

STATUS OF FEDERAL SSO RULEMAKING

YES..., NO..., OR SOMEWHERE IN-BETWEEN???



**Remarks of Stephen N. Haughey, Esq.
Chair, Government Practice Group
Environmental Department
FROST BROWN TODD LLC
201 E. 5th Street, Suite 2200
Cincinnati, OH 45202
(513) 651-6127
shaughey@fbtlaw.com**

I. PREVIOUS U.S. EPA SSO RULEMAKING INITIATIVE.

A. An informal ANPRM was issued sometime in mid-2000.

- 1. A result of President Clinton's 1998 Clean Water Action Plan, in which wet weather overflows were identified among the highest level of priority. Issuance of the plan caused the SSO Federal Advisory Subcommittee to accelerate its meetings to discuss the prospect of SSO regulations.**

- B. ANPRM proposed requiring the development of C-MOM programs; construction of Peak Excess Flow Treatment Facilities (PEFTF) for the most severe, chronic SSOs; reporting and public notification of SSO occurrences; requirements for satellite collection systems upstream of SSO locations; and criteria defining an affirmative defense for “unavoidable” SSOs.**
- C. ANPRM proved to be quite contentious. More than 10,000 comments submitted. Disputed issues included:**

- 1. Definition of “chronic” SSO for purposes of requiring construction of PEFTF;**
- 2. Elements of the proposed C-MOM, costs thereof, and the scope of the proposed requirement;**
- 3. Proposed permit requirements for satellite collection systems;**

- 4. Proposed notification for SSOs that do not reach waters of the U.S.;**
- 5. Scope and timing of proposed public notification requirements; and**
- 6. Definition of “unavoidable” SSO for purposes of an affirmative defense.**

II. WHAT HAS HAPPENED SINCE TERMINATION/WITHDRAWAL OF THE ANPRM FOR SSOs.

- A. The 2000 ANPRM was withdrawn and the prospect of SSO rulemaking terminated sometime in early 2001.**
- B. In lieu of rulemaking, model proposed narrative permit language was developed and issued to the Regions for distribution to delegated state NPDES programs.**

1. **Model language for immediate reporting and follow-up written reports, and for recordkeeping and reporting to health departments.**
2. **Optional, model language proposed for C-MOM program requirements.**
3. **Model permit language subsequently developed to define the narrative prohibition against SSOs, and a definition of an “unavoidable” SSO.**

- C. Delegated state NPDES programs began to incorporate the model permit language for reporting SSO occurrences, notification to local health authorities, and follow-up reports, or some variation thereof.**
 - 1. Most delegated state programs did not adopt the model C-MOM permit language, but instead incorporated it as a term or condition in administrative and judicial SSO enforcement actions.**

2. Most delegated state programs incorporated the broad narrative prohibition against SSOs, but virtually none incorporated the model language creating an affirmative defense for “unavoidable” SSOs.

D. General increase in administrative and judicial SSO enforcement, with accelerated increase beginning once permit holders began complying with the narrative requirements for reporting, notification and recordkeeping for SSO occurrences.

- 1. Vast majority of enforcement actions have been state administrative findings and orders, imposing C-MOM, SECAP, SSES and submittal of schedules for elimination of chronic SSO locations.**
- 2. Some administrative and judicial settlements have included assessment of treatment plant bypasses and schedule to eliminate same (see below).**
- 3. Civil penalties relatively modest, at least in the Midwest.**

- E. In 2008, U.S. EPA HQ issued instructions to the Regions to inspect at least 50% of all SSO communities with downstream POTWs $\geq 10\text{mg} \leq 100 \text{ mgd}$ by the end of 2010.**
- F. Reaction of local sewer districts to new permit language and SSO enforcement:**
 - 1. Significant increase in expenditures for SSO evaluation programs and subsequent capital spending to eliminate SSOs, often without being prompted by enforcement.**

2. **Development of C-MOM programs becoming almost routine, and, most recently development of asset management programs in conjunction with C-MOM programs as a tool to protect and preserve existing infrastructure, and provide for orderly implementation of replacement and repair programs.**
3. **Notable successes include Montgomery County, Ohio (56 SSO locations reduced to 0) and Tri-Cities Regional Sewer District (38 SSOs locations reduced to 5).**

III. JUNE 1, 2010, FEDERAL REGISTER NOTICE – ARE WE BACK ON AGAIN?

- A. June 1, 2010, notice of “listening sessions” scheduled in order to seek stakeholder input into potential SSO rulemaking, including elements from the earlier 2000 ANPRM, but also including possible codification of the draft 2005 policy addressing peak wet weather discharges from POTWs.**

- B. Primary reason given for revisiting the 2000 initiative was a concern with lack of standardized permit language used by delegated state NPDES programs for addressing SSO occurrences.**
- C. Decision to take additional input on the draft 2005 blending policy, with the eye toward potentially incorporating same into the rulemaking or, at a minimum, providing additional guidance in the preamble to the rulemaking.**
- D. On August 4, 2010, NACWA submitted comprehensive written comments to U.S. EPA addressing all aspects of the potential SSO rulemaking, including the draft blending policy.**

IV. IS SSO RULEMAKING IN THE BEST INTERESTS OF LOCAL SEWER DISTRICTS?

A. Advantages of SSO rulemaking.

- 1. Provides for uniform national standards, including uniform permit language, thereby creating a level playing field regarding all aspects of SSOs across the country.**

2. Avoids piecemeal development of narrative permit conditions, with particularly severe impacts on smaller sewer districts that do not have the expertise and resources to challenge overreaching permit terms and conditions.
3. Minimizes piecemeal enforcement with widely varying results depending on the particular state's permit language.

