment efficiency and potential water quality concerns associated with different practices and procedures, including pathogen control, toxicity reduction and nitrification.

Thank you for your interest and concern. If you have any questions, please do not hesitate to contact me.

Sincerely,



Diane C. Regas  
Acting Assistant Administrator



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

EXHIBIT

21

April 6, 2000

OFFICE OF  
WATER

Mr. John C. Hall  
Hall and Associates  
1101 15<sup>th</sup> Street, NW  
Washington, D.C. 20005-5007

Dear Mr. Hall:

This is in response to your Freedom of Information Act request (Reference Number HQ-RIN-00728-00).

Based on our recent telephone discussion and your follow-up March 6, 2000 letter, I have attached two pieces of correspondence that are responsive to your request. At your request, I faxed a copy of these documents to you on March 21, 2000.

I believe that this satisfies the above referenced Freedom of Information Act request. If you have any additional questions on this matter, please contact me at 202-260-6064.

Sincerely yours,

Timothy J. Dwyer  
Water Permits Division (4203)

Attachments

cc: Freedom Of Information Office (1105)

**From:** TINKA HYDE  
**To:** DCWIC04.DCWCP07.COOK-MIKE  
**Date:** 4/15/99 5:53pm  
**Subject:** REQUEST for Concurrence: Recombination

Mike -

Attached is a memo requesting your consideration and concurrence on a letter (attached) we would like to send to IDEM regarding recombination for CSOs. We appreciate your attention to this issue as it will help IDEM move forward on some outstanding permitting issues. Please note that a hard copy with attachments of this memo will follow shortly. Please let me know if you have any questions. Thanks for your help. Tinka Hyde

**CC:** HENRY-TIMOTHY, R5ORC.R5ORC1.PRICHARD-GARY, R5WQB1....



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 5**  
**77 WEST JACKSON BOULEVARD**  
**CHICAGO, IL 60604-3590**

REPLY TO THE ATTENTION OF:  
WN-16J

**MEMORANDUM**

**DATE:**

**SUBJECT:** Request for Concurrence with Recombination Letter

**FROM:** Tinka G. Hyde, Acting Director  
Water Division

**TO:** Michael B. Cook, Director  
Office of Wastewater Management

Region 5 has been interested in establishing guidance on the use of recombination as a means to meet NPDES permit effluent limitations at POTWs served by combined sewer systems. Such an approach, if carefully applied, could allow POTWs greater flexibility to treat a larger amount of flows during wet weather periods which might otherwise be discharged as untreated CSOs. Region 5 requested Headquarters' concurrence with the recombination approach in a February 26, 1998, memorandum from Jo Lynn Traub to Eric Schaeffer, Susan Lepow and yourself. (Copy attached).

Although we have had a number of discussions on the Region 5 approach and believe we have your agreement on our proposal, we have not received a formal response to our request. We understand that such a response will not be forthcoming, as staff are concentrating on the sanitary sewer overflow policy. In view of this, and the fact that the Indiana Department of Environmental Management has been requesting a determination from EPA on recombination in order to resolve a number of permitting matters, we would like to send the attached letter to IDEM, with your concurrence. This letter has been drafted along the lines of past discussions we have had with you and your staff. If you agree with the attached letter, we would appreciate your concurrence. Once you concur with the attached letter, we will as a matter of courtesy, send a copy to OECA and notify them that we intend to send it to IDEM in the near future.

Thank you for your assistance in this matter.

Attachments

cc: Steve Sweeney, OGC

[Addressee at IDEM]

Dear []:

The Indiana Department of Environmental Management (IDEM) has requested input from the United States Environmental Protection Agency (U.S. EPA) regarding interpretation and application of National Pollutant Discharge Elimination System (NPDES) regulations under a specific set of circumstances associated with operation of a municipal wastewater treatment plant (WWTP) that serves a combined sewer system. Specifically, municipalities with combined sewer systems want to route excess, peak, wet weather flows at the WWTP that have received primary treatment around their biological treatment units and recombine such flows with flows that have received biological treatment prior to discharge and monitoring for compliance with effluent limitations. This scenario is likely to arise with great frequency as municipalities with combined sewer systems seek to implement the Nine Minimum Controls and their Long Term Control Plans to ensure that their discharges from combined sewer overflows meet the requirements of the Clean Water Act. IDEM has asked whether NPDES permits can be issued authorizing such peak flow routing and recombination without such rerouting and recombination being considered a "bypass" under federal NPDES regulations at 40 CFR 122.41(m).

U.S. EPA believes that the answer to IDEM's question is "yes," provided the permit application explicitly describes the circumstances during which the rerouting/recombination would occur and the permit contains provisions explicitly recognizing those circumstances. U.S. EPA's position is based upon the fact that "bypass" is defined as "the intentional diversion of waste streams from any portion of the treatment facility." 40 CFR 122.41(m)(1)(i). The question of what constitutes a permittee's "treatment facility" is one that can be answered by the permittee in its permit application. See 40 CFR 122.21(f)(7). A permittee can describe in its permit application that the "treatment facility" it has designed and constructed for the purpose of providing treatment necessary to comply with NPDES permit effluent limitations is one designed to provide differential treatment of wastestreams during peak flow conditions (*i.e.*, it is designed to provide only primary treatment to certain flows during peak flow conditions). If the permit writer includes in the permit an explicit recognition of this differential treatment, and if the treatment facility is operated in accordance with the treatment facility's design for providing treatment during peak flow conditions, any rerouting/recombination that occurs during such conditions would not constitute a diversion from the "treatment facility," and so would not constitute a "bypass."



U.S. EPA expects that a permittee's utilization of differential treatment will, in many situations, give rise to the need for additional water quality based effluent limitations and monitoring requirements beyond those that might be necessary if the permittee's chosen treatment facility is one designed to provide biological treatment to all flows. Consequently, U.S. EPA believes that a permittee proposing to utilize differential treatment should be required to provide the permit writer with monitoring data on how the types and quantities of pollutants in rerouted flows may differ from flows which have gone through biological treatment units. This additional data should include data to characterize the toxicity of the combined flows. The permit writer should carefully evaluate that data to determine whether additional water quality-based limitations and monitoring requirements should be included in the permit to ensure that discharges do not cause or contribute to nonattainment of water quality standards, including requirements to ensure that the permittee performs effluent monitoring for assessing compliance with effluent limitations during periods when differential treatment is being utilized.

U.S. EPA further believes that a permittee seeking authorization to utilize such differential treatment should be required to describe in the permit application exactly how the WWTP will be operated during peak, wet weather flow conditions to best utilize the full treatment capacity of the WWTP. For example, the permittee should describe the capacity of the biological treatment units and the peak flow conditions under which rerouting would occur, and the permit writer should include conditions in the permit to ensure that the WWTP is operated in a manner that will best utilize the full treatment capacity of the WWTP.

U.S. EPA notes that "removal credits" that may have been allowed to the municipality's industrial users in the past may have to be reexamined and adjusted to reflect the fact that the WWTP would not be providing full biological treatment to all flows. U.S. EPA also notes that permittees have the obligation to design and construct treatment facilities that will be adequate to ensure compliance with effluent limitations. If a permittee is unable to meet its effluent limits using differential treatment, the permittee could be subject to an enforcement action under the Clean Water Act for civil penalties and injunctive relief. The extent to which the permittee knew or should have known that its differential treatment facility might be inadequate to allow it to meet effluent limits would be a relevant factor in assessing the permittee's culpability and good faith efforts to comply, both of which are factors that would be taken into account in determining the amount of any civil penalty that might be imposed for such violations.

We appreciate IDEM's patience as U.S. EPA has sorted through the issues raised by IDEM's question. If you have any further questions, please contact Peter Swenson of my staff at (312) 886-0236.

Sincerely,

Tinka Hyde, Acting Director  
Water Division



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460



April 5, 2002

OFFICE OF  
WATER

John C. Hall  
Hall & Associates  
Suite 203  
1101 15<sup>th</sup> Street, N.W.  
Washington, D.C. 20005-5004

Dear Mr. Hall:

This is a partial response to your October 25, 2001, letter which requested information under the Freedom of Information Act. EPA has assigned this request the number HQ-RIN-00459-02. In your letter, you requested information pertaining to:

Secondary Treatment Regulation

- 1) Any documents from the development of the secondary treatment rule which confirm or discuss that:
  - A) EPA intended 100% of all flows, including peak wet weather flows, to be processed through biological treatment;
  - B) In developing the cost impact associated with achievement of secondary treatment requirements, EPA included costs associated with ensuring that the biological treatment operation was sized to process all peak wet weather flows, regardless of magnitude; and
  - C) EPA intended to restrict or prohibit the practice of blending primary treated peak flows with other flows receiving biological treatment as a wet weather flow management option for achieving compliance with secondary effluent limitations.

Bypass Regulation

- 2) The entire administrative record for the proposed and final adoption of the federal bypass regulations (1979 and 1984 final agency action), including any internal comments generated by EPA regarding the intended scope and application of the rule.

\* \* \*

- 4) Any document prepared by EPA indicating the cost impacts of prohibiting the use of blending at POTWs to manage peak wet weather flows.
- 5) Any document indicating whether EPA approved federal funding under the Construction Grants Program for projects incorporating blending of peak flows (e.g, agreed to allow primary facilities to be sized to accommodate greater influent flow than the secondary biological process).

## Response

### Response to Question 1A

In response to question 1A, EPA has no documents showing that 100 percent of all flows must be processed through biological treatment. I have enclosed the following:

- I) A March 2, 2001, letter from Diane Regas to the Honorable George W. Gekas of the United States House of Representatives. This letter clarifies that with the exception of alternative requirements for facilities eligible for treatment equivalent to secondary treatment, the secondary treatment regulations at 40 CFR 133 do not specify the type of treatment process that must be used to meet secondary treatment requirements nor do they preclude the use of non-biological facilities.
- II) Excerpts from the November 16, 1983 preamble from 48 FR 52259. This document provides that "With the exception of the SS adjustment for WSPs, the current secondary treatment regulation itself does not address the type of technology used to achieve secondary treatment requirements"

### Response to Question 1.B

In response to question 1.B. EPA did not estimate costs associated with ensuring that the biological treatment operation was sized to process all peak wet weather flows under all conditions. In general, performance and cost information considered during the development of the secondary treatment regulation focused on effluent concentrations consistently achievable through proper operation and maintenance from "well operated" treatment plants. "Effluent concentrations consistently achievable through proper operation and maintenance" is defined at 40 CFR 133.101(f) as the 95<sup>th</sup> percentile values for the 30-day average effluent quality achieved by treatment works, excluding values attributable to upsets, bypasses, or other unusual conditions.

A Statement of Work used to direct the contractor Roy Weston to develop technical background material for guidelines for secondary treatment or equivalent is enclosed. The statement of work clarifies that the effluent guideline is based on data from facilities that are 'not overloaded beyond

the design criteria by pollutants or hydraulics'. Excerpts from the resulting product "Effluent Limitations by the Application of Secondary Treatment", November 17, 1972 are also enclosed.

Response to Question 1.C

There is no information on the record to the secondary treatment regulation that indicates that EPA considered restricting the practice of blending primary treated peak flows with other flows receiving biological treatment as a wet weather flow management option for achieving compliance with secondary effluent limitations. As stated above, in general the secondary treatment regulation itself does not address the type of technology used to achieve secondary treatment requirements.

Response to Question 2

A list of the documents EPA has regarding the administrative record for the proposed and final adoption of the federal bypass regulations (1979 and 1984 final agency action), including internal comments generated by EPA, is attached. Please let me know if you want to review any of these materials, or would like copies of any of the materials.

Response to Question 4

EPA has no documents indicating the cost impacts of prohibiting the use of blending at POTWs to manage peak wet weather flows that were used in the development of the secondary treatment regulations or the bypass regulations.

Response to Question 5

EPA has a number of documents indicating that EPA allowed the use of federal funds under the Construction Grants Program to build facilities that were designed to blend effluent from primary treatment processes with effluent from biological treatment processes during peak wet weather events. These records are available for your review and copying.

Please call me at (202) 564-0742 if you have any questions regarding our response.

Sincerely,

A handwritten signature in dark ink, appearing to read "Kevin Weiss", with a stylized flourish at the end.

Kevin Weiss  
Water Permits Division  
Office of Wastewater Management



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 2 2001

OFFICE OF  
WATER

The Honorable George W. Gekas  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Gekas:

Thank you for your December 5, 2000, and February 2, 2001, letters asking the U.S. Environmental Protection Agency (EPA) to respond to a December 1, 2000, letter from George Wolfe, Township Manager for Lower Paxton Township. Mr. Wolfe's letter requests that EPA respond to a October 16, 2000, letter from Frederick Morrocco of the Pennsylvania Department of Environmental Protection (PADEP). There has been extensive correspondence over the past several months between EPA, PADEP, Lower Paxton Township, and the attorneys representing the Township. This response is to address the major regulatory and policy questions that are raised in the collective correspondence. We have copied various representatives with the PADEP with the intent of responding to the issues, along with our response to you and Lower Paxton Township.

The questions raised in the correspondence center on the degree to which Lower Paxton Township has taken appropriate efforts to effectively manage (e.g., collect, transport and treat) municipal and industrial wastewater. More specifically, the correspondence raises questions about the applicability of the secondary treatment regulation (40 CFR Part 133). While the regulation does establish requirements for effluent quality from municipal wastewater treatment plants, it also provides discretion on when and how to apply this flexibility given site specific considerations. EPA or the State's determination of the degree of flexibility to be allowed is guided by the regulations, but is determinant upon an agreed understanding of the core facts and conditions associated with the past, current and future efforts of Lower Paxton Township to address problems with its existing wastewater collection and treatment system. Clearly, the State and Lower Paxton Township need to agree on the basic facts of the situation before agreement can be reached on when and how to apply the flexibility in the regulations. With that said, we can now address the specific questions that have been raised regarding application of the secondary treatment regulations to peak excess flow treatment facilities (PEFTFs) that are designed solely to treat peak wet weather flows from sanitary sewer collection systems.

**Do the secondary treatment regulations apply to PEFTFs serving sanitary sewer collection systems?**

Yes. EPA interprets the Clean Water Act to require that a permit issued for discharges from a PEFTF that is part of a sanitary sewer collection system needs to include effluent limitations based on the secondary treatment regulations and any more stringent limitations necessary to attain water quality standards.

**Do the secondary treatment regulations allow an authorized NPDES State to grant a less restrictive percent removal requirement in a permit authorizing discharges from a PEFTF on a sanitary sewer system?**

Yes. The regulations do recognize specific situations where an NPDES authority may substitute lower percent removal requirements for less concentrated influent from separate sanitary sewer systems. The regulations authorize the NPDES authority to substitute either a lower percent removal requirement or a mass loading limit for the 85 percent removal requirements (or lower percent removal requirements for facilities eligible for treatment equivalent to secondary treatment), as long as the regulatory prerequisites identified in 40 CFR 133.103(d) are met.

**Do the secondary treatment regulations preclude the use of non-biological facilities that otherwise meet secondary treatment objectives?**

No. The secondary treatment regulations define minimum levels of effluent quality for publicly owned treatment works (POTWs). These requirements are in the form of 7-day and 30-day average effluent concentrations and a 30-day average percent removal requirement. With the exception of alternative requirements for facilities eligible for treatment equivalent to secondary treatment, the secondary treatment regulations do not specify the type of treatment process that must be used to meet secondary treatment requirements nor do they preclude the use of non-biological facilities.

**When adjusting percent removal requirements under the secondary treatment regulations, should the cost of removing infiltration and inflow (I/I) be compared with the cost of transporting and treatment to a continuously operating treatment facility providing biological treatment or to the cost of transporting and treatment at a PEFTF?**

The secondary treatment regulations do not specify whether the cost of correcting I I conditions should be compared with the cost of transport and treatment to a continuously operating treatment facility providing biological treatment or the cost of transport and treatment at a PEFTF designed to solely treat wet weather flows. Therefore, the NPDES authority has discretion in how this analysis should be applied and should be guided by the underlying

objectives and considerations of the percent removal requirements in determining the most cost-effective combination of treatment necessary for addressing the flow. The secondary treatment regulations define 30-day average percent removal requirements for suspended solids (SS) and the five-day measure of biochemical oxygen demand (BOD<sub>5</sub>). For most POTWs, the secondary treatment regulations establish a 30-day average percent removal requirement of 85 percent for SS and BOD<sub>5</sub>. Facilities eligible for treatment equivalent to secondary treatment are subject to lower percent removal requirements.

The percent removal requirements were originally established to achieve two basic objectives: (1) to encourage municipalities to correct excessive I/I problems in their sanitary sewer systems, and (2) to help prevent intentional dilution of influent wastewater as a means of meeting permit limits. Later, the Agency recognized the need for adjustment of the percent removal requirements in some cases. This need was based on the following considerations: (1) in general, I/I programs have not been as successful in reducing excessive I/I as expected; (2) many treatment systems without excessive I/I have relatively low influent strengths; (3) certain treatment technologies cannot achieve 85 percent removal under all conditions; and (4) a mandatory requirement of 85 percent removal for all POTWs could cause overly stringent levels of treatment and use of expensive advanced treatment processes in some cases.

As a result of these findings, the secondary treatment regulations provide that the Director is authorized to substitute lower percent removal requirements or a mass loading limit for the percent removal requirement if the permittee demonstrates:

- A) the treatment facility will consistently meet its permit effluent concentration limitations but its percent removal requirements cannot be met due to less concentrated influent.
- B) to meet the percent removal requirements, the facility would have to achieve significantly more stringent limitations than would otherwise be required by concentration-based standards, and
- C) the less concentrated influent is not the result of excessive I/I. Excessive I/I is the quantities of I/I that can be economically eliminated from a sewer system as determined by a cost-effectiveness analysis that compares the costs for correcting the I/I conditions to the total costs for transportation and treatment of the I/I to a treatment facility.

