

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner,

v.

United States Environmental
Protection Agency,

Respondent.

Petition for Review

14-1150

On March 25, 2013, the Eighth Circuit Court of Appeals issued a decision under § 509(b)(1) of the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. § 1369(b)(1), (*Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013)). In this decision, the Eighth Circuit vacated the United States Environmental Protection Agency’s (“EPA” or “the Agency”) attempted unlawful rule modifications pertaining to National Pollutant Discharge Elimination System (“NPDES”) effluent limitations and permitting requirements on both procedural and substantive grounds. After foregoing its right to seek Supreme Court review of the *Iowa League of Cities*’ decision, EPA announced that it was limiting the decision to the states in the

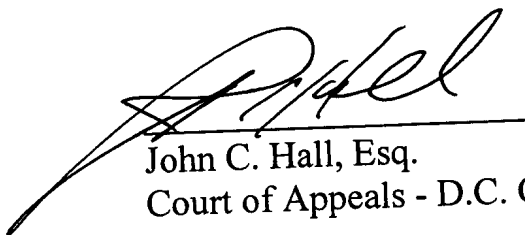
Eighth Circuit and would continue to impose the vacated requirements elsewhere.

Accordingly, pursuant to § 509(b)(1) of the CWA, the Center for Regulatory Reasonableness ("CRR"), on behalf of its members, hereby petitions this court for review of EPA's actions that have, again, modified NPDES rules and program requirements without rulemaking. Specifically, CRR challenges the Agency's decision to again impose the previously vacated re-interpretations of its 'bypass' regulation (40 C.F.R. § 122.41(m)), secondary treatment rule (40 C.F.R. Part 133), and regulation concerning allowable effluent limitations for bacteria (40 C.F.R. § 122.44(d)). Additionally, CRR challenges the Agency's new rule providing for more stringent implementation, imposition, and enforcement of nationally applicable permitting rules for facilities outside of the Eighth Circuit and requiring approved states under CWA § 402(b), 33 U.S.C. § 1342(b), to meet the more stringent requirements.

These rule modifications, subject to CWA § 509(b) review, were unequivocally announced in two letters sent from the Acting Assistant Administrator of EPA's Office of Water to national organizations that represent municipal interests impacted by the revised legislative rules. *See* Ex. A, April 2, 2014 Letter from EPA to IMLA; Ex. B, June 18, 2014 Letter


from EPA to NACWA. These letters were sent as responses to two joint requests for definitive clarification on whether and how EPA would implement the *Iowa League of Cities*' decision nationwide. See Ex. C, November 26, 2013 Letter from National Associations to EPA; Ex. D, May 30, 2014, Letter from National Associations to EPA. For reference, the documents that served as the basis for the *Iowa League of Cities*' petition have also been provided. See Exs. E-H.

Respectfully submitted,

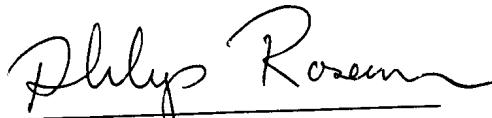


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Philip D. Rosenman, Esq.

Application to D.C. Circuit to be submitted

Hall & Associates

E-Mail: prosenman@hall-associates.com

Attorneys for Petitioner

Dated: August 12, 2014

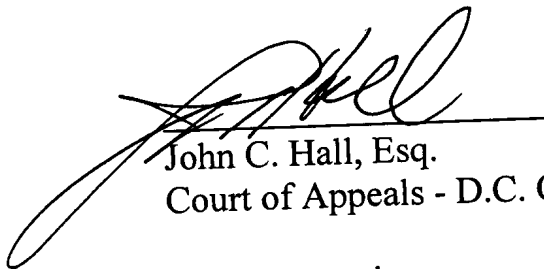
Center for Regulatory Reasonableness,
Petitioner,
v.
United States Environmental
Protection Agency,
Respondent.

Pursuant to Fed. R. App. P. and Circuit Rule 26.1, the undersigned, counsel for Petitioner, Center for Regulatory Reasonableness, certifies as follows:

1

consideration of public comments regarding the need for and efficacy of such requirements. Most, if not all, of CRR's members operate under National Pollutant Discharge Elimination System permits issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* CRR has no parent companies, and there are no other publicly-held companies that have a 10% or greater ownership interest in CRR. CRR has no outstanding shares or debt securities in the hands of the public.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Hall", written over a horizontal line.

John C. Hall, Esq.
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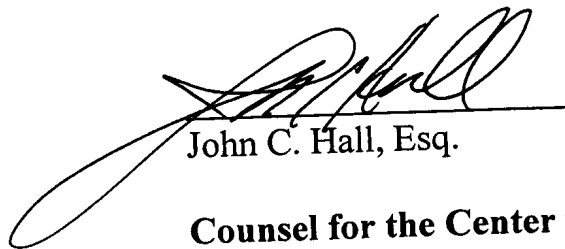
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August 2014, a copy of the foregoing **Petition for Review and Petitioner's Rule 26.1 Statement** was served on each of the following by United States Priority Mail:

Office of the Administrator
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code I 101A
Washington, D.C. 20460

United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Mail Code 2310A
Washington, D.C. 20460

Attorney General for the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Room 2141
Washington, D.C. 20530



John C. Hall, Esq.

