

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES)
ASSOCIATION; TENNESSEE MUNICIPAL)
LEAGUE; THE CITY OF LITTLE ROCK)
SANITARY SEWER COMMITTEE)

Plaintiffs,)

ASSOCIATION OF METROPOLITAN)
SEWERAGE AGENCIES)

Intervenor)

v.)

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

CHRISTINE TODD WHITMAN, Administrator,)
United States Environmental Protection Agency,)
1200 Pennsylvania Avenue, NW, Washington,)
DC 20460;)

DONALD S. WELSH, Regional Administrator,)
U.S. Environmental Protection Agency, Region III)
1650 Arch Street, Philadelphia, PA 19103;)

J.J. PALMER, JR., Regional Administrator,)
U.S. Environmental Protection Agency, Region IV)
Atlanta Federal Center, 61 Forsyth Street, SW)
Atlanta, GA 30303;)

GREGG COOKE, Regional Administrator)
U.S. Environmental Protection Agency, Region VI)
Fountain Place 12th Floor, Suite 1200)
1445 Ross Avenue, Dallas, TX 75202)

Defendants.)

**MOTION TO DISMISS PLAINTIFFS AND INTERVENOR'S COMPLAINTS
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
I. STATUTORY AND REGULATORY BACKGROUND	2
A. NPDES Permit Limitations	3
1. Technology-Based Limitations in NPDES Permits	4
2. “Secondary Treatment” Is the Technology-Based Standard for POTWs	5
3. Provisions in NPDES Permits Addressing “Bypass”	6
4. Provisions in NPDES Permits Addressing “Upset”	7
B. Procedures for Obtaining NPDES Permits and Judicial Review of Permits	7
C. POTWs: Separate Sanitary Sewers vs. Combined Storm and Sanitary Systems	9
1. Combined Sewer Overflows (“CSOs”)	9
2. Sanitary Sewer Overflows	10
D. Judicial Review of EPA Rules Under the Clean Water Act	11
II. PLAINTIFFS’ COMPLAINTS	12
A. Alleged EPA Regional Rules	12
1. Alleged “Rule” # 1: Blending	12
• Alleged “Rule” #2: Prohibition of Emergency Outfalls	14
• Alleged “Rule” #3: Secondary Treatment Standards Apply to SSOs ...	15
B. Plaintiffs’ Alleged Causes of Action	16
STANDARD OF REVIEW	16
SUMMARY OF ARGUMENT	17

ARGUMENT	18
I. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE RULES RELATING TO CLEAN WATER ACT EFFLUENT LIMITATIONS ARE EXCLUSIVELY REVIEWABLE IN THE UNITED STATES COURT OF APPEALS	18
A. The Federal Question and Declaratory Judgment Statutes Do Not Confer An Independent Basis for Jurisdiction	19
B. The United States Court of Appeals is the Exclusive Forum For Pursuing an Appeal of Rules Relating to Effluent Limitations And Other Limitations Applied in The NPDES Permitting Program	19
C. Because Review of The Alleged Rules At Issue Is Available Under the Clean Water Act, the APA Is Unavailable As An Additional Remedy Or Basis for Jurisdiction	23
II. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE CHALLENGED STATEMENTS DO NOT CONSTITUTE FINAL AGENCY ACTIONS	25
A. Statements Reflecting Legal Positions Taken In Specific Ongoing Or Potential Enforcement Proceedings Are Not Judicially Reviewable	26
B. Internal Deliberative Agency Communications and Memorandums Do Not Constitute Judicially Reviewable Final Agency Action	28
C. Regional Guidance Documents Do Not Constitute Final Agency Actions	30
III. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW	33
A. The Issues Raised By Plaintiffs Are Not Fit For Judicial Decision	33
1. Judicial Intervention Would Inappropriately Interfere With Further Administrative Action	34
2. The Judiciary Would Benefit From Further Factual Development of the Issues Presented	35
B. Plaintiffs Will Not Suffer Hardship If The Court Withholds Review	36

IV.	PLAINTIFFS CANNOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PREMISED ON THE THEORY THAT AGENCY ACTION HAS BEEN UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED	36
CONCLUSION		38

TABLE OF AUTHORITIES

FEDERAL CASES

	PAGE
* <u>Abbott Laboratories v. Gardner</u> , 387 U.S. 136 (1967)	33, 34
<u>American Canoe Association, Inc. v. EPA</u> , 30 F. Supp. 2d 908 (E.D. Va. 1998)	24
* <u>American Paper Institute v. EPA</u> , 726 F. Supp. 1256 (S.D. Ala. 1989)	31, 32
* <u>American Paper Institute v. EPA</u> , 882 F.2d 287 (7th Cir. 1989)	31, 35
* <u>American Telephone & Telegraph Co. v. EEOC</u> , 270 F.3d 973 (D.C. Cir. 2001)	25, 27
<u>Appalachian Energy Group v. EPA</u> , 33 F.3d 319 (4th Cir. 1994)	30
<u>Appalachian Power Co. v. EPA</u> , 208 F.3d 1015 (D.C. Cir. 2000)	32
* <u>Bennett v. Spear</u> , 520 U.S. 154 (1997)	25
<u>Blanchette v. Connecticut General Insurance Corp.</u> , 419 U.S. 102 (1974)	33
<u>Brock v. Cathedral Bluffs Shale Oil Co.</u> , 796 F.2d 533 (D.C. Cir. 1986)	34
<u>Champion International Corp. v. EPA</u> , 850 F.2d 182 (4th Cir. 1988)	8
<u>Ciba-Geigy v. EPA</u> , 801 F.2d 430 (D.C. Cir. 1986)	32
<u>Clinton County Comm'rs v. EPA</u> , 116 F.3d 1018 (3d Cir. 1997)	18
<u>District of Columbia v. Schramm</u> , 631 F.2d 854 (D.C. Cir. 1980)	8
<u>E.I. du Pont de Nemours & Co. v. Train</u> , 430 U.S. 112 (1977)	4, 22
<u>Environmental Defense Fund, Inc. v. Costle</u> , 657 F.2d 275 (D.C. Cir. 1981)	36
<u>EPA v. California ex rel. State Water Resources Control Bd.</u> , 426 U.S. 200 (1976)	4
<u>FTC v. Standard Oil</u> , 449 U.S. 232 (1980)	27
<u>Hayes v. Whitman</u> , 264 F.3d 1017 (10th Cir. 2001)	24

<u>Heckler v. Chaney</u> , 470 U.S. 821 (1985)	34
<u>Hoffman Group, Inc. v. EPA</u> , 902 F.2d 567 (7th Cir. 1990)	28
<u>Kokkonen v. Guardian Life Insurance Co. of America</u> , 511 U.S. 375 (1994)	17
<u>Laguna Gatuna, Inc. v. Browner</u> , 58 F.3d 564 (10th Cir. 1995)	28
<u>Lane v. Pena</u> , 518 U.S. 187 (1996)	18
<u>Mada-Luna v. Fitzpatrick</u> , 813 F.2d 1006 (9th Cir. 1987)	35
<u>Madison-Hughes v. Shalala</u> , 80 F.3d 1121 (6th Cir. 1996)	36
<u>Maier v. EPA</u> , 114 F.3d 1032 (10th Cir. 1997)	5
<u>Montgomery Environmental Coalition v. Costle</u> , 646 F.2d 568 (D.C. Cir. 1980)	10
<u>Moog Industrial v. FTC</u> , 355 U.S. 411 (1958)	34
<u>Natural Resources Defense Council, Inc. v. Costle</u> , 568 F.2d 1369 (D.C. Cir. 1977)	3
* <u>Natural Resources Defense Council v. EPA</u> , 656 F.2d 768 (D.C. Cir. 1981)	21
* <u>Natural Resources Defense Council v. EPA</u> , 673 F.2d 400 (D.C. Cir. 1982)	21
* <u>Natural Resources Defense Council v. EPA</u> , 822 F.2d 104 (D.C. Cir. 1987)	7, 21, 22
<u>Natural Resources Defense Council v. EPA</u> , 859 F.2d 156 (D.C. Cir. 1988)	5, 7
<u>Natural Resources Defense Council v. EPA</u> , 966 F.2d 1292 (9th Cir. 1992)	21
<u>NLRB v. Sears, Roebuck & Co.</u> , 421 U.S. 132 (1975)	29
* <u>Ohio Forestry Association v. Sierra Club</u> , 523 U.S. 726 (1998)	33, 36
<u>Oregon Natural Resources Council v. United States Forest Service</u> , 834 F.2d 842 (9th Cir. 1987)	24
<u>Puerto Rico Aqueduct & Sewer Authority v. EPA</u> , 35 F.3d 600 (1st Cir. 1994)	4
<u>Randall v. United States</u> , 95 F.3d 339 (4th Cir. 1996)	19

<u>Reuth v. EPA</u> , 13 F.3d 227 (7th Cir. 1993)	19, 28
<u>San Francisco Baykeeper v. Whitman</u> , 297 F.3d 877 (9th Cir. 2002)	37
<u>Sierra Club v. Thomas</u> , 828 F.2d 783 (D.C. Cir. 1987)	37
<u>Skelly Oil Co. v. Phillips Petroleum Co.</u> , 339 U.S. 667 (1950)	19
<u>Southern Ohio Coal Co. v. OSM</u> , 20 F.3d 1418 (6th Cir. 1994)	28
<u>Southern Pines Associates v. United States</u> , 912 F.2d 713 (4th Cir. 1990)	28
<u>Southern Railway Co. v. Seaboard Allied Milling Corp.</u> , 442 U.S. 444 (1979)	34
<u>Spectacor Management Group v. Brown</u> , 131 F.3d 120 (3d Cir. 1997)	16
<u>Steele Co. v. Citizens for a Better Environment</u> , 523 U.S. 83 (1998)	16
* <u>Sun Enterprises, Ltd. v. Train</u> , 532 F.2d 280 (2d Cir. 1976)	23, 24
<u>Taxation with Representation Fund v. IRS</u> , 646 F.2d 666 (D.C. Cir. 1981)	29
<u>Telecommunications Research and Action Center v. FCC</u> , 750 F.2d 70 (D.C. Cir. 1984)	37
<u>Toilet Goods Association v. Gardner</u> , 387 U.S. 158 (1967)	35
<u>United States ex rel. Coffey v. William R. Austin Construction Co.</u> , 436 F. Supp. 626 (W.D. Okla. 1977)	16
<u>United States v. City of Toledo</u> , 63 F. Supp. 2d 834 (N.D. Ohio 1999)	7
<u>United States v. Mitchell</u> , 445 U.S. 535 (1980)	18
<u>United States v. Sherwood</u> , 312 U.S. 584 (1941)	18
<u>Westvaco Corporation v. EPA</u> , 899 F.2d 1383 (4th Cir. 1990)	25

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq	19
Administrative Procedure Act, 5 U.S.C. § 702	19

5 U.S.C. § 704	19, 23
Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 <u>et seq</u>	24
Federal Question Statute, 28 U.S.C. § 1331	19, 24
Declaratory Judgment Act, 28 U.S.C. §§ 2201-02	19
Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-1387	2, 13
CWA section 101(a), 33 U.S.C. § 1251(a)	2
CWA sections 301 and 304, 33 U.S.C. §§ 1311 and 1314	4
CWA section 301(a), 33 U.S.C. § 1311(a)	2
CWA section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A)	5
CWA section 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B)	5
CWA section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A)	5
CWA section 304(d)(1), 33 U.S.C. § 1314(d)(1)	5
CWA section 309(a),(b),(g), 33 U.S.C. §§ 1319(a),(b),(g)	9, 28
CWA section 402, 33 U.S.C. § 1342	2-3, 22
CWA section 402(a), 33 U.S.C. § 1342(a)	3
CWA section 402(b), 33 U.S.C. § 1342(b)	3
CWA section 402(d), 33 U.S.C. § 1342(d)	8
CWA section 402(q)(1), 33 U.S.C. § 1342(q)(1)	10
CWA section 502(11), 33 U.S.C. § 1362(11)	4, 21
CWA section 502(14), 33 U.S.C. § 1362(14)	3
CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2)	37
CWA section 509(b), 33 U.S.C. § 1369(b)	11, 23

CWA section 509(b)(1), 33 U.S.C. § 1369(b)(1)	23
CWA section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E)	2, 12, 20, 21, 22
CWA section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F)	8, 12, 20, 28

RULES

Fed. R. Civ. P. 12(b)(1) and 12(b)(6)	1
---	---

CODE OF FEDERAL REGULATIONS

40 C.F.R. § 122.21	14
40 C.F.R. § 122.41	35
40 C.F.R. § 122.41(m)	13, 22
40 C.F.R. § 122.41(m)(1)	6
40 C.F.R. § 122.41(m)(2)	6
40 C.F.R. § 122.41(m)(4)	6, 7
40 C.F.R. § 122.41(n)(1)	7
40 C.F.R. § 122.41(n)(2)	7
40 C.F.R. § 123.30	8
40 C.F.R. § 123.44	8
40 C.F.R. §§ 124.3 & 122.21	8
40 C.F.R. § 124.15	8
40 C.F.R. § 124.19	8
40 C.F.R. Part 133	6
40 C.F.R. § 133.102	6

40 C.F.R. § 403.3(o)	4
----------------------------	---

FEDERAL REGISTERS

45 Fed. Reg. 33,448 (May 19, 1980)	7
54 Fed. Reg. 37,370 (Sept. 8, 1989)	10
54 Fed. Reg. at 37,371	10, 11
59 Fed. Reg. 18,688 (Apr. 19, 1994)	10
66 Fed. Reg. 61,268, 61,283-84 (Dec. 3, 2001)	11
67 Fed. Reg. 33,859, 33,863 (May 13, 2002)	11
67 Fed. Reg. 22,077 (May 2, 2002)	9

**MOTION TO DISMISS PLAINTIFFS AND INTERVENOR’S COMPLAINTS
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendants Christine Todd Whitman, Administrator, United States Environmental Protection Agency, Donald S. Welsh, Regional Administrator, United States Environmental Protection Agency, Region III, J.J. Palmer, Jr., Regional Administrator, United States Environmental Protection Agency, Region IV, and Gregg Cooke, Regional Administrator, United States Environmental Protection Agency, Region VI (collectively “EPA” or the “Agency”), hereby move to dismiss the Complaints filed by Plaintiffs Pennsylvania Municipal Authorities Association, et al., and Intervenor Association of Metropolitan Sewerage Agencies (collectively “Plaintiffs”) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

INTRODUCTION

This case relates to EPA’s administration of the Clean Water Act’s framework for regulating the discharge of pollutants into the Nation’s waters from municipal wastewater treatment systems. Plaintiffs are associations representing municipalities who own and operate municipal wastewater treatment plants and collection systems, and who seek to discharge under some circumstances untreated or partially treated sewage into the Nation’s waters.

In this lawsuit, Plaintiffs essentially seek to entangle this Court in abstract disagreements over EPA permitting and enforcement policies related to the discharge of untreated or partially treated sewage. Plaintiffs point to an assortment of statements by subordinate agency officials or representatives and claim that these statements reflect the promulgation of “rules” by certain EPA regional offices. These assorted statements do not, in fact, constitute final agency actions ripe for judicial review.

But principles of finality and ripeness need not even be considered here because this Court plainly lacks subject matter jurisdiction over the claims asserted. Taking Plaintiffs at their word that they have identified and are challenging rules promulgated under the Clean Water Act, Plaintiffs are clearly in the wrong court. Under the Clean Water Act's judicial review provision, 33 U.S.C. § 1369(b)(1)(E), the Courts of Appeals have exclusive jurisdiction over the review of rules concerning discharge limitations under the Clean Water Act, such as those Plaintiffs purport to identify and challenge.^{1/}

While jurisdictional defects preclude this Court from considering Plaintiffs' claims, a forum is available for challenging EPA actions that actually govern their discharges. Specifically, municipalities can challenge final EPA actions in the context of challenging individual permitting decisions, or in the context of defending enforcement actions brought by EPA alleging permit violations.

I. STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act, 33 U.S.C. §§ 1251-1387, is a comprehensive statute designed “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters” through reduction and eventual elimination of pollutant discharges into those waters. Section 101(a), 33 U.S.C. § 1251(a). The Act generally prohibits the discharge of pollutants into waters of the United States from “point sources” except as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit. See CWA section 301(a), 33 U.S.C. § 1311(a); CWA section 402, 33 U.S.C. § 1342. The CWA defines a “point source” as “any discernible, confined

^{1/} Petitions in the Court of Appeals challenging EPA rules generally have to be filed within 120 days of the rules' promulgation. Perhaps Plaintiffs have filed in this Court recognizing that a suit in the Court of Appeals would be deemed untimely.

and discrete conveyance ... from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. § 1362(14).

NPDES permits are issued by EPA unless EPA has authorized the relevant State (or Tribe or Territory) to administer the NPDES program under State (or Tribal or Territorial) law pursuant to CWA section 402(b), 33 U.S.C. § 1342(b).^{2/} The core provision of the CWA relating to EPA's issuance of NPDES permits is section 402(a), 33 U.S.C. § 1342(a). This provision provides that the EPA Administrator:

may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, . . . notwithstanding section 1311(a) of this title [prohibiting discharge except in compliance with law] . . . upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the [EPA] Administrator determines are necessary to carry out the provisions of this chapter.

(emphasis added). Thus, in each instance EPA (or authorized States) have discretion to determine whether to issue a permit for a particular pollutant discharge or leave the discharger subject to the default total proscription on discharge. See Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977).

A. NPDES Permit Limitations

NPDES permits typically contain limitations that restrict the amounts (i.e., quantities, rates, and concentrations) of pollutants that may be discharged, or that restrict key generic

^{2/} In the interest of brevity, the balance of this Memorandum refers only to "States" in references to entities that EPA may authorize to administer the NPDES program in lieu of EPA.

parameters such as acidity (pH) or biochemical oxygen demand.^{3/} These "effluent limitations"^{4/} implement both technology-based and water quality-based CWA requirements.

Technology-based limitations represent the degree of pollutant control that can be achieved using various levels of pollution control technology. Sections 301 and 304, 33 U.S.C. §§ 1311 and 1314; See E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 126-36 (1977); Puerto Rico Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 602 (1st Cir. 1994). Water quality-based limitations are additional limitations that may be imposed based upon the environmental effects of the discharge on the waters receiving the discharge. EPA v. California et rel. State Resources Control Board, 426 U.S. 200, 205 n.12 (1976). In addition to effluent limitations, NPDES permits generally include other provisions as well, such as monitoring and reporting requirements, compliance schedules, and management practices.

1. Technology-Based Limitations in NPDES Permits

The CWA mandates varying standards of technology-based treatment as the minimum requirement for different categories of point sources. 33 U.S.C. §§ 1311, 1314. For "publicly owned treatment works," ("POTWs"),^{5/} such as the municipal wastewater treatment plants

^{3/} Biochemical oxygen demand (BOD) measures the biological or bacteriological pollution of the water.

^{4/} The CWA defines an "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

^{5/} EPA regulations define POTWs to include "any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature," owned by a municipality or State. This definition includes "sewers, pipes, and other conveyances only if they convey wastewater to a POTW Treatment Plant." 40 C.F.R. § 403.3(o).

represented or operated by Plaintiffs in this case, the CWA mandates that effluent limitations be based upon “secondary treatment.” 33 U.S.C. § 1311(b)(1)(B). By contrast, under subsections 301(b)(1)(A) and 301(b)(2)(A), the CWA mandates that effluent limitations for non-POTW point sources be based on either the “best practicable control technology currently available” (the “BPT” standard), “the best available technology economically achievable” (the “BAT” standard), or “the best conventional technology” (the “BCT” standard), depending on the pollutant discharged. 33 U.S.C. § 1311(b)(1)(A); or (b)(2)(A).