This approach was adopted to provide flexibility, and, at the same time, encourage cost effective I/I reduction. The flexibility is necessary to address facilities that are experiencing various degrees of less concentrated influent and cannot meet the 85 percent removal requirement without significant additional construction.

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 nonexcessive if the total flow to the POTW (i.e., wastewater plus inflow plus infiltration) is less than 275 gallons per capita per day. The 275 gallons per capita per day figure is only a threshold value, and permittees may determine that even higher values of I/I are nonexcessive through a cost-effective evaluation on a case-by-case sewer system basis. Guidance for the cost-effectiveness analysis associated with demonstrating that I/I is not excessive is provided in *Sewer System Infrastructure Analysis and Rehabilitation*. (EPA, 1991, EPA-625 6-91/030).

Neither the regulations nor EPA guidance specifically address the issue of whether the cost of correcting I/I conditions should be compared with the cost of transport and treatment to a continuously operating treatment facility providing biological treatment or the cost of transport and treatment at a PEFTF designed to solely treat wet weather flows. EPA did not focus on the distinction during the rulemaking. The NPDES authority has discretion in how this analysis should be applied and should be guided by the underlying objectives and considerations of the percent removal requirements in determining the most cost-effective combination of treatment necessary for addressing the flow.

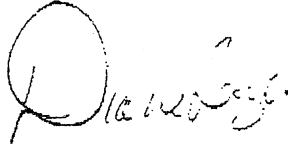
In summary, EPA supports appropriate flexibility when applying percent removal requirements, provided there is a clear, comprehensive plan to effectively address collection system deficiencies. EPA recognizes that addressing I/I problems in a sanitary sewer collection system typically calls for an ongoing commitment and that achieving significant reductions in I/I can take time.

Where the secondary treatment percent removal requirement is modified in accordance with 40 CFR 133.103(d), the situation must be reevaluated when reissuing a subsequent permit in light of: changing circumstances, such as progress made in rehabilitating the collection system; and planning criteria, such as the duration of financial instruments used to finance the project. If the reevaluation of criteria indicate that I/I was significantly reduced and/or the peak flow capacity of the system was increased, the percent removal requirement of subsequent permits may be more stringent. EPA would address PEFTFs that are not designed to meet effluent limitations based on secondary treatment or any more stringent water quality-based requirements on an interim basis in enforcement actions, which provides a formal commitment and schedule to carry out a plan to correct problems and which identifies a date by which discharges from the PEFTF would need to be eliminated.



We are committed to help all the parties reach agreement on a common understanding of the technical information that forms the basis of the appropriate application of regulatory flexibility provided in the secondary treatment rule. I hope this letter addresses your concerns. If you have any questions, please do not hesitate to contact me, or have your staff contact Kevin Weiss at (202) 564-0742.

Sincerely,

A handwritten signature in dark ink, appearing to read "Diane C. Regas". The signature is written in a cursive style with a large initial "D" and a stylized "R".

Diane C. Regas  
Acting Assistant Administrator



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

EXHIBIT

23

April 8, 2002 OFFICE OF  
WATER

John C. Hall  
Hall & Associates  
Suite 203  
1101 15<sup>th</sup> Street, N.W.  
Washington, D.C. 20005-5004

Dear Mr. Hall:

This is a partial response to your October 25, 2001, letter which requested information under the Freedom of Information Act. EPA has assigned this request the number HQ-RIN-00459-02. This partial response addresses question 3 from your letter, in which you requested information pertaining to:

Bypass Regulation

- 3 Any document developed as part of the bypass rule adoption indicating that the bypass regulation intended to restrict the ability to use blending as a wet weather flow management option at POTWs.

**Response**

Under the NPDES regulations, bypass is defined as 'any intentional diversion of waste streams from any portion of a treatment facility'. The bypass provision prohibits bypasses except in limited circumstances where the bypass is for essential maintenance and does not cause effluent limitations to be exceeded (see 122.41(m)(4) and (m)(2)). A similar bypass provision has been incorporated into the pretreatment regulations at 40 CFR 403.17.

EPA has no documents from the promulgation of the bypass provisions that indicate that the bypass rule was intended to preclude the use of blending as a wet weather flow management option. However, EPA has indicated that "the bypass regulation is a general requirement which, although it works in conjunction with a categorical [treatment] standards, is not itself an effluent standard . . . the bypass provision merely 'piggybacks' existing requirements, it does not itself impose costs that have not already been taken account in development of categorical standards" (53 FR 40609 (October 17, 1988)) "The bypass regulation is *not* a *de facto* effluent limitation" (*NRDC v EPA* (822 F.2d 104, 123)) [emphasis in opinion]. "The bypass provision does not dictate how users must comply because it does not dictate what [treatment] technology the user must install. . . Instead, the user must operate the treatment system in a manner consistent with appropriate engineering practice." (53 FR 40609 (October 17, 1988)). "The [bypass] regulation

thus ensures that treatment systems chosen by the permittee are operated as anticipated by the permit writer, that is, as they are designed to be operated and in accordance with the conditions set forth in the permit.” NRDC v. EPA 822 F.2d 104, 122 (D.C. Cir.1987).

As noted in my April 5, 2002 partial response to FOIA HQ-RIN-00459-02, there is no information on the record to the secondary treatment regulation that indicates that EPA considered restricting the practice of blending primary treated peak flows with other flows receiving biological treatment as a wet weather flow management option for achieving compliance with secondary effluent limitations. As stated in the April 5 response, in general the secondary treatment regulation itself does not address the type of technology used to achieve secondary treatment requirements. The secondary treatment requirements are in the form of 7-day and 30-day average effluent concentrations and a 30-day average percent removal requirement. With the exception of alternative requirements for facilities eligible for treatment equivalent to secondary treatment, the secondary treatment regulations do not specify the type of treatment process that must be used to meet secondary treatment requirements nor do they preclude the use of non-biological facilities.

EPA does have other information relating to the purpose and scope of the bypass provision. Please let me know if you want to review any of these materials, or would like copies of any of the materials. A partial summary of some of the information follows.

In promulgating the bypass regulation, EPA indicated, “[t]he bypass provision was intended to accomplish two purposes. First, it excused certain unavoidable or justifiable violations of permit effluent limitations, provided the permittee could meet the bypass criteria. Second, it required that permittees operate control equipment at all times, thus obtaining maximum pollutant reductions consistent with technology-based requirements. Without such a provision, discharges could avoid appropriate technology-based control requirements.” (49 FR 38036 (Sept. 26, 1984)).

After promulgation, the bypass provision was challenged, and ultimately upheld by the court in NRDC v. U.S. EPA (822 F.2d 104, 122 (D.C. Cir.1987)). The NRDC court found that “the bypass regulation does not, in fact, dictate that a specific treatment technology be employed; instead, the regulation requires that a system be operated as designed and according to the conditions of the NPDES permit.” (822 F.2d 104, 123). The NRDC court made a distinction between a regulation that prohibited permittees from “shut[ing] off their treatment facilities and “coast” simply because they were momentarily not in danger of violating effluent limitations” and “dictat[ing] a specific treatment technology be employed”. EPA has indicated that the bypass “provision thus requires NPDES permittees to operate their entire treatment facility at all time.” (53 FR 40607, October 17, 1988).

The court in U.S. v. City of Toledo, Ohio (63 F.Supp.2d 834 (N.D. Ohio 1999)) provided “that one focus of the bypass prohibition is to ensure the constant operation of all *existing* equipment, . . . [and] another focus is to avoid any violations of permit effluent limitations”.

[emphasis added]. In the Toledo case, the court used these two focusses of the bypass provision to justify requiring, in addition to the use of existing equipment, the permittee to provide additional capacity that was necessary to avoid violations of permit effluent limitations.

“[T]he National Pollutant Discharge Elimination System (NPDES) regulations provide sufficient flexibility for permit writers to account for the designed-in intentional diversion of wastewater around a treatment unit without triggering bypass in special or unique situations when writing permits.” (March 12, 1997 letter from EPA Water Management Division to Lial Tischler)

The preamble to the 1984 bypass regulations provides, “Seasonal effluent limitations which allow the facility to shut down a specific pollution control process during certain periods of the year are not considered to be a bypass. Any variation in effluent limits accounted for and recognized in the permit which *allows a facility to dispense with some unit processes under certain conditions is not considered bypassing.*” [emphasis added]

In addition, 40 CFR 122.41(e) provides that the permittee shall at all times properly operate and maintain all facilities and systems of treatment. 40 CFR 122.41(e) requires the operation of backup and auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

EPA also has some limited guidance on the term ‘essential maintenance’ that appears in the bypass provision. When promulgating the bypass provision, EPA indicated that “[g]enerally, maintenance is that which is necessary to maintain the performance, removal efficiency and effluent quality of the pollution control equipment.” (Sept. 26, 1984).

EPA has information from Water Environment Manuals of Practice that provide that:

- where peak flows approach or exceed the design capacity of a treatment plant they can seriously reduce treatment efficiency<sup>1</sup>.
- Activated sludge systems are particularly vulnerable to high volume peak flows. Peak flows that approach or exceed design capacity of an activated sludge unit shift aeration basin solids inventory to the clarifiers and can lead to excessive solids losses (i.e., wash out the biological mass necessary for treatment)<sup>2</sup>.
- Shifting solids from the aeration basin to the clarifiers lowers treatment rates until after

---

<sup>1</sup>  
Design of Municipal Wastewater Treatment Plants Fourth Edition, 1998, Water Environment Federation Manual of Practice 8, ASCE Manual and Report of Engineering Practice No. 76, Volume 2, page 11-5.

<sup>2</sup>  
Design of Municipal Wastewater Treatment Plants Fourth Edition, 1998, Water Environment Federation Manual of Practice 8, ASCE Manual and Report of Engineering Practice No. 76, Volume 2, page 11-6.

flows have decreased and the solids inventory are returned to the aeration basin. If the clarifier experiences excessive loss of solids, treatment efficiencies can be lowered for weeks or months until the biological mass in the aeration basin is reestablished. In addition to these hydraulic concerns, wastewater associated with peak flows may have low organic strength, which can also decrease treatment efficiencies.

- There are a number of design and operational options routinely employed by POTWs to handle peak wet weather flows without an excessive loss of solids from the clarifiers<sup>3</sup>. These include utilizing the full capacity of the biological treatment unit and providing primary treatment for additional flows where primary treatment capacity exceeds the capacity of the biological treatment unit. Excess flows receiving primary treatment are typically either discharged directly to receiving waters, with or without disinfection, or recombined with the effluent from the biological units, disinfected and discharged.

Please call me at (202) 564-0742 if you have any questions regarding this response.

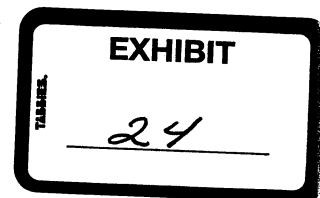
Sincerely,



Kevin Weiss  
Water Permits Division  
Office of Wastewater Management

Roosevelt Childress  
05/11/02 09:34 PM

To: Saya Qualls <Saya.Qualls@state.tn.us>  
cc: Scott Gordon/R4/USEPA/US@EPA, Connie  
Kagey/R4/USEPA/US@EPA  
Subject: Re: Bypass



Saya,

There still is no national policy on this (see the attached blending paper accompanying the April Monthly Update).



apr02blending.wp

In March, we objected to two Alabama drafted permits that proposed to allow blending. After discussions with John Poole, he agreed with us and will either apply secondary limits to the "off-line flow" or allow the county to report any discharges as bypasses or upsets.

We are also preparing to object to a draft permit from South Carolina that allows blending.

We have not changed our position on this and 4-5 other Regions that have an interest in this decision are with us.

I will be out of the office until next Friday. Please call Scott (404/562-9741) if you would like to discuss further.

Thanks,

Ro

Saya Qualls <Saya.Qualls@state.tn.us>



Saya Qualls  
<Saya.Qualls@state.tn.us>

To: Roosevelt Childress/R4/USEPA/US@EPA  
cc:  
Subject: Bypass

05/10/2002 04:26 PM

Ro,

Our permittees are asking about the resolution of this issue. What is the status?

saq



Barry Benroth

11/27/02  
01:40 PM

To: aaron.shultz@EPA.STATE.OH.US, Atal  
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Olander/R2/USEPA/US@EPA, Jamie  
Bernard-Drakey/WWPD/R7/USEPA/US@  
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Huynh/R10/USEPA/US@EPA, Ken  
Greenberg/R9/USEPA/US@EPA, Ken  
Moraff/R1/USEPA/US@EPA, Kevin  
Bell/DC/USEPA/US@EPA, Kevin  
DeBell/DC/USEPA/US@EPA, Kevin  
Magerr/R3/USEPA/US@EPA, Kevin  
Weiss/DC/USEPA/US@EPA, Laura  
Palmer/DC/USEPA/US@EPA, Leonard  
Hotham/R3/USEPA/US@EPA,  
marie.doklovic@ncmail.net, Madonna  
Narvaez/R10/USEPA/US@EPA, Michael  
Wagner/R1/USEPA/US@EPA,

EXHIBIT

25

**SSO Coordinators Teleconference  
November 12, 2002**

**Attendees**

**Headquarters**

Kevin Weiss	OWM/WRD
Kevin DeBell	OWM/WRD
Ross Brennan	OWM/WRD
Barry Benroth	OWM/MSD
Walter Brodtman	OECA
Steve Sweeney	OGC

**Regions**

Jim Olander, Paul Molinari	Region 2
Angela McFadden, Dave Arent	Region 3
Trent Rainey	Region 4
Monica Burrell	Region 6
Jamie Bernard-Drakey	Region 7
Kelly Huynh	Region 10

**States**

Shellie Chard McClary	OK
Patrick Rosch	OK
Tyson Griswold	AL
Rene Mason	OH
Dean Studer	IL
Marie Doklovic	NC

**Agenda**

- Update on the SSO Rule
- Update of the 2003 Report to Congress on the environmental and public health impacts of sewer overflows
- Update on blending lawsuit

**Summary**

**Update on the SSO Rule**

**Ross Brennan** provided a brief update on the SSO rule. He stated that EPA HQ is continuing to work on a revised version of the 2001 SSO rule package for OMB review. The direction WPD staff has received from EPA Administrator Whitman is to go ahead with the regulatory language from the 2001 draft but to revise the preamble. Brennan indicated that there are three fundamental changes to the preamble the WPD is focused on:



- Seeking comments on alternatives to the strict prohibition on SSO discharges laid out in the 2001 draft rule package
- Improving the economic analysis used to support the draft rule
- Summarizing the comments received on the 2001 draft for inclusion in the preamble

WPD has been working with EPA HQ staff and the EPA regional offices to develop the revised version. Brennan indicated that the Agency expects to move shortly into final agency review, the final step before the draft is sent to OMB for their review. WPD is targeting delivery to OMB in early December. Therefore it will likely be February or March of 2003 before the rule would be released from OMB for public comment.

#### Update on the 2003 Report to Congress

**Kevin DeBell** provided an update on the 2003 Report to Congress. The report is due in December 2003, and will report on:

- Location, frequency, volume, and constituents of CSO and SSOs
- Environmental and human health impacts from CSOs and SSOs
- Technologies used by municipalities to control the impacts
- Resources spent to control the impacts.

There is a lot to cover with this Report, but DeBell indicated that the Agency feels good about the direction the Report is taking. Data collection to support the Report is continuing; EPA and its contractors have visited 8 states, with a trip to California scheduled for next week. In addition, the Agency has received electronic SSO data from 13 states. EPA is continuing efforts to improve the number of CSO outfalls with geodata (latitude and longitude) from the 2001 Report to Congress. EPA currently has geodata for nearly 90% of the CSO outfalls, and expects to have data 95% by the time the Report is submitted.

DeBell summarized the public health experts meeting which was held in August 2002. At the meeting EPA received feedback on the strengths and weaknesses of the current methodology for this portion of the Report, and also comments on the relative risk of CSOs and SSOs pose to public health. At the meeting EPA received feedback on the strengths and weaknesses of the current methodology for this portion of the Report, discussed data sources that are available, and gave comments on the relative risk of CSOs and SSOs pose to public health. DeBell added that a meeting summary will be published later this year and made available to the coordinators.

DeBell reported that detailed outlines have been developed for each of the report chapters and that he expects to start drafting portions of the Report in the next couple of weeks. DeBell added that report chapters will not be made available for external review, but promised to keep coordinators involved. And he closed noting that a stakeholder meeting is planned for next spring, with more details to follow.

**Dean Studer** asked about the accuracy of geodata EPA has collected.

DeBell responded that although the level of refinement varies from state to state, the QA/QC process implemented by the contractor team ensures that the data is pretty good.

**Dave Arent** asked when the summary from the public health experts meeting will be available?

DeBell offered that he could provide a draft now; and expects to have the final version formally released by mid-December.

**Jim Olander** asked if the Agency planned to prepare anything similar to the state profiles in the 2001 Report for SSOs.

DeBell responded that EPA intends to profile a subset of municipalities in this report, but not states. He added that the congressional directive for the Report showed more interest in municipal-level efforts as opposed to actions taken by the states.

Olander asked if there be an opportunity to review the municipal profiles before they are finalized.

