



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

MAR 26 2010

OFFICE OF
WATER

Jennifer Hindel, P.E.
Vice President
Illinois Association of Wastewater Agencies
241 North Fifth Street
Springfield, Illinois 62701

Dear Ms. Hindel:

Thank you for your January 15, 2010, letter to Administrator Lisa P. Jackson of the U.S. Environmental Protection Agency (EPA). In your letter, you object to EPA's assertion that the bypass regulation at 40 CFR 122.41(m) applies to excess flow treatment facilities. In addition, you request that EPA withdraw its 2005 Draft Peak Flow Policy and 2009 Draft Guidance on Preparing a Utility Analysis. You also request that EPA review the benefits of excess flow treatment; the costs of eliminating excess flow treatment and whether any related benefit exists; and the costs and feasibility of rectifying other sources of watershed pollution, especially non-point sources.

The National Pollutant Discharge Elimination System (NPDES) regulations define standard permit conditions which are to be included in all NPDES permits. One of those standard permit conditions is the bypass provision of the NPDES regulations at 40 CFR 122.41(m) which was promulgated in 1979 and which has remained in effect since that time. The provision defines bypass to mean the "intentional diversion of waste streams from any portion of a treatment facility." The regulation prohibits bypasses except where necessary for essential maintenance to assure efficient operation. For all other bypasses, the Director of the NPDES program may take enforcement action against a permittee for a bypass, unless:

- (A) the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- (B) there were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime; and
- (C) the permittee submitted the notices required by the regulation.

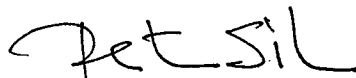
The bypass regulation provides that the Director of the NPDES authority may approve an anticipated bypass, after considering its adverse effects, if the Director determines that the bypass will meet the criteria identified in the regulation and listed above. Approval of an anticipated bypass does not "authorize" the bypass, rather an approval of an anticipated bypass describes the circumstances in which the NPDES authority will not take an enforcement action against the permittee for a prohibited bypass.

EPA considers the diversion around the secondary treatment units to excess flow treatment units to be a bypass where the effluent from the excess flow treatment unit does not meet the minimum requirements for secondary treatment at 40 CFR 133. EPA commends those municipalities that have installed excess peak flow facilities and we recognize that the treatment provided by these facilities reduces the discharge of pollutants to receiving waters, even though the facilities may not provide full secondary treatment. The use of excess peak flow facilities should be an important component of any analysis to address feasible alternatives to a bypass.

Although the 2005 policy has not been finalized, it remains a viable path forward for utilities to meet their obligations under the bypass regulation. The regulation itself establishes whether a particular diversion is a bypass, the draft policy recommends guidance on implementing the bypass provision, to include setting forth a process for determining whether or not feasible alternatives exist to bypasses around secondary treatment units. We will continue to implement the existing bypass regulation as permits are reissued. The July 2009 draft "Guidance on Preparing a Utility Analysis" is intended to provide guidance to permittees that are attempting to comply with the bypass provision. The main focus of the draft guidance is to provide technical assistance to permittees related to the existing bypass regulation.

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 Kevin Weiss of the Permits Division at (202) 564-0742.

Sincerely,

A handwritten signature in black ink, appearing to read "Pet Silva", with a stylized flourish at the end.

Peter S. Silva
Assistant Administrator