



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

SEP 28 2009

OFFICE OF
WATER

Mr. Ken Kirk
Executive Director
National Association of Clean Water Agencies
1816 Jefferson Place, NW
Washington DC, 20036-2505

Dear Mr. Kirk:

Thank you for your May 1, 2009 and August 13, 2009, letters concerning the December 22, 2005, draft Peak Flows Policy and the July 2009, draft "Guidance on Preparing a Utility Analysis." In your letters, you raise concerns that the Environmental Protection Agency (EPA) is implementing the draft Peak Flows Policy prior to its finalization. You also expressed concern that EPA's approach is inconsistent with the National Association of Clean Water Agencies' (NAWCA) understanding of the draft policy and you provide comments on the draft "Guidance on Preparing a Utility Analysis." You indicate that you believe it is inappropriate for EPA to issue guidance based on a new interpretation of the bypass regulation that has never been officially stated and, in turn, to use this guidance to implement the draft Peak Flows Policy that has never been finalized.

I would like to express my appreciation for NACWA's history of strong and continued cooperation with the Agency as it has worked on wet weather issues. In particular, I would like to thank NACWA who, along with the Natural Resources Defense Council, provided valuable input to the development of the 2005 draft Peak Flows Policy. The December 2005 draft Peak Flows Policy was intended to interpret the bypass provision in the permit program regulations at 40 CFR §122.41(m) and provide a structure that wastewater utilities could use as a reliable path forward in implementing their responsibilities under the rule. EPA received comments on the December 2005 policy and, as your letter points out, has not issued a final policy. The proposed Policy, however has not been withdrawn, and remains a viable path forward for utilities to meet their obligations under the bypass rule.

With regard to your concern that EPA should not issue the draft "Guidance on Preparing a Utility Analysis" until it finalizes the 2005 draft Peak Flows Policy, EPA will continue to implement the existing bypass regulation as permits are reissued. The existing bypass regulation, which was promulgated in 1979, generally prohibits bypasses. The bypass regulation provides that the Director of the NPDES program may take enforcement action against a permittee for a bypass, unless the permittee demonstrates that certain criteria are met, including a showing that there were no feasible alternatives to the bypass. The July 2009 draft "Guidance on Preparing a Utility Analysis" is intended to provide guidance to permittees that are attempting to comply with this provision. While the draft guidance contains a discussion of both the 2005 draft Peak Flows Policy and the 1994 Combined Sewer Overflow Policy, the main focus of the draft guidance is to provide technical assistance to permittees related to the existing bypass regulation.

We appreciate the technical comments on the draft guidance and we will consider these comments, as well as those received from other stakeholders, when we revise the guidance. As we establish priorities for the National Water Program, clarifying the regulatory and policy requirements for the management of wet weather flows is a priority. We look forward to continuing to work with NACWA and its members as we work through these important issues.

Again, thank you for your letter. I appreciate your concern for the health and safety of the public and the environment. If you have any questions or suggestions, please contact James A. Hanlon, Director of the Office of Wastewater Management, at (202) 564-0748.

Sincerely,

A handwritten signature in black ink, appearing to read "Pet Silva". The signature is stylized with a large, sweeping "P" and a long, horizontal "S".

Peter S. Silva
Assistant Administrator