DeBell replied that municipalities will have an opportunity to review the profiles before they are made final. In addition, EPA regional staff will have an opportunity to review pertinent pieces of the Report.

DeBell then mentioned that EPA is working to finalize the CMOM checklist and SSO emergency overflow response plan. He asked if those on the call recall seeing these documents, and if enough time has passed where it would be worthwhile to review them again.

**Shellie Chard McClary** responded that she would like to see them again.

Arent also indicated that he thought it would be a good idea to send them around.

**Barry Benroth** added that one of the documents may have undergone OCMER review and therefore it may not be appropriate to circulate prior to publication. *[Note from JSM: Although a previous version of the Emergency Overflow Response Plan underwent OCMER review, it has undergone extensive changes and therefore it shouldn't be a problem to redistribute it to the coordinators for comment.]*

#### Update on blending lawsuit

**Steve Sweeney** provided an updated on the Pennsylvania Municipal Authorities Association (PMAA) litigation related to blending. The case was filed by three organizations – PMAA, the Tennessee Municipal League, and the City of Little Rock, AR against EPA Administrator Whitman, and the Regional Administrators for Regions 3, 4, and 6. Lawyers for the plaintiffs are John Hall and Gary Cohen. The lawsuit challenges various positions taken and documents generated by those three EPA regions.

The lawsuit specifically addresses blending or recombination (flows that receive primary treatment, are then diverted around secondary, and recombined prior to discharge); emergency overflow structures in separate sanitary systems (what should the permit say about the structures, if anything); and, what is the statutory standard that applies to SSOs (secondary treatment? BAT? BCT?).

Sweeney indicated that these Regions have taken position the blending is a prohibited bypass, and that the secondary treatment standard applies to SSOs. He added that it is likely that other regions have taken the same position, even if they are not involved in the current case.

On October 25, EPA filed a motion to dismiss this lawsuit, primarily on jurisdictional grounds. The plaintiffs case is based on documents generated as part of a particular enforcement case, or comments generated during the internal Agency process of developing the SSO rule or blending guidance. Sweeney that such documents represent internal deliberations and therefore not final Agency action that is subject to judicial review (unless and until applied). The plaintiffs also contend that EPA has unreasonably delayed action in resolving questions related to blending. The plaintiffs' response to EPA's motion to dismiss is due November 19<sup>th</sup>, and EPA will have until December 4<sup>th</sup> to respond. In the meantime, the plaintiffs have filed a motion for discovery seeking all documents related to these three topics. EPA has moved to stay discovery until the jurisdictional motion to dismiss is resolved.

**McClary** asked if the City of Little Rock was asking to be allowed to using blending.

**Monica Burrell** responded that Region 6 has received a request for blending form Little Rock, and the Region is considering whether a permit modification is appropriate at this point.

#### Next Meeting

Coordinators can e-mail agenda suggestions to Barry at [benroth.barry@epa.gov](mailto:benroth.barry@epa.gov) by December 6<sup>th</sup>. The next meeting will be December 10, 2002, at 3:00 p.m. The phone number is 202-260-7280; the meeting code is 7217#.

SENT BY:

3- 5- 3 : 14:26 : Reg 6 Water SUPPLY -

815016620810;# 2/ 7



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

 REGION 6  
 1445 ROSS AVENUE, SUITE 1200  
 DALLAS, TX 75202-2733

MAR 5 2003

EXHIBIT

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 CERTIFIED MAIL: RETURN RECEIPT REQUESTED (7000-0520-0022-2558-9733)  
 Ms. Maryala Jastrzebski

Manager, NPDES Program

Arkansas Department of Environmental Quality

P. O. Box 8913

Little Rock, AR 72219-8913

 Re: Objection(s) to Preliminary Draft General Permit  
 City of Little Rock - Adams Field  
 NPDES Permit No. AR0021806

Dear Ms. Jastrzebski:

This letter is a follow-up to the general objection letter forwarded to Mr. Chuck Bennett in regard to the above-referenced draft permit modification on December 4, 2002. The December 4, 2002, letter notified the Arkansas Department of Environmental Quality (ADEQ) that EPA believes this permit to be inconsistent with the requirements of the Clean Water Act, including 40 C.F.R. § 122.41(m). In accordance with 40 C.F.R. § 122.44(b)(2) and the memorandum of understanding between EPA and ADEQ, EPA provides the following specific reasons for the objection.

The permit modification as written would allow a diversion from the biological process units at Little Rock Wastewater Utility's (LRWU) Adams Field Wastewater Treatment Plant whenever influent flow exceeds 42 MGD (by specifying that any re-routing of flow beyond the hydraulic capacity of those units is not subject to the bypass prohibition nor is it a bypass as contemplated by Part II, Section B.4 of the Permit). Neither the draft permit nor the fact sheet accompanying the draft permit provide any explanation why such a diversion from the biological portion of the treatment facility would meet the conditions of the bypass regulation found at 40 CFR §122.41(m) and analogous provisions of Arkansas law.

Because the final discharge would include flows diverted from a portion of the treatment system, it is possible that ADEQ could approve an anticipated bypass based on the provisions of 40 C.F.R. § 122.41(m)(4)(ii) and analogous provisions of Arkansas law. Under that provision, the permitting agency may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions in 40 C.F.R. 122.41(m)(4)(i) and analogous provisions of Arkansas law. However, there is nothing in the record or the fact sheet accompanying the draft permit to demonstrate acknowledgment of the three conditions, much



U.S. Department of Justice

Environment and Natural Resources Division

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Telephone (202) 305-2326  
Facsimile (202) 514-8865

February 21, 2003

By Facsimile and  
First Class Mail

EXHIBIT

27

John C. Hall  
Hall & Associates  
1101 15 th St., N.W., Suite 203  
Washington, D.C.

Re: Pennsylvania Municipal Authorities Ass'n v. Whitman,  
Case No. 02-1361

Dear Mr. Hall:

This is to respond to your letter dated February 7, 2003, concerning EPA's responses to Plaintiffs' First Request for Admissions. EPA has carefully considered the issues addressed in your letter and generally disagrees that its responses to Plaintiffs' Requests were deficient in any respect, except as explained herein. The various issues addressed in your letter are discussed below.

**I. EPA's Objections Were Proper**

**1. Objections to Pure Conclusions of Law**

EPA properly objected to certain requests for admission on the basis that these requests seek that EPA admit to pure conclusions of law. There is abundant case law supporting the propriety of this objection. See, e.g., Vons Companies v. United States, 51 Fed. Cl. 1, 14 (U.S. Ct. Fed. Cl. 2001) (holding that government properly objected to taxpayer's requests seeking to have the Internal Revenue Service admit to statements constituting interpretations of rulings, memoranda and other IRS documents). While the distinction between a "pure conclusion of law" and the "application of law to fact" can admittedly be fuzzy, See Kendrick v. Sullivan, 125 F.R.D. 1, 3 (D.D.C. 1989), EPA's objections to the particular requests at issue were well-founded.

The requests at issue ask that EPA admit to legal interpretations concerning the requirements of the Clean Water Act and its implementing regulations, or otherwise answer "hypothetical legal questions." Vons Companies at 13. For example, Request No. 1 seeks that EPA admit that "a municipal facility is not required to utilize biological treatment either

in whole or in part to meet secondary treatment requirements under 40 C.F.R. Part 133." Such a request does not seek application of law to fact; it seeks admission of a pure conclusion of law. To the extent that any of the requests at issue can be said to incorporate facts, they are hypothetical facts, not specific facts that have been established in this case. See Vons Companies, 51 Fed. Cl. 1 at 14 (legal conclusions not "expressly tethered" to facts of the case are objectionable).

Furthermore, Fed. R. Civ. P. 36 clearly does not provide authority for parties to litigation to agree contractually to rewrite the law to assist management of the case. See Vons Companies, 51 Fed. Cl. 1 at 14, n. 15 (statutory interpretation is a legal issue to be determined by the Court not agreement of the parties). Thus, even if EPA were to waive its objection and to admit to any requests, such admissions would have no binding effect on the Court.

Moreover, EPA interpretations of a statute that it administers and its implementing regulations are properly made through administrative processes - including where appropriate after solicitation and consideration of public comments - not by responding in ad hoc fashion to requests for admission intended to advance a particular entity's litigation position.

## **2. Objections Based on APA**

EPA properly objected to certain requests based on the fact that judicial review of claims brought under the Administrative Procedure Act is limited to the existing administrative record, not a new record made initially in the reviewing court.

In the administrative law context, "courts have uniformly held that discovery is typically not permitted." Common Sense Salmon Recovery v. Evans, 217 F. Supp. 2d 17, 20 (D.D.C. 2002). EPA moved to dismiss Plaintiffs' claims (rather than answering and producing an administrative record), because EPA believes that Plaintiffs have failed to identify in their Complaint any reviewable final agency action.

Assuming, solely for the sake of argument, that after consideration of EPA's motion to dismiss, the Court identifies an agency action(s) that is judicially reviewable, EPA would at that point be in a position to produce a record associated with that action(s). After such record had been produced, if Plaintiffs believed that the record needed to be supplemented, Plaintiffs could move to supplement the administrative record. At this point it is unclear that Plaintiffs' Complaint will survive EPA's motion to dismiss. Plaintiffs have not established any need for record supplementation, much less any need to supplement the

record with responses to requests for admission.<sup>1/</sup>

3. Objections To Characterizing Documents That Speak For Themselves

EPA objected to Requests ## 24 and 26 on the grounds that the documents speak for themselves because these requests called for EPA to characterize the contents of a broad universe of complex documentation associated with prior EPA rulemakings. EPA's objections to these requests on such basis were well-founded.<sup>2/</sup>

The Henry case cited in your letter generally supports the proposition that requests for admission that seek interpretations of complex documentation are improper. See Henry v. Champlain Enterprises, 2003 WL 111442 at\*5. As the court stated in Henry, "the more complicated the document, the stronger the objection to an ['interpretation inquiry'] because the complexity obscures the Rule 36 intent to have simple and definitive answers." Id. at \*6. Consistent with this analysis in Henry, EPA objected to requests ## 24 and 26. EPA notes that these requests were the subject of other objections as well.

II. EPA Engaged in a Reasonable Inquiry

EPA engaged in a reasonable inquiry in an effort to respond to Plaintiffs' requests for admission. To respond to Plaintiffs' requests, EPA consulted persons with relevant knowledge concerning the matters addressed, and further reviewed readily accessible documents. As noted in EPA's response to Plaintiffs' interrogatory, 65 EPA employees located in 12 EPA offices nationwide assisted in the preparation of responses to Plaintiffs' requests for admission.<sup>3/</sup>

In preparing its responses, EPA limited its review of documents to documents that were readily accessible. There are

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<sup>1/</sup> For the reasons stated in EPA's motion to dismiss, Plaintiffs have also failed to state a claim under the theory that agency action has been unlawfully withheld or unreasonably delayed. The requests at issue are not relevant to the Court's consideration of this claim. No fact discovery is needed to support or refute EPA's motion to dismiss this claim.

<sup>2/</sup> EPA notes that it asserted this as an objection in response to two of Plaintiffs' requests (requests ## 24 and 26). Requests ## 9, 22 and 63 were answered.

<sup>3/</sup> EPA's search for "grant documents" is described more fully below in the specific discussion of Requests No. 12 and 28.

hundreds of thousands of documents that might potentially address issues covered in the requests for admission. Older documents are generally archived according to federal record retention schedules, and are not readily accessible to current EPA employees.<sup>4/</sup> It is not reasonable to expect EPA to have reviewed every document ever generated that contains information relating to the NPDES permitting program issues addressed in Plaintiffs' requests.

### III. Issues Associated with Particular Requests

#### Request for Admission No. 4

Request for Admission No. 4 seeks EPA's admission that "The Clean Water Act, as interpreted by EPA, does not authorize EPA to dictate municipal treatment plant design." EPA disagrees that this request "asks a purely factual question." The request as phrased is clearly asking for EPA's current legal interpretation of the Clean Water Act.

#### Request for Admission No. 6

Request for Admission No. 6 seeks EPA's admission that the Agency has issued NPDES permits that do not require biological treatment of all flows entering a POTW. EPA admitted to issuance of such permits "when certain other conditions are met or when certain other criteria apply." EPA qualified its response to this request because the request, as phrased, misleadingly implies that biological treatment is not necessary to meet secondary treatment limits. As a practical matter, any POTW will need to use biological treatment to meet secondary treatment limits. Other circumstances exist, however, when secondary treatment limits need not be met and this practical necessity for biological treatment may not exist. These "other conditions" or "other criteria," referred to in EPA's response, include where POTWs discharge to marine waters under permits (with relaxed limits) modified under CWA section 301(h) and, where POTWs discharge under the bypass provision (when treatment of all flows would cause severe property damage, and there would be no feasible alternatives to such treatment).

#### Request for Admissions Nos. 9 and 10

EPA's responses to these requests are not deficient. In responding to these requests, EPA understood that these requests pertain to the Office of Wastewater Management, and EPA's

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<sup>4/</sup> Older construction grant documents may also have been retired (i.e., destroyed) over time pursuant to federal records retention schedules.



responded accordingly. EPA referenced communications from the Administrator, Office of Water, because the Office of Wastewater Management is within the Office of Water.

Other than the communications identified, EPA is not aware of "issued" OWM correspondence responsive to this request. The April 5 and April 8 letters of Kevin Weiss are not responsive to this request. These letters do not "specify[] that NPDES authorities may authorize blending in NPDES permits," or "specify[] that blending or slipstreaming are not prohibited under the federal bypass regulation."

EPA further observes that the word "issued" as it appears in these requests implies that the requests are inquiring into communications relaying official agency policy, not internal deliberative correspondence in which persons within OWM express their own internal views concerning policies under development. If Plaintiffs had drafted the request so as to inquire into such internal deliberative communications, EPA would have objected to the request to the extent it was seeking information protected by the attorney-client privilege, the attorney work product privilege, the deliberative process privilege and other applicable privileges. The memorandum from Mike Cook to Region V identified in Request for Admission No. 32 is an internal deliberative memorandum. That memorandum further does not "specify that NPDES authorities may authorize blending in NPDES permits."

Likewise, the phrase "issued" as it applies to guidance implies that the request does not encompass draft deliberative documents. As discussed in EPA's response to Request for Admission No. 22, OWM did seek internal Agency (and external/States') comments on a draft deliberative memorandum dated December 21, 2001, containing contemplated guidance. This draft memorandum does not constitute "issued" guidance and therefore is not referenced in EPA's response to Request No. 10.

#### Requests for Admission Nos. 12 and 28

To respond to requests for admission 12 and 28 EPA generally questioned persons who work in EPA's Clean Water Act grants offices (in EPA Headquarters and EPA Regions), and who were EPA employees involved in Clean Water Act grant decisions in the 1970s and 1980s. These individuals included Larry McGee and Jim Wheeler, who were "area managers" for the Clean Water Act Construction grants program in EPA Headquarters, Lee Murphy in EPA Region 3, Gene Wossum in EPA Region 6, and Don Gibbons in EPA Region 7.

Historical documentation related to the construction grants program are not maintained in the offices of current EPA employees and are not readily accessible to current EPA

employees. We believe that specific grant documents that are official records of the vintage in your request are likely to have been retired pursuant to federal records retention schedules, whether originally archived by an Office in EPA Headquarters or a Region.

In responding to the requests, EPA questioned Kevin Weiss concerning what documents he was referring to in his letter of April 5, 2002. Mr. Weiss explained that he based his statement on excerpts from three documents provided to him by you and one in his possession, as well as his understanding of the CWA construction grants program. Mr. Weiss does not work in and has not worked in EPA's CWA construction grants program. Mr. Weiss specifically referred to all or portions of four documents: Value Engineering, EPA-430-9-77009 (June 1977) (excerpt); Process Design Manual: Wastewater Treatment Facilities for Sewered Small Communities, EPA-625/1-77-009 (Oct. 1977) (excerpt); Review of Performance of Municipal Secondary Treatment Plants, unknown document number (1982) (excerpt); and Sewer System Infrastructure Analysis and Rehabilitation, EPA/625/6-91/030 (Oct. 1991). EPA subsequently reviewed these documents, and concluded that they do not contain information responsive to Requests for Admission No. 12 and 28.

EPA has been unable to locate the "NPDES Branch Chief meeting" handout identified in paragraphs 66-68 of your Complaint, and is uncertain what briefing materials relating to briefings of Mr. Mehan you are referring to. Briefing materials prepared by Mr. Lape, and/or provided to Mr. Mehan may be privileged. Without waiving any privilege over specific briefing materials, upon information and belief, references within briefing materials to blending being an accepted design under the construction grants program simply restate positions taken by municipalities in contending that EPA should allow blending, and do not reflect the author's independent knowledge of facts relating to the construction grants program.

Gene Wossum of EPA Region VI, who worked in the Clean Water Acts grants program for 31 years, reported that, to his knowledge, no Clean Water Act grant-funded facilities in Region 6 were ever intentionally designed to blend primary effluent with higher treated wastewater to produce an acceptable effluent, except when operating in an emergency mode where treatment units are out of service. However, since receiving your February 7, letter, EPA has made further inquiries concerning the Port Arthur POTW specifically. Mr. Henry Liao, another Region VI employee, who has worked in the Clean Water Acts grant program for over 25 years, recalls the Port Arthur project (funded in the 1970s), and believes it was designed to blend. Mr. Liao recalls that the plant design was "controversial" at the time.