Limits within individual NPDES permits that reflect application of the various technology-based standards (as opposed to limits reflecting application of water-quality based standards) are derived based either (a) on nationally-applicable standards or guidelines that have been promulgated by EPA, or, (b) in instances where EPA has not yet promulgated such limitations and standards, on a permit-by-permit basis according to the “best professional judgment” (“BPJ”) of the permit writer applying the statutory standards. See Natural Resources Defense Council v. EPA, 859 F.2d 156, 183 (D.C. Cir. 1988).

2. “Secondary Treatment” Is the Technology-Based Standard for POTWs

As noted earlier, discharges from POTWs such as the municipal wastewater treatment plants represented or operated by Plaintiffs in this case must meet limits based on “secondary treatment” technology. 33 U.S.C. § 1314(d)(1). The term “secondary treatment” generally refers to the process of collecting and conveying sewage in and through sewer systems to a municipal treatment plant, wherein physical and biological processes are employed to improve effluent quality. See generally Maier v. EPA, 114 F.3d 1032, 1035, n.2 (10th Cir. 1997). Physical processes to address municipal sewage might include, for example, screening and settling to

remove solids. Biological processes to address municipal sewage might include, for example, use of microbes to break down solid wastes.

EPA has promulgated nationally-applicable effluent limitations guidelines and standards reflecting the capabilities of “secondary treatment” technology. 40 C.F.R. Part 133. EPA specifically has promulgated secondary treatment standards that are expressed in terms of numerical values for three conventional water quality parameters -- biochemical oxygen demand (“BOD”), total suspended solids (“TSS”) and acidity (pH). See 40 C.F.R. §§ 133.102. The “secondary treatment” standards promulgated by EPA are thus expressed in terms of the limitations that must be achieved, and do not dictate the type or form of technology that may be used to attain the limitations.

3. Provisions in NPDES Permits Addressing “Bypass”

NPDES permits typically contain provisions addressing the “bypass” of waste streams from a portion of a wastewater treatment facility. EPA regulations define “bypass” to mean the “intentional diversion of waste streams from any portion of a treatment facility.” 40 C.F.R. § 122.41(m)(1).

EPA regulations generally prohibit bypasses. 40 C.F.R. § 122.41(m)(4). However, bypasses may be approved where (1) the bypass does not cause effluent limitations to be exceeded and (2) “if it . . . is for essential maintenance to assure efficient operation.” 40 C.F.R. § 122.41(m)(2). EPA regulations also provide that an enforcement action for a bypass may not be brought under certain circumstances. Specifically, the regulations provide that an enforcement action may not be brought for a bypass where all three of the following conditions are met: (1) the bypass “was unavoidable to prevent loss of life, personal injury, or severe

property damage,” (2) “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,” and (3) the permittee provides advance notice of the bypass. 40 C.F.R. § 122.41(m)(4). See United States v. City of Toledo, 63 F. Supp. 2d 834 (N.D. Ohio 1999).

The regulations relating to “bypass” described above were promulgated by EPA in 1980. 45 Fed. Reg. 33,448 (May 19, 1980). Upon judicial review, the D.C. Circuit concluded that the bypass provision “directly promotes the goals of the Act” and “is fully consistent with the technology-forcing framework of the Act.” Natural Resources Defense Council v. EPA, 822 F.2d 104, 122-126 (D.C. Cir. 1987).

4. Provisions in NPDES Permits Addressing “Upset”

NPDES permits also typically contain provisions addressing the “upset” of treatment processes. EPA regulations define an “upset” as “an exceptional incident in which there is unintentional and temporary noncompliance with . . . permit effluent limitations because of factors beyond the reasonable control of the permittee.” 40 C.F.R. § 122.41(n)(1). See Natural Resources Defense Council v. EPA, 859 F.2d 156, 206 (D.C. Cir. 1988) (discussing upset regulation). EPA regulations provide that an “upset” can constitute an affirmative defense to an enforcement action brought for noncompliance with permit limitations under certain circumstances. 40 C.F.R. § 122.41(n)(2). However, no EPA determination concerning whether there has been an “upset” made “before an action for noncompliance, is final administrative action subject to judicial review.” Id.

B. Procedures for Obtaining NPDES Permits and Judicial Review of Permits

In jurisdictions where EPA is the NPDES permitting agency, a discharger initiates the

NPDES permitting process by filing a permit application providing detailed information regarding the facility for which the permit is sought and the facility's planned discharges. 40 C.F.R. §§ 124.3 & 122.21. EPA determines whether a final permit should be issued based on the administrative record compiled during those proceedings. 40 C.F.R. § 124.15. Judicial review of EPA action in the issuance or denial of an NPDES permit lies in the United States Court of Appeals. CWA section 509(b)(1)(F); 33 U.S.C. § 1369(b)(1)(F).⁹

In jurisdictions authorized by EPA to administer the NPDES permitting program under State law, EPA has an oversight role in that other agency's permitting program. CWA section 402(d), 33 U.S.C. § 1342(d). EPA may review a permit issued by the authorized agency and object to its issuance as being "outside the guidelines and requirements" of the CWA. *Id.* If the authorized agency does not revise the permit to meet EPA's objection, then EPA assumes authority to issue the permit. Aggrieved persons may obtain judicial review of the permit issued by EPA as described above. If the authorized agency revises the permit to meet the objection, then judicial review of the authorized agency's permit would be available in State (or Tribal or Territorial) courts. 40 C.F.R. § 123.30. An EPA decision not to object to an authorized agency's permit is not subject to judicial review. District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980). An EPA decision to object to an authorized agency's permit is reviewable as explained above, when EPA completes the objection process and takes final action to issue or deny the permit to which it has objected. See 40 C.F.R. § 123.44. See also Champion Int'l Corp. v. EPA, 850 F.2d 182, 186-189 (4th Cir. 1988).

⁹ A petition to EPA's Environmental Appeals Board ("EAB") for review is a prerequisite to judicial review. 40 C.F.R. § 124.19.

The CWA confers a variety of discretionary enforcement options on EPA in response to NPDES permit violations, including issuing administrative compliance orders, initiating administrative penalty actions, or bringing civil enforcement actions in federal court seeking penalties and injunctive relief. 33 U.S.C. §§ 1319(a),(b),(g).

C. POTWs: Separate Sanitary Sewers vs. Combined Storm and Sanitary Systems

As noted above, this case involves the permitting of publicly owned treatment works (“POTWs”) under the NPDES permitting program. In the United States, sewerage collection systems for publicly owned treatment works (“POTWs”) exist in two basic forms: (1) separate sanitary sewer systems and (2) combined storm and sanitary sewer systems. The former is designed to convey only sanitary sewage.⁷ The latter is a publicly owned pipe system that conveys a combination of sanitary sewage and storm water runoff to a publicly owned treatment works. EPA has estimated that there are more than 19,000 publicly owned treatment works nationwide, providing municipal wastewater collection and/or treatment, and that most of these are served by separate sanitary sewer systems. 67 Fed. Reg. 22,077 (May 2, 2002).

Approximately 850 publicly owned treatment works are served by combined systems. *Id.*

1. Combined Sewer Overflows (“CSOs”)

During and after heavy precipitation, a portion of the sewage in a combined system may not be delivered to a treatment plant, but may overflow from the conveyance system into waters of the United States. Such discharges are referred to as “combined sewer overflows” (“CSOs”). CSOs present significant public health risks and can contribute to exceedance of water quality

⁷ A municipality served by a separate sanitary sewer system is usually served by a “municipal separate storm sewer system” (“MS4”), which conveys storm water.

standards. 54 Fed. Reg. at 37,371 (Sept. 8, 1989)

The framework for controlling discharges of CSOs to the Nation's waters through the NPDES permit program is set forth in two national guidance documents: (1) the 1989 "National Combined Sewer Overflow Control Strategy," 54 Fed. Reg. 37,370 (Sept. 8, 1989) (hereinafter "1989 CSO Control Policy"); and (2) the 1994 "Combined Sewer Overflow (CSO) Control Policy," 59 Fed. Reg. 18,688 (Apr. 19, 1994) (hereinafter "1994 CSO Control Policy"). The 1994 CSO Control Policy elaborates on the 1989 CSO Control Policy. 59 Fed. Reg. 18,688.

EPA's national guidance concerning CSO discharges has essentially been codified by Congress in 2000 amendments to the CWA. Specifically, new section 402(q)(1) of the CWA, 33 U.S.C. § 1342(q)(1), provides that NPDES permits after the enactment of the amendment "for a discharge from a municipal combined storm and sanitary system shall conform to the [1994 CSO Control Policy]." EPA's 1994 CSO Control Policy recognizes the site-specific nature of CSOs and their impacts, and provides flexibility for controls to be tailored to local situations. 59 Fed. Reg. 18,688.

CSOs are not considered by EPA to be discharges from a publicly owned treatment works subject to "secondary treatment" standards, but rather to be subject to other technology-based standards. See 54 Fed. Reg. at 37371 (Sept. 8, 1989); Montgomery Environmental Coalition v. Costle, 646 F. 2d 568 (D.C. Cir. 1980).

2. Sanitary Sewer Overflows

Overflows from separate sanitary sewers which cause raw sewage to be discharged without receiving treatment are commonly referred to as "sanitary sewer overflows" ("SSOs"). Like CSOs, SSOs present significant public health risks, and can contribute to exceedance of

water quality standards. EPA Unified Regulatory Agenda, 66 Fed. Reg. 61,268, 61283-84 (Dec. 3, 2001) (discussing the need for an SSO rule). SSOs can release raw sewage to areas where they present high risks of human exposure, such as streets, private property, basements, and receiving waters used for drinking water, fishing, or recreation. Id. The most immediate health risks associated with SSOs are potential exposure to bacteria, viruses, and other pathogens. Id. EPA has estimated that there are at least 40,000 SSO events per year and perhaps as many as 400,000 occurrences of sewage backing up into basements. Id.

Currently, EPA is in the process of developing a rulemaking that would establish a broad-based regulatory framework for controlling SSOs. See 67 Fed. Reg. 33,859, 33,863 (May 13, 2002) (identifying in EPA's semiannual regulatory agenda that rulemaking related to "NPDES permit requirements for municipal sanitary sewer collection systems" and "sanitary sewer overflows" is among major rulemakings under development). EPA expects to issue a notice of proposed rulemaking relating to sanitary sewers sometime in 2003.

In the context of the 1989 CSO Control Policy, EPA did provide some guidance on sanitary sewer systems as well, stating that "Sanitary sewer systems must adhere to the strict design and operational standards established to protect the integrity of the sanitary system and wastewater treatment facilities. Discharges from separate sanitary sewer systems with less than secondary treatment are prohibited." 54 Fed. Reg. 37,371.

D. Judicial Review of EPA Rules Under the Clean Water Act

Claims regarding certain enumerated EPA actions, including most EPA regulations under the CWA, fall within the exclusive, original jurisdiction of the Courts of Appeals. 33 U.S.C. § 1369(b). Of relevance in this case, CWA section 509(b)(1)(E) vests judicial review in the Courts

of Appeals for promulgation or approval of any “effluent limitation or other limitation” under section 301. 33 U.S.C. § 1369(b)(1)(E). As noted above, judicial review of EPA action in the issuance or denial of an NPDES permit also lies in the U.S. Courts of Appeals. CWA section 509(b)(1)(F); 33 U.S.C. §§ 1369(b)(1)(F).

II. PLAINTIFFS’ COMPLAINTS

Plaintiffs Pennsylvania Municipal Authorities Association (“PMAA”), Tennessee Municipal League, the City of Little Rock Sanitary Sewer Committee and intervenor Plaintiff Association of Metropolitan Sewerage Agencies (“AMSA”) (collectively “Plaintiffs”) represent municipalities who own and/or operate wastewater systems. At the core of Plaintiffs’ lengthy Complaints is the allegation that certain EPA regional offices have adopted three “rules” concerning NPDES permit limitations for municipal treatment works.

A. Alleged EPA Regional Rules

These three alleged EPA regional “rules” are summarized briefly below.

1. Alleged “Rule” # 1: Blending

First, Plaintiffs allege that EPA Regions III, IV and VI have adopted a rule prohibiting NPDES permits from allowing “blending” (See PMAA Complaint, Preliminary Statement and ¶¶ 243, 246, 249). The term “blending” as used by Plaintiffs is not a term that appears in the Clean Water Act or in EPA’s NPDES regulations. Plaintiffs do not offer a precise definition of “blending” as they use this term in their Complaints. They indicate, however, that “blending” for purposes of their claims “generally refers to the practice where peak wet weather flows exceeding the capacity of a treatment unit (e.g., biological unit) are routed around that unit, blended together with an effluent from that unit prior to discharge, and the blended flows meet applicable

permit effluent limitations at the final discharge location.” Plaintiffs’ Complaint ¶ 56.

The term “blending” as loosely defined by Plaintiffs in their Complaints potentially implicates EPA’s “bypass” regulation, 40 C.F.R. § 122.41(m). As noted above (See supra at 6), EPA regulations define “bypass” to mean the “intentional diversion of waste streams from any portion of a treatment facility.” EPA regulations prohibit bypasses except under specified conditions. Id. In their prayer for relief, Plaintiffs request that the Court declare that the “bypass rule” “does not restrict the ability of municipal entities to design and operate facilities that utilize blending to process peak wet weather flows.” PMAA Prayer for Relief ¶ 4, AMSA Prayer for Relief, ¶ 3. Plaintiffs further request that the Court declare that “where blending has been authorized as part of the plant operations, it is authorized and shall continue to be authorized under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and its implementing regulations regardless of whether or not the NPDES permit specifically references blending as an operational practice.” PMAA Prayer for Relief, ¶ 5; AMSA Prayer for Relief, ¶ 4.

In support of their position that EPA Regions III, IV, and VI have adopted a final rule prohibiting “blending,” Plaintiffs point to statements in the following seven documents:

- a June 22, 1999, settlement communication between Lisa Cherup, a lawyer with the Department of Justice to Wayne Kablack, Solicitor, Borough of Indiana, Pennsylvania (See Exhibit 1). PMAA Complaint ¶ 149-150;
- a July 20, 1999, memorandum from Brian J. Maas, Director, Water Enforcement Division, EPA, to David McGuigan, Chief, NPDES Branch, Region III, EPA (See Exhibit 2). PMAA Complaint ¶ 151;
- an October 20, 1999, letter from Lisa Cherup, Department of Justice, to Steven R. McGraw, representing the Borough of Indiana (See Exhibit 3). PMAA Complaint ¶ 153;

- a June 27, 2000, memorandum from Douglas Mundrick, EPA Region IV Permits Chief, to Charles Sutfin, Director, Water Permits Division, EPA (See Exhibit 4). PMAA Complaint ¶ 174;
- a December 16, 1998, EPA Region 6 Permits Branch document titled “Strategy for Permitting Discharges of Wet-Weather-Related Peak Flows,” (See Exhibit 5). PMAA Complaint ¶ 183;
- a May 21, 1997, letter from Jack V. Ferguson, Chief, NPDES Permits Branch, to Mr. William Larrain, Director of Utility Operations, City of Port Arthur (See Exhibit 6). PMAA Complaint ¶ 186;
- a November 23, 1999, email from Jack Ferguson, Chief, NPDES Permit Branch, EPA Region VI. PMAA Complaint ¶ 187 (See Exhibit 7).

2. Alleged “Rule” #2: Prohibition of Emergency Outfalls

Plaintiffs additionally allege that EPA Regions III and IV have unlawfully adopted a rule prohibiting the permitting of “emergency outfalls.” PMAA Complaint, ¶¶ 209, 215, 258-66; AMSA Complaint ¶¶ 118, 123, 157-163.

Like the term “blending,” the term “emergency outfalls” is not defined in the Clean Water Act or NPDES regulations.^{8/} Nor do Plaintiffs themselves define the term “emergency outfalls” as they use this term in their Complaints. Plaintiffs appear, however, to use this term to refer generally to emergency overflows from sanitary sewer systems (i.e., “SSOs”). See PMAA Complaint ¶¶ 197-220. Rather than challenge the denial of a specific permit application, Plaintiffs bring this action requesting that the Court “[d]eclare that SSOs may receive NPDES permits covering emergency outfall locations subject to the upset and bypass rule provisions and that EPA Regions III and IV may not prohibit the NPDES permitting of emergency outfall locations.” PMAA Prayer for Relief, ¶ 6; AMSA Prayer for Relief, ¶ 5.

^{8/} EPA’s NPDES regulations do require permit applicants to identify “constructed emergency overflows” in a permit application. 40 C.F.R. § 122.21.

In support of their position that EPA Regions III and IV have adopted a rule prohibiting the permitting of “emergency outfalls,” Plaintiffs point to the following statements in the following three documents:

- a December 6, 1996, letter from Bill Colley, and Lynnette Elser, EPA Region III, to Kevin Weiss, EPA Office of Water (See Exhibit 8). PMAA Complaint ¶ 211;
- a March 12, 1997, document titled “Region III Interim Guidance for Sanitary Sewer Overflows and NPDES Permits (See Exhibit 9); PMAA Complaint ¶ 212.
- a June 27, 2000, memorandum from Douglas Mundrick, EPA Region IV Permits Chief, to Charles Sutfin, Director, Water Permits Division, EPA, and attached paper (See Exhibit 4). PMAA Complaint ¶¶ 217-218.

3. Alleged “Rule” # 3: Secondary Treatment Standards Apply to SSOs

Plaintiffs additionally allege that EPA Regions III, IV, and VI have adopted a regional rule establishing “secondary treatment” as the technology-based standard applicable to sanitary sewer overflows (“SSOs”).

In support of their position that EPA Regions III, IV, and VI have adopted a regional rule establishing “secondary treatment” as the technology-based standard for SSOs, Plaintiffs point to statements by EPA regions in the following 2 documents:

- a November 7, 1996, NPDES permit objection letter from Alvin Morris, EPA Region III Water Management Division Director, to Steven Beckman, Pennsylvania DEP, regarding the City of Sharon, Pennsylvania. PMAA Complaint ¶ 229;
- a June 27, 2000, memorandum from Douglas Mundrick, EPA Region IV Permits Chief, to Charles Sutfin, Director, Water Permits Division, EPA, and attached paper (See Exhibit 4). PMAA Complaint ¶ 223.

B. Plaintiffs' Alleged Causes of Action

Based on their allegation that EPA regional offices have adopted the three “rules” described above, Plaintiffs’ Complaints include the following specific claims: (1) that EPA regional offices do not have statutory authority to promulgate rules; (See PMAA Counts I-IV; AMSA Counts I-III), (2) that the rules allegedly adopted by EPA regional offices are arbitrary and capricious (See PMAA Counts VI and VIII; AMSA Count V), and (3) that the alleged rules have been established without following the procedural requirements of the Administrative Procedures Act (“APA”) and the Unfunded Mandates Reform Act (See PMAA Counts V, X; AMSA Counts IV; VIII). Plaintiffs additionally contend that EPA headquarters has unlawfully withheld or unreasonably delayed agency action by failing to eliminate the alleged regional “rules.” (See PMAA Count VII; AMSA Count VI). Plaintiffs request broad declaratory and injunctive relief.