4. Formal rulemaking triggers a host of associated reviews that have the potential to minimize overreaching aspects of the rules, and possibly helps provide for funding programs to implement the new rules.
5. Potential for an affirmative defense for “unavoidable” SSO occurrences, something that extremely few permits currently provide across the country.

B. Disadvantages of SSO rulemaking.

- 1. We have no CSO rules, so why do we need SSO rules?**
- 2. Despite the absence of SSO rules, local sewer districts have made substantial improvements in the last 10 years to both eliminate and reduce SSO occurrences, frequency and duration.**

3. Many aspects of the 2000 ANPRM are unnecessary requirements for a considerable percentage of local sewer districts, and should be used as terms and conditions in SSO enforcement documents. Examples include C-MOM, SSES and SECAP requirements.
4. Requirements for satellite sewer collection systems are better addressed through local contract requirements and, at most, state permitting programs, rather than national rulemaking.

- 5. Rulemaking that includes a host of different requirements and programs substantially increases the risk of federal enforcement.**
- 6. There is absolutely no guarantee that new SSO rules will lead to additional funding being made available for sewer districts that are already financially stressed.**

V. BLENDING PEAK WET WEATHER FLOWS – ILLEGAL SSO/BYPASS OR EXERCISE OF DESIGN FUNCTIONS AND BEST PROFESSIONAL JUDGMENT?

**A. 40 C.F.R. § 122.41(m) can be summarized in
pertinent part as follows:**

- 1. A bypass is the intentional diversion of
waste
streams from any portion of a treatment
facility.**

2. **Bypasses are permitted if they do not cause violation of effluent limitations, but only if they are for essential maintenance to ensure efficient operation. Such permitted bypasses are not subject to notification requirements, and are not subject to a requirement to demonstrate that the bypass was unavoidable, and that the permittee had no feasible alternatives.**

3. **Other anticipated and unanticipated bypasses that cause violation of the permit are prohibited unless the subject of certain notification requirements, and the permittee demonstrates that the bypass was unavoidable to prevent loss of life, personal injury or severe property damage, and demonstrates that there were no feasible alternatives.**

B. Criticism of the draft 2005 wet weather “blending/bypass” policy includes the following:

1. The draft policy constitutes a change in interpretation of the lawfulness of a bypass that meets all applicable effluent limitations;

2. The draft policy declares as illegal a secondary treatment bypass that is designed and constructed as part of the treatment plant, authorized through issuance of a permit to install or construct by a delegated state NPDES program;

3. The draft policy requires that a no feasible alternatives analysis be performed even for a secondary treatment bypass that reconnects at the point of a chlorine contact tank and meets all applicable water quality-based effluent limitations;
4. The draft policy represents a new restriction on the definition of “essential maintenance to assure efficient operation” as that terms applies to bypasses that do not cause effluent limitations to be violated;

- 5. The draft policy imposes a much stricter interpretation of “no feasible alternatives” than was previously applied to situations where anticipated or unanticipated bypasses occurred that cause a violation of the permit; and**
- 6. The draft policy is being applied by U.S. EPA Regions as if it were a rule, without first proceeding through proper notice and comment rulemaking requirements under the CWA and the APA.**

- C. The draft policy arguably constitutes a change in interpretation of the bypass rule. *Compare* 44 Fed. Reg. 32905-906 (June 7, 1979) (seems to authorize bypasses *per se* that do not violate applicable permit limits); 47 Fed. Reg. 52079 (November 18, 1982) (proposing to eliminate the essential maintenance requirement and allow all bypasses that do not cause violation of the applicable permit) *with* 49 Fed. Reg. 38036-038 (September 26, 1984) (retaining the “essential maintenance” requirement for bypasses that meet applicable permit limits, but broadly construing essential maintenance to include bypasses that maintain the performance, removal efficiency, and effluent quality of the pollution control equipment at the treatment plant). [See also *NRDC v. U.S. Environmental Protection Agency*, 822 F. 2d 104, 122-125 (D.C. Cir. 1987) (upholding the language of the bypass rule).

D. Advantages of codifying the blending/bypass policy as part of a national SSO rulemaking:

- 1. If U.S. EPA's Regions are going to apply the draft policy as if it were a rule, then codifying it as part of a national SSO rulemaking would at least afford the regulated community proper notice and comment rulemaking procedures and other protections afforded through traditional review of rulemaking initiatives in Washington.**

2. **Codifying the policy avoids piecemeal enforcement thereof against smaller, unsophisticated sewer districts that lack the expertise and resource to challenge application of the draft policy.**
3. **It is possible that codifying the draft blending policy will result in federal funding being made available to assist in evaluation and implementation of feasible controls and, where necessary and affordable, elimination of the bypass.**

E. Disadvantages of codifying the draft policy as part an SSO rulemaking:

- 1. Most local sewer districts do not equate an internal treatment plant bypass as being a sanitary sewer overflow.**
- 2. The blending policy is really an enforcement policy and does not fit logically within an SSO rulemaking.**
- 3. If the policy becomes a rule, it will be applied uniformly across the country, forcing a significant increase in both enforcement and capital improvement projects by sewer districts that are already financially stressed.**