Request for Admission No. 15

We have reviewed the information contained in your letter. We still believe that the request as phrased is vague, ambiguous and unclear. An online search for the term "design and operational mode" reflects that this term does not appear in EPA's current regulations. Your letter cited to 40 C.F.R. § 305, but this section implements the Comprehensive Emergency Response, Compensation, and Liability Act. You have cited to 40 C.F.R. § 35.835-7, but there is no such section EPA's current regulations. Your letter may have intended to refer to regulations that have been repealed or renumbered. Regardless, we continue to believe that the reference to "federally approvable design and operational mode" is not "patently clear."

Request for Admission No. 19

Your letter contains no information that suggests EPA's response to this request should be amended. None of the specific documents you refer to in your letter contradict EPA's response.

You cite to a statement in the draft 1992 CSO Policy, but a statement in a proposed policy (identified as "proposed" and upon which EPA invited public comment) that was removed from the final policy does not constitute a "historical interpretation." The statements in the final policy constitute EPA's historical interpretation. Moreover, as indicated in EPA's response to the Request, the language in the final CSO Policy does not distinguish between intentionally diverted flows that are discharged directly and intentionally diverted flows that are blended with undiverted flows prior to discharge.

The Mike Cook correspondence to Region 5 is an internal deliberative document and does not "specifically recognize" that "blending can be authorized in an NPDES permit without demonstrating compliance with the bypass provision." James Pendergast's letter to Lial Tischler does not address "blending," as that term is defined in your Requests. The Pendergast letter addressed an industrial facility, not a POTW engaged in "blending" as you have defined that term. We are not certain what Region I documents you are referring to, and therefore are unable to comment on such documents.

Request for Admission No. 23

EPA's objection to this request was proper. The request clearly inquires into matters protected by the attorney-client, attorney work product and deliberative process privileges. The cases you cite in your letter do not support the proposition that an agency defendant can be compelled to respond to a request for an admission that agency counsel "concurred" with a draft

deliberative memorandum. Moreover, EPA disagrees that the December 21, 2001, draft document constituted the working law of the agency, especially given that the purpose of the document was to seek comments on a draft.

Requests for Admission No. 24, 31 and 53

EPA properly objected to these requests on the grounds that they are vague, ambiguous and unclear. If particular language is vague, ambiguous, and unclear, the fact that a particular EPA employee used such language in correspondence does not make that language any less vague, ambiguous, or unclear. It is Plaintiffs' burden to craft requests that are not vague and ambiguous. It is not defendants' burden to divine clarity where Plaintiffs have failed to propound simple and direct requests. See Henry v. Champlain Enterprises, 2003 WL 11142 at \*3 ("The requesting party bears the burden of setting forth its requests simply, directly, not vaguely or ambiguously").

Request for Admission No. 32

EPA properly objected to this request. The request clearly inquires into matters protected by the attorney-client and deliberative process privileges. EPA disagrees that internal comments on a draft response letter constitute the "working law" of the agency (EPA notes that upon information and belief, the draft letter referenced in the request was never signed, dated, and finalized for transmission).

Request for Admission No. 33

EPA appropriately qualified its response to this request. See Henry v. Champlain Enterprises at \*3 ("There will be times . . . when the answer cannot be a succinct yes or no, and a qualification of the response is . . . necessary"). If admitted without qualification, the admission would imply that EPA Regions III, IV and VI have taken the position that blending cannot be approved in an NPDES permit. Such implication would have been misleading, and therefore, EPA qualified its response. See Henry at \*3 ("Generally, qualification is permitted if the statement, although containing some truth . . . standing alone out of context of the whole truth . . . conveys unwarranted unfair references").

EPA's qualification stems in part from the complexities inherent in EPA's bypass regulation. Under EPA's regulations, all "bypasses" by definition are "prohibited." See 40 CFR Part 122.4. However, under EPA's regulations, a bypass may be nonetheless be approved in an NPDES permit (even though it is "prohibited"). Thus, to conclude that blending is a bypass is not to conclude that a particular instance of blending cannot be

approved in an NPDES permit.<sup>5/</sup>

It is unclear what document you are referring to which contains the statement attributed to Mr. Sweeney, or the context of that quotation, and therefore we cannot comment on that particular document. However, nothing that you have quoted from that document is inconsistent with EPA's response.

Furthermore, EPA's qualified response to this request is sufficiently detailed. You have requested that EPA identify the "factual circumstances" in which blending can be approved in EPA Region 4. There are an infinite number of potential "factual circumstances" involving blended flows at POTWs. It would be an impossibility to conceive of every factual circumstance in which blending might be involved, and EPA regions have not taken a position on every conceivable factual circumstance in which blending might be involved. As EPA stated in its response to this request, all EPA regions evaluate NPDES permits involving blended flows on a case-by-case basis.

While EPA believes its response was sufficiently detailed, EPA is able to provide some additional information concerning factors considered by EPA Regions III, IV, and VI in evaluating blending. Among other factors, EPA Regions III, IV and VI have considered the bypass criteria specified in 40 C.F.R. 122.41(m)(4)(i)(A)-(C), as well as the "adverse effects" criteria specified in 40 C.F.R. 122.41(m)(4)(ii), which applies to approval of an anticipated bypass.

EPA Region III additionally has considered the criteria set forth in the March 7, 2001, correspondence to Senator Frist referenced in response to request for admission No. 9.

EPA Region VI additionally has considered factors identified in the "Strategy" document attached as Exhibit 5 to EPA's motion to dismiss, and identified in the Complaint at Paragraph 183. The factors identified in this strategy document include: whether peak blended flows receive treatment functionally equivalent to secondary treatment (e.g., advanced physical-chemical treatment); whether the POTW has proper maintenance and controls on its collection system; and whether the principal secondary treatment portion would have the ability to treat 97% of the daily flows reaching the headworks of the plant (i.e., that the peak flow blending scenario would need to be used only 3% or less of daily

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<sup>5/</sup> Accordingly, EPA's statement that each EPA region evaluates NPDES permits involving blended flows on a case-by-case basis is accurate. The fact that Regions III, IV and VI have taken the position that blending is a bypass does not mean that these regions do not evaluate NPDES permits involving blending on a case-by-case basis.

flows reaching the headworks over the course of the year).

EPA Region IV has taken the position that the factors under 40 C.F.R. 122.41(m)(4)(i)&(ii) need not be considered if the permittee instead elects to measure for compliance at an "internal outfall." For clarification, the term "internal outfall" as it appears in EPA's response to Request for Admission 33 refers to an internal compliance monitoring location, not a point of discharge directly into waters of the United States (i.e., after the diversion but prior to the recombination/blending).

#### Requests for Admission No. 34 and 35

EPA's responses to these requests were sufficiently detailed. The further information you request in your letter is not readily accessible. EPA estimates that there are over 19,000 POTWs in the United States (most of which discharge less than 1 million gallons per day), each of which requires an NPDES permit that must be renewed every five years. There exists no database in which the information sought is compiled and maintained. To the extent Plaintiffs seek to obtain such information through discovery, EPA would object on the grounds that such a request is unduly burdensome and oppressive.

#### Request for Admission No. 36

Mr. Roy Herwig is a former EPA employee who has been retired for a number of years. We are not aware of any communications from Mr. Herwig responsive to this request. In response to your letter, EPA has spoken to Mr. Herwig, and Mr. Herwig indicated that he does not recall any such communication.

#### Requests for Admission Nos. 37 and 38

EPA continues to believe that the phrases "lead parties to believe that" and "lead State permitting agencies to believe that," as used in these requests, are vague, ambiguous, and uncertain. EPA acknowledges that these terms appear in Appalachian Power v. EPA, but in responding to your request, EPA did not realize that you intended for these terms to convey a legal standard. Had you made this clear, EPA would have objected to the request. In any event, these terms are not defined or explained in Appalachian Power. Accordingly, to meaningfully answer these requests, EPA believes that some more precise meaning must be ascribed to these vague terms. Without waiving its ambiguity objection, it should be noted that EPA did respond to these requests based on the assumption that the term "lead . . . to believe" was intended to mean "EPA regions have taken the position that . . ."

#### Request for Admission No. 39

EPA does not believe that its response needs to be amended. See above discussion regarding Request for Admission No. 33 for further clarification concerning EPA's response.

#### Request for Admission No. 41

EPA objected to the term "end of pipe limitations" as vague, ambiguous, and unclear because, the request for admission presumes (without so specifying) that such limitations are appropriately derived and reflect all applicable water quality-based and technology-based limitations (including percentage removal requirements).

#### Request for Admission No. 44

We have reviewed EPA's response to this request in response to your letter and determined that EPA did recently resume work on the cost impacts of a prohibition on blending. Accordingly, EPA is amending its prior response to admit the request without qualification.

#### Requests for Admission Nos. 45-51

The requests are objectionable for the reasons stated. Whether or not the requests seek EPA's admission of pure conclusions of law does not turn on whether or not the request is based on a statement that has appeared in some document previously. Likewise, whether or not the requests seek to go beyond an applicable administrative record does not turn on whether or not the admission is based on a statement that has appeared in some document previously.

#### Request for Admission Nos. 57, 58, 60 and 61

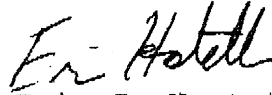
In your letter you indicate that for purposes of these requests an SSO should be defined as an "untreated discharge." However, the instructions within the requests themselves did not define SSOs as "untreated discharges." Thus, EPA's responses were not based on the assumption that SSO are "untreated discharges." As noted in response to Requests for Admission Nos. 67, 69, 70, 71, EPA stated in the 1989 CSO Control Strategy that discharges from separate sanitary sewer systems with less than secondary treatment are prohibited.

#### Request for Admission No. 66

Given that you, in fact, have a copy of this document, we are prepared to waive our objection to this request and to provide a response to this request. Amended responses to this request and to Request 44 are attached hereto.

We would be happy to discuss with you any further questions concerning EPA's responses to Plaintiffs' First Request for Admission.

Sincerely,

A handwritten signature in cursive script, appearing to read "Eric Hostetler".

Eric G. Hostetler

cc: Stephen Sweeney



**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

PENNSYLVANIA MUNICIPAL  
AUTHORITIES ASSOCIATION, *et al.*,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN,  
Administrator, U.S. Environmental  
Protection Agency, *et al.*

Defendants.

Civil Action No. 1-02-01361 (HHK)

**EPA'S AMENDED RESPONSES TO PLAINTIFFS'  
FIRST REQUESTS FOR ADMISSIONS**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants Christine Todd Whitman, Administrator, United States Environmental Protection Agency et al. (collectively "EPA") hereby submits amended responses to Plaintiffs' First Set of Requests for Admissions.

**PRELIMINARY STATEMENT**

Discovery in connection with the matters alleged in the Complaint is continuing and the responses set forth below are based only on currently available information. EPA reserves the right to amend or supplement the responses if different or additional information is subsequently discovered, or if there are changes in the relevance, significance, or applicability of information currently known.

**GENERAL OBJECTIONS**

Defendants specifically incorporate by reference as though fully set forth below

each of their "General Objections" in Defendants' Responses to Plaintiffs' First Requests to Admit,. Subject to and without waiving those General Objections, and asserting each such General Objection for the Amended Responses set forth below as if fully stated therein, Defendants amend their responses to the identified Requests as follows:

### **AMENDED RESPONSES TO REQUESTS FOR ADMISSION**

#### **Request for Admission 44**

EPA has initiated a study to determine the national costs associated with a prohibition on blending.

#### **Response to No. 44**

Admitted.

#### **Request for Admission No. 66**

By letter dated March 23, 1995 from Michael B. Cook, Director, EPA Office of Wastewater Management, to Myron Knudson, Director, EPA Region VI Water Management, EPA Headquarters stated that the effluent limitations for SSO discharges should be based upon BAT/BCT.

#### **Response to No. 66**

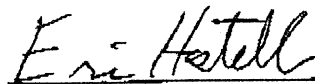
Denied in part, and admitted in part. EPA admits that Michael B. Cook, Director, EPA Office of Wastewater Management, sent a letter dated March 23, 1995 Myron Knudson,, Director, Water Management Division, Region VI. The letter reflects the views of Michael Cook, on behalf of the Office of Wastewater Management, though not "EPA Headquarters" in its entirety. The letter relates to the NPDES permit for the Scott Street Treatment facility in Houston, Texas, and does not refer generally to all SSO discharges, particularly untreated SSO discharges. EPA admits that Mr. Cook with respect to the Scott Street Treatment facility, requested that the final permit decision discussion be modified so that the effluent limitations for SSO discharges at the Scott

Street Treatment facility be based on BAT/BCT. Among other things, Mr. Cook stated in the letter in question:

I recognize that a number of alternative legal theories and implementation approaches (e.g. permits, enforcement) could be used to address the discharges from sanitary sewer collection systems. The Agency intends to have all possible options evaluated as part of the sanitary sewer overflow (SSO) Policy Dialogue. However, given the unique features of the Houston collection system, the desire to issue a permit quickly, our review of the merits of the bypass approach compared with the BAT/BCT approach in this case, and the timing of this action relative to the Policy Dialogue, I believe that the BAT/BCT approach should be used in the Scott Street permit.

Respectfully submitted,

THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment & Natural Resources Division



ERIC G. HOSTETLER  
D.C. Bar # 445917  
United States Department of Justice  
Environment & Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20004  
(202) 305-2326 (telephone)  
(202) 514-8865 (fax)

Of Counsel

STEPHEN J. SWEENEY  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Counsel for Defendants

DATED: February 21, 2003



STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

Division of Water Pollution Control  
6<sup>th</sup> Floor, L & C Annex  
401 Church Street  
Nashville, TN 37243-1534

EXHIBIT

28

February 4, 2002

Mr. Patrick Bradley  
Water Permits Division  
U. S. Environmental Protection Agency  
1200 Pennsylvania Ave. NW (MC 4205M)  
Washington, D.C. 20460

Re: Proposed EPA Memorandum  
NPDES Conditions to Address Municipal Wet Weather Conditions

Dear Mr. Bradley:

The Tennessee Division of Water Pollution Control has completed its review of the above-referenced draft memorandum, dated December 21, 2001, and has generated several comments that are germane to this Division. Briefly, the draft memorandum seeks to address three situations that are related to POTWs and wet weather flow conditions.

1. Tennessee does not allow "emergency" overflows to be constructed at pump stations or at other points in a collection system. NPDES permittees are required to report all instances of overflows in their collection systems. POTWs with chronic overflow situations, defined as five or more events in a 12-month period, are subject to enforcement action and are often required to develop a plan for addressing the situation. Currently, collection system overflow points that are identified in an application are not included in NPDES permits. We do agree that, if collection system overflow points are identified in an NPDES permit, they should also have discharge conditions (either appropriate numerical limitations or a prohibition of discharge). However, this could only be done after the necessary changes to the appropriate regulations.
2. This Division does not necessarily agree with the statement that "A discharge from an emergency outfall identified in a permit is also subject to the bypass provision of that permit." Our interpretation of 40 CFR 122.41(m) is that, by the manner in which the word "bypass" is defined, this section of federal regulations pertains only to diversions of sewage at "treatment plants". As such, collection system overflows do not fit into the category of "bypasses".
3. In one paragraph, a statement is made that the EPA would support NPDES permit conditions that "specifically require a clear, comprehensive plan to effectively address collection system deficiencies including appropriate I/I reduction measures to ensure that the collection system is properly operated and maintained." This plan could include requirements for developing and implementing a program modeled after the EPA's CMOM program. The Tennessee Division of Water Pollution Control is concerned that placing this type of language in this draft memorandum might be somewhat premature, considering that the proposed "SSO" modifications to the NPDES permit rules have not yet reached the Notice of Proposed Rule Making stage. Further, even though the EPA might support such permit conditions, permittees might appeal those provisions, on the grounds that they are not specifically included in any federal rules and are, therefore, not enforceable.
4. The third situation addressed in the draft memorandum pertains to "Wet Weather Treatment Scenarios at Publicly Owned Treatment Works" and is of special interest to the Tennessee Division of Water Pollution Control. In NPDES permits that are issued to POTWs, this Division inserts, nearly verbatim, the contents of 40 CFR 122.41(m). In essence, this Division is placing verbiage in its NPDES permits which prohibits sending any part of sewage around

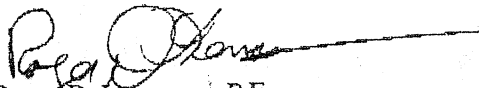
any portion of the treatment train, a term defined as "bypassing". Even though the permittee may argue that the "blended" flow meets all numerical permit limits, we are constrained by the verbiage in 40 CFR 122.41(m), which indicates that bypassing is allowed "only if it also is for essential maintenance to assure efficient operation". The personnel in EPA Region IV who overview our NPDES permits are insistent that this is the proper use of that part of the federal rules. Currently, approximately ten Tennessee permittees who have bypass provisions at their STPs have appealed those specific provisions in their NPDES permits. EPA Region IV staff have been unable to provide a consensus opinion on how to resolve those appeals and have requested a final determination from EPA headquarters. While the verbiage in the draft memo appears to allow "bypassing and blending" at STPs only if the provisions of all five specified conditions are followed, the basis premise of how bypassing is defined and allowed in 40 CFR 122.41(m) remains.

While these five conditions may be appropriate to resolve the NPDES permits that were appealed, there may be those persons who disagree with this decision by the EPA and who may be ready to argue that these five conditions are contrary to the intent of 40 CFR 122.41(m). Perhaps a thorough review of the history of this section of federal regulations might shed some light on how its specific verbiage was determined and whether or not the contents of this draft memorandum are appropriate. Perhaps a modification to the actual verbiage in 40 CFR 122.41(m) might be in order, as a method of providing a definition of the circumstances under which "bypassing and blending" might be a valid method of treating flows in excess of the design capacity of the STP.