STANDARD OF REVIEW

The Supreme Court has held that a court should not review the merits of a claim until the court has determined that it has jurisdiction to do so. Steele Co. v. Citizens for a Better Env’t, 523 U.S. 83, 93-94 (1998). When, as here, a challenge to subject matter jurisdiction is made, it must be “fully considered.” See, e.g., Spectacor Management Group v. Brown, 131 F.3d 120, 127 (3d Cir. 1997); United States ex rel. Coffey v. William R. Austin Construction Co., 436 F. Supp. 626, 628 (W.D. Okla.1977).

The burden of proof on a Rule 12(b)(1) motion to dismiss for lack of jurisdiction is on the party asserting jurisdiction. “Federal courts are courts of limited jurisdiction It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the

contrary rests upon the party asserting jurisdiction.” Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) (citations omitted).

SUMMARY OF ARGUMENT

This Court does not have subject matter jurisdiction over the claims raised. The Courts of Appeals have exclusive jurisdiction over any challenges to EPA rulemaking relating to NPDES permit limitations. Thus, even assuming, solely for the sake of argument, that Plaintiffs had identified any final EPA rules in their Complaints that are ripe for judicial review – and they cannot identify any such rules – they would have to pursue their challenges in the appropriate Court of Appeals within the 120 day statutory time limit. The fact that Plaintiffs apparently have failed to file a timely petition with the Court of Appeals challenging alleged EPA actions does not mean that they can now pursue an untimely challenge in the wrong court.

Furthermore, even if this Court otherwise had jurisdiction, the assorted agency statements Plaintiffs point to in their Complaints do not constitute final agency actions, and are not ripe for judicial review. Indeed, the assorted agency communications Plaintiffs cite to in their Complaints that allegedly reflect promulgation of “rules” include such items as confidential settlement communications made in the context of enforcement proceedings and internal agency deliberative memoranda. These communications do not mark the consummation of any agency decisionmaking process and have no binding legal effect. If Plaintiffs wish to challenge a permitting decision that actually limits their ability to discharge untreated or partially treated sewage into the Nation’s waters, they can do so in the context of a specific permitting proceeding.

In addition, EPA is currently working on a rulemaking that will address sanitary sewer

overflows, and any challenges to national requirements that EPA might adopt in that rulemaking are premature.

Finally, Plaintiffs fail to state a claim upon which relief may be granted under section 706(1) of the APA under the theory that agency action has been unlawfully withheld or unreasonably delayed. To establish that agency action has been unlawfully withheld or unreasonably delayed, Plaintiffs would have to prove that EPA has some mandatory duty or obligation that it has not performed under the CWA, and this Plaintiffs cannot do.

For all of these reasons, Plaintiffs' Complaints must be dismissed in their entirety for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE RULES RELATING TO CLEAN WATER ACT EFFLUENT LIMITATIONS ARE EXCLUSIVELY REVIEWABLE IN THE UNITED STATES COURT OF APPEALS

The United States, as sovereign, is immune from suit except to the extent that it specifically consents to be sued on the claim brought. United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). When a plaintiff sues the United States or an instrumentality thereof, he must identify a specific statutory provision that waives the government's immunity from suit. Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1021 (3d Cir. 1997). Waivers of sovereign immunity "must be unequivocally expressed in [the] statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted).

Plaintiffs contend that this Court has jurisdiction over the claims asserted under the

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., the federal question statute, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, (See PMAA Complaint ¶¶ 1-8; AMSA Complaint ¶¶ 1-8). However, none of these statutes provides a basis for jurisdiction.

A. The Federal Question and Declaratory Judgment Statutes Do Not Confer An Independent Basis for Jurisdiction

As an initial matter, it is well-established that the Federal Question Statute, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 do not confer an independent basis for jurisdiction and are not, in themselves, a waiver of the United States' sovereign immunity from suit. "Section 1331 'is not a general waiver of sovereign immunity. It merely establishes a subject matter that is within the competence of federal courts to entertain.'" Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996) (citation omitted). Likewise, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, is a procedural statute only, and neither waives sovereign immunity nor establishes jurisdiction for a claim. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-672 (1950); Reuth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993).

The only waiver of sovereign immunity even potentially applicable to this case is that found in the Administrative Procedure Act, 5 U.S.C. § 702. However, the APA authorizes review only of "final agency action," 5 U.S.C. § 704, and does not apply at all where another statute precludes judicial review. As will be discussed below, both of these limitations on the APA apply in this case.

B. The United States Court of Appeals is the Exclusive Forum For Pursuing an Appeal of Rules Relating to Effluent Limitations And Other Limitations Applied in The NPDES Permitting Program

In this case, the United States Court of Appeals has exclusive jurisdiction over review of

EPA NPDES permitting regulations according to the provisions of CWA section 509(b)(1), subsections (E) and (F). 33 U.S.C. § 1369(b)(1)(E), (F). Those provisions state:

Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of [the Act], [or] (F) in issuing or denying any permit under section 1342 of [the Act] . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business . . .

33 U.S.C. § 1369(b)(1)(E),(F) (emphasis added).

Assuming, solely for the sake of argument, that the alleged “rules” Plaintiffs describe in their Complaints constitute final agency actions that are judicially reviewable, these “rules” would fall into the category of “effluent limitations or other limitations” under section 1311 of the Act, which are reviewable exclusively in the Court of Appeals.

Plaintiffs identify the following three “rules” that EPA regional offices have allegedly adopted:

(1) a prohibition on permitting “blending” (i.e., a prohibition on permitting the practice where peak wet weather flows exceeding the capacity of a treatment unit are routed around that unit, and blended together with an effluent from that unit prior to discharge”);

(2) a prohibition on permitting emergency overflows from sanitary sewer systems;

(3) a determination that “secondary treatment” standards shall apply to secondary sewer overflows (“SSO”)

Each of these three so-called “rules” constitutes an “effluent limitation or other limitation” within

the meaning of CWA section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E).^{2/}

To the extent it is not self-evident that the alleged “rules” Plaintiffs point to constitute “effluent limitation or other limitations” this is made abundantly clear by D.C. Circuit caselaw construing the scope of the Clean Water Act’s judicial review provision. See Natural Resources Defense Council v. EPA, 656 F.2d 768 (D.C. Cir. 1981) (“NRDC I”); Natural Resources Defense Council v. EPA, 673 F.2d 400 (D.C. Cir. 1982) (“NRDC II”); Natural Resources Defense Council v. EPA, 822 F.2d 104 (D.C. Cir. 1987) (“NRDC III”). See also Natural Resources Defense Council v. EPA, 966 F.2d 1292 (9th Cir. 1992).

In NRDC I, the D.C. Circuit addressed a challenge to regulations governing applications for variances from the limitations imposed on municipal sewage plants. These regulations defined various terms of importance to municipalities seeking to discharge without secondary treatment. 656 F.2d at 774. The regulations contained prohibitions on the issuance of permits for certain types of discharges. Id. The regulations set no numerical limitations. The D.C. Circuit concluded that the regulations were “effluent limitations . . . under section 1311.” Id. at 775.

The D.C. Circuit in NRDC I emphasized that individual permits granted by EPA applying effluent limitations are reviewable in the court of appeals under section 1369(b)(1)(F). The Court pointed out that were it to conclude that the challenged regulations were not reviewable in the court of appeals as an “effluent or other limitations” then this would lead to a “perverse

^{2/} The CWA defines an “effluent limitation” as “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. § 1362(11).

situation.” Id at 775. As explained by the Supreme Court, this “perverse situation” would be that “The court of appeals would review numerous individual actions issuing or denying permits pursuant to section 402 [33 U.S.C. § 1342] but would have no power of direct review of the basic regulations governing those individual actions.” E.I. duPont de Nemours & Co. v. Train, 430 U.S. at 136.

Similarly, in NRDC II, the D.C. Circuit held that it had jurisdiction to review challenges to Consolidated Permit Regulations issued by EPA. The Consolidated Permit Regulations consisted of a complex set of procedures for issuing or denying NPDES permits. They did not set any numerical limitations on pollutant discharge. Industry petitioners contended that the court did not have jurisdiction under section 509(b)(1)(E). The D.C. Circuit disagreed, concluding that the procedural regulations were “effluent limitation[s] or other limitation[s]” within the meaning of section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E). 673 F.2d at 407.

Likewise, in NRDC III, the D.C. Circuit held that it had jurisdiction to review a set of comprehensive NPDES regulations, including elaborations upon statutory definitions and conditions to be incorporated into NPDES permits. 822 F.2d at 111. Significantly, among the regulations the D.C. Circuit reviewed in NRDC III was EPA’s bypass rule. In this case, the alleged “rule” regarding “blending” that Plaintiffs ask this Court to review is essentially an alleged rule interpreting how the “bypass rule” should be applied to some category of factual circumstances. That is, Plaintiffs essentially allege here that EPA regions have established a “rule” pertaining to whether the practice of “blending,” – as Plaintiffs have loosely defined that term – constitutes a “bypass” within the meaning of 40 C.F.R. § 122.41(m). If the Court of Appeals has exclusive jurisdiction to review the “bypass rule” at 40 C.F.R. § 122.41(m) (and it

has already exercised such jurisdiction in NRDC III), then, *a fortiori*, the Court of Appeals must have exclusive jurisdiction over an alleged rule interpreting whether the “bypass rule” encompasses “blending.”

The Court of Appeals is the proper forum for filing challenges to EPA rulemaking concerning NPDES permit limitations under the Clean Water Act. Needless to say, to the extent that the EPA statements Plaintiffs point to in their Complaints constitute “rules,” Plaintiffs have failed to file a timely challenge to such rules by not filing within the 120 day window provided in section 509(b)(1), 33 U.S.C. § 1369(b)(1).¹⁰

C. Because Review of The Alleged Rules At Issue Is Available Under the Clean Water Act, the APA Is Unavailable As An Additional Remedy Or Basis for Jurisdiction

Plaintiffs cite to the Administrative Procedure Act (“APA”), and not the Clean Water Act, as the basis for this Court’s jurisdiction. The APA does not create a cause of action for review of every federal decision, however. For an agency action to be subject to APA review, it must, inter alia, be a final agency action for which there is no other adequate remedy in a court. 5 U.S.C. § 704. In the case of EPA rulemaking concerning effluent limitations and other limitations, there is an adequate remedy in the court of appeals under the judicial review provision of the Clean Water Act. Review is therefore not available under the APA.

The Second Circuit addressed a similar issue in Sun Enterprises, Ltd. v. Train, 532 F.2d

¹⁰ Any challenges to EPA action approving or promulgating effluent or other limitations under the Clean Water Act must be “made within 120 days from the date of . . . such promulgation,” “or after such date only if such application is based solely on grounds which arose after such 120th day.” 33 U.S.C. § 1369(b). Plaintiffs’ allegations that EPA regions have promulgated rules are based on an assortment of statements made between 1996 and 2000. All of the statements relied on are more than 2 years old -- so Plaintiffs are already far on the other side of the 120 day window.

280 (2d Cir. 1976). In Sun, the plaintiffs challenged EPA’s issuance of a section 402 permit on various grounds, including an allegation that EPA violated the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq, by failing properly to consult with the Interior Department. Id. at 286. The district court dismissed the suit, holding that review was available only in the court of appeals under section 509(b)(1) of the CWA. Id. On appeal, the plaintiffs in Sun Enterprises argued that the district court had jurisdiction to review their claims under, inter alia, 28 U.S.C. § 1331 and the APA. Id. at 287. The Second Circuit disagreed, pointing out that “[r]eview of [EPA’s] actions in issuing or denying a permit must, by the explicit terms of § 509, be sought in the court of appeals whose jurisdiction is . . . exclusive.” Id. The court explained that the APA only applies “where there is no other adequate remedy in a court,” and the “availability of § 509 review preclud[ed] the application of [the APA].” Id. at 288. The Second Circuit further explained: “Certainly it would be an unsatisfactory result if the otherwise exclusive mode of review of an NPDES’s permit issuance, a § 509 petition to the court of appeals, could be circumvented by an action in the district court” Id. See also Hayes v. Whitman, 264 F.3d 1017, 1025 (10th Cir. 2001) (“Because review of Plaintiff’s claim is available under the Clean Water Act, it is not subject to review under the APA.”); Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 851 (9th Cir. 1987) (“Where [the] plaintiffs may otherwise proceed under the citizen suit provision, they should not be allowed to bypass the explicit requirements of the [CWA] established by Congress through resort to . . . the APA.”); American Canoe Assoc., Inc. v. EPA, 30 F. Supp. 2d 908, 915 (E.D. Va. 1998) (“[D]uplicative causes of action cannot lie under both the Clean Water Act and the Administrative Procedure Act.”).

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE CHALLENGED STATEMENTS DO NOT CONSTITUTE FINAL AGENCY ACTIONS

Judicial review, whether it is under the judicial review provision of the CWA, 33 U.S.C. § 1369(b), or the APA, is limited to final agency action. American Telephone & Telegraph Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001) (addressing APA); Westvaco Corporation v. EPA, 899 F.2d 1383, 1386 (4th Cir. 1990) (addressing CWA). If a challenged agency action is not final, then the reviewing court lacks subject matter jurisdiction.

The Supreme Court has established that two conditions must be satisfied for agency action to be final. Bennett v. Spear, 520 U.S. 154, 178 (1997). First, the action “must be one from which ‘rights or obligations have been determined,’ or from which ‘legal obligations will flow.’” Id. (citations omitted). Second, the action “must mark the ‘consummation’ of the agency’s decisionmaking process,” and not be “of a merely tentative or interlocutory nature.” 520 U.S. at 177-78.

Plaintiffs cite in their Complaints to an assorted collection of statements by subordinate agency officials or representatives concerning the permitting of pollutant discharges from municipal owned sanitary sewer systems or treatment works. Plaintiffs claim that these statements reflect the promulgation of “rules” by certain EPA regional offices related to such discharges. The various statements that Plaintiffs cite to, however, do not constitute final agency actions. They do not mark the consummation of the agency’s decisionmaking process. They do not impose any obligation, deny any right, or fix any legal relationship.

Generally speaking, the documents Plaintiffs cite to in their Complaints fall into one of the following three categories: (1) factual findings and legal positions related to specific ongoing

or potential enforcement proceedings; (2) internal agency deliberative memoranda concerning permitting and enforcement policies under development; and (3) guidance or policy documents drafted by EPA regional offices. As discussed below, the statements Plaintiffs cite to within these documents do not, either individually or collectively, constitute final agency actions.

A. Statements Reflecting Legal Positions Taken In Specific Ongoing Or Potential Enforcement Proceedings Are Not Judicially Reviewable

In support of their claim that EPA regions have promulgated a “rule” related to “blending,” Plaintiffs point to several statements made in the context of specific potential or ongoing enforcement proceedings related to NPDES permit violations. Specifically, Plaintiffs cite to statements within the following four documents:

- a June 22, 1999, settlement communication between Lisa Cherup, a lawyer with the Department of Justice to Wayne Kablack, Solicitor, Borough of Indiana, Pennsylvania (See Exhibit 1); PMAA Complaint ¶ 149-150;
- a July 20, 1999, memorandum from Brian J. Maas, Director, Water Enforcement Division, EPA, to David McGuigan, Chief, NPDES Branch, Region III, EPA (See Exhibit 2); PMAA Complaint ¶ 151;
- an October 20, 1999, letter from Lisa Cherup, Department of Justice, to Steven R. McGraw, representing the Borough of Indiana (See Exhibit 3); PMAA Complaint ¶ 153;
- a May 21, 1997, letter from Jack V. Ferguson, Chief, NPDES Permits Branch, to Mr. William Larrain, Director of Utility Operations, City of Port Arthur (See Exhibit 6); PMAA Complaint ¶ 186;

The June 22, and October 20, 1999, letters authored by Ms. Cherup, an attorney in the Environmental Enforcement Section of the Department of Justice, are confidential settlement communications in a specific enforcement proceeding. See Exhibits 1 and 3. The June 22, 1999,

letter is explicitly stamped “Settlement Confidential: Not Discoverable Pursuant to Fed. R. Evid. 408.” See Exhibit 1. The July 20, 1999, memorandum authored by Mr. Maas is an internal agency deliberative memorandum that similarly relates to a specific pending enforcement case. See Exhibit 2. The May 2, 1997, letter from the EPA Region VI permits branch chief to the Director of Utility Operations for the City of Port Arthur likewise relates to a specific facility’s compliance with the Clean Water Act. See Exhibit 6.

Such confidential settlement communications or other statements conveying EPA’s pre-enforcement factual findings or legal positions do not constitute final agency actions. They do not determine any rights or obligations. They do not mark the consummation of EPA’s decisionmaking process. The D.C. Circuit’s recent decision in the case of American Telephone and Telegraph Co. v. EEOC, 270 F.3d 973 (D.C. Cir. 2001) (“A T & T”), is instructive. In AT & T, a company sought a declaratory judgment against the Equal Employment Opportunity Commission (“EEOC”), where the EEOC had issued a Letter of Determination expressing its view that the company’s pension calculation policy violated the Pregnancy Discrimination Act. The D.C. Circuit held that legal positions contained in the EEOC letter did not reflect final agency action subject to judicial review. The Court noted that EEOC was “not bound to sue” the company and that allowing the company to litigate with the EEOC over the lawfulness of its policy “would disrupt the administrative process in a manner clearly at odds with the contemplation of Congress.” 270 F.3d 976-77. See also FTC v. Standard Oil, 449 U.S. 232, 239-40 (1980) (holding FTC’s issuance of administrative complaint was not “final agency action” under the APA and hence not judicially reviewable before the conclusion of the administrative adjudication).

Like the Pregnancy Discrimination Act at issue in AT & T, the structure of the Clean Water Act reflects Congress' intention that challenges to legal positions and factual findings adopted by EPA in enforcement proceedings not be subject to judicial review unless and until EPA brings an enforcement action in federal district court. See 33 U.S.C. §§ 1319(a),(b),(g) (conferring a variety of discretionary enforcement options on EPA). Accordingly, in CWA cases, courts have overwhelmingly agreed that the CWA precludes pre-enforcement challenges to legal positions adopted by EPA. See, e.g., Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995) (holding compliance order issued by EPA under CWA is not subject to judicial review); Southern Ohio Coal Co. v. OSM, 20 F.3d 1418, 1426-28 (6th Cir. 1994) (same); Reuth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993) (same); Southern Pines Assocs. v. United States, 912 F.2d 713, 716-17 (4th Cir. 1990) (same); Hoffman Group, Inc. v. EPA, 902 F.2d 567, 569 (7th Cir. 1990) (same). The statements at issue here that are contained in confidential settlement communications and the like have even less legal force than the compliance orders at issue in the case law and are even more clearly not subject to judicial review.^{11/}

B. Internal Deliberative Agency Communications and Memorandums Do Not Constitute Judicially Reviewable Final Agency Action

In support of their claims that EPA Regions have promulgated “rules,” Plaintiffs additionally cite to statements within several internal deliberative agency memorandums regarding policies under development. Specifically, Plaintiffs cite to statements within the

^{11/} Plaintiffs also cite to a November 7, 1996, NPDES permit objection letter from Alvin Morris, EPA Region III Water Management Division Director, to Steven Beckman, Pennsylvania DEP, regarding the City of Sharon, Pennsylvania. PMAA Complaint ¶ 229. Review of final EPA decisions in issuing or denying an NPDES permit is within the exclusive jurisdiction of the courts of appeals, pursuant to 33 U.S.C. § 1369(b)(1)(F).

following internal agency memorandums:

- a June 27, 2000, memorandum from Douglas Mundrick, EPA Region IV Permits Chief, to Charles Sutfin, Director, Water Permits Division, EPA, and attached paper. PMAA Complaint ¶¶ 217-218 (See Exhibit 4);
- a November 23, 1999, email from Jack Ferguson, Chief, NPDES Permit Branch, EPA Region VI. PMAA Complaint ¶ 187 (See Exhibit 7);
- a December 6, 1996, letter from Bill Colley, and Lynnette Elser, EPA Region III, to Kevin Weiss, EPA Office of Water. PMAA Complaint ¶ 211 (See Exhibit 8).

Statements contained in such internal deliberative documents do not constitute final agency actions. The documents cited contain comments from EPA regional offices to EPA headquarters concerning policies under development. It is apparent from a review of these documents that EPA has not arrived at a settled agency position with respect to the issues discussed. To the contrary, they evidence a debate within the Agency. Such intra-agency communications do not mark the consummation of the agency's decisionmaking process. They also have no legal effect; they neither create rights nor impose obligations. The statements therein are not directed to the regulated community.

Indeed, these communications might have been withheld from release consistent with the deliberative process privilege.^{12/} The fact that persons outside of EPA may have obtained copies of internal deliberative communications through Freedom of Information Act requests or

^{12/} The deliberative process privilege encompasses "documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, as well as other subjective documents that reflect the personal opinions of the writer prior to the agency's adoption of a policy." Taxation with Representation Fund v. IRS, 646 F.2d 666, 677 (D.C. Cir. 11981) (citing NLRB v. Sears Roebuck Co., 421 U.S. 132, 150 (1975)).

otherwise does not convert deliberative communications into agency “actions.” See Appalachian Energy Group v. EPA, 33 F.3d 319 (4th Cir. 1994) (holding that internal memorandum transmitted to public advising that NPDES permit was required for storm water discharges was not a “final action” subject to judicial review even though it signaled position that EPA might eventually take).

C. Regional Guidance Documents Do Not Constitute Final Agency Actions

Plaintiffs additionally cite to statements within the following two guidance documents created by EPA regional offices, in support of their claim that EPA Regions have promulgated final rules:

- an unsigned December 16, 1998, EPA Region 6 Permits Branch document titled “Strategy for Permitting Discharges of Wet-Weather-Related Peak Flows,” (See Exhibit 5). PMAA Complaint ¶ 183”) (hereinafter “Region VI Strategy Document”); and
- an unsigned March 12, 1997, document titled “Region III Interim Guidance for Sanitary Sewer Overflows and NPDES Permits. (See Exhibit 9) (“hereinafter Region III Interim Guidance”); PMAA Complaint ¶ 212.

The Region VI “Strategy” and Region III “Interim Guidance” documents are policy statements expressing how these EPA offices intend to exercise their discretionary authority to issue NPDES permits or oversee state issuance of permits for certain types of discharges. These regional guidance documents have no independent legal force or binding legal effect, however, and do not mark the consummation of EPA’s decisionmaking process. In fact, the Region III document explicitly is characterized as “interim.”

A regional policy statement, in and of itself, does not have legal force and does not reflect

a final agency position on any particular matter. See American Paper Institute v. EPA, 882 F.2d 287 (7th Cir. 1989) (holding that guidance document concerning discharge limitations issued by EPA Region V was not final agency action subject to judicial review unless adopted by Administrator in particular permitting decision); American Paper Institute v. EPA, 726 F. Supp. 1256 (S.D. Ala. 1989) (holding guidance document concerning discharge limitations issued by EPA Region IV was not final agency action).

The American Paper decisions are particularly instructive. In the Seventh Circuit case, EPA Region V issued a guidance document addressing discharge standards under the CWA for pulp and paper mills. The Seventh Circuit held that the document had no legal effect and was not subject to judicial review. The Court stressed that “the [EPA] Administrator may overrule Region V” in determining whether the region’s guidance should be followed in a particular permitting decision. Id. at 289. The Seventh Circuit further noted that in the event the Administrator “adopts Region V’s position, and a permit is turned down, modified, or rescinded, review will be available in state or federal court. That review, on a full record, will disclose EPA’s final position, as applied to the plant in question.” Id. The Court noted that although “Region V told the states how it thought it might react to particular proposals,” “telegraphing your punches is not the same as delivering them.” 882 F.2d 287 at 289.

The United States District Court for the Southern District of Alabama in American Paper Institute v. EPA, 726 F. Supp. 1256 (S.D. Ala. 1989), agreed with the Seventh Circuit and likewise held that an EPA Region IV policy statement concerning NPDES discharges did not constitute final agency action. The district court explained that regional guidance documents do not have binding legal effect because states authorized to administer NPDES permitting

programs “may or may not choose to implement the Region IV suggestions in whole or in part” and that “at the time the issue reaches the EPA for review, EPA could . . . change its position.” The Court explained that “because EPA does not have the power to force compliance at this point, the plaintiffs are not being required . . . to make any changes.” 726 F. Supp. at 1260.^{13/}

The regional guidance documents at issue here are distinguishable from those cases in which the D.C. Circuit has deemed nationally applicable agency guidance documents to be judicially reviewable. See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000); Ciba-Geigy v. EPA, 801 F.2d 430 (D.C. Cir. 1986). Unlike in Appalachian Power or Ciba-Geigy, this case does not involve a situation where EPA Headquarters has adopted guidance that is nationwide in scope and has directed all Regions to apply it.

In this case Plaintiffs do not purport to challenge a nationwide policy. Rather, Plaintiffs contend that EPA regional offices have failed to adopt uniform enforcement policies. Plaintiffs express a preference for policies allegedly adopted by some regions over policies allegedly adopted by others. To the extent that EPA regions have not adopted a uniform enforcement policy, this reflects that EPA has not promulgated a nationwide position that could be judicially reviewable. Indeed, the fact that EPA has a proposed rulemaking under development intended for the first time to specifically address the regulatory framework for SSOs underscores the lack of finality. Cf. Ciba-Geigy, 801 F.2d at 437 (noting that “[W]e have no reason to believe that the . . . statement of the agency’s position [at issue in case] was ‘only the ruling of a subordinate official’ that could be appealed to a higher level of EPA [authority].”); Appalachian Power Co.

^{13/} All of the states in EPA Regions III, IV, and VI are authorized to administer an NPDES permit program except New Mexico in Region VI and the District of Columbia in Region III.

v. EPA, 208 F.3d at 1021 (addressing legal effect of “document issued at headquarters” that was nationwide in scope).

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS’ CLAIMS ARE NOT RIPE FOR REVIEW

Plaintiffs’ claims additionally are not ripe for review. The ripeness doctrine is rooted in both the Article III requirement of “cases or controversy” and in prudential considerations favoring the orderly conduct of administrative and judicial processes. See Blanchette v. Connecticut General Ins. Co., 419 U.S. 102, 138 (1974). The doctrine was developed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

Application of the ripeness doctrine requires consideration of two basic factors:

(1) “the fitness of the issues for judicial decision,” and (2) “the hardship to the parties of withholding court consideration.” Id. at 149. Both of these factors counsel against the exercise by this Court of judicial review.

A. The Issues Raised By Plaintiffs Are Not Fit For Judicial Decision

The Supreme Court has indicated that the following two factors should be considered in evaluating whether the issues raised in a challenge to agency action are fit for review: (1) “whether judicial intervention would inappropriately interfere with further administrative action,” and (2) “whether the courts would benefit from further factual development of the issues presented.” Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733 (1998). Both of these factors

compel the conclusion that Plaintiffs' claims are not ripe for review.

1. Judicial Intervention Would Inappropriately Interfere With Further Administrative Action

The Supreme Court has indicated that whether an action constitutes "final agency action" should be considered in determining whether judicial intervention would inappropriately interfere with further administrative action. See Abbott Laboratories, 387 U.S. at 149. For the reasons stated above, the challenged agency statements do not constitute final agency actions. Furthermore, in this case EPA Headquarters has formally announced an intention to conduct a rulemaking related to issues Plaintiffs identify in their Complaint, and premature judicial intervention would inappropriately interfere with this rulemaking.

Judicial review of various non-final agency statements would further embroil the Court in an area of policy, enforcement, that is traditionally reserved for the executive. See Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986) (decision that policy is unreviewable was "reinforced by the fact that the statement here in question pertains to an agency's exercise of its enforcement discretion"). The decision whether, and how, to pursue enforcement action in any particular instance is within the government's prosecutorial discretion, and is generally not reviewable. Heckler v. Chaney, 470 U.S. 821, 836 (1985); see also Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 460 (1979). "[An agency] alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a [manner] as to execute its policy efficiently and economically." Moog Indus. v. FTC, 355 U.S. 411, 413 (1958).

Allowing judicial review of the instant generalized challenge to various alleged regional

permitting and enforcement policies – before the EPA decisionmaker has had the opportunity to evaluate any particular permit application or potential permit violation – would effectively usurp EPA’s enforcement discretion and substitute this Court’s judgment for EPA’s as to when and on what terms EPA may seek to exercise its enforcement discretion. Cf. American Paper Institute, 882 F.2d at 290 (“Nothing but grief could come of trying to review an [NPDES] ‘enforcement policy’ without knowing how (or even whether) it would affect any plant.”). Id. at 290.

2. The Judiciary Would Benefit From Further Factual Development of the Issues Presented

Additional factual development will further significantly advance the courts’ ability to deal with the types of issues presented by Plaintiffs, and assist in their resolution on a case-by-case basis. For example, judicial consideration of whether routing wastewater flows around a treatment unit and “blending” these flows with wastewater flows going through the treatment unit is consistent with EPA’s “bypass” regulation at 40 C.F.R. § 122.41 will stand “on a much surer footing” in the context of a case-specific permitting or enforcement decision than in the instant “generalized challenge” to EPA regions alleged interpretations of the bypass rule. Toilet Goods Ass’n v. Gardner, 387 U.S. 158, 164 (1967). Likewise, judicial review of whether a particular “sanitary sewer overflow” (“SSO”) may be permitted consistent with the Clean Water Act and applicable regulations will stand on a surer footing in the context of a case-specific permitting or enforcement decision than in the instant generalized challenge.

If EPA does elect to issue, deny or object to any NPDES permits consistent with or shaped by the alleged regional policies, adversely affected parties will have an opportunity to contest the policy’s application in a concrete setting. See Mada-Luna v. Fitzpatrick, 813 F.2d

1006, 1013 (9th Cir. 1987) (holding that persons can challenge determinations embodied in agency guidance only if and when guidance has been applied specifically to them).

In short, judicial review will be enhanced by waiting until the effects of the alleged policies have been crystalized in a concrete fact situation involving an actual, present impact on a particular affected party. Judicial review in the absence of a concrete fact situation would entangle the Court in precisely the sort of “abstract disagreements over administrative policies” that the ripeness doctrine seeks to avoid. Ohio Forestry Ass’n, 523 U.S. at 732-33.

B. Plaintiffs Will Not Suffer Hardship If The Court Withholds Review

Withholding court consideration until discharge limitations are actually applied at specific sites will not cause Plaintiffs any hardship. As discussed above, the alleged regional policies Plaintiffs cite do not create any actual legal rights or obligations. They do not “command anyone to do anything or to refrain from doing anything,” Ohio Forestry Ass’n v. Sierra Club, 523 U.S. at 733; nor do they “grant, withhold, or modify any formal legal license, power or authority.” Id. The impact of these alleged policies on municipalities is speculative until they are actually applied in a particular permitting decision or enforcement action.

IV. PLAINTIFFS CANNOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PREMISED ON THE THEORY THAT AGENCY ACTION HAS BEEN UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED

Plaintiffs additionally fail to state a claim upon which relief may be granted under section 706(1) of the APA under the theory that agency action has been unlawfully withheld or unreasonably delayed. In order to establish that agency action has unlawfully been withheld or unreasonably delayed, Plaintiffs would have to prove that EPA has some mandatory duty or obligation which EPA has not performed under the CWA. Madison-Hughes v. Shalala, 80 F.3d

1121, 1124-25 (6th Cir. 1996) ("Agency action is 'unlawfully withheld' only when 'the agency has violated its statutory mandate by failing to act.' . . . [J]urisdiction depends upon the alleged existence of a mandatory legal requirement" (quoting Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981)); San Francisco Baykeeper v. Whitman, 297 F.3d 877, 885 (9th Cir. 2002) ("for a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place"). Here, Plaintiffs have not identified, and cannot identify, any statutory duty for EPA to set nationwide effluent or other limitations relating to the subject areas Plaintiffs have identified (i.e., "blending," "emergency outfalls," "SSOs").^{14/}

^{14/} Furthermore, if Plaintiffs could identify a nondiscretionary duty to act by a date-certain deadline (and they cannot), the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a)(2), provides a remedy, and Plaintiffs therefore would not be able to proceed under the APA. In the event that Plaintiffs could identify a statutory duty to act without a readily ascertainable deadline, they could pursue a claim for unreasonable delay, but only in the court of appeals, which would have exclusive jurisdiction over Plaintiffs' claim under the jurisdictional rule announced by the D.C. Circuit in Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 75-78 ("TRAC") (D.C. Cir. 1984). See Sierra Club v. Thomas, 828 F.2d 783, 790-92 (D.C. Cir. 1987) (discussing application of TRAC to claim for unreasonable delay under the Clean Air Act). Thus, even if Plaintiffs could identify a statutory duty to act (and they cannot), this Court would not have jurisdiction over a claim brought under section 706(1) of the APA.

CONCLUSION

For the foregoing reasons, EPA's motion to dismiss Plaintiffs' Complaints for lack of subject matter jurisdiction and for failure to state a claim should be granted.

Respectfully submitted,

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

By: /s/
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Counsel for Defendants

DATED: October 25, 2002



Environment and Natural Resources Division

LAC

DJ 90-5-1-1-4475

Environmental Enforcement Section

P.O. Box 7611

Washington, DC 20044-7611

SETTLEMENT CONFIDENTIAL,
NOT DISCOVERABLE PURSUANT
TO FED. R. EVID. 408

Telephone (202) 514-2862

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June 22, 1999

By Facsimile, Follow Up
by Regular Mail

Wayne Kablack, Esq.
Solicitor, Borough of Indiana
20 North Seventh Street
Indiana, PA 15701

Re: The Borough of Indiana's Wastewater
Treatment Plant and Collection System

Dear Mr. Kablack:

This letter is in response to Steve McGraw's letters of April 29, 1999 and June 9, 1999 to Rob Sanchez of U.S. EPA Region III. Because the Department of Justice is representing U.S. EPA in the ongoing negotiations concerning the Borough's compliance with the Clean Water Act, it is appropriate that I respond on behalf of U.S. EPA to Steve McGraw's letters.

Bypassing of treatment units

We were very surprised to receive notice that the Borough's expansion plans included bypassing untreated or partially treated sewage around treatment units. It is U.S. EPA's policy that "slipstreaming" or "internal bypassing" of treatment units, (whether those units are for primary or secondary treatment), constitutes illegal bypassing, and is not allowed.

The Borough's National Pollutant Discharge Elimination System (NPDES) permit defines the term "bypass" as "the intentional diversion of waste streams from any portion of a treatment facility." This definition is identical to the definition of "bypass" in the EPA bypass regulations found at 40 CFR 122.41(m). The Borough's permit states that "bypass is prohibited, and the Director 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

EXHIBIT

tabbles

1

(C) The permittee submitted notices as required..."

Slipstreaming is clearly the intentional diversion of waste streams from a portion, or portions, of a treatment facility. The purpose of such slipstreaming would not be to respond to an emergency situation to prevent loss of life, personal injury or severe property damage, etc. Therefore, such slipstreaming would be prohibited bypassing under the Borough's NPDES permit. Such bypassing could subject the Borough to additional federal enforcement.

Any proposed expansion of the Borough of Indiana POTW should not incorporate plans to slipstream any of the waste streams from portions of the treatment facility, as such slipstreaming would constitute illegal bypassing.

Digester Improvements

The changes that Steve McGraw suggested in reference to converting the existing 185,000 gallon secondary digester to a primary digester are acceptable to U.S. EPA as long as the overall digestion capacity increases at the Borough's treatment plant. The elimination of the secondary digester, however, will increase the volume of sludge created, and your related disposal costs.

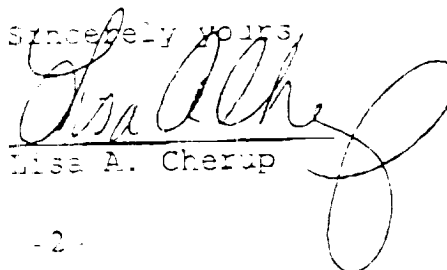
Two Channel Monsters

The modifications to the headworks (as described in Steve McGraw's June 9, 1999 letter) are acceptable. However, in the Borough's effort to increase the upstream head by raising the overflow weir 2+ feet, it should be careful not to create overflows at Manhole 17 or at the channel monster. Additionally, the United States is concerned that the Borough lacks a backup power source for the channel monsters.

If Steve McGraw or the Borough's plant operators desire to speak to EPA regarding any of the issues discussed above, please call me so we can arrange a conference call.

Finally, we hope that the Borough will proceed with the schedule for plant expansion that has been negotiated. The United States and the Commonwealth will be making a civil penalty counterproposal to the Borough shortly.

Sincerely yours,


Lisa A. Cherup

215 814 2623

Attorney, Environmental
Enforcement Section
Environmental and Natural
Resources Division
U.S. Department of Justice
(202) 514-2802

cc: Steve McGraw, Stiffler, McGraw
Cassandra Rice, Esq., EPA Region HQ
Andrew Hudock, EPA Region HQ
Renee Sarajian, Esq., EPA Region III
Robert Sanchez, Region III
Bruce Herschlag, Esq., PA DEP



UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460ENFORCEMENT-SENSITIVE
CONFIDENTIALOFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

JUL 20 1999

MEMORANDUM

SUBJECT: Plans to "Slipstream" [REDACTED]

FROM: Brian J. Maas, Director
Water Enforcement Division [Signature]

TO: David McGuigan, Chief (3WP3Y)
NPDES Branch, Region III

As you know, there is a pending civil judicial referral action against [REDACTED] for its NPDES effluent violations, bypasses and sewer overflows. Expansion of the POTW in [REDACTED] is part of the injunctive relief which the Agency and the Department of Justice seek in settlement of this referral action. My staff have recently informed me that these expansion plans also indicate that [REDACTED] is considering "slipstreaming" or "internal bypassing" of some of the treatment units. As you also know, such slipstreaming of treatment units, whether those units are for primary or secondary treatment, would constitute bypassing and would not be acceptable long-term injunctive relief.

The NPDES permit [REDACTED] defines the term bypass and identifies prohibitions of bypass. These definitions are very similar to those in the NPDES regulations at 40 CFR 122.41(m)(1) and (4), respectively. The [REDACTED] permit clearly states that "bypass means the intentional diversion of waste streams from any portion of a treatment facility." The permit also states that "bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass w [REDACTED] prevent loss of life, personal injury, or severe property damage;

B. There were no feasible alternatives to the bypass...;
and

(C) The permittee submitted notices as required..."