While the Tennessee Division of Water Pollution Control understands and basically concurs with the logic of "bypassing and blending", we are concerned that the contents of the draft memorandum are simply a "patch" and do not resolve the actual contents of 40 CFR 122.41(m). Nevertheless, if the contents of the draft memorandum become official EPA headquarters policy, this Division will concur and write NPDES permits which will allow the use of "bypassing and blending", within the conditions that are included in the memorandum.

We appreciate having the opportunity of reviewing and commenting on the draft memorandum. If you have any questions regarding our comments, please do not hesitate to contact us at (615) 532-0649.

Sincerely,

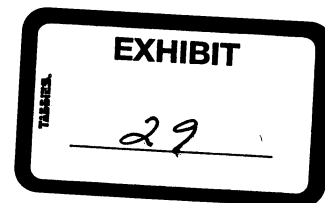


Roger D. Lemasters, P.E.  
Chief Engineer  
Division of Water Pollution Control



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960



MAR 01 2000

REF: 4WM

Mr. Roger D. Lemasters, Manager  
Municipal Facilities Section  
Division of Water Pollution Control  
Department of Environment and Conservation  
6th Floor, L & C Annex  
401 Church Street  
Nashville, TN 37243-1534

SUBJECT: Bristol Wastewater Treatment Plant #2  
Peak Flow Chemically Enhanced Treatment System  
Project No. 98-1148

Dear Mr. Lemasters:

We are in receipt of your letter dated January 27, 2000, asking for our opinion as to whether a proposed alternative by Bristol to address the problem of excessive infiltration/inflow would conflict with 40 CFR Section 122.41(m). After review of the material provided, it is our opinion that this alternative treatment as proposed by Bristol is not in accordance with the regulations and is not consistent with "secondary treatment."

Enclosed are specific comments to the letter dated October 8, 1999, from Mr. William L. Sorah, Deputy City Manager for Operations, City of Bristol. If you have additional questions regarding the technical review of this alternative, you may contact John Harkins at (404) 562-9245. You may direct any questions about the permitting of this facility to Connie Kagey at (404) 562-9300.

Sincerely,

Douglas F. Mundrick, P.E., Chief  
Permits, Grants & Technical Assistance Branch  
Water Management Division

Enclosure: Comments

- 1) The letter clearly states that "the wastewater treated in this system will then be combined with the secondary treatment system effluent." It also states that "the proposed PFCETS ... will provide primary treatment and disinfection ...." The City thus admits that the proposed treatment system does not provide secondary treatment. The Clean Water Act requires that all wastewater discharged from publicly owned treatment works (POTWs) receive, at a minimum, secondary treatment. Thus all treatment trains at a POTW must provide secondary treatment. A treatment train consisting of physical/chemical processes only, in order to meet the requirement for secondary treatment, must at a minimum meet the standards set forth in 40 CFR § 133.102. That is, it must achieve an effluent quality of 30 mg/l BOD<sub>5</sub>, 30 mg/l TSS and a 30 day average of 85% removal of BOD<sub>5</sub> and TSS. Treatment trains incorporating significant biological treatment must meet the secondary treatment standards set forth in 40 CFR § 133.102 or the equivalent to secondary treatment standards set forth in 40 CFR § 133.105.
- 2) Item 1. If the permit does not conform to the regulations then the permit should be modified. The construction of the proposed facility would require a significant increase in the facility's design flow.
- 3) Item 2. Failure to control excessive infiltration and inflow and failure to build adequate secondary treatment units makes the bypass prohibited. Any auxiliary treatment facilities must comply with the Clean Water Act and must provide secondary treatment. Again the City admits that what they are building is not secondary treatment.
- 4) Item 3. Chattanooga, TN and Columbus, GA have combined sewer systems and are subject to EPA's Combined Sewer Overflow Policy. Hartford, CT is not in Region 4, but according to our records, they also have a combined sewer system.
- 5) Item 4. Again the City admits that the planned facility does not provide secondary treatment. The City of Bristol should undertake an aggressive program to eliminate the excessive infiltration and inflow (I/I) which is the obvious cause of their problems. The cost-effective solution, however, must consider the cost to treat to the standard of secondary treatment as set forth in the Clean Water Act.
- 6) The City of Bristol received federal construction grant monies for their wastewater facilities. In accepting these grants the City agreed to properly operate and maintain their collection and treatment facilities and to eliminate excessive infiltration and inflow. Allowing the sewer infrastructure to deteriorate and cause peak flow problems at the wastewater treatment plant is not proper operation and maintenance.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

ATLANTA FEDERAL CENTER  
61 FORSYTH STREET, SW  
ATLANTA, GEORGIA 30303-8909

EXHIBIT

30

JUN 29 1998

REF: 4WMD-SWPFB

Mr. William B. Hathaway, Director  
Water Quality Protection Division  
Environmental Protection Agency  
Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202-2733

Dear Mr. Hathaway:

This letter responds to your February 24, 1998, memorandum requesting copies of all materials that were supplied in response to a December 11, 1997, Freedom of Information Act (FOIA) request by Ms. Carrie McKinney of Kelly, Hart and Hallman. Please find enclosed copies of the materials sent to Ms. McKinney. Because each of the states in Region 4 has been authorized to administer the NPDES program, the state programs were contacted to provide information for the FOIA request. The responses from the States were forwarded to Ms. McKinney, with a copy of any of the permits that were available in the Regional office.

In addition, you requested information regarding the Dayton, Tennessee NPDES permit, TN0020478, which was cited by the City of Fort Worth. Prior to this FOIA request, Region 4 had no knowledge of the current permit requirements. When the draft permit was submitted to the Region for review, the permit required secondary limits for all discharges. The permit, as it is currently written, was revised prior to final issuance without further review from the Region. The permit is clearly inconsistent with requirements of the Clean Water Act (CWA). I have instructed my staff to work with each of the Region 4 states to assure that all NPDES permits for publicly owned treatment works require a minimum of secondary treatment for all discharges.

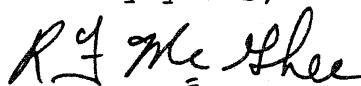
The question of how to deal with peak flows from a POTW due to excessive infiltration/inflow during wet weather is an issue that Region 4 has had an opportunity to address in the Jefferson County, Alabama permit. It has been our position, based on the requirements of the CWA, that after the headworks of a treatment facility, all wastewaters must receive a minimum of secondary treatment, or an approved equivalent to secondary treatment. Thus, a peak flow handling facility, with either a direct discharge or subsequent blending with flows from the wastewater treatment facility, must be designed to achieve secondary treatment standards. A copy of the Jefferson County, Alabama, NPDES permit will be sent to you under separate cover.



With regard to sanitary sewer overflows (SSOs), under the CWA a sanitary system overflow occurring prior to the headworks of the treatment facility is an unpermitted discharge. It has been our position that permits issued to POTWs and private domestic systems must require compliance with this requirement. Several years ago, in response to recognized confusion on the part of POTWs in the State of Florida, Region 4 drafted standard language which is included in Part I of the NPDES permit. A copy of this standard language is attached for your information.

If I may be of further assistance, please do not hesitate to call me or to have your staff contact Andrea Zimmer at (404) 562-9306.

Sincerely yours,



Robert F. McGhee, Director  
Water Management Division

Enclosures

cc: Water Division Directors, Region 1-3, 5, 7-10  
Michael B. Cook

**Kevin Weiss**

09/23/02 12:16 PM

To: Steve Sweeney/DC/USEPA/US@EPA

cc:

Subject: Re: Objection Letters on Blending Issue - Per Conf. Call Request

----- Forwarded by Kevin Weiss/DC/USEPA/US on 09/23/02 12:21 PM -----

**Roosevelt Childress**

09/23/02 11:55 AM

To: Kevin Weiss/DC/USEPA/US@EPA

cc: Scott Gordon/R4/USEPA/US@EPA, Kevin Smith/R4/USEPA/US@EPA

Subject: Re: Objection Letters on Blending Issue - Per Conf. Call Request

Kevin,

These letters are dated March 18, 2002.

The State of Alabama issued these permits on August 29, 2002, after they explained the options to the County. The County chose to report any discharges as upsets or bypasses when they occur. The permits will become effective on October 1, 2002.

Please let me know if you have further questions.

Thanks,

Ro

Kevin Weiss

**Kevin Weiss**

09/20/02 09:08 AM

To: Roosevelt Childress/R4/USEPA/US@EPA

cc:

Subject: Re: Objection Letters on Blending Issue - Per Conf. Call Request

Roosevelt:

Could you let me know the dates the 'Jefferson County' letters were signed? Thanks and hope all is well.

Roosevelt Childress

**Roosevelt Childress**

08/22/02 04:29 PM

To: Kevin Weiss/DC/USEPA/US@EPA, Rebecca

Harvey/R5/USEPA/US@EPA, Russell Martin/R5/USEPA/US@EPA

cc: Scott Gordon/R4/USEPA/US@EPA

Subject: Objection Letters on Blending Issue - Per Conf. Call Request

Kevin,

Attached are letters we sent to Alabama regarding blending concerns with two Jefferson County draft NPDES permits. The letters basically tells the State to instruct the County to choose between two options:

1) if the peak flows are going to be permitted, they would have to comply with secondary treatment standards before blending; or

2) report discharges as either upsets or bypasses and the State will use its enforcement

discretion.

The County wants the flow scheme permitted without limits. Alabama agreed with us and has made this known to the County.

Please contact me if you have any questions,

Roosevelt  
404/562-9279

----- Forwarded by Roosevelt Childress/R4/USEPA/US on 08/22/02 04:05 PM -----

**Andrea Zimmer**  
03/18/02 02:35 PM

To: Roosevelt Childress/R4/USEPA/US@EPA  
cc:  
Subject: Jefferson County Letters

  
jc5m.wp

  
jctc.wpd

CITY OF

**Bangor** MAINE



ENGINEERING DEPARTMENT

James D. Ring, P.E., City Engineer/Director of Public Services

73 HARLOW STREET  
BANGOR, MAINE 04401

TEL. 207/945-4400

May 13, 1994

Joy Palmer  
U.S. Environmental Protection Agency  
Region I  
J.F. Kennedy Federal Building  
Boston, MA 02203

RECEIVED-EPA

MAY 16 1994

COMPLIANCE BRANCH

EXHIBIT

32

Re: City of Bangor, Maine  
CSO Facilities Plan

Dear Joy:

Pursuant to your letter dated February 16, 1994, following is our response to your comments on the Final Draft CSO Facilities Plan. The numbers correspond to the comment numbers presented in your letter.

### 1. PHASES I AND II

The City agrees with the CSO control measures recommended under Phase I and II in the Final Draft CSO Facilities Plan and is proceeding with the implementation of system improvements identified. These will be implemented in accordance with the schedule presented in Figure 1 and Table 2-3. Justification for this schedule is discussed under Item 5 - Financial Capability Analysis.

### 2. CSO MONITORING PROGRAM

The City will continue to monitor CSO discharges and will implement a long-term program to:

- o Obtain data necessary to refine the sewer system model.
- o Determine the impact of Phase I and II projects on CSO frequency and volumes
- o Provide additional data for refining the sizes of Phase III and IV facilities
- o Demonstrate compliance with NPDES Permit conditions after completion of the CSO control program

The program will consist of continued block testing at all CSO regulators, flow monitoring on a rotating basis at the Kenduskeag East and West, Hancock Street, Davis Brook, and Barkersville regulators, continuous rainfall and flow monitoring at the Kenduskeag Pumping Station, and influent flow monitoring and sampling at the Pollution Abatement Facilities (PAF). The

proposed program is discussed in detail in Chapter 6 of the Final Draft Plan. It should be noted that, with the exception of influent sampling at the PAF, the City did not intend to conduct sampling and analyses of CSO discharges on a regular basis. As documented in the Facilities Plan, the quality characteristics of the CSO discharges varied significantly from event to event. We do not feel that periodic sampling and analysis would significantly change the CSO characteristic data obtained during the facilities planning process and therefore do not think that it would be cost-effective. Specific sampling and analysis will be performed after completion of the Phase I and II improvements to verify the impact of these projects. Sampling and testing will also be conducted as part of the vortex separator pilot testing program. Detailed monitoring and sampling plans will be prepared and submitted to EPA/DEP for review and comments prior to beginning these programs.

### 3. PHASES III AND IV OF THE CSO ABATEMENT PLAN

The Phase III and IV storage facilities (Kenduskeag East, Davis Brook, and Barkersville) are all located at the end of autonomous drainage basins that will not be affected by the sewer separation projects. Implementation of the Phase I and II projects will not significantly impact the size of these facilities, therefore, they could actually be implemented any time during the program. The storage projects are scheduled during Phases III and IV as the CSO control program has been structured to optimize CSO capture and treatment through relatively low cost best management practices (BMP) and to eliminate CSO discharges to the critical use areas of the Upper Kenduskeag before implementing the more costly storage and treatment facilities on the Lower Kenduskeag and Penobscot. Expansion of the Pollution Abatement Facilities (PAF) and the Kenduskeag Pumping Station to 43 mgd wet weather flow and 28 mgd, respectively, will be required before the storage facilities can be constructed. These projects will maximize the wet weather flow that can be transported and treated by the existing system.

The size of the storage facilities will be confirmed during design. Final sizing will be based on the refined system model using additional data collected during the long-term monitoring program. The re-evaluation of these facilities after completion of all Phase I and II projects, however, will not significantly change the sizes recommended in the CSO Facilities Plan and therefore is not required.

A pilot study of the proposed vortex separator at Hancock Street will also be conducted prior to beginning design. This study will address solids removal and disinfection efficiencies over the expected range of influent flows as well as the potential for toxic discharges due to control limitations and/or system malfunctions. The City will prepare a plan describing the proposed program prior to beginning the pilot testing. This will be submitted to EPA/DEP for review and approval. The City will work with EPA/DEP in developing the plan to insure that your concerns are adequately addressed. Upon completion of the testing, a TM will be prepared that summarizes the results of the pilot program and documents recent operating data from other vortex separator facilities not previously submitted, as available. The TM will be submitted to EPA/DEP for review and approval prior to beginning the design of Phase IV facilities.

#### 4. WWTP EXPANSION EVALUATION AND GENERIC BYPASS ANALYSIS

The Bangor Water Pollution Control Facility (WPCF) is presently sized to accommodate an annual average flow of 10 mgd, a maximum 30-day flow of 18 mgd, and a peak hydraulic flow of 30 mgd. As stated in the CSO Facilities Plan, expansion of the plant to handle a maximum wet weather flow of 43 mgd is an integral part of the proposed CSO control program. This expansion complies with the Federal CSO Policy in that it 1) maximizes the capture and treatment of wet weather flows at the treatment facility and 2) is the most cost-effective means of providing this treatment as demonstrated in the Facilities Plan. It also complies with draft Region I guidance on CSO related bypasses regarding combining primary and secondary effluent during wet weather events to meet NPDES discharge effluent limitations (Attachment 1).

The projected dry weather flowrate (summer) is 8 mgd. For service areas of this size, the typical ratio of peak dry weather flow as compared to average flow is 2.5 (from Metcalf & Eddy - 3rd Edition) which for Bangor is equal to 20 mgd. Since the facility can handle a maximum of 30 mgd, approximately 10 mgd of wet weather flow can be treated in conjunction with peak dry weather flows. The treatment facility has been designed to be readily expanded to 43 mgd which would provide 23 mgd of wet weather treatment in conjunction with peak dry weather flows.

The full volume of wet weather flow has never been quantified, however the actual flowrate is well in excess of 100 mgd. The Bangor WPCF can only receive approximately 43 mgd from the existing delivery system. Even if the additional flow could reach the WPCF, the existing plant would be unable to treat the additional quantities without washing out the solids in the aeration basins and secondary clarifiers, creating a larger pollutional impact on the receiving water.

It is possible to construct additional secondary treatment facilities (up to 43 mgd, total) on the existing plant site. Additional capacity at this site in excess of this is not possible because of space limitations. The best solution from a technical and cost standpoint for maximizing treatment and minimizing pollutional discharges on site is to provide full secondary treatment for 30 mgd as presently designed and provide primary treatment and disinfection for an additional 13 mgd. By providing treatment capabilities for 43 mgd, the WPCF will provide the optimum level of treatment for all waste flows capable of reaching the plant site thereby minimizing the amount of untreated discharge to the Penobscot River.

Bangor is presently undertaking a pilot study to demonstrate that additional storm flows can receive primary treatment and disinfection, be blended with secondary effluent, and still meet NPDES effluent limitations. If this is demonstrated, a generic bypass authorization will not be required in accordance with current Region I guidance. Therefore, the water quality standards for the Penobscot, by definition, would not be exceeded with this operating configuration. If the study indicates that a generic bypass will be required, water quality standards for coliforms and floating solids would still not be exceeded. This study will be completed during the summer of this year.

An assessment of the environmental impacts of the proposed CSO control program is summarized in Chapter 6 of the CSO Facilities Plan and discussed in detail in Technical Memorandum 10 - Environmental Information Document of the Appendix. As stated in this document, there are no endangered species within the Bangor project area. Therefore, the proposed generic bypass would not jeopardize any endangered species.

*Done P.S.  
memo  
w/ G&T  
& Wildlife  
says there  
are...*

## 5. FINANCIAL CAPABILITIES ANALYSIS

Based on the comments presented in your letter of February 16, the proposed implementation schedule was revised to reflect more realistic sewer separation costs based on ongoing City projects. The revised schedule, presented in Figure 1, still recommends a 15-year implementation period. The projected sewer rates for both a 10-year and 15-year implementation program were also revised based on a more realistic representation of project sequencing. Results of this analysis are presented in Attachment 2 along with additional considerations that support the selection of a 15-year implementation schedule.