Slipstreaming is clearly the intentional diversion of waste streams from a portion of a treatment facility. Therefore, any such slipstreaming would constitute bypassing. Furthermore, the purpose of such slipstreaming would not be to prevent loss of life, personal injury or severe property damage, etc.; therefore, such slipstreaming would be prohibited bypasses and thus permit violations. These violations could subject the [REDACTED] additional federal enforcement.

Any proposed expansion of [REDACTED] 907W should not incorporate operational plans to slipstream any of the waste streams from portions of the treatment facility, as such slipstreaming would constitute illegal bypassing unless the above factors were met. For further discussion of this issue, please contact me at (202)-564-2240 or ask your staff to contact Alan Morrissey or my staff at (202)-564-4026.

cc: Lisa Cherup, DCM
Cassandra Rice
Andrew Hudson
Alan Morrissey
Acal Enalp
Kevin Bell
Renee Sarajian, Region III
Robert Sanchez, Region III



Environment and Natural Resources Division

DJ 90-5-1-1-4475

Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

Telephone (202) 514-2802
Facsimile (202) 616-6583

October 20, 1999

**BY FACSIMILE,
FOLLOW UP BY REGULAR MAIL**

Steven R. McGraw, P.E.
Stiffler, McGraw & Associates, Inc.
19 N. Juniata Street
P.O. Box 462
Hollidaysburg, PA 16648

Re: Improvements to the Borough of Indiana, Pennsylvania's
Sewage Treatment Plant and Collection System- Bypass Issue

Dear Mr. McGraw:

The United States is in receipt of your letter dated September 13, 1999 in which the Borough of Indiana has proposed to resolve the issue that has arisen over the Borough's plan to bypass a portion of flow around primary treatment.

The United States Environmental Protection Agency and the United States Department of Justice have reviewed and discussed your proposal, and do not find it an acceptable solution to the bypass problem. We request that the Borough proposed another solution, or set of solutions by November 5, 1999, that will avoid bypassing any treatment unit at the Sewage Treatment Plant. Again, the Clean Water Act requires the Borough, among other things, to eliminate all sanitary sewer overflows ("SSOs") from its collection system, to avoid bypassing treatment units at the treatment plant except in emergency situations, and to meet all permit conditions including but not limited to the final effluent limits set for the plant. The Borough's new proposal(s) should meet these requirements.

After consulting with the Borough regarding schedules, please call me so we can arrange a conference call for early November to discuss the Borough's new proposal(s).

Sincerely yours,

Lisa A. Cherup
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice

cc. Wayne Kablack (by fax)
Counsel for Borough of Indiana

EXHIBIT

James Gladkosky
Borough Manager

Rob Sanchez
USEPA Region III

Renee Sarajian
USEPA Region III

Cassandra Rice
USEPA Headquarters

Andy Hudock
USEPA Headquarters

Bruce Herschlag
PADEP



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

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

JUN 27 2000

MEMORANDUM

SUBJECT: Bypass Language

TO: Charles Sutfin, Director
Water Permits Division

FROM: Douglas F. Mundrick, P.E., Chief
Permits, Grants and Technical Assistance Branch

In response to your request for more information on the bypass language in NPDES permits and this Region's concern with blending of wastewater receiving less than secondary treatment, attached is a paper on the subject.

This issue has recently been brought to this Region's attention in the State of Tennessee which has the authority to implement the National Pollutant Discharge Elimination System (NPDES) program. The Region had been requesting that the State bring their standard or "boilerplate" language of their NPDES permits which are issued to publicly owned treatment works (POTWs) in line with the federal requirements of secondary treatment, including language about bypasses and overflows. The State had language in their NPDES permits for POTWs that allowed bypasses during wet weather peak flow conditions and blending with other treated wastewaters. The Region learned from State personnel that some of their previous built POTWs actually allowed in-plant bypassing, some of which were SWIRL devices. Late 1999, the State changed their permit language to attempt to reflect the federal regulations. This language would now consider bypasses to be permit violations. As a result of this, the State is being questioned by the POTWs and various organizations that support the municipalities, whether EPA's interpretation of the secondary treatment is correct as this Region has interpreted it below. Also, this new language is still not totally consistent with federal regulations. The Region is working with the State to resolve our concerns with this language.

On June 14, 2000, Regional staff traveled to Chattanooga to support the State of Tennessee in their meeting with municipalities on the prohibition of bypasses at POTWs. The municipalities are concerned that some of their plants with bypasses were designed and built using State and federal funds to allow this. Now EPA and the State are saying they are illegal. EPA contends that all wastewaters entering a POTW must receive at least secondary treatment.

Senator Bill Frist had a representative at the meeting. Also, Congressman Bart Gordon's office called in May to discuss the Region's position on this matter and was going to contact Headquarters for their position. Finally, John Hall was at the meeting and stated that he participated in the development of the secondary treatment regulations and he contended that as long as the final effluent discharge met secondary treatment standards, the treatment processes were not a concern. The Region will continue discussions on this matter with Headquarters, but in the interim, our position remains as stated. All other states in the Southeastern Region are agreeable with our position.

Attachment

Regulatory History of the Secondary Treatment Standard of the Clean Water Act

Regulatory Requirement

Under Section 301 (b)(1)(B), of the Clean Water Act, Publicly Owned Treatment Works (POTW) in existence on July 1, 1974, or approved pursuant to Section 203 of the Act prior to June 30, 1974, are required to meet effluent limits based upon secondary treatment standards, as defined by the Administrator, pursuant to Section 304(d)(1) of the Act. Among the effluent limits set are the following standards for Biochemical Oxygen Demand (BOD) and Total Suspended Solids (TSS):

BOD: 30 day average not to exceed 30 mg/L;
TSS: 30 day average not to exceed 30 mg/L;
BOD and TSS: 30 day average percent removal not to be less than 85%.

These limits were set after an extensive period of discussion between EPA and interested parties. They reflect the level of performance expected from a properly designed and operated domestic activated sludge waste water treatment plant, treating a typical domestic waste water stream.

Historical Perspective

At the end of the 19th century, the population of the United States grew and shifted from predominately rural to urban communities. The increasing concentration of the population made the disposal of domestic wastewater an important issue. In 1887, the first formal biological wastewater treatment system, an intermittant sand filter, was placed in service in Medford, Massachusetts. The first activated sludge plant was placed in operation in San Marcos, Texas, in 1916.¹ Biological systems were recognised as being an effective mechanism for removing soluble organic pollutants in wastewater. As the 20th Century progressed, activated sludge treatment plants became the predominant wastewater treatment method for large urban areas. Wastewater treatment came to be classified as primary, secondary or intermediate. Secondary treatment was expected to remove up to 90% of suspended solids and 75 to 90% of BOD.²

Federal efforts to promote water quality through secondary treatment began with the Water Pollution Control Act of 1948.¹ Prior to this, Congress had passed the Rivers and Harbors Act of 1890, which prohibited any discharge to interstate waters that would inhibit navigation. Subsequently, there was an ongoing legislative debate about water pollution. Several bills were introduced, but failed to be enacted, prior to 1948. The Act of 1948 authorized a Federal loans program to assist States and municipalities in the construction of treatment facilities to control water pollution (however, no funds were appropriated). It also stated that the principle responsibility for controlling pollution lay with the States, with the Federal Government providing assistance. Its main contribution was expressing the need for water pollution control at a national

level.

The first revision to the Act was in 1956. This revision provided for grants and appropriated funds, which was not done under the original legislation. These grants were intended for municipalities in States that had developed comprehensive water pollution control laws. The Act was again revised in 1961. The revision extended the Act through 1967 and provided for appropriations through this period. The 1961 revision also marked the first instance of setting treatment levels. The Senate report included the following passage: "The highest degree of water treatment by present methods is generally called complete [secondary] treatment, that is, a high degree of suspended solids and biochemical oxygen demand (b.o.d.) is removed. In complete treatment employing the activated sludge process, removals of 85 to 95 percent of the b.o.d., and 85-90 percent of the suspended solids are possible. Generally, the percentage of removal is about 85%." Legislative hearings during passage of the legislation focused attention on the need to provide secondary treatment and 85 % removal of BOD and TSS.

The Water Quality Act of 1965 required States to develop water quality criteria to receive Federal Grants. The criteria would require standards to protect public health, enhance the quality of water and consider the use and value of public water supplies propagation of fish and wildlife, recreational purposes and agricultural, industrial, and other legitimate needs.¹ Compliance with these criteria increasingly required secondary treatment. The Act also created the Federal Water Pollution Control Administration (F.W.P.C.A.) and required it to cooperate with the States in developing comprehensive water pollution control programs. The Clean Water Restoration Act of 1966 further required the development of water quality criteria and attempted to require (unsuccessfully) conformity with a national standard of secondary treatment. The Water Quality Improvement Act of 1970 continued the same.

In 1972, the Federal Water Pollution Control Act Amendments, known as the Clean Water Act, were passed. This Act, for the first time, established the requirement for secondary treatment. The Federal regulations promulgated under the Act defined the effluent quality to be achieved using secondary treatment, including 30 mg/L BOD and TSS and 85% removal of these pollutants. Secondary treatment is set as the *minimum* standard of treatment required for waste management alternatives employing treatment and discharge into navigable waters. Selection of the treatment process to meet secondary standards is left to the discretion of the POTW.

The definition of secondary treatment was further refined by adding effluent concentration values. These concentration values (30 mg/L monthly average and 45 mg/L weekly average for BOD and TSS, pH between 6.0 and 9.0 s.u., fecal coliform not to exceed 200 colonies/100mL for monthly average and 400/100 for weekly average) were *in addition to* the 85% reduction requirement, not a substitute for it. This definition was subsequently modified in 1976 and 1977, which added provision for the deletion of the fecal coliform limit, clarification of the pH limits, and provision for modification of the TSS limit for waste stabilization ponds of less than 2 mgd.

The Act was amended in 1977 to allow a modification of treatment requirements for marine discharges. The secondary treatment requirement could be waved for such discharges, provided specific conditions were met.

In 1981, the Act was again amended. These amendments modified the definition of secondary treatment by defining oxidation ditches, ponds, and lagoons, and trickling filters as treatment "equivalent to secondary". The legislative history as recorded in the preamble to the implementing regulations makes clear that only these types of biological systems are accorded the definition of "equivalent to secondary". Under this definition, these facilities were allowed a reduction in the 85% removal requirement down to 65%.

In 1985, EPA published a revision to the implementing regulations in the Federal Register. This revision modified the existing percent removal requirements for facilities that receive "less concentrated" (i.e. concentrations less than 200 mg/L, not due to excessive I&I). The threshold for "less concentrated" is defined as a total flow of 285 gallons/day per capita, including all I&I. Flows greater than this are deemed to have excessive I&I and are not eligible for modification of the 85 % removal requirement.³

Technical Merit

The regulatory rationale for establishing the 85% removal requirement was to ensure that 1) municipalities would be encouraged to correct excessive I&I in their collection systems, and 2) prevent intentional dilution of influent wastewater.³ Beyond this, there are significant benefits derived from secondary treatment. Many organic pollutants, such as nitrogenous and phosphate based compounds can be significantly reduced by biological activity. The predatory environment substantially reduces the concentration of pathogens, viruses, and protozoans, which might not be reduced through conventional disinfection. Effectively operated biological systems are capable of significantly better performance than required, further reducing the pollutant loading to receiving waters.

Although a rigorous physical-chemical treatment process can achieve the 30 mg/L and 85% removal limits, it should not be considered to be equivalent treatment. Meeting the requirements for BOD and TSS obscures the fact that the nature of the BOD and TSS discharged from an activated sludge plant is significantly different from the influent BOD and TSS. Most of the influent solids are recycled through the treatment process (up to 38 times for a typical wastewater concentration of 200 mg/L) before leaving the system. This results in a 99.99% removal of actual influent solids, the balance of the discharge solids being contributed by the treatment process. For a more complete discussion of this, see the attachment "Percent Removal by Various Wastewater Processes."

There are numerous secondary benefits as well. Forcing municipalities to eliminate excessive I&I results in improved maintenance, operations and management ("MOM") of collection systems. Inadequate MOM is responsible for over 90% of sewer system overflows.⁴ Such overflows result in direct exposure of the public to untreated wastewater and to significant degradation of surface waters. Associated surcharging results in damage to pipes, manholes, and pumpstations. In addition, proper MOM protects the massive infrastructure investment in collection systems and wastewater treatment plants, while reducing costs by minimizing the quantity of flow being transported and treated.

Summary

The use of biological treatment systems has been recognized throughout this century as being the most cost-effective means of achieving effective pollutant removal from wastewaters. Congress has codified this in the Clean Water Act and its amendments, by requiring secondary treatment and defining it as a biological activated sludge system. Although specific alternative biological systems have been deemed "equivalent" to secondary treatment, physical-chemical processes without activated sludge have not. Qualitatively, physical-chemical processes do not achieve the same level of pollutant removal, including transformation of solids and more effective pathogen removal, which are not codified in the Act.

List of References

- 1) "National Environmental Benefits of Secondary Treatment" Tetra Tech, Inc. Fairfax, V.A. 1992
- 2) "Design of Municipal Wastewater Treatment Plants" WEF Manual of Practice No. 8 ASCE Manual and Report on Engineering Practice No. 76. Water Environment Federation and American Society of Civil Engineers. Book Press Inc. Brattleboro, VT. 1992.
- 3) Federal Register Vol. 49, No. 184

The Term of Art "Secondary Treatment"

Based upon these references, "secondary treatment" is a biological process to convert suspended and soluble organics into settleable solids. The following references were chosen because they discuss the term of art "secondary treatment," and reflect the state of knowledge (with the exception of #6) at the time of the 1972 Federal Water Pollution Control Act (The Clean Water Act). Secondary treatment is not a set of effluent limits, such as 30 mg/l BOD₅, 30 mg/l TSS and 85% removal of both BOD₅ and TSS. In fact, none of the references cited below discuss a standard set of effluent parameters. The effluent limits, obtainable through the application of secondary treatment, have been established for the purposes of permitting and compliance monitoring.

References:

- 1) Sewerage. The Design, Construction, and Maintenance of Sewerage Systems., by A. Prescott Folwell, John Wiley & Sons, Inc., New York, © 1916, Article 81, page 363, and Article 94, page 426.

"That the only true destruction of the dangerous characteristics of sewage is that effected by oxidation and by removal of the disease-germs."

"Sedimentation and precipitation, as described, remove 40 to 60 percent of the organic impurities, but leave most of those in solution unchanged, A change of the putrescible matter of either into permanently non-putrescible, harmless compounds or elements can be attained only by changing it into mineral form by oxidation While this change is described in chemical terms, it has been found that no mere mixing of chemicals with sewage will produce it, but it is in part a biological process."

- 2) Sewage Treatment Plant Design, ASCE Manuals of Engineering Practice - No. 36 (also Water Pollution Control Federation Manual of Practice No. 8), American Society of Civil Engineers & the Water Pollution Control Federation, © 1959, Section 1.9, page 10.

"Sewage treatment. - Sewage treatment processes may be generally classified as "primary," "intermediate," and "secondary." Primary treatment, such as sedimentation, can usually be expected to remove 50 to 60% suspended solids and 25 to 35% BOD. Secondary treatment using conventional biological processes may remove up to 90% of suspended solids and 75 to 90% BOD. Chemical treatment and modifications of the conventional biological processes yield efficiencies intermediate between primary and secondary treatment."

- 3) Wastewater Engineering: Collection, Treatment, Disposal, by Metcalf & Eddy, Inc., McGraw-Hill Book Company, © 1972, Chapter 12, page 481.

"Biological processes are used to convert the finely divided and dissolved organic matter in wastewater into flocculent settleable solids that can be removed in sedimentation tanks."

Although these processes (also called secondary processes) are employed in conjunction with the physical and chemical processes used for the preliminary treatment of wastewater discussed in Chap. 11, they are not substitutes."

- 4) Manual of Instruction for Sewage Treatment Plant Operators, by New York State Department of Health, date unknown, but prior to 1972, Chapter 6, page 47.

"However, if the accomplishment of primary treatment is not sufficient, there are two basic methods of secondary treatment available, trickling filters and activated sludge.... These types of treatment employ biological growths to effect aerobic decomposition or oxidation of organic material into more stable compounds...."

- 5) Water Quality Engineering for Practicing Engineers,
W. Wesley Eckenfelder, Jr., Barnes & Noble, © 1970
Chapter 3, page 41; Chapter 10, page 214

"When secondary-sewage-treatment plants are installed, the quantity of carbonaceous organic to be removed is greatly reduced, but much larger numbers of nitrifying organisms are present in the stream." "Tertiary treatment may be categorically defined as treatment for the removal of pollutants not removed by conventional biological treatment processes (activated sludge, trickling filters, aerated lagoons, etc.)... The characteristics of secondary effluents will vary widely ..."

- 6) Operation of Wastewater Treatment Plants, U.S. Environmental Protection Agency, Office of Water Programs, prepared by California State University, © 1994.
Volume 1, Chapter 3. Wastewater Treatment Facilities, Glossary, page 30

"SECONDARY TREATMENT. A wastewater treatment process used to convert dissolved or suspended materials into a form more readily separated from the water being treated. Usually the process follows primary treatment by sedimentation. The process commonly is a type of biological treatment process followed by secondary clarifiers that allow the solids to settle out from the water being treated."

Technical Merit of the Secondary Treatment Rule

The requirement for secondary treatment of wastewater resulted from the development of biological treatment systems over the past 100 years. Although secondary treatment is not exclusively limited to biological systems in the Federal Regulations, the specific performance limits required are based upon the expected performance of activated sludge systems. Such systems demonstrate the advantages of high removal performance with relatively low cost, as compared to physical-chemical systems. But regardless of the relative merits of biological versus physical-chemical systems, secondary treatment as a performance standard is a necessary element in the protection of public health and the enhancement of the Nation's waters.

Historical Overview

At the end of the 19th century, the population of the United States grew and shifted from predominately rural to urban communities. The increasing concentration of the population made the disposal of domestic wastewater an important issue. A chief concern was the deposition of organic material, often referred to in the early literature as "putrescible". Such deposits became a source of noxious odors and were recognized as a potential health menace. Although existing primary systems were capable of removing significant proportions of settleable solids, fine suspended solids and soluble organic material was largely unaffected. Removal of this material became the focus of sanitary engineers in the mid to late 1800's.

Interest in biological systems for the treatment of wastewater began in England and Europe in the mid-1800's and shortly thereafter in the United States. Biological treatment systems were recognized as being an effective mechanism for removing soluble organic pollutants in wastewater. In 1887, the first formal biological wastewater treatment system, an intermittent sand filter, was placed in service in Medford, Massachusetts.¹ 1901 saw the first use of a trickling filter in Madison, Wisconsin. In 1909, the first Imhoff tank was installed. And in 1916, the first activated sludge plant was placed in operation in San Marcos, Texas.

Prior to the 1950's and 60's, the majority of wastewater treatment facilities in the United States provided primary treatment only. Secondary treatment systems were commonly installed only in larger communities, where the concentrated population led to greater impairment of the receiving waters. Heavy concentrations of dissolved organic material and nutrient placed a heavy load on dissolved oxygen, both as a direct demand, and through eutrophication. As the 20th Century progressed, activated sludge treatment plants became the more predominant wastewater treatment method for large urban areas. Biological treatment was seen as a cost effective remedy to remove such loadings. By 1972, biological secondary treatment was considered the "state of the art" in wastewater treatment, and was already required by many States for new treatment plants (see attachment The Term of Art "Secondary Treatment"). The Clean Water Act created a Federal requirement for secondary treatment, which in the regulatory history was presumed to be biological treatment.