The City has made good faith efforts to implement the recommended CSO control program including the initiation of recommended separation projects and systematic rate increases to fund the CSO and other wastewater system improvement programs. The City is committed to implementing all recommended improvements. However, based on the documentation presented in Attachment 2, the implementation of a 10-year program is not financially feasible.

## 6. USE ATTAINABILITY ANALYSIS

The City agrees that a partial use classification for portions of the Kenduskeag Stream and Penobscot River will be required. As stated in the Facilities Plan, water quality violations for fecal coliform will be violated in the vicinity of the remaining discharges after the recommended CSO control program is implemented. Therefore, the City will request that the state adopt a special partial use classification for those portions of the Kenduskeag Stream and Penobscot River that are impacted. This will be done after completion of Phases I and II. We would like to meet with the appropriate EPA and DEP staff prior to submitting this request to determine the information that will be required to substantiate our request.

## 7. CONSENT DECREE COMPLIANCE


Approximate start and end dates for the proposed CSO control program are presented in Figure 1. This schedule shows the approximate start and end times for all projects on a calendar year basis. All City projects, however, are undertaken on a Fiscal Year basis, beginning in July and ending in June of the following year. Multiple year projects will end in June of the year indicated.

The schedule is based on our best estimates at this time. Specific start/end dates are not given.

The City is committed to completing each Phase within the time frame shown. However, the City must have the flexibility to modify the actual start and end dates of individual projects to allow coordination with other capital projects such as other utility installation/repairs, street repaving, etc., minimize the amount of disruption within the City due to construction, as well as to allow for the weather conditions. Therefore, we request that the Consent Decree stipulate end dates for program phases only and allow for modifications of specific project dates within each phase. The same applies to the projected annual expenditures presented in Table 2-2. These are based on our best estimates at this time and may change based on actual project sequencing and construction costs. While the City will commit to the completion of the Program Phases presented in Figure 1, the inclusion of specific annual expenditures in the Consent Decree would not be appropriate.

We hope that the information presented above addresses the questions and concerns raised in your February 16 letter. We intend to prepare an addendum to the Final Draft Facility Plan that incorporates the above revisions after receiving your concurrence. Perhaps it would be appropriate to meet with you at your convenience to discuss our responses and answer any additional questions you may have. Again, we extend the offer for you and other involved EPA staff to meet here in Bangor to see firsthand our new wastewater treatment plant and the other sewer projects that we have undertaken. Please consider this as we feel that it would be very beneficial to both you and the City.

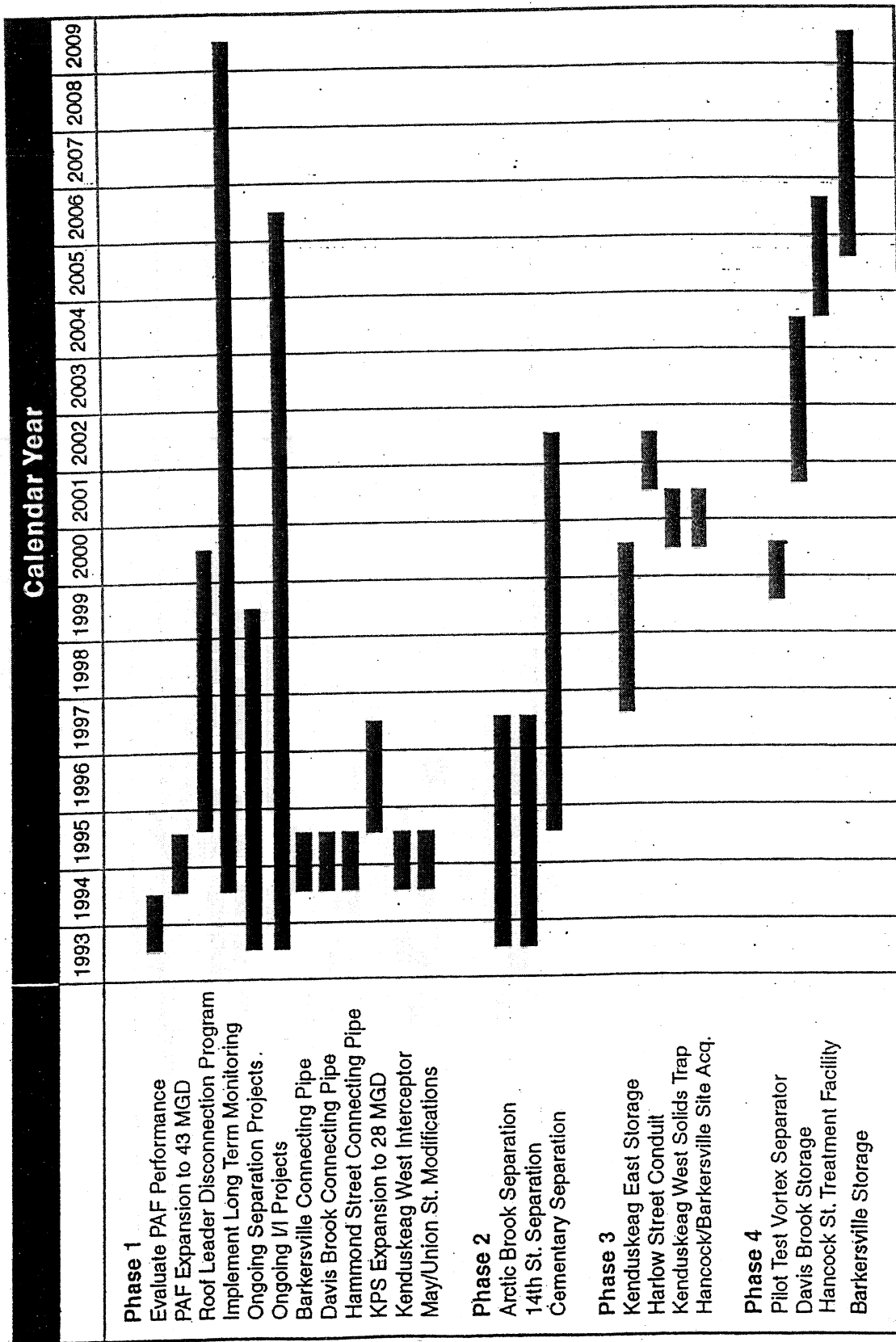
Yours truly,



John L. Murphy, P.E.

cc: J Ring/Bangor  
D. Pincumbe/EPA  
B. Pitt/EPA  
T. Bandrowicz/EPA  
D. Merrill/ME DEP  
S. McLaughlin/ME DEP  
W. Fick/CH2M Hill  
C. Bowers/CH2M Hill





**Figure 1**  
BANGOR CSO FACILITIES PLAN  
REVISED PROGRAM SCHEDULE

Note: Projects are all undertaken on a fiscal year basis, beginning in July and ending in June of the following year. Multi-year projects will end in June of the noted year.

# ATTACHMENT 1

## DRAFT CSO RELATED BYPASS APPLICATION GUIDANCE

### I. Background

EPA has established that CSO communities may apply for "CSO related bypass" authorization for their POTWs. A bypass is defined by federal regulations (see 40 CFR §122.41(m)) as the intentional diversion of waste streams from any portion of a treatment facility. A "CSO related bypass" is defined by the Draft National CSO Control Policy as a preapproved anticipated bypass of secondary treatment facilities. A CSO related bypass authorization would consist of a set of conditions, included in the community's NPDES permit, which would establish when a POTW would be allowed to bypass secondary treatment units and discharge wastewater flow after primary treatment. The purpose of this document is to provide guidance to communities preparing an application for a CSO related bypass authorization to be included in its NPDES permit. Pending full compliance with these guidelines, NPDES Authorities (EPA or delegated state) may, in their enforcement discretion, allow CSO related bypasses as mitigation measures in formal enforcement actions, however all NPDES permit requirements will still apply.

EPA has determined that if a POTW discharges combined primary/secondary effluent which will achieve the numerical limitations contained the community's NPDES permit, the community is not required to obtain a CSO related bypass authorization.

The rationale for a CSO related bypass is that operating conditions can be identified at which a permittee's POTW would always meet the criteria for receiving approval of a bypass (see 40 C.F.R. § 122.41(m)). The criteria which must be met are;

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage. Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass.

For purposes of this guidance, severe property damage may include loss of biomass from biological treatment plants and subsequent inability to comply with permit requirements until the necessary biomass is re-established.

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the

exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance.

For purposes of this guidance, feasibility means both technological feasibility and economic feasibility.

Technological infeasibility might be demonstrated by an analysis showing that the peak secondary capacity of the POTW is as high as is feasible. This might be done by an analysis demonstrating that the amount of pollutants which can be removed by the biological treatment plant is limited by the amount of available biomass. Therefore, even if additional secondary hydraulic capacity were available in reserve, sufficient biomass would not be available to provide effective treatment.

If the community demonstrates that secondary treatment capacity of the POTW is at the limit of technological feasibility, it must still demonstrate that it is infeasible and/or environmentally undesirable to reduce POTW wastewater flows to within the capacity of the secondary plant through sewer separation or storage or other CSO abatement alternative.

Economic infeasibility could be shown by cost analysis demonstrating that the community could not support the financial burden that construction and operation of additional facilities would impose. As part of such a showing, the permittee must demonstrate that bypass of the POTW, coupled with other recommended CSO abatement projects, provides the most environmental benefit for affordable level of investment. The affordability analysis shall consider both marginal costs of increasing levels of CSO control and the ability of the community to fund increasing levels of CSO control. Benefits to be considered include elimination of CSO discharges, restoration of uses, and improvements in the attainment of water quality criteria in CSO impacted areas.

For example, the permittee might demonstrate that pollutant reductions and/or reductions in untreated overflow events attained by using available funds to provide additional primary treatment at the POTW exceed those attained by the same expenditure on secondary expansion or other CSO abatement alternatives such as separation, storage or other CSO abatement alternative.

(C) The permittee submitted notices as required under paragraph (m) (3). (notice at least 10 days prior to the date of the bypass)

Additional requirements established in the National CSO Control Policy are that;

1. A CSO related bypass authorization will not be issued which will result in the POTW discharge causing a violation of water quality standards. For example, disinfection of the bypassed flow must be provided where necessary to achieve bacteriological water quality criteria.
2. A CSO related bypass authorization will not be issued which allows a POTW to bypass prior to primary treatment.
3. The feasible alternative analysis should include consideration of enhanced primary treatment.

## II Guidelines

### A. Applicants must;

1. Be NPDES permittees, or own or operate a point source discharge within the meaning of the Act.
2. Own or operate a POTW which receives flow from combined sewers.

### Applications must;

1. Be received in conjunction with a request to modify or reissue the permittee's NPDES permit.
2. Contain all information necessary for the NPDES Authority to make a decision on the application.
3. Contain the specific conditions under which the permittee believe it can justify the CSO related bypass. Bypasses of POTWs prior to primary treatment will not be considered for CSO related bypass authorizations.

If these condition are met, the application shall be deemed sufficient to meet the notice requirements of 40 C.F.R. 122.41(m) (4) (C).

### B. Information necessary for NPDES Authority to make a decision on the application

A long term CSO control plan (CSO Facilities Plan) must be submitted with the application. The long term control plan must contain the information required by EPA's National Combined Sewer Overflow Control Policy. Specific information which must be

included in a long term control plan which recommends a CSO related bypass includes;

1. A description of the existing POTW, including the design flow capacity (both average and peak) of the existing treatment units, and the discharge point of the bypassed effluent (i.e. will it be combined with secondary effluent and discharged through the POTW outfall or will it discharge through a separate outfall?).
2. Alternative Evaluation
  - a. A summary of the alternatives to the CSO related bypass which were evaluated, with an analysis of why they were not considered feasible (see I(B) above).

Examples of such alternatives are sewer separation or CSO storage sufficient to reduce POTW peak flow rates to within the capacity of secondary treatment facilities.

- b. If no alternatives to a CSO related bypass are considered feasible, the permittee must demonstrate that its selected alternative maximizes the amount of flow receiving secondary treatment, consistent with technological and economic feasibility requirements (see I.(B) above).

Reductions of flows receiving secondary treatment at existing facilities will not be considered, unless the applicant shows that the existing POTW is experiencing severe property damage during wet weather events, and it is infeasible to increase secondary capacity.

Costs of all alternatives evaluated and the resulting impacts on effluent quality and the environment shall be presented. Impacts which shall be considered are;

- i. Primary, secondary, and combined primary/secondary effluent quality during the bypass. Effluent quality estimates shall be made for all pollutants limited in the current NPDES permit. Estimates may be based on actual discharge data, results from full scale tests conducted at the proposed flow rates, or projections based on models or literature values, whichever is most appropriate.
      - ii. Number of times per year the CSO related bypass will be activated in a typical year, the size of the rainfall event which will trigger the bypass, and the estimated annual amount of primary effluent that will be

bypassed.

- iii. The impact on attainment of water quality criteria and uses. The assessment of compliance with water quality criteria shall be based on the effluent quality estimates made in item i. above and the effluent limitations contained in the current NPDES permit. Proposed CSO related bypasses must not cause violations of water quality standards. Downgrades from existing standards must be justified in accordance with regulations found at 40 CFR § 131.10.

The cost and impacts analysis must include the cost and impacts of the recommended CSO abatement facilities. The applicant must show that CSO related bypass of the recommended POTW, coupled with other recommended CSO abatement projects, provides the most environmental benefit for affordable level of investment (see I.(B)). Benefits to be considered include elimination of CSO discharges, restoration of uses, and improvement in the attainment of water quality criteria in CSO impacted areas.

3. A recommended plan which describes;
  - a. All recommended improvements to the POTW
  - b. The conditions under which the CSO related bypass would be activated. Where possible, the conditions under which the bypass will be activated shall be based on a maximum flow rate to secondary treatment. Other operational parameters may be proposed however.







## **Attachment 2**

### **Response to Financial Capability Analysis Comments**

The State's comments on the facilities plan submittal noted that there is only a difference of \$11 in estimated average annual residential sewerage bills between the 10-year and 15-year CSO implementation options. As a result, the comments indicated that additional justification for selecting the 15-year CSO implementation option over the 10-year option would need to be provided. This section provides some additional considerations that support the selection of the 15-year option, including the results of revised rate estimates that more accurately reflect the cost of sewer separation and rate differences between the two options during the peak year of program implementation. As detailed below, the difference in the projected residential bills during the peak years is more than doubled when compared with the data presented in the previously submitted facilities plan when the more accurate schedule information is taken into consideration.

#### **Revised Methodology For Estimating Rate/Financial Impacts**

The estimated cost for the CSO control program presented in the CSO Facilities Plan was based on the best available information at the time. The City has conducted several sewer separation projects since the draft was prepared (Meadowbrook and Arctic Brook). Actual cost data from these projects indicate that the separation costs for the Arctic Brook system presented in the draft plan were high. Therefore, these costs were revised to reflect actual construction costs. The costs for expanding the wet weather capacity of the PAF to 43 mgd were also revised to reflect the upgrading method recommended in the plan.

The revised program costs are presented in Table 2-1. This table includes the costs for ongoing separation projects (i.e. Meadowbrook) and I/I projects that were not included in the draft plan but are costs associated with the CSO control program. The costs presented in this table were used to determine the rate impacts and program affordability analyses presented in this Attachment.

The City plans to finance the capital portion of the CSO program by issuing 20-year bonds each year in order to raise the funds required to implement the current year's projects. The financial impact analysis conducted for the facilities plan, was based on an even distribution of the CSO program debt service during the study period, based on the City's plan to finance the program with 20-year bonds with an assumed interest rate of 8 percent.

The annual debt service calculated for a single 20-year bond issue was assumed to be spread evenly over a thirty or thirty-five year period to simulate the effect of the implementation periods for the two implementation options. This method tended to "smooth out" the effect of the gradual financing for the CSO program options over time, and therefore tended to minimize the differences in the estimated rate effects to homeowners of the 10 and 15-year implementation

options.

Detailed schedules for the two implementation options have subsequently been prepared, which permit more accurate consideration of financial impact of the City's plan to issue bonds for the project on a phased basis. Tables 2-2 and 2-3 indicate the cash flow requirements for the two schedule options. It should be noted that the project costs and estimated annual expenditures shown are approximate based on information available at this time. The actual expenditures may vary based on economic conditions and actual project costs at the time that they are awarded.

The estimated financial effect of the program options on residential customers has been revised to reflect the revised cost estimates, more detailed schedule, and capital expenditure cash flows that have been developed for the 15-year and 10-year implementation options. The assumption is made that each year's program expenditures will be funded by including the CSO capital costs in a City of Bangor general obligation bond issue, issued for 20 years with an interest rate of 8 percent. All other assumptions and background financial and rate data from the Facilities Plan report have been maintained for this analysis.

To test the potential effects of higher CSO program costs with delayed implementation as a result of cost escalation, a sensitivity analysis was conducted in which three percent construction inflation was introduced for CSO construction costs only. The relationship of the options with respect to household financial impacts was found to be unchanged during the study period. As indicated in Table 2-4, in the average year, the 10-year implementation option would cost the typical residential customer approximately \$12 more than the 15-year implementation option; in the peak year, the 10-year implementation option cost approximately \$34 more.

### **Reasons For Selection of the 15-Year Implementation Option**

The City maintains a strong preference for the recommended 15-year implementation period for the following reasons:

**Opportunity For Staggered Rate Impacts** - The 15-year implementation option would allow the City to stagger the rate increases required to implement the CSO program over a longer period of time. The City has increased sewerage rates by 10 percent every six months since July of 1989 as part of its good-faith efforts to address its CSO problems. The resulting rates have reached a point at which even small additional increases are significant, in that they result in additional households reaching the point at which sewerage rates are considered a hardship. A recent survey of rates in the State of Maine found that the City of Bangor's sewerage rates are the third highest in the State. Planned increases to implement the 15-year implementation will soon result in Bangor having the highest rates in the State. Implementation of the 10-year option would increase further this anticipated future burden.

One of the City's objectives is to minimize the extent to which sewerage charges for a median income household exceed 2.0 percent of median household income (MHI) during both the average and peak years of projected rate impacts of the program. The 2.0 percent figure has been suggested in a number of guidance documents as a threshold beyond which sewerage charges should be considered a financial burden. Implementation of the 15-year option would result in sewer rates below the 2.0 percent standard during the average year (typical charges would be 1.94 percent of median household income); implementation of the 10-year option would push the City's bills to typical residential customers to the 2.0 percent level.

It should also be noted that the 2.0 percent level is based on current guidelines that are outdated. The House version of the Water Quality Act of 1994 (Clean Water Act) is considering a 1.25% MHI as the threshold of economic hardship. The CSO Partnership Clean Water Act Position Paper of August 1993 recommends economic capability to be between 1.0 and 1.5 % of MHI. Bangor's median household income is approximately \$24,100. The current average residential sewer bill (1994) is \$341, or 1.41% of the current MHI. Therefore, Bangor is approaching its financial capacity to do additional wastewater work under both existing and proposed criteria.

The City is currently experiencing a major additional expense with the disposal of sludge from the wastewater treatment plant. At the current rate, the City will experience an increased cost of approximately \$600,000 this year for sludge disposal. This represents an additional cost of approximately \$33 per year per residential user or nearly 10% of the average annual sewer bill. This is equal to 24% of the estimated \$2.5M annual CSO budget and could significantly impact the increased rates necessary to implement this program.

**Minimize Peak Year Rate Impacts** - As detailed below, the methods used to estimate the rate and sewerage charge impacts of the CSO implementation options have been refined to more accurately reflect the staged financial implementation that would occur for the two options. The results of this analysis during the average and peak years are indicated in Table 2-5. Table 2-6 illustrate the estimated pattern of sewer rates and typical residential bills during the twenty-year study period for the two implementation options.

Table 2-5 shows the revised estimated residential sewerage bills for the average year and peak year of a twenty year study period. As indicated in the table, the average annual bill for a residential customer would be approximately \$12 higher for the 10-Year implementation option, when compared with the recommended

15-Year option<sup>1</sup>; this difference is approximately the same as the average year difference observed during the average year in the previously submitted facilities plan. However, the estimated difference during the peak year is more than double the earlier estimate. During its peak year of financial impact, the 10-year option is approximately \$36 more expensive than the peak year for the 15-year option, compared with a difference of approximately \$15 during the peak year indicated in the earlier facilities plan document. Because the peaking patterns for the two options occur in different years, during the peak year of difference between the two options the projected residential bill for the 10-year schedule is approximately \$41 higher than the corresponding bill for the 15-year schedule.

The results indicate that the peak year charges for a typical residential customer would increase from approximately 2.04 percent of median household income for the 15-year implementation option to approximately 2.19 percent of median household income for the 10-year implementation option. This would be even greater if the proposed lower guidelines are adopted.

**Provide Relief To Low-to-Moderate Income Residents** - Information gathered by the City indicates that the demographic profile of Bangor includes a sizeable low-to-moderate income group. An estimated 41 percent of the residential customers of the City have been classified as low-to-moderate income, which is defined as having incomes of 80 percent or less of median income. This suggests that a sizeable number residential customers will be affected more heavily than suggested by the results shown in Table 2-5 and discussed above. For this group of residents, the extra cost that would be required to implement the 10-year option rather than the recommended 15-year option would be particularly burdensome.

**Protect the City's Financial Position and Credit-Worthiness** - The City currently has approximately \$56 million in outstanding debt related to its sewer fund as a result of recent work at its wastewater treatment plant, CSO projects that have been started, collection system work and other sewer-related projects. This represents a significant financial commitment for a City with a population under 35,000. The existing debt represents almost \$1,700 per capita just for sewer-related items. Implementation of the 15-year CSO option rather than the 10-year option would allow the City to spread the financing program over a longer period, reducing the required additional outstanding debt during the early years of the program, which would help the City to maintain a reasonable credit rating and provide funding for other municipal improvements that may be required.

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<sup>1</sup>As in the facilities plan report, these costs estimates are presented in 1992 dollars to facilitate comparison with current household income estimates.

**Short Construction Season** - The construction season in Bangor is typically from May 1 through October 30, however, this could be shorter due to severe weather. A 10-year implementation program would require the City to construct numerous projects simultaneously. As indicated above, this would result in increased economic impacts. The implementation of numerous projects simultaneously would also increase disruption in the City due to construction activities. A shortened construction season would exacerbate this condition and increase disruption. The City intends to meet its commitment to implement the CSO Control Program but wants to minimize disruption to the residents of Bangor to the greatest extent possible. This can only be accomplished with the 15-year program.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

ATLANTA FEDERAL CENTER  
100 ALABAMA STREET, S.W.  
ATLANTA, GEORGIA 30303-3104

EXHIBIT

33

OCT 11 1996

4EAD

Mr. Harry T. Chandler  
Assistant Director of Environmental Services  
Environmental Services Department  
Jefferson County Commission  
202-B Courthouse  
Birmingham, AL 35263-0044

SUBJ: Village Creek Waste Water Treatment Plant

Dear Mr. Chandler:

Thank you for your letter of July 31, 1996, to Mr. Tom McGill of my staff. I understand your concerns and appreciate the information you have provided. While a meeting at this time might be beneficial, we could only provide a partial answer. As explained below, the Environmental Protection Agency (EPA) needs some additional information to fully address your concern. Also, any final response would necessarily need to be coordinated with the Alabama Department of Environmental Management (ADEM) since the authorized authority to act on your request rests with the State.

In your letter, you explain the concern that during wet weather, due to the increased influent to the Village Creek waste water treatment plant (WWTP), it is and will be impossible to treat the increased flows to meet the currently permitted water-quality-based limits for BOD<sub>5</sub>, NH<sub>3</sub>-N and percent removal. This problem is due to the excessive infiltration/inflow problems. Your letter raises the issue of whether it is possible to provide relief from the 7Q10 standards, as applied to a "blended" effluent, through a "wet weather water quality standard" in your permit. Your letter also raises the issue of whether EPA, or the State, may permit a discharge of "blended" effluent based on the construction of additional "peak flow" handling facilities, which provide only limited physical/chemical treatment to the overflow amount. Let me address the second issue first.

As you are aware, a publicly owned treatment works (POTW), must meet the degree of effluent reduction attainable through application of "secondary treatment." The definition of secondary treatment, a technology-based standard, is provided at 40 CFR § 133.102. This level of treatment describes the minimum level of effluent quality attainable for certain parameters -- BOD<sub>5</sub>, TSS, pH, and percent removal. Except for the TSS adjustment for trickling filter systems and waste stabilization

ponds (WSPs) (see below), the federal regulation defining secondary treatment does not address the type of technology to be used to achieve secondary treatment requirements. However, the federal regulations do generally prohibit bypasses of waste streams from any portion of the treatment facility even where the bypass does not cause effluent limitations to be exceeded. The bypass regulation indicates that the NPDES authority may bring enforcement against a permittee for bypasses unless special conditions are met, including that there be no feasible alternatives to the discharge (see 40 CFR §122.41(m)). Additional information would be needed before any recommendation could be provided to you or ADEM on the applicability of this provision to your proposed blended effluent process.<sup>1</sup>

Given the novelty of your proposal, however, further discussion between EPA and Jefferson County might be most appropriate on this issue. I would ask that the following information be provided prior to such a discussion: (1) a description of receiving water quality data during wet weather conditions, including information demonstrating your contention that "due to the higher flows in the receiving stream during wet weather, this blended effluent would not degrade water quality in Village Creek;" and (2) preliminary cost estimates of providing alternative facilities across the river or further explanation of why they would not be feasible [e.g., equalization basin(s) for the excess after I/I is addressed (200 MGD); providing primary clarification for the excess flows; or providing advanced primary treatment for these flows].

The above issue aside, the regulations do provide five circumstances under which one may receive special consideration (relief) from the strict application of the federal secondary treatment requirements. These circumstances are found at 40 CFR §§ 133.103 and 133.105. In your case, EPA reads only two options as possible bases for adjustment of your permit parameters:

1. § 133.103(d) - Less concentrated influent wastewater from separate sewers: where the stress on the system is due to increased less concentrated influent during wet weather. In this instance, where supported, percent removal requirements may be adjusted or a mass loading limit provided; and

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<sup>1</sup> While a different analysis might apply if we were discussing a wet weather discharge occurring prior to the headworks of the WWTP, this factor was not presented by your letter or information submitted. This factor may be important, depending on the process at your WWTP and the proposed point of bypass/peak flow diversion. Currently, the SSO Federal Advisory Subcommittee, which makes recommendations to EPA on SSO-related issues, is discussing the need to clarify the applicable technology-based standard for wet weather discharges from sanitary sewer collection systems that occur prior to the headworks of a POTW.

2. § 133.105 - Treatment equivalent to secondary treatment: where the system meets the definition of equivalent to secondary treatment [see 40 CFR § 133.101(g)], the permitting agency may, on a case-by-case basis, adjust the permit parameters for BOD<sub>5</sub>, TSS and pH.

However, additional information is necessary before any recommendation could be provided to you or ADEM on the applicability of these exceptions. If you think one of the relief mechanisms might apply to the proposed Village Creek system, I ask that you provide supporting factual and legal documentation demonstrating that your proposed facility modifications would meet the requirements under either §§ 133.103 or 133.105.

Finally, the permit parameters of concern in your letter appear to be more stringent than applicable technology-based limits based on the application of state water-quality-based standards. Adjustment in this case, (i.e., "wet weather" based limits) might be better addressed through application of the appropriate state regulation -- recognizing that the federal technology-based limits would act as a ceiling to any adjustments (unless you met the above mentioned requirements of 40 CFR §§ 133.103 or 133.105).

There is no requirement in the Clean Water Act that all water-quality-based effluent limitations be developed, based upon a single, non-seasonal 7Q10 flow. Thus, seasonal or tiered effluent limits are legally acceptable under the Clean Water Act provided the requirements of § 301(b)(1)(C) are met. This section requires that NPDES permits contain " . . . any more stringent limitation, including those necessary to meet water quality standards . . . ." (see also 40 CFR § 122.44(d)(1)(vii)(A)). Thus, permitting authorities incorporating seasonal limits into a permit must ensure that such effluent limits meet the magnitude, duration, and frequency requirements of the applicable water quality criteria. Also, in accordance with 40 CFR 122.44(d)(1)(vii)(B), all effluent limits (including tiered limits) must be consistent with any wasteload allocation developed for the facility as part of a total maximum daily load (TMDL). In the end, all permits should be evaluated on a case-by-case basis for the appropriateness of seasonal limits.

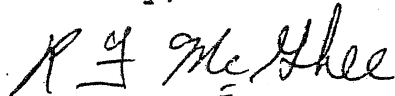


Where feasible and permissible under state law, EPA is not adverse to the use of dynamic models for the application of water quality standards because they explicitly predict the effects of variability in receiving water flow, effluent flow, and effluent concentration on receiving water concentrations of the pollutant or parameter of concern.<sup>2</sup> However, if a state's water quality standards require that all water-quality-based effluent limits be based upon a single, non-seasonal receiving water flow, the Clean Water Act would not allow these limits to be based on seasonal flows.

EPA would welcome the opportunity to discuss your situation further in a meeting with representatives from both your office and ADEM. Prior to such a meeting, however, we would need the above requested additional information in order to be more fully prepared to discuss your concerns.

If I may be of further assistance, please do not hesitate to contact me, or have a member of your staff contact Mr. Roosevelt Childress, Chief, Surface Water Permits Section, at (404) 562-9279, or Mr. Kevin B. Smith, Assistant Regional Counsel, at (404) 562-9525.

Sincerely,



Robert F. McGhee, Director  
Water Management Division

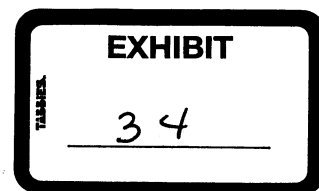
cc: Charles Horn, ADEM  
Bill A. Weinischke, DOJ  
Roosevelt Childress, WMD  
Kevin B. Smith, ORC

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<sup>2</sup> See e.g., the "Responsiveness Summary - Technical Support Document for Water Quality-based Toxics Control" (Responsiveness Summary, 1991) (EPA indicates acceptance of the concept of limits that vary with seasonal receiving water flows, at p. 21); and the "Questions and Answers on Implementing the Great Lakes Guidance - Set 2" (GLI Q&A, March 20, 1996) (EPA has indicated the technical basis for considering seasonal or tiered effluent limits).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431



MAY 01 1997

Mr. John C. Hall  
Hall & Associates  
Suite 203  
1101 15th Street, N. W.  
Washington, DC 20005-5007

Re: Freedom of Information Act Request No. 3RIN-00657-97

Dear Mr. Hall:

The Region III permittees required to meet secondary treatment standards for sanitary sewer overflows information is enclosed for your review.

If you have any questions, please contact Bill Colley at (215) 566-5722.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Colley".

Bill Colley  
Environmental Engineer  
PA/DE Branch



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

B, C, D, E  
R, P, Q, R  
SEP 17 1993

Mr. Steven Beckman  
Regional Director  
Pennsylvania Department of Environmental Protection  
230 Chestnut Street  
Meadville, PA 16335-3481

Re: NPDES Draft Permit No. PA0027138  
City of Sharon  
Mercer County

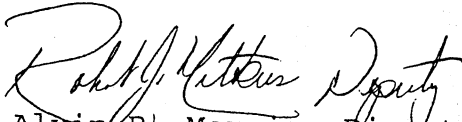
Dear Mr. Beckman:

This is a General Objection Letter, issued pursuant to 40 CFR Section 123.44(b)(1) and Section III.A.2 of the Memorandum of Agreement between the Environmental Protection Agency (EPA) and the Pennsylvania Department of Environmental Protection. A 90 day extension of the time for review of the above referenced draft NPDES permit is needed to investigate several issues including those related to the sanitary sewer overflows and the determination of zinc, lead, and WET effluent limitations.

EPA will respond to this permit no later than the 90th day from the date the draft permit was received. You should not proceed with final draft issuance until you have heard from EPA in writing. Verbal approval from EPA to issue the permit is not authorized.

If you have any questions, please contact me or Evelyn MacKnight at 215-566-5717.

Sincerely,

  
Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer, DER  
Dan Drawbaugh, DER  
Robert Price, Sharon



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III

841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

Mr. Steven Beckman  
Regional Director  
Pennsylvania Department of Environmental Protection  
230 Chestnut Street  
Meadville, PA 16335-3481

NOV 0-7 1996

Re: NPDES Draft Permit No. PA0027138  
City of Sharon  
Mercer County

Dear Mr. Beckman:

This is a specific objection letter, submitted pursuant to 40 CFR Section 123.44 and Section III. A. 2. of the Memorandum of Agreement (MOA) between the Commonwealth of Pennsylvania and the United States Environmental Protection Agency (EPA) Region III.

There is at least one location in the sewer system where there are separate sewer system overflows (SSOs). Section 301 of the Clean Water Act prohibits such discharges of untreated sewage without meeting the pollution control requirements listed in Section 301. These treatment requirements may be met by installing holding tanks to contain the untreated sewage from the SSOs or by installing secondary treatment facilities to treat the sewage before it is discharged to the Shenango River.

In order to eliminate the objection pursuant to 40 CFR 123.44(b)(2)(ii), acceptable language should be included in the permit to prohibit the SSO discharges. The language should also provide a list of affirmative defenses for such SSO discharges.

You should not proceed with final draft issuance until you have heard from EPA in writing. Verbal approval from EPA to issue the permit is not authorized.

If you have any questions, please contact me or Evelyn MacKnight at 215-566-5717.

Sincerely,

*Alvin R. Morris, Deputy*

for Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer, DEP  
Dan Drawbaugh, DEP  
Robert Price, Sharon



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

OCT 17 1996

Mr. Steven Beckman  
Regional Director  
Pennsylvania Department of Environmental Protection  
230 Chestnut Street  
Meadville, PA 16335-3481

Re: Municipal Authority of the Borough of St. Marys  
St. Marys, Elk County

Dear Mr. Beckman:

In July 1996, the Environmental Protection Agency (EPA) issued a specific objection letter, pursuant to 40 CFR Section 123.44 and Section III. A. 2. of the Memorandum of Agreement between the Commonwealth of Pennsylvania and EPA Region III.

The sanitary sewer overflows (SSOs) discharge at the head of the St. Marys sewage treatment plant to Elk Creek and have a potential for causing environmental harm to the Creek and health risks to the community. Section 301 of the Clean Water Act prohibits the discharge of the untreated sewage in SSOs without meeting the pollution control requirements listed in Section 301. In addition, SSOs are prohibited pursuant to 40 CFR Section 122.41(m) (4).

After issuing the objection letter, EPA has had several phone conversations with the Pennsylvania Department of Environmental Protection concerning the above SSOs in the St. Marys sewer system. As a result of our investigation, we are willing to withdraw our July 1996 objection letter if no listing or reference to the SSOs is made in the permit, as was the case in the draft that we had reviewed.