Defining Secondary Treatment

Although secondary treatment has not been defined as a specific technology under the Clean Water Act regulations, the regulations do set effluent limits which are to be achieved through the application of secondary treatment. These regulatory limits are a final effluent concentration of 30 mg/L of Five Day Biochemical Oxygen Demand ("BOD₅"), 30 mg/L of Total Suspended Solids ("TSS"), and pH in the range of 6.0 to 9.0 Standard Units ("S.U."). There has been some confusion that these limits define secondary treatment, to be achieved without regard to the technology employed. In fact the secondary treatment requirement is a technology based requirement, and the limits reflected the minimum performance to be achieved through application of that technology. However, Congress specifically avoided defining what technology had to be applied to meet the secondary treatment requirement. This was done to allow for the application of new technologies as they were developed.

In setting the secondary treatment requirement, Congress relied on terminology common to engineering practice in order to distinguish different levels of treatment. During the 20th century, wastewater treatment practices came to be classified as primary, secondary, and advanced or tertiary. Primary treatment generally consists of screening of a wastewater stream, followed by sedimentation. The objective is to remove large debris and other "floatables", and to settle out larger and denser suspended particles. A properly designed primary treatment system is expected to remove 30-40% total BOD₅, 50-65% TSS, 10-20% of phosphorus and 10-20 % of organic nitrogen. Primary treatment was expected to have little to no impact on the relative concentration of dissolved organic compounds, ammonia nitrogen, or the concentration of microorganisms. Secondary treatment has been defined as being a biological system applied to the effluent from a primary treatment system. Secondary treatment is expected to remove 80-95% total BOD₅, 80-90 % TSS, 10-25 % of phosphorus, 15-50% organic nitrogen and 8-15 % ammonia nitrogen. Advanced activated sludge systems add filtration and optimize the biological process for removal of nutrients and nitrogenous compounds. Such systems can achieve significantly higher removal efficiencies for phosphorus, organic nitrogen and ammonia than more conventional secondary systems.

Characteristics of Secondary Treatment

The chief distinguishing characteristic of secondary treatment is that it results in a *conversion* of influent organic material and some inorganic compounds. In biological systems, soluble BOD and certain inorganic compounds are used for metabolism and reproduction by the microbial population. Pollutants are therefore converted to cell material, which is removed in the clarification process. A similar result can be achieved through chemical oxidation, the end product being a settleable solid that can be removed during clarification. However, mainly due to economic factors, the vast majority of secondary systems have been biological systems.

The need to convert the organic components in a waste stream through biological oxidation was recognized as early as 1916, as the following excerpt indicates: "Sedimentation and precipitation, as described, remove 40 to 60 percent of the organic impurities, but leave most of those in solution unchanged.... A change of the putrescible matter of either into permanently non-putrescible, harmless compounds or elements can be attained only by changing it into mineral form by oxidation... While this change is described in chemical terms, it has been found that no

mere mixing of chemicals with sewage will produce it, but it is in part a biological process." (Sewerage. The Design, Construction, and Maintenance of Sewerage Systems., by A. Prescott Folwell, John Wiley & Sons, Inc., New York, © 1916, Article 94, page 426.) The technical literature throughout this century has emphasized biological systems as a prime component of secondary treatment, because of the conversion factor.

As previously stated, the regulations set effluent concentration limits to be achieved through the application of secondary treatment. These limits can be approached and sometimes met by non-secondary treatment methods. However the effluent characteristics differ markedly. In primary treatment, soluble organic material and nutrients pass through and are discharged into the receiving stream. No conversion of BOD or nutrients takes place. The end result is that the concentration of the pollutants is changed, but not the character. Furthermore, the mass and concentration of influent solids discharged during biological treatment is far less than is suggested by the 30 mg/L limit. For example, biological treatment actually removes up to 99.99 % of the influent solids (the remainder of the discharge solids are those contributed by the treatment process). This is significant because the majority of the solids discharged after secondary treatment will be relatively inert, non-biodegradable material (see the attachment Percent Removal by Various Processes).

The biological process also creates a predatory environment hostile to disease causing microorganisms and viruses. Such an environment significantly enhances the effect of subsequent disinfection by chemical addition and other means. Physical-chemical systems rely exclusively on chemical disinfection such as chlorine or ozone, or ultraviolet (UV) radiation for pathogen control. These techniques are not as effective against viruses and certain protozoans. Biological systems repeatedly expose such organisms to a hostile, highly competitive environment, prior to the disinfection process. Significant reductions in the concentration of viruses, pathogens and protozoans can be realized before even reaching the disinfection portion of the treatment process.

Non-Biological Alternatives for Secondary Treatment

Although biological systems have been the predominate means of providing secondary treatment, there are potential alternatives. Physical chemical processes can sometimes approach the effluent concentrations required of secondary systems, but have a much more difficult time achieving the percent removal efficiency required. This is primarily due to the dissolved organic component. In addition, conversion of the soluble organics and nutrients is generally absent. To meet the criteria for secondary treatment, alternative systems must overcome these two principle obstacles.

Conversion of organic and some inorganic compounds can be achieved through chemical oxidation, such as excess chlorine addition and ozonation. This has generally been avoided due to the high chemical cost. Activated carbon can be employed to remove organic and inorganic compounds from the waste stream. However, this technology is most often employed as a polishing filter, rather than as the main source of organic removal. A physical-chemical treatment which consists of, at a minimum, chemical flocculation (for removal of the soluble material, not just enhanced settling of suspended solids), filtration and activated carbon may be capable of

meeting the secondary treatment requirement.³ Such systems, however, have rarely been proposed as alternatives to activated sludge because of the significantly higher operating costs.

Summary

Secondary treatment is a process that results in the conversion of organic and inorganic pollutants to forms that can be more easily removed from the flow stream. As a secondary benefit, biological treatment enhances the effectiveness of disinfection technology. Secondary treatment also reduces the potential threat to public health by enhancing the disinfection process.

References

1. Wastewater Engineering: Treatment, Disposal, Reuse. Metcalf & Eddy, Third Edition. McGraw-Hill, Inc., New York, 1991
2. Sewerage. The Design, Construction, and Maintenance of Sewerage Systems., by A. Prescott Folwell, John Wiley & Sons, Inc., New York, 1916.
3. Alternative Waste Management Techniques for Best Practicable Waste Treatment, USEPA, October 1975 (EPA-430/9-75-013)

Percent Removal by Various Wastewater Processes

Primary type processes remove a portion of the incoming waste discharging the remainder. Typical primary clarifiers can remove 50 to 60% of the TSS (total suspended solids) and 25 to 35% of the BOD. Thus 40 to 50% of the original solids are discharged untreated. In a more advanced primary process, such as "Ballast Flocculation", removals of up to 85% of the incoming solids have been reported. Still 15% of the incoming solids are discharged. That is, even in advanced primary systems, about 15% of all the bacteria, viruses, and protozoa from the incoming wastewater are discharged. Primary processes have short detention times with no significant conversion (predator/prey). Chlorination is effective against bacteria, but not against viruses and protozoans. During wet weather, high flows, chlorine contact times are short. Thus there may be a significant discharge of pathogenetic organisms.

The Math

Let

influent TSS=200 mg/l = X_{in}

effluent TSS=30 mg/l = X_{out} (an advanced type primary)

then

percent removal = $(X_{in} - X_{out}) / X_{in} = (200 - 30) / 200 = 0.85 \Rightarrow 85\%$

or let

effluent TSS=80 mg/l = X_{out} (a typical primary clarifier)

then

percent removal = $(200 - 80) / 200 = 0.60 \Rightarrow 60\%$

In the case of the advanced type primary, 30 mg/l or 15% of the influent, raw sewage is discharged. For the typical primary clarifier, 80 mg/l or 40% of the influent raw sewage is discharged.

Secondary treatment provides additional buffers plus a predator/prey environment. A typical activated sludge process operates with a basin mixed liquor suspended solids (MLSS) of 3000 mg/l and uses a recycle rate of about 1.5 times the incoming flow. For a typical wastewater of 200 mg/l total suspended solids (TSS) only 1 in 37.5 (based upon the system mass balance) of the aeration basins solids are from the first pass of the incoming wastewater. The remainder of the solids have been through the process one or more times (up to 38). Given the predator/prey relationship and the short lifetime of most of these organisms, very few of the original bacteria in the incoming wastewater are present in the recycle flow. Assuming a discharge concentration of 30 mg/l TSS, only 1 in 250 of the MLSS is actually discharged and only 1 in 37.5 of these are first pass solids. This gives an effective removal rate of 99.99% of the first pass solids. Less than 0.01% of the incoming solids are discharged and for the most part these have been converted through the predator/prey interaction which is effective against not only bacteria, but also viruses and protozoans. Although the overall removal rate (incoming solids compared with outgoing solids) is still only 85%, this represents a significantly different fraction of raw wastewater than what can be achieved in the best primary processes.

The Math

Let

influent TSS = 200 mg/l = X_{in}

effluent TSS = 30 mg/l = X_{out}

mixed liquor suspended solids = 3000 mg/l = MLSS

flow = Q

recycle concentration = X_r

recycle rate = $R = 1.5Q$

aeration mass balance

$$X_r \cdot R + X_{in} \cdot Q = (R + Q) \cdot \text{MLSS}$$

recycle concentration

$$X_r = [(R + Q) \cdot \text{MLSS} - X_{in} \cdot Q] / R = [(1.5Q + Q) \cdot \text{MLSS} - X_{in} \cdot Q] / 1.5Q =$$
$$[(1.5 + 1) \cdot \text{MLSS} - X_{in}] / 1.5 = [2.5 \cdot 3000 - 200] / 1.5 = 4867 \text{ mg/l}$$

$$\text{percent of influent in MLSS} \Rightarrow (X_{in} \cdot Q) / [\text{MLSS} \cdot (R + Q)] = X_{in} / [\text{MLSS} \cdot 2.5] =$$
$$200 / [3000 \cdot 2.5] = 0.0267 \Rightarrow 2.67\%$$
$$1 / 0.0267 = 37.5$$

$$\text{percent of MLSS in effluent} \Rightarrow X_{out} \cdot Q / [\text{MLSS} \cdot (R + Q)] = X_{out} / [\text{MLSS} \cdot 2.5] =$$
$$30 / [3000 \cdot 2.5] = 0.004 \Rightarrow 0.4\%$$
$$1 / 0.004 = 250$$

$$\text{percent of influent in effluent} \Rightarrow 0.0267 \cdot 0.004 = 0.00011 \Rightarrow 0.011\%$$
$$(100\% - 0.011\%) = 99.99\%$$
$$1 / 0.00011 = 9091$$

$$0.00011 \cdot 30 \text{ mg/l} = 0.0033 \text{ mg/l}$$

overall removal rate

$$\text{overall percent removal} \Rightarrow (X_{in} - X_{out}) / X_{in} = (200 - 30) / 200 = 0.85 \Rightarrow 85\%$$

Permitting Implications of the Secondary Treatment Rule

Recently, there has been considerable discussion about the Clean Water Act ("CWA") requirement to provide secondary treatment and how the standard applies to permits issued to Publicly Owned Treatment Works ("POTW") for the discharge of wastewater. Much of the discussion has centered around whether to permit unconventional discharges such as separate sanitary sewer overflows, overflows from pump stations, and blended flows of primary and secondary treated wastewater. The CWA and the attendant secondary treatment rule places severe restrictions on what types of discharges are permissible and what requirements must be met. There is, therefore, a need to restate some of the fundamental requirements for the discharge of wastewater under the CWA.

Secondary Treatment Standard

Section 301(b)(1)(B) of the Act sets technology-based standards of secondary treatment (as opposed to a water quality based standard) for effluent discharged from POTWs. In Section 304(d)(1), the EPA was charged with establishing the degree of effluent reduction attainable through the application of secondary treatment.

It is clear from the language in the CWA and its legislative history, that secondary treatment is the *minimum* standard established for POTWs (see the attachment "Regulatory History of the Secondary Treatment Standard of the Clean Water Act"). Although the Agency recognized that "there is a great variety of secondary treatment processes, and a variety of conditions under which these processes operate, ... the level of effluent quality attainable by a publicly owned treatment works through the application of secondary treatment has been defined in the proposed regulation in terms of a minimum level" [F.R. Vol. 38, No. 82, April 30, 1973]. Thus 40 CFR § 133.102, describes "the minimum level of effluent quality attainable by secondary treatment in terms of the parameters 5-day Biochemical Oxygen Demand ("BOD₅"), or Carbonaceous Biochemical Oxygen Demand ("CBOD"), Total Suspended Solids ("TSS"), and pH." When Congress expanded this technology-based standard to include "equivalent to secondary treatment" for small communities, the Senate report states that "this section is not intended to sanction the introduction of raw sewage into the Nation's waterways" and "water quality impact is not a consideration in defining technology-based regulations" [S. Rep. No. 97-204, 97th Cong., 1st Sess. 18(1981)].

Applicable Technology

Neither the CWA nor the regulations define or directly discuss what secondary treatment technology entails. This lack of discussion suggests that the original authors were fully aware of what the term and the art of "secondary treatment" meant. The legislative history does clearly distinguish secondary treatment from primary treatment and requires "equivalent to secondary treatment" facilities to employ biological treatment [CWA § 304(d)(4)]. Furthermore, the sanitary engineering literature makes it clear that secondary treatment is a process which converts suspended and soluble organics into settleable solids. This concept of conversion goes back to

the earliest part of the twentieth century from the foundation of the field of Sanitary Engineering. In general, the term "secondary treatment" has been synonymous with "biological treatment." Although nothing in the CWA rules out the use of physical-chemical treatment to obtain this conversion of organic materials, the literature clearly indicates that the mere addition of chemicals is not sufficient.

In 1975, EPA published "Alternative Waste Management Techniques for Best Practicable Waste Treatment" (EPA 430/9-75-013, October 1975) which listed "techniques to achieve secondary treatment." Included in this report are the biological processes of ponds, trickling filters, and activated sludge and physical-chemical treatment. Of these, only the activated sludge process was capable of meeting the minimum requirements established under 40 CFR § 133.102. Later developments in biological treatment technology, such as rotating biological contactors and bio-towers, have achieved the minimum requirements. Ponds and conventional rock trickling filters were later addressed in amendments to the CWA and in the regulations as "equivalent to secondary treatment" processes and reduced effluent requirements were established for these processes. Based upon this document, physical-chemical treatment which consists of, at a minimum, chemical flocculation, filtration and activated carbon may be capable of meeting the secondary treatment requirement.

In order to qualify as a secondary treatment technology, *a conversion of the suspended and soluble organics must occur*. The technology must also be capable of, at a minimum, achieving a 30-day average effluent quality of 30 mg/l BOD₅ or 25 mg/l CBOD₅, 30 mg/l TSS, 85% removal of BOD₅ or CBOD₅ and 85% removal of TSS as required in 40 CFR § 133.102. The conversion process, taking place in a secondary treatment system, is necessary to provide adequate protection of public health. Mr. A. Prescott Folwell in his seventh edition of Sewerage, The Design, Construction, and Maintenance of Sewerage Systems, (© 1916), wrote "(t)hat the only true destruction of the dangerous characteristics of sewage is that effected by oxidation and by removal of the disease-germs." Mr. Folwell went on to state "(w)hile this change is described in chemical terms, it has been found that no mere mixing of chemicals with sewage will produce it, but it is in part a biological process."

It can be demonstrated that an activated sludge process, which achieves an overall 85% reduction of TSS, in fact will have upwards of a 99.99% reduction in the incoming solids (see the attachment "Percent Removal by Various Processes"). That is, less than one-hundredth of one percent of the incoming bacteria, viruses, and protozoans can be found in the effluent, prior to disinfection. Compare this with a primary process in which, typically, 40 to 50% of the incoming bacteria, viruses, and protozoans pass through to the effluent. Since the standard disinfection processes, using chlorine or ultraviolet light, are ineffective against viruses and protozoans (cryptosporidia, giardia, etc.), secondary treatment technology is necessary for the protection of public health.

Exceptions in the Secondary Treatment Requirement

EPA has established certain exceptions to the secondary treatment requirement. These include treatment systems deemed "equivalent to secondary treatment", and the reduction in the

percent removal requirement for systems subject to dilute influents due to industrial flows or from combined sewer systems. The first exception is established by law [CWA § 304(d)(4)], and the other two based upon specific regulatory requirements [40 CFR § 133.103].

Treatment systems deemed "equivalent to secondary treatment" are defined by the CWA as the biological treatment processes of oxidation ponds, lagoons and ditches, and trickling filters. These processes have relaxed standards for BOD₅, TSS and the percent removal requirements, provided that water quality standards are met [40 CFR § 133.105]. "*Equivalent treatment works must provide significant biological treatment of wastewater* (italics added). This provision ensures that the facilities applying for permit adjustments provide a level of treatment significantly beyond that achieved through primary treatment, i.e., physical separation and removal of grit, coarse sands, settleable, and floatable materials." [FR Vol. 49, No. 184, September 20, 1984]

In addition, POTWs receiving less concentrated wastewater due to industrial flows can also receive a reduction to the 85% removal requirement. However, the "less-concentrated flow" must not be the result of excessive infiltration and inflow (I&I) [40 CFR § 133.103(d)], as described in the regulations [40 CFR § 35.2005(b)(16)]. For sanitary sewer systems non-excessive I&I is that portion of I&I which cannot be cost-effectively removed compared to the cost of transportation and treatment of the wastewater. This provision, however, *does not eliminate the technology-based requirement for secondary treatment* on which the cost of treatment must be based.

POTWs treating flows from combined sewers can receive a reduction in the percent removal requirement during wet weather [40 CFR § 133.103(a)] and during dry weather [40 CFR § 133.103(e)]. In addition, EPA's Combined Sewer Overflow Policy currently does not require combined sewer overflows to meet the secondary treatment standard. However, the Policy does require combined sewer overflow facilities to implement the nine minimum controls described in EPA's Combined Sewer Overflow Control Manual (EPA/625/R-93/007), and such overflows must not cause violations in the water quality standards of the receiving stream. Separate sanitary sewers carrying excessive I&I are not considered combined sewers and can not receive relief under this regulation.

Bypassing and Blending

A bypass means the intentional diversion of waste streams from any portion of a treatment facility (as opposed to a release upstream of the headworks, which would be a sewer overflow). A bypass which does not exceed the effluent limitations may be allowed, but only if it is also for essential maintenance to assure efficient operation and it is reported to the permitting authority [40 CFR § 122.41(m)]. Otherwise, bypassing is only allowed where the bypass is unavoidable to prevent loss of life, personal injury, or severe property damage and where there is no feasible alternative to the bypass, such as the use of auxiliary treatment facilities. Failure to construct adequate facilities to treat expected wet weather flows, is not a valid excuse for bypassing. The bypassing of the required secondary treatment process is prohibited except as provided for in this section of the regulations.

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Blending is the combination of two or more effluent streams, where the combined flow is discharged through a single permitted outfall and the combined discharge is monitored. Blending can be permitted when all effluent streams have *individually received secondary treatment*. Blending may be used when a higher efficiency secondary process is used to offset a lower efficiency secondary process (e.g. activated sludge effluent blended with trickling filter effluent). Or blending can be permitted when a portion of a secondary effluent is filtered and the remainder is not, if such a situation is provided for in the NPDES permit. The blending of a secondary effluent and a primary effluent is not permissible, since this would constitute a bypass of the required secondary treatment units. Neither is "mathematical blending" permitted, where separate outfalls are monitored and the results averaged to meet a single effluent requirement. Separate outfalls must independently meet all the requirements of the Act.

Sanitary Sewer Overflows

Sanitary Sewer Overflows (SSOs), include discharges from pump stations, manholes and other sewer appurtenances, are violations of the Act and cannot be permitted, since they do not provide a minimum of secondary treatment. SSOs which result in the discharge of wastewater to Waters of the United States are violations of Section 301 of the Act, for discharges without a permit. SSOs which result in discharges to yards, basements, or other locations, other than to Waters of the United States, are violations of the proper operation and maintenance provisions of the NPDES permit. All SSOs are a threat to public health and should be reported to the permitting authority.

Conclusion

All discharges from POTWs to surface waters must meet the secondary treatment rule. With very few exceptions, the minimum effluent standards established for secondary treatment must also be met and in no case can a discharge be permitted which will result in the violation of water quality standards. The application of these principles needs to be consistently applied in all permits for all discharges. The blending of a secondary waste stream with a waste stream from primary clarifiers, swirl concentrators, or other less than secondary processes can not be permitted for either dry weather or wet weather conditions. Each permitted outfall from a facility must independently meet the secondary treatment rule and the effluent limits. Permits cannot be written for separate sanitary sewer overflows. When applying any of the variances for percent removal, it must first be established that the wastewater is treated in a secondary treatment process and that all other requirements, such as L/I reduction, have been satisfied.

Strategy for Permitting Discharges of Wet Weather-Related Peak Flows

U.S.E.P.A., Region 6
Permits Branch
December 16, 1998

1. BACKGROUND

Many municipalities in Region 6 experience wet weather-related peak flows beyond the treatment capacity of their wastewater treatment plants. Such peak flows may not always be the result of inadequate efforts by municipal permittees to abate infiltration and inflow (I&I) to their wastewater collection systems. In addition, peak flows related to wet weather events may not always be biologically treatable, even where existing treatment capacity at the publicly owned treatment works meets appropriate design standards. Besides causing the hydraulic capacity of the treatment units to be exceeded, wet weather-related peak flows may be too low in biochemical oxygen demand to be efficiently treated using biological processes. In such cases, permittees have protected their treatment systems against hydraulic washout by diverting untreated/partially-treated sewage around biological treatment units. Any diversion of wastewater from any portion of a treatment facility is defined as a "bypass" (40 CFR 122.41(m)).

2. GUIDING PRINCIPLE

Section 301(b)(1)(B) of the Clean Water Act (CWA) and the NPDES regulations at 40 CFR Part 133 require that publicly owned treatment works (POTWs) achieve effluent limitations based upon secondary treatment as defined by the Administrator. The current secondary treatment regulation defines "secondary treatment" as attaining an average effluent quality for both biochemical oxygen demand (five day) and suspended solids of 30 milligrams per liter (mg/l) in a period of 30 consecutive days, an average effluent quality of 45 mg/l for the same pollutants in a period of seven consecutive days, and 85 percent removal of the same pollutants in a period of 30 consecutive days. (Emphasis added.)

3. CRITERIA FOR PERMITTING PEAK FLOW DISCHARGES

The EPA Region 6 Permits Branch has determined that peak-flow circumstances are not appropriately addressed in terms of 30-day average effluent limitations, including that related to removal efficiency. The Permits Branch has also determined that there may be certain circumstances which warrant special consideration. The Permits Branch will therefore support the application of 7-day average effluent limitations to peak flow discharges where the permittee demonstrates satisfaction of the criteria identified below.

EXHIBIT

5

- ### A. Characteristics of the Principal Biological Treatment System

principal biological treatment system must be determined using a flow-weighted average. The flow weighted average effluent quality must meet all applicable water quality-based effluent limitations.

D. Other Criteria

1. The collection system must not be subject to excessive I&I. The permittee and any customer cities must be operating an adequate collection system operation and maintenance program.
2. Adequate flow equalization facilities shall be used to mitigate peak flows wherever feasible.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE SUITE 1200
DALLAS TX 75202-2133

MAY 21 1997

CERTIFIED MAIL RETURN RECEIPT REQUESTED (P 121 808 891)

Mr. William V. Larrain, P.E.
Director of Utility Operations
City of Port Arthur
P O Box 1089
Port Arthur, TX 77641

Re. National Pollutant Discharge Elimination System (NPDES) Permit No. TX0047589 -
Potential Bypass Situation

Dear Mr. Larrain:

We recently reviewed your wastewater treatment facility's NPDES permit file. Based on that review, we believe it appropriate to bring to your attention certain conditions of your permit, particularly the bypass prohibition [Part III.B.4.c.(1)]. A bypass is defined as the intentional diversion of waste streams from any portion of a treatment facility [Part III.F.5.]. When we examined the schematic of your plant's treatment process, which was attached to your most recent permit application, we noted it depicted an apparent bypass situation.

The schematic indicated that some wastewater at your facility may be diverted from the complete secondary treatment process and processed only through a primary treatment unit. A primary clarifier, sometimes referred to as a "stormwater clarifier," appeared to be the principal facility which treats these diverted flows prior to discharge. We also noted that the schematic shows diverted flows to be disinfected prior to discharge.

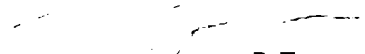
Your permit prohibits bypasses except in certain limited situations. Specifically, the diversion of wastewater through a primary treatment process instead of a secondary treatment process, as shown on your schematic, would be a prohibited bypass unless: (1) it meets all permit limitations and is necessary to conduct essential maintenance [Part III.B.4.a.]; or, (2) it satisfies all the criteria stated at Part III.B.4.c.(1)(a),(b), and (c) of your permit. Any such diversion, such as may occur during high inflow periods, must be reported in accordance with Part III.B.4 and Part III.D.7.

EXHIBIT

6

We would be happy to discuss this issue with you. Please feel free to call Richard Wooster of my staff at (214) 645-6473.

Sincerely yours,



Jack V. Ferguson, P.E.
Chief
NPDES Permits Branch

cc Texas Natural Resource Conservation Commission

From: <Mundrick.Doug@epamail.epa.gov>
 To: R6DAL03.RSWATIAN(FERGUSON-JACK.HATHAWAY-WILLIAM.JO...
 Date: 11/24/99 10:20am
 Subject: Re: DECEMBER 2ND MEETING ON MUNICIPAL TREATMENT RECOMBINATION

We have taken the exact same approach as Jack has outlined with similar results.

Doug

Reply Separator

Subject: DECEMBER 2ND MEETING ON MUNICIPAL TREATMENT RECOMBINATION -R
 Author: FERGUSON.JACK at IN
 Date: 11/23/1999 4:24 PM

BYPASSING

This question of the diversion of waste streams around portions of a waste treatment system has come up on numerous occasions in our Region 6 permit program over the past decade or so.

This is usually presented as some type of 'blend-and-treat' approach, whereby waste only receiving primary treatment is mixed with fully treated waste and discharged with an associated claim that it 'meets the Permit limits' (usually they don't talk about the % removal requirement).

Our answer has always been the same - these types of diversions, either from a municipal or industrial facility, constitute a bypass under 122.41. (i.e., the diversion of waste streams from any portion of a treatment facility.)

We have told municipalities that have "designed" their treatment system with such a system, that any such diversion must be reported as a bypass and is generally prohibited under the standard permit (regulatory) language.

This approach is applied uniformly in all the states in our Region.

A number of folks have spent, and are spending, fairly significant sums to correct and eliminate these conditions in our region.

The basis for objecting to a permit which would grant such a bypass - is that the permit is authorizing something which is expressly prohibited regulations.

Given these points - we do believe it is possible, however, to install a bona fide, but different kind of, parallel treatment system (for example a physical/chemical treatment system) which can be used to treat isolated peak flows. We have permitted such facilities (with substantial additional restrictions) on the basis that the peak flow itself undergoes treatment (physical/chemical) which is equivalent to secondary treatment and is not simply diverted around a facilities main treatment units.

Other Points

Diversion around a facilities main treatment unit means that this waste is simply not being treated.

If the waste stream is diverted around a municipal waste treatment system it will not receive the treatment level envisioned when categorical standards were developed.

The definition of Secondary Treatment includes a requirement for percent removal in addition to concentration limits (which may also be difficult to achieve with bypassing).

We may not be able to make a trip to Washington on this short notice - but believe this to be a very important issue and would like to have

EXHIBIT

From: Bill Colley, Region III
Lynnette Elser, Region III

To: Kevin Weiss

Date: Friday, December 6, 1996

Subject: Review of Sanitary Sewer Collection System and SSO
Unified Paper (November 20, 1996 Version)

The directions for submitting comments includes listing comments in the order of priority, so the first few pages of comments are prioritized.

Region III believes that the most significant issue is whether the unification paper is necessary. This Region does not believe that it is necessary. In fact, this Region believes that it will significantly hinder our ability to protect human health and the environment. If a unification paper is necessary, this Region would prefer that the current paper be disposed of and that EPA begin this process again. This Region would prefer that FAC develop a list of concerns and leave writing the actual policy, if any, to EPA. This Region considers work such as writing a policy to be a government function that should not be delegated to contractors such as SAIC or advisory committees. By allowing the FAC to develop a document in the policy format, EPA as a full agency (e.g. HQ and the REGIONS) is not being allowed the opportunity to openly and fully discuss the best approach to addressing the concerns of the FAC, how the recommendations of the FAC fit into EPA's mission to protect human health and the environment, how SSOs are currently treated, changes that may be necessary in regulatory oversight, how to best produce these changes, etc. Additionally, it is very difficult to comment on a document when the HQ overseer is interested in specific wording and the Region is concerned about the conceptual approach.

This Region is also concerned that there does not appear to be a basic concern at HQ regarding Regional input. In early November this Region received a copy of the unified paper (dated November 12, of about 30 pages). This Region was given two days to comment on this document. Since this issue is a priority for this Region, several individuals shifted their workload to accommodate HQ's short turn around time and provide comments on this paper. In late November this Region received another

EXHIBIT

slightly altered version of this document (dated November 20, 1996, 56 pages). This time we were given a week to comment. Again, employees will shift their work to provide comments. The second document does not appear to address any of our previous comments, nor does it have them attached, nor does it have comments from other parties (were there any?). What was the purpose in HQ soliciting comments on the November 12 version? By our Region's standards, soliciting comments and not responding to them does not count for Regional involvement. Will the manner in which this document is being developed result in a policy that includes real EPA Regional involvement?

Region III is very concerned about the approach that this document is taking. This Region believes that SSOs are illegal discharges and should be eliminated as quickly and inexpensively as possible. This Region believes that SSOs are significantly different than CSOs in that CSOs are designed to have the capacity to transport the "first flush" of sewage to the treatment plant and then to discharge into surface water bodies. SSOs are not designed into the sewer conveyance system, but rather are a clear indication that the sewer system was poorly designed, poorly constructed, poorly maintained, poorly operated and/or poorly developed and expanded into new areas. SSOs often do not discharge directly to a surface water body, but rather run down streets, across residential property until they eventually reach a stream. Humans rarely have direct contact with CSO discharges but often have direct contact with SSO discharges. Our past cases have indicated that excessive and expensive studies and I/I work does little to reduce these types of discharges. Holding tanks, increased sewer conveyance capacity, better engineering of problem areas are much less costly and will eliminate these discharges. This Region believes that the approach used in this document to address SSOs will be much more costly in the long run and do little to eliminate a serious environmental problem.

This Region believes that once sewage reaches a municipal sewer conveyance system that the owner/operator of the sewer conveyance system becomes responsible to either discharge the treated sewage through an permitted outfall or to transport it on to another conveyance system for treatment and discharge. This Region believes that any discharge from the sewer conveyance system, whether it reaches a surface water of the U.S. or someone's basement, should be eliminated. In fact, the discharges that do not reach a water of the U.S. often have much more severe potential human health consequences. This Region has

a zero tolerance level for untreated sewage discharges. This is the message that we hope to send to the public. However, it is also understood that all discharges may not warrant enforcement action. These situations should be the rare exception, not the rule. Enforcement discretion allows the facts for each case to be considered and appropriate action to occur.

This Region is does not agree with allowing wet weather facilities to discharge untreated or partially treated sewage to receiving waters, nor does this Region believe that it is necessary. This Region requires that wet weather facilities hold the sewage until the flow in the conveyance system and at the treatment plant is reduced to a level that the sewage can be discharged BACK INTO THE SEWER and transported to the treatment plant for full treatment and discharge through the permitted outfall. We believe that discharging untreated or partially treated sewage from a wet weather facility will greatly increase the potential for human health concerns. The vast majority of the wet weather events that result in discharges in our geographic region are caused by snow melt. Since the snow melts on the warmer days following a cold spell, many humans are outdoors enjoying the warm weather by fishing, hiking, etc. by the rivers. The potential for contact with the wet weather discharge is greatly increased because of the weather conditions that caused the snow melt. This Region prefers "no discharge" from wet weather facilities, but if discharges are allowed nationally, we prefer that the discharges have the same limitations already included in the NPDES permit for the treatment plant discharge with sampling and reporting requirements. (This would require a mini-plant in most cases and we acknowledge that it would be prone to have many problems and costs associated with its construction, operation and maintenance, but we believe that the potential for environmental harm, including human health, is significant enough to warrant this measure.)

Additionally, this Region believes that there is an equity concern in this approach. Many communities try to treat all of their flow at their treatment plants, but will have violations that are subject to enforcement due to excessive flow during wet weather. Other treatment plants may have no effluent violations due to excessive flow during wet weather because the flow never makes it to the plant. It is discharged through SSOs. Environmentally, it is much better to obtain as much treatment as possible, even though loadings may be higher than the permit

allows than to discharge untreated sewage and not even consider the loading. What is suppose to motivate the municipalities to subject themselves to enforcement for effluent violations at the plant rather than to create more SSOs? Is it fair that EPA as an agency will not enforce against the municipalities that are causing the greater environmental harm, have a more poorly maintained system, have a more poorly operated system and are not trying to minimize the impacts of their poorly functioning system yet will take enforcement actions against municipalities that are trying to meet the goals of the Clean Water Act and their permits, but falling short?

It appears that this document will take away some citizen's rights to address the SSO discharges through citizen's suits under Section 505 of the Clean Water Act. These citizens are most affected by the sewage discharges. They are being deprived of their rights to control their exposure to sewage. It is important to realize that it is these citizens who have to live with the sewage flowing across their yards, down their streets and driveways and into their basements. The SSO portion of EPA's case against Plum Borough began with a citizen that was tired of hosing raw sewage off her child's swing set in the backyard. Part of EPA's mission is to protect these citizens from these situations. Reducing their rights to protect themselves seems unjust.

This Region is concerned about the enforcement approach in this document. It appears that enforcement is not desired for SSOs. Although HQ has stated to the Regions that the expectation is to continue enforcement for SSOs, this Region is uncomfortable in doing that with the "split" approach we are sensing from HQ on this matter. It would be greatly beneficial for this Region as well as for the permittee to have HQ present a more unified approach. This Region is devoting a lot of resources to identify and work towards eliminating SSOs. If the direction that HQ is taking is to allow SSOs, this Region would appreciate being told that directly.

Region III has reviewed the subject document and has the following comments from our permits branch. (Questions in regards to these comments should be directed to Bill Colley at (215) 566-57212.) (NOTE: paragraph references were taken from the November 12 document, so they may have changed slightly on the November 20 document.):

In discussing the watershed approach for dealing with SSOs, the authors of the referenced document indicate that effluent trading was one of the advantages of the watershed approach. In the "Draft Framework for Watershed-Based Trading " (EPA 800-R-96-001, May 1996), there is a requirement that all trading partners must meet technology-based requirements. As a result, operators with SSOs in their sewer systems cannot trade because the SSO discharges of untreated sewage do not meet technology-based treatment requirements.

Reaching an agreement with permittee on the SSO requirements that are to be included in NPDES permits will be difficult under the Management Strategy developed in paragraph II in the Executive Summary. Most permittee with SSOs will claim and have developed detailed arguments that the SSOs in their sewer systems are in the category of SSOs beyond the reasonable control of the operator and that efforts should focus on SSOs that are avoidable. They will also develop arguments that the SSOs in their sewer systems should be addressed in a long term comprehensive plan rather than a short term plan. Permit writers have time constraints which lead them to give into pressure caused by these type arguments. The result would be that many SSOs would be classified as beyond the reasonable control of the operator so that no corrective action would be required in the near future under a long term remediation plan that could last for decades.

The above type problems originate from the assumption that some SSOs are unavoidable as discussed in the above paragraph. In paragraph II.2. of the Executive Summary, a listing is given in Table I of the "Criteria for Demonstrating that an SSO was Unavoidable". One of the criteria in this table is that "there was no feasible alternative to the discharge". This quotation comes from 40 CFR 122.41(m)(ii) which I believed was originally intended to allow unexpected maintenance or short term operational problems to be taken care of within a treatment plant. I question that it can ever apply to an SSO structure because an equalization tank could have been installed to contain the discharge from the structure or the capacity of the sewer line increased to eliminate the requirement for a bypass. .

In paragraphs E.3 and E.6, the elements of the short and long term plans are given. These elements seem to be similar to those given in the EPA Report to Congress, "Rainfall Induced Infiltration into Sewer Systems" (EPA 430-90-005, August 1990).

Rehabilitation of sewer lines on public property only reduces the infiltration flow by 30 to 40 percent according to this report. However, this reduction probably would be even less in a rehabilitation program that takes over 20 years to complete because of the creation of new infiltration sources due to the damage and deterioration of the sewer system over time.

The conclusions mentioned in the above report agree with our recent observations in Pennsylvania. During the last fiscal year, EPA reviewed about 10 draft permits in Northwestern Pennsylvania with SSOs. From a review of the files for these permits, it is obvious that these SSOs have persisted for years. Actually, the permittees have already tried many of the corrective actions suggested in the referenced document (that we are reviewing) without eliminating all of the SSOs in their sewer systems. A point seems to be reached eventually where sewer rehabilitation does little to further reduce the frequency, duration, or rate of the SSO discharges.

From the known flow rate data available for these SSOs, estimates can be made of the cost of containing the volume of wastewater discharged at the SSO structures. Based on the cost of a holding tank (about a dollar a gallon), the capital expenditure to eliminate the SSOs can be determined. The cost per person or household is trivial.

In summary, we conclude that the work that the POTW operators have in mind in writing their version of the "Unified Paper" seems to envision sewer rehabilitation, which our experience indicates rarely works to eliminate SSO problems. It does not envision capital expenditure to construct holding tanks or to increase the sewer line capacity, which we have found in the three cases we are familiar with in Pennsylvania has always worked.

Back in the early and mid 1970's, the EPA indexes that we have searched indicate that a lot of work was done by EPA to compare the costs of various alternatives for controlling the pollution from CSOs and SSOs. Comparisons were made among the costs for storage tanks for containing the flow from these bypasses, various ways of increasing the volume capacity of the sewer system, and means of treating the CSO and SSO discharges. Little similar work has been done since that time as far as I can tell from the information available to us. We have not been able to find a comparison between the capital investment for holding

tanks verses the long term costs for sewer rehabilitation, taking into account the long term expense of consultant fees and repair costs and the low rate of success with rehabilitation efforts. Based on our current information, we believe that with a reasonable capital expenditure, SSOs can be eliminated within three years. In several cases, we have demonstrated the feasibility of doing this. To achieve this goal, we want to have SSOs prohibited with few or better no affirmative defenses. The above document written by the POTW operators has too many loopholes and requires too long for its implementation.