If you have any questions, please contact me or Evelyn MacKnight at 215-566-5717.

Sincerely,

*Joseph T. Potomah*  
Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer, DEP  
Dan Drawbaugh, DEP  
Ladislás Kornacki, St. Marys





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

MAY 31 1996

Mr. Steven Beckman  
Regional Director  
Pennsylvania Department of Environmental Protection  
230 Chestnut Street  
Meadville, PA 16335-3481

Re: Municipal Authority of the Borough of St. Marys  
St. Marys, Elk County

Dear Mr. Beckman:

We request a 90 day extension in the time for review of the above referenced draft NPDES permit, pursuant to 40 CFR Section 123.44(b)(1) and Section III.A.2 of the Memorandum of Agreement between the Environmental Protection Agency (EPA) and the Pennsylvania Department of Environmental Protection. Additional time is needed to investigate several issues including those related to the sanitary sewer overflow (SSO) at the sewage treatment plant.

Section 301 of the Clean Water Act prohibits the discharge of untreated sewage without meeting the pollution control requirements listed in Section 301. These treatment requirements may be met by installing holding tanks to contain the untreated sewage from the SSO near the treatment plant or by installing secondary treatment facilities to treat the sewage before it is discharged to Elk Creek.

EPA will respond to this permit no later than the 90th day from the date the draft permit was received. You should not proceed with final draft permit issuance until you have heard from EPA in writing. Verbal approval from EPA to issue the permit is not authorized.

If you have any questions, please contact me or Evelyn MacKnight at 215-566-5717.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alvin R. Morris".

Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer, DEP  
Dan Drawbaugh, DEP  
Ladislav Kornacki, St. Marys



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

FEB 19 1997

Mr. Charles Duritsa  
Regional Director  
Southwest Regional Office  
Department of Environmental Protection  
400 Waterfront Drive  
Pittsburgh, Pennsylvania 15222-4745

Re: Draft NPDES Permit No. PA0025968  
Municipal Water Authority of Aliquippa  
Beaver County

Dear Mr. Duritsa:

This is a General Objection Letter, issued pursuant to 40 CFR Section 123.44(b)(1) and Section III.A.2 of the Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Pennsylvania Department of Environmental Protection (DEP). A 90 day extension of the time for review of the above referenced draft NPDES permit is needed to investigate several issues including those related to the sanitary sewer overflows (SSOs), which discharge from the Municipal Water Authority of Aliquippa's sewer system.

EPA will respond to this permit no later than the 90th day from the date the draft permit was received. You should not proceed with final draft issuance until you have heard from EPA in writing. Verbal approval from EPA to issue the permit is not authorized.

If you have any questions, please contact me or Evelyn MacKnight of my staff at 215-566-5717.

Sincerely,

Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer, DEP  
Dan Drawbaugh, DEP  
Eugene Smith, Aliquippa



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

Steven Beckman  
Regional Director  
Pennsylvania Department of Environmental Protection  
210 Chestnut Street  
Meadville, PA 16335-3481

Re: NPDES Draft Permit No. PA0026301  
Erie Sewer Authority  
Erie County

Dear Mr. Beckman:

This is a specific objection letter, submitted pursuant to 40 CFR Section 123.44 and Section III. A. 2. of the Memorandum of Agreement (MOA) between the Commonwealth of Pennsylvania and the United States Environmental Protection Agency (EPA) Region III.

There are several locations in the Erie Sewer Authority's sewer system where there are separate sewer system overflows (SSOs). Section 301 of the Clean Water Act prohibits such discharges of untreated sewage without meeting the pollution control requirements listed in Section 301. These treatment requirements may be met by installing holding tanks to contain the untreated sewage from the SSOs or by installing secondary treatment facilities to treat the sewage before it is discharged to Lake Erie.

The effluent limitations for CBOD and suspended solids in the referenced draft permit are less stringent than those in the previous permit. For example, the concentration limits for CBOD were changed from a monthly average of 37 mg/l and a weekly average of 55 mg/l in the previous permit to a monthly average of 45 mg/l and a weekly average of 67 mg/l in the above referenced draft permit. The concentration limits for suspended solids were changed from a monthly average of 50 mg/l and a weekly average of 75 mg/l in the previous permit to a monthly average of 70 mg/l and a weekly average of 105 mg/l in the above referenced draft permit. Backsliding is prohibited according to Section 402(o) of the Clean Water Act. Pursuant to 40 CFR 122.45(2)(i), the production based effluent limitations must be determined from a reasonable measure of actual production rather than the maximum monthly production rate as was apparently done in determining the

effluent limits for the referenced draft permit. An average production rate should be used rather than the monthly maximum, an error made in determining the monthly average mass limit for suspended solids should be corrected, and the above effluent limits should be adjusted to prevent backsliding. In addition, effluent limits for color are needed in the draft permit to be consistent with those required for other treatment systems.

In order to eliminate the objection pursuant to 40 CFR 123.44(b)(2)(ii), acceptable language should be included in the permit to prohibit the SSO discharges. The language should also provide a list of affirmative defenses for such SSO discharges.

The pretreatment language must be worded to meet the requirements of the Clean Water Act. Regulations at Section 403.5(c) require the development of local limits for the POTW pretreatment program. A schedule for developing and implementing the local limits as expeditiously as possible should be included in the above draft permit to be consistent with the deadline set for this schedule at 40 CFR 403.5(f).

You should not proceed with final draft issuance until you have heard from EPA in writing. Verbal approval from EPA to issue the permit is not authorized.

If you have any questions, please contact me or Evelyn MacKnight at 215-566-5717.

Sincerely,

Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer, DEP  
Dan Drawbaugh, DEP  
Stu Gansell, DEP  
Truman Andrews, Erie



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

APR 03 1996

Mr. Steven Beckman, Regional Director  
Pennsylvania Department of Environmental Protection  
230 Chestnut Street  
Meadville, PA 16335-3481

Re: New Castle Sanitary Authority  
City of New Castle, Lawrence County  
NPDES Permit No. PA0027511

Dear Mr. Beckman:

We request an extension in the time for review of the above referenced draft NPDES permit, pursuant to 40 CFR Section 123.44(b)(1) and Part III. A. 2. and 5. of the Memorandum of Agreement between EPA and the Pennsylvania Department of Environmental Protection (PADER).

The additional time is needed to resolve complex issues such as those related to the discharge of untreated sewage from separate sewer overflows (SSOs) and the schedule for upgrading the New Castle expanded sewage treatment plant.

Section 301(b)(1)(b) of the Clean Water Act requires sewage to be treated at least to the level of secondary treatment. Section 301(i)(1) requires this treatment to be achieved under no circumstances later than July 1, 1988. Regulations at 40 CFR Section 122.47(a)(1) and PA Code 92.55 prohibit any compliance schedule which extends beyond a statutory deadline for sewage treatment. As a result, the compliance schedule included in the New Castle draft permit is not consistent with the above mentioned provisions of the Clean Water Act and the requirements of EPA and State regulations.

The four SSOs listed in the above permit are prohibited by 40 CFR Section 122.41(m)(4) because there is a feasible alternative to the bypass of untreated sewage at the SSOs. The bypassed sewage may be treated to meet water quality criteria and secondary treatments or contained in properly constructed holding tanks.

Regulations at 40 CFR 122.21(j)(1)-(3) require major municipalities to complete the WET testing with the NPDES permit application. According to 40 CFR 122.21(e), "... The Director shall not issue a permit before receiving a complete application ...". WET tests have not been completed for the New Castle draft permit. According to Section III. A. 2. of the Memorandum of Agreement, EPA can request a 90 day extension if the information provided in the draft permit is not adequate.

If you have any questions, please contact me or Evelyn MacKnight at (215) 597-4491.

Sincerely,

*for Robert J. Matthews Deputy*  
Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer  
Dan Drawbaugh  
Richard Ross



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

SEP 12 1996

Mr. Steven Beckman  
Regional Director  
Pennsylvania Department of Environmental Protection  
230 Chestnut Street  
Meadville, PA 16335-3481

Re: NPDES Draft Permit No. PA0028487  
Hermitage Municipal Authority  
Mercer County

Dear Mr. Beckman:

This is a specific objection letter, submitted pursuant to 40 CFR Section 123.44 and Section III. A. 2. of the Memorandum of Agreement between the Commonwealth of Pennsylvania and the United States Environmental Protection Agency (EPA), Region III.

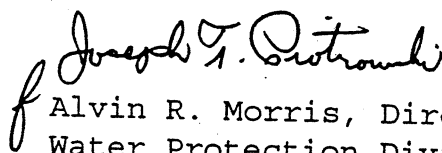
There are several locations in the Hermitage Municipal Authority's sewer system where there are separate sewer system overflows (SSOs). Section 301 of the Clean Water Act prohibits such discharges of untreated sewage without meeting the pollution control requirements listed in Section 301. These treatment requirements may be met by installing holding tanks to contain the untreated sewage from the SSOs or by installing secondary treatment facilities to treat the sewage before it is discharged to the Shenango River.

In order to eliminate the objection pursuant to 40 CFR 123.44(b)(2)(ii), acceptable language should be included in the permit to prohibit the SSO discharges. The language should also provide a list of affirmative defenses for such SSO discharges.

You should not proceed with final draft issuance until you have heard from EPA in writing. Verbal approval from EPA to issue the permit is not authorized.

If you have any questions, please contact me or Evelyn MacKnight at 215-566-5717.

Sincerely,

  
Alvin R. Morris, Director  
Water Protection Division

cc: Hugh Archer, DEP  
Dan Drawbaugh, DEP  
Thomas Darby, Hermitage





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

MAR 18 2002

EXHIBIT

35

Mr. John Poole, Chief  
Water Division  
Alabama Department of Environmental Management  
Post Office Box 301463  
Montgomery, AL 36130-1463

Re: Jefferson County Five Mile Creek WWTP  
NPDES Permit No. AL0026913

Dear Mr. Poole:

This letter responds to your December 13, 2001, request for EPA, Region 4, to review and comment on the proposed draft National Pollutant Discharge Elimination System (NPDES) permit referenced above. EPA appreciates the extension of time granted on February 19, 2002, by the Alabama Department of Environmental Management (ADEM) to complete our review. In accordance with the EPA/ADEM Memorandum of Agreement (MOA), we have completed our review and provide the comments below.

Neither the proposed draft permit nor the Fact Sheet identify a peak flow handling facility, a peak flow treatment scheme, or alternative routing schemes to address the fate of peak wet weather flows. Therefore, the draft permit is based on an application that is incomplete and fails to comply with 40 Code of Federal Regulations §124.3(a)(2).

The previous NPDES permit allows a discharge from Outfall 002 which is identified as "the equalization basin overflow outfall". The permit application, dated February 25, 1997, identifies Outfall 002 as a bypass, "occurring less than once per year, due to wet weather causing flows to exceed the design capacity of the plant." The permit application also includes Figure 2-B, a schematic plant layout, which shows a "peak flow handling facility" that is not further described. The proposed draft permit eliminates Outfall 002 as an overflow outfall, but neither the permit nor the Fact Sheet specifically identifies a treatment scheme for peak wet weather flows.

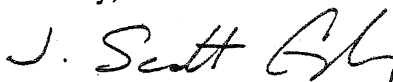
Given this scenario, EPA offers two permitting strategies that may be used to address the peak wet weather flows at the Jefferson County Five Mile Creek WWTP. The first alternative is for Jefferson County to report the peak wet weather flows that are routed around the biological treatment units of the WWTP as either bypasses or upsets. The requirements of Part II.C. and the definitions in Part III.H. of the proposed draft permit would address this alternative. If Jefferson County agrees with this alternative and the State uses its enforcement discretion accordingly,

EPA would have no further comments on the permit as drafted. However, the Fact Sheet would have to specifically identify the alternate flow routing scheme and state that the County must report any discharges resulting from this flow routing scheme in accordance with the conditions in Part II.C.1. or 2. of the permit.

In consideration of the second alternative, if the County intends for the peak flow facility to achieve a level of treatment equivalent to secondary, then the proposed permit must be revised to include appropriate limitations and monitoring requirements. Peak flows that are routed around the biological treatment units of the WWTP must be treated to achieve an equivalent of secondary treatment before they are blended with the effluent from the biological units. Please provide EPA with documentation, from Jefferson County, that the peak flow facility is performing at this level of treatment. The Fact Sheet must be revised to identify both the routing schemes and the treatment system for the peak wet weather flows.

EPA requests that ADEM respond to this objection and provide copies of the proposed final permit and the permit rationale for EPA review prior to the final issuance of the permit. Please note that the above comment constitutes a specific objection which must be resolved prior to final permit issuance. In addition, please provide EPA with any other significant public comments made during the public comment period and ADEM's response to those comments. If you have any questions, please contact Andrea Zimmer of my staff at (404) 562-9306.

Sincerely,



J. Scott Gordon, Chief  
Permits, Grants, and Technical Assistance Branch  
Water Management Division

cc: Jefferson County  
Kevin B. Smith, OLS



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
100 ALABAMA STREET, S.W.  
ATLANTA, GEORGIA 30303-3104

EXHIBIT

36

August 8, 1997

4WM-SWPFB

Mr. Dennis Harrison, Chief  
Permit/Compliance Section  
Municipal Branch  
Water Division  
Alabama Dept. of Environmental Management  
PO Box 301463  
Montgomery, Alabama 36130-1463

Re: NPDES Permit No. AL0023647 - Jefferson County  
Village Creek WWTP

Dear Mr. Harrison:

In accordance with the EPA/ADEM Memorandum of Agreement, we have completed review of the above referenced draft permit modification, dated July 10, 1997, and have the following comments:

Page I-B:

1. The notation "\*\*\*\*" which references the footnote "\*\*\*\* See Part IV., C., 2." should be placed after the text "A. DISCHARGE LIMITATIONS AND MONITORING REQUIREMENTS".
2. TRC limits should be required at Outfall 001 at all times.
3. During high stream flow conditions, the Village Creek WWTP must be operated in such a manner that all flow receives secondary treatment. No flow should receive only primary treatment and then be blended with effluent from the rest of the treatment plant to meet the required secondary limitations. Specifying a maximum flow (MGD) limitation for the WWTP would address this concern.

Page I-C:

1. The notation "\*\*\*\*" which references the footnote "\*\*\*\* See Part IV., C., 2." should be placed after the text "A. DISCHARGE LIMITATIONS AND MONITORING REQUIREMENTS".
2. Based on the State's previous inclusion of limits requiring disinfection in the "dry" weather discharge permit, we assume that primary contact recreation is an

existing use in the receiving stream downstream of the discharge. Therefore, in order to be fully consistent with State water quality standards (including Tier I of the State's antidegradation policy), the permit should also include limits requiring disinfection for the "wet" weather discharge, as well.

3. Are monthly and weekly averages appropriate for the intermittent wet weather discharge events? Will compliance be per event or a monthly average of events?

Page III-12:

1. Under Part III.E.1., please add that plans and specifications for the peak flow handling facility must be submitted to and reviewed by EPA prior to initiating construction.

Page IV-18:

1. Part IV.C.1. should provide a definition of a "discharge event."
2. The permit should also clarify the definition for 24 hour composite. For the PFWWTP, a 24 hour composite could be flow proportional composites at 2 hour intervals beginning within the first 15 to 30 minutes of the discharge and continuing until discharge has ceased. If discharge ceases, but resumes within less than a 2 hour interval from the last sampling, then continue with the discharge event. If discharge resumes after a 2 hour interval, then a new event begins.
3. Please revise Part IV.C.2(a) to read: "Discharge to Village Creek at the limits identified by Part I, pages I-B and I-C shall occur only when the stream flow is greater than or equal to 200 cubic feet per second (cfs). When the stream flow is less than 200 cfs, the discharge limitations identified by Part I, page I-A shall apply."

Page IV-19:

1. Part IV.C.2.(c) should be clarified to state that the effluent flow (MGD) from Outfall 001 and Outfall 002 shall be recorded continuously, as required on pages I-B and I-C. The total flow (MGD) to Village Creek from both of the outfalls shall then be calculated and reported.
2. Part IV.C.2.(d) should include a requirement that ADEM and EPA review the contract between the permittee and

the USGS. The contract should specify the type of flow meter at the gaging station.

Page IV-21:

1. Part IV.G. should include the possibility of a stream reclassification as "new information."

Fact Sheet:

I.F. "Location of Discharge" should specify the individual locations for both Outfall 001 and Outfall 002.

I.G. Description of Wastewater Treatment Facilities should discuss that plans for the PFWWTP will be reviewed by ADEM and EPA prior to construction.

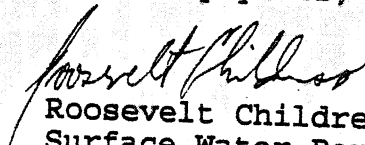
IV.D. This is the basis for the final effluent limits for the PFWWTP (Outfall 002) and the WWTP (Outfall 001) as appear on pages I-B and I-C.

IV.E. The basis for effluent toxicity limits only addresses a discharge from Outfall 001; the permit language in Part IV.B. references both Outfall 001 and Outfall 002. This language should be clarified. EPA may have additional comments on the toxicity language.

The Fact Sheet should address the rationale for changes in effluent limitations for Outfall 001 during high stream flow conditions.

If you have any questions or comments, please contact Andrea Zimmer at (404) 562-9306.

Sincerely yours,



Roosevelt Childress, Chief  
Surface Water Permits Section  
Surface Water Permits and  
Facilities Branch  
Water Management Division