In Appendix A on "Public Health and Environmental Risks of Sanitary Sewer Discharges", one important factor, quality of life, was not included in my opinion. The odor, the appearance of the stream, and the knowledge that the SSO is located near to your home and that there is apparently nothing that you can do about it are serious problems for people. In some communities, arguments have lasted for years between people who live near the SSOs verses those who do not and are not willing to pay to have the problem fixed.

My concern is that I do not see an attempt made in even a qualitative manner to compare the costs due to environmental impacts on the affected streams, public health risks, and quality of life considerations compared with the necessary expenditures for fixing the SSO problems.

The following comments are from our compliance and enforcement branch. (Questions should be directed to Lynnette Elser at (215) 566-5438.):

Section I. D. second paragraph: If this document is to exist, this Region believes that its purpose should be to eliminate SSOs. This Region requires that SSOs are **eliminated** rather than reduced. We have concerns about projecting an attitude that SSOs are an acceptable part of operating a sewer conveyance system. This attitude often leads to excessive discharges and disagreements with dischargers about what is an acceptable number/amount of discharges. This Region maintains that these discharges are illegal and should be eliminated.

Figure 1, Block 9: This Region believes that 1-3 are always feasible, if the permittee have the option of discharge rather than spending the funds to expand their sewers and/or plant they will chose to discharge through the SSO. Providing the discharge

option for failure to correct the situation will result in most permittee choosing to fail. This Region is also uncomfortable with meeting watershed - water quality standards for parameters such as pH and bacteria. We believe that this raises a potential for environmental harm and human health concerns.

Section II. A. Second bullet: We agree that initial efforts should be directed at SSOs that are easily "avoidable", but are not in agreement that SSOs are beyond the reasonable control of the operator. This Region maintains that it should be a very rare occurrence that an SSO is beyond the control of the operator. Most of the SSOs that we deal with are due to poor maintenance, poor operation and/or poor growth planning. By focusing on this "avoidable" and "unavoidable" concept we are misleading the operators into believing that EPA is willing to "excuse" SSOs.

Section II. A., last paragraph: While watershed planning can be a useful tool, this Region believes that it should be clear that watershed planning should not delay the SSO actions that are required. Due to the watershed planning concept for permit reissuance combined with the CSO policy requirements being placed in permits when the permits are reissued, this Region is still trying to get Pennsylvania permittee started with the Nine Minimum CSO Controls. It should be clear from the beginning that watershed planning can not delay enacting SSO concerns.

Section II. B, operators: This should include coordinating the actions and educating the streets/transportation department in regards to SSO situations such as manholes, street flooding, creating SSOs, etc. The streets/transportation department often are left out of this loop and can contribute greatly to the situation.

Section III. ALL And Section III B, first paragraph: All reporting should also include EPA.

Section III. D. Public Notification: Public notification should be performed with any SSO event. The citizens around these discharges deserve to know this information prior to using the surface water for recreation or fishing, etc. Also, all potential outfalls should be labeled with the statement that it can discharge raw sewage and a contact person/phone number. Individuals living around SSOs should also receive a public education letter that states what the structure is and that is

discharges raw sewage. Children will play in the discharge when they do not know what it is.

Section III. B-operators:: Operators and owners should both be key participants in the program. Often the operator can not control the finances to correct the problem nor control future taps. This Region prefers to make both the owner and operator jointly responsible.

Section III. Page 10, Table, Public Notification-All overflows should have public notification.

Minimum Operational Requirements- All sewer conveyance system owners and operators should meet these requirements.

Advanced Operational Requirement: Please add 'or which your sewage contributes to due to a flow beyond the capacity of your conveyance system or a downstream system'.

Table II: As stated above, this Region is not comfortable with the "avoidable/unavoidable" concept. In general, this chart will make enforcement very difficult. The following comments are offered in regards to the chart: the permittee should state the cause of the SSO event and how that cause was determined. This assessment should clearly and reasonably show that there is nothing that can be done to prevent the same occurrence in the future. 2) There is generally an alternative to the discharge, such as a temporary holding tank or temporary sewer line. 3) Please add an F. Lack of capacity due to poor limitation of new tap-ins or growth as shown by a dry weather flow rate greater than one third of the sewer capacity. 5) Notification should include EPA and the public with in a specific time period. 6?) Consider adding that an SSO event doesn't happen often. A system that often has "unavoidable" SSOs needs to change something, maybe how they determine "avoidable" and "unavoidable". This Region could live with this table being written into NPDES permits given the definition of terms being develop by Kevin Bell/OECA if it was used IN PLACE OF any other SSO policy or formal HQ program.

Section III. A. 3. A): Please add 'or would occur at the same location if the location was not physically changed'. This Region has had cases where a POTW changed the flap at one home because of basement flooding then the next home upstream flooded out. The POTW changed that flap and the next house upstream

flooded out. The hydraulically over loaded sewer line was the problem and it wasn't addressed immediately due to the "different" location. Moving the problem doesn't eliminate it, so we do not want to leave in this loop-hole. Also, this Region includes any discharge from the conveyance system that does not reach the sewage treatment plant as an SSO. We had one municipality that preferred to flood homes rather than discharge to a water and potentially pay a penalty. The owners/operators of separate systems should be required to be responsible for any discharge of sewage that reached their conveyance system and that does not reach their treatment plant.

Section III. B. Bullet two: Please include 'or to any other source' as discussed in the paragraph above. Even if the discharge doesn't reach a water of the U.S., such as basement flooding, the owner/operator should be responsible to ensure that all sewage that enters their sewer conveyance system is treated and discharged through a permitted discharge pipe.

Section III. B. Last bullet: No permit should authorize discharge from a SSO.

Section III. B. Second paragraph: Should report to EPA as well and should report any discharges that do not make it to the treatment plant, i.e. basement flooding, etc.

Section III. C. First bullet, Consider using three years instead of 24 months since three years is the trigger for compliance and is the general record keeping responsibility in our permits. Also the last paragraph here may lead some operators to believe that they have a 30 month "grace period" when in fact they are probably required to keep the records from "bypass" provisions in the current permit or may have records from citizen complaints. It would be better to state that if records were not kept, the permittee should search available information and create records, even though they may not be complete, they will most likely identify the chronic problems.

Section III. C. third bullet: Proper O&M should also include increasing the capacity of the sewers as the taps increase. Proper O&M should also include eliminating major inflow sources.

Section III. D: Due to the potential for human contact with SSOs, this Region believes that there should be public notification for all SSO events. Additionally, all potential SSO locations should

be labeled as potentially discharging untreated sewage and include a 24-hour number to obtain more information. Residents that live near SSOs should be educated about these discharges.

Section III. E. This Region is opposed to this approach in addressing SSOs. We believe that all SSOs should be addressed in a timely manner. Short term plans may not be necessary if the system operator knows the system well, he or she may be able to determine that the short term actions will not alleviate the situation. In this case it would save time and expenses to proceed directly to the "long term solution". This approach will be very slow, expensive and not obtain the desired results of eliminating the SSOs. This Region has found that installing holding tanks can easily and realistically occur within three years and that this is much less expensive than a lot of expensive studies and expensive I/I work which yield little reduction of SSO discharges. Additionally, most of what is classified as "short term" are actually under your "avoidable" category and should be subject to immediate action. For example, broken pump should be immediately fixed, not studied, included in a remediation plan, etc.

Table III: This Region believes that these types of problems should be corrected immediately, not subjected to a plan and study first. By even considering this "study and plan first" manner of addressing these types of violations the permittees are being misled and the environmental harm is increased due to the lack of timely action. A broken pump, a collapsed sewer, insufficient staffing are all types of situations that should be corrected as soon as they are discovered.

Section III. 2. This Region disagrees with the short term/long term remediation approach. Continually updating a plan generally results in permittees rarely completing the plan. Most of our permittees will redo their plan and study the situation for years if the alternative is costly.

Section III 4. Second paragraph: If the primary focus is changed to containing the discharge if it can not be easily related to a specific source (such as a stream in the sewer) it will decrease the cost of the solution significantly.

Section III 5. b. Third paragraph: I&I is very expensive with little results. This focus will greatly increase the cost of the solution.

Section III. 5. b.: "However, the Agency recognizes two sets of circumstance where it may be appropriate to consider authorizing discharges from wet weather facilities as part of a comprehensive remediation effort." The two circumstances were not initially identified, but this Region has great concerns about this statement. Hopefully, the two reasons are a hurricane and a earthquake, otherwise, we would like to discuss this concept further. This Region prefers to treat SSOs as illegal and not permit them for any reason. Once we start permitting SSOs it will be much harder to enforce other SSOs and to enforce effluent limitations due to equity issues.

Section III. I. Paragraph 2: Flows should be managed and limited. New taps should not be allowed if a system is approaching its design capacity.

Section III. I. Bullets: Please consider adding a bullet that states that regional operators must operate and maintain their conveyance systems as well as maximize the wet weather treatment at the plant utilizing all possible storage capacity. Some regional operators own parts of the conveyance system.

Section III. J. Second paragraph: This Region does not agree that these parties are always responsible for discharges from their system. Often the Regional system is so over loaded that it is the cause of the discharge or the regional system may be poorly engineered at the point of attachment to the private system.

Section III. J. Third paragraph: They should manage the flow they have and limit new taps as they approach their design flow.

Section III. K. This Region has great concerns about this entire section. Small systems still should not discharge untreated sewage. They often discharge to the smaller streams and can have an environmental impact equivalent to the large facilities discharging to the large streams. Populations under 20,000 may in fact be a very large population for satellite collection systems. (It also makes sense if exceptions are to be made that they are the same throughout the policy, other places in the policy use 'flow' as the measure to establish the exception. This will make it a lot easier to administer the policy.) The statement that EPA will not generally pursue federal civil administrative or judicial action for penalties or injunctive relief is of great concern. States and EPA can disagree on what reasonable progress towards compliance may mean. Also, the

progress may be reasonable, just too slow. If environmental damage has occurred it is likely to occur we may have a very difficult time taking appropriate enforcement action. This Region is opposed to this type of generic "no-action" type of assurances and believes that it will make it much more difficult to obtain the necessary injunctive relief when the regulated community does not believe that EPA will take action. This Region believes that the second paragraph will basically allow SSOs in communities with a population under 20,000 since the short term actions rarely will result in eliminating the SSO. This Region would like this section completely eliminated from this document.

IV. C. 1. Second sentence: This Region would prefer that noncompliance be defined as 'the discharge of any sewage that has entered your sewer conveyance system through any unpermitted location'. This will include basement discharges, etc. and will not imply that some SSOs are authorized.

V. D. 1. Implementation of this section is likely to result in significant environmental harm and there are alternatives to discharging untreated sewage. If, for example, it is infeasible to 'control future system deterioration' then, rather than allowing untreated sewage discharges, the system should be replaced. Many municipalities have very old, deteriorating conveyance systems. Rather than allowing these systems to deteriorate to the point of collapse, this Region encourages the permittee to replace the system. The sewer conveyance system is a valuable part of a municipality's infrastructure, but it also has a useful life. Many municipalities are at the end of the useful life for their systems. Rather than encouraging the neglect of the infrastructure of these communities and the eventual collapse of the sewer system altogether by allowing untreated sewage discharges this Region encourages timely replacement of the sewers. This Region will acknowledge that a SSO may continue to discharge while the corrective action takes place, but we would not allow the discharge. It would be prohibited. If the SSO is allowed and the situation becomes much worse or the municipality decides to stop implementing the controls on the SSO it may be very difficult to obtain injunctive relief through a judge since EPA allowed the situation in the first place. Preliminary injunctive relief (which will require that the injunctive relief be addressed more quickly) will be nearly impossible to obtain from a judge since it will be a change in the current situation that will have a significant

cost. Also, the 'maximum discharge frequency' can not be incorporated in an order. Since these discharges are weather related and the weather can not be controlled, how can they control the discharge frequency?

V. D. 2. Second bullet. This Region is concerned about the bacteria content of untreated sewage. The wet-weather water quality concept usually assumes no human contact, but that is not generally the case for snow melt induced SSO discharges.

IX. Definitions, page 12, authorized wet weather facility discharges. This Region is opposed to the concept of discharging partially treated sewage to a surface water body as a solution to SSOs. Wet weather facilities should hold peak flows and discharge back into the sewer conveyance system when the sewer conveyance system and the treatment plant have the capacity to transport and treat the sewage and discharge it through the permitted discharge point.

Other comments made by Bill Colley on the November 21, 1996 document

Page 34 Prohibition/Defense Provisions

Of special concern is the statement beginning on line 16 of page 34, "These provisions [122.41(m)] allow the permittee to raise a defense to enforcement actions against discharges that meet criteria specified in this regulation". Section 301 of the Clean Water Act specifies that any discharge that does not have an NPDES permit is prohibited. The SSO structures in a sewer system are usually not permitted, at least in Region 3. As a result any discharge is prohibited regardless of whether an affirmative defense can be claimed. Enforcement discretion (instead of a listing affirmative defenses) can always be applied to these types of situations. I also question the apparent conclusion that affirmative defenses are required.

Page 35 Compliance Schedules

BCT/BAT was to be achieved by 1989. Our determination of BAT/BCT under BPJ for SSOs is zero discharge. As a result, the SSOs discharges in Region 3 would require an enforceable schedule in an enforceable order. I assume the permit would require immediate compliance with zero discharge and the order provide

time for achieving compliance with BCT/BAT. However, states(Pennsylvania) in this region in the past have not been willing to issue such orders, claiming (I believe) hardship due to the required administrative burden for writing such orders.

Page 22 Optimization of Operations

The statement, "you may request that the NPDES authority review the mass limitations in the permit for your treatment plant to see if any adjustments ... are appropriate". We have had considerable problems with this issue. The increase in the mass limits would violate the anti-backsliding provisions at 40 CFR 122.44(L)(1) in my opinion. In the case, I am most familiar with the permittee should have made full use of the holding tanks in the sewer system before increasing the mass loading through the treatment plant.

Page 53 SSO Definition

This definition has caused difficulties in several permits that we have reviewed. One problem is that we have never been able to define the term, "head works". If a discharge is due to excessive infiltration and inflow, what difference does it make whether it occurs upstream or downstream from the head works?

Conclusion

The document contains a lot of good information on the environmental and health effects of SSOs and the need to make decisions based on cost benefit analysis. The watershed approach can be very cost effective if properly applied. Much of the work in figure 1 has already been done without success. It can serve as a basis for indefinite delay in fixing the problem that can be resolved by reasonable capital expenditures in at most three years. I suggest that general wording on the above mentioned issues (public health and cost benefit) be kept in the document. As an alternation, a statement should be made that the procedures in figure 1 are possible procedures developed by the group of municipalities, but that the regions have discretion to set their own requirements according to law and regulations, as required by 123.44(c).

Comments in response to the questions on the cover letter
(Lynnette Elser):

operating permit.

Preference #1. No permit issued at all. An Administrative Order to eliminate the discharge.

Preference #2. "No discharge permit" with an administrative Order to eliminate the discharge

long term plan: (Only if this concept must be used)

Preference #1. Corrective Action Plan (no time implied)

Preference #2. Comprehensive schedule

Tier I/II-no

Chronic/Repeated-repeated

Lastly, if this document is to be modified and released for comment in the future, it would be helpful to make the changes and release a marked up version for comment.

3/12/97

REGION III INTERIM GUIDANCE FOR SANITARY SEWER OVERFLOWS AND NPDES PERMITS

GENERAL BACKGROUND:

Sanitary Sewer Overflows (SSOs) occur when the capacity of a separate sanitary sewer is exceeded, normally during storm events and a discharge occurs prior to treatment at a wastewater treatment plant.

Discharges from SSOs can be caused by a variety of factors including:

1. Inadequate Operation and Maintenance of the collection system. Failure to routinely clean out pipes, failure to repair deteriorating sewer lines, failure to have quick response to line blockages, failure to maintain pump stations, etc.
2. Inadequate design of the sewer collection system, excessive Infiltration/Inflow, allowing new development without increasing capacity of sewer lines and pump stations, illicit connections, etc
3. Insufficient capacity of the wastewater treatment plant so that overflows must occur on a regular basis to limit flows to the treatment plant.
4. Extremely unusual weather events.

These SSO discharges of raw or diluted raw sewage before treatment can cause significant public health and environmental problems. Since there are approximately 18,500 municipal separate sanitary sewage collection systems nationwide all of which can, under certain circumstances, experience discharges, an effective National policy is needed to address SSOs. Surveys show dramatic inconsistency between NPDES authorities on key SSO issues, including permitting conditions, use of bypass and upset provisions, and permitting of wet weather facilities. Also, estimates of SSO occurrence is believed under reported, since it is not always a permit or application requirement. Historically, EPA and States have initiated enforcement actions to correct serious known SSO problems

EXHIBIT

9

EPA HEADQUARTERS SSO ADVISORY SUBCOMMITTEE

In 1994, at the request of the Association of Metropolitan Sewerage Agencies (AMSA), EPA Headquarters convened an SSO Advisory Subcommittee to develop a national policy to address SSOs. HQs believes a two prong position on SSOs is needed thru both enforcement and permitting. In 1996, EPA Headquarters issued a guidance document to be incorporated into the existing Enforcement Management System Guidance. This SSO guidance set enforcement priorities for addressing discharges from SSOs, e.g., dry weather, wet weather, water quality impacts, etc.

EPA Headquarters has also drafted a Unified SSO guidance paper to define the role of NPDES permits in regulating SSOs, which includes: (1) a goal to "eliminate avoidable SSOs," (2) require reporting and public notification of SSOs, (3) require standard O&M conditions to apply to the collection systems, (4) provide a limited defense provision for SSOs, (5) ensure SSOs in municipal satellite collection systems are covered, and (5) set limits for controlled treated SSO discharges. This guidance is still being debated within EPA Headquarters and the Regions, and a final document does not seem imminent.

EPA REGION III INTERIM POSITION ON SSO

In order to address the SSO issue and establish consistency among our states, Region III will follow the following interim SSO guidance.

SSO discharges shall not be permitted in NPDES permits, but corrected thru an enforcement action, e.g., Administrative Order.

SSOs shall not be included in NPDES permits in order not to weaken enforcement actions for their correction. But, all permits should contain the following permit condition to identify SSOs, "Report every discharge from the sewer conveyance system prior to the treatment plant on your monthly Discharge Monitoring Report (DMR) in the Remarks block. Include the date of discharge, cause, action taken, and volume of discharge. Any discharge from any point other than the permitted treatment plant outfall is prohibited."

When reviewing DMRs this information would be reviewed and appropriate action taken by the State or EPA. This action would be an Administrative Order requiring a corrective action plan and schedule for eliminating the SSO. If there are numerous SSOs, the schedule for correction can be prioritized according to the severity of water quality and human health impacts. Obviously plans and schedules for correction will be site specific. A sample AO for SSO discharges is attached.

Draft AOs for SSOs sent in with draft permits will be sent to the Enforcement Branch for review. Also, if an application identifies an SSO, but an AO is not prepared by the State, the Enforcement Branch should be notified.

The existing standard bypass/upset provisions do not apply to the collection system SSOs. EPA HQ's is drafting specific SSO bypass/upset language with a limited defense to apply to SSOs. Region III will wait for this HQ SSO bypass permit condition language.