**Counsel for the Center for
Regulatory Reasonableness**

Exhibit A



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

APR - 2 2014

OFFICE OF WATER

Mr. Chuck Thompson
International Municipal Lawyers Association
7910 Woodmont Avenue
Bethesda, Maryland 20814

Dear Mr. Thompson:

Thank you for your November 26, 2013, letter to Administrator McCarthy. In your letter, you raised concerns about how the Environmental Protection Agency is responding to the decision in *Iowa League of Cities v. EPA* (711 F.3d 844 (8th Cir. 2013)). In addition, you indicated that you believe that there is no legal basis for EPA to assert that the decision does not apply nationwide and request that the EPA apply the *Iowa League of Cities* decision uniformly across the country.

In the *Iowa League of Cities* decision, the Eighth Circuit reviewed two EPA letters regarding two subjects under the Clean Water Act. The first area addressed in the decision was the EPA's policy view that bacteria mixing zones "should not be permitted" in waters designated for primary contact recreation. The second area addressed the issue of blending and the specific question of whether a facility that uses a physical/ chemical treatment process, such as ACTIFLO, to treat flows that are diverted around biological treatment units during wet weather events is subject to a "no feasible alternatives" demonstration under the bypass provision at 40 CFR 122.41(m). The court determined that the letters constituted legislative rules and vacated the letter's "rules" because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act.

While not necessary to its holding to vacate the letters as legislative rules, the court also stated that the EPA's statement in the blending letter "severely restricts the use of 'ACTIFLO systems that do not include a biological component' because the EPA does not 'consider[] [them] to be secondary treatment units' If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations." 711 F.3d at 876. The court stated that "the September 2011 letter applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe." *Id.* at 876. Finally the court stated that "the blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits." *Id.* at 877.

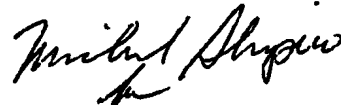
The Eighth Circuit's decision applies as binding precedent in the Eighth Circuit. The court's decision, however, did not and could not have vacated the bypass regulation at 40 C.F.R. §122.41. The bypass regulation itself was promulgated in 1984 (94 Fed. Reg. 37,990 (Sept 26, 1984)) and was subject to the exclusive jurisdiction review provision of section 509(b) of the Clean Water Act after its date of

promulgation. That rule was reviewed and upheld by the U.S. Court of Appeals for the D.C. Circuit in *NRDC Inc. v. US EPA*, 822 F.2d 104, 126 (D.C. Cir. 1987). The D.C. Circuit found that "[t]he agency's adoption of a bypass regulation which incorporates two broad and sensible exceptions . . . is, in our view, reasonable and therefore lawful." The Eighth Circuit vacated only the letters at issue in the case.

The EPA shares with you a desire to protect human health and the environment while recognizing economic constraints and feasibility concerns. To that end, the EPA is planning to hold a forum with public health experts to ask questions about the public health implications of various bypass and blending scenarios during wet weather events. The EPA believes that this public health forum will provide valuable information on how to address discharges from POTWs that, during certain wet weather events, are diverted around biological treatment units. We expect to hold this workshop in the summer of 2014.

If you have any questions, please contact Andrew Sawyers, Director of the Office of Wastewater Management, at 202-564-0748.

Sincerely,

A handwritten signature in dark ink, appearing to read "Nancy K. Stoner", with a stylized flourish at the end.

Nancy K Stoner
Acting Assistant Administrator

Exhibit B



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

JUN 18 2014

Mr. Ken Kirk
National Association of Clean Water Agencies
1816 Jefferson Place, NW
Washington, D.C. 20036-2505

OFFICE OF WATER

Dear Mr. Kirk:

Thank you for your May 30, 2014, letter in which you request the Environmental Protection Agency to supplement the Agency's April 2, 2014, letter to provide additional explanation for the way the Agency is applying the decision in *Iowa League of Cities v. EPA* (711 F.3d 844 (8th Cir. 2013)). I acknowledge that you disagree with my April 2, 2014, letter to you that articulated that the Eighth's Circuit decision applies as binding precedent in the Eighth Circuit. We hope that discussions at the June experts forum on the public health impacts of blending will provide valuable information on how to address discharges from publicly owned treatment works that, during certain wet weather events, are diverted around biological treatment units. In addition, you request clarification from the EPA on the goals and desired outcomes of the experts forum on the public health impacts of blending that is scheduled for June 19 and 20, 2014.

I would like to express my deep appreciation for your strong and continued support of sustainable policies and requirements for municipal wastewater infrastructure. The EPA shares your desire to protect human health and the environment while recognizing economic constraints and feasibility concerns. Thanks to your efforts and those of many others, the nation has come a long way in improving water quality, public health and the environment since Congress enacted the Clean Water Act over 40 years ago. Much of those gains are associated with the expansion and improvement of the nation's municipal wastewater infrastructure. We know that you and the other signatories to your letter agree with the EPA that a primary goal of sewage treatment is to protect public health. In fact, improved sewage treatment has been identified as one of the ten greatest advances in the protection of public health during the 20th century. We are all proud of that collective achievement.

The June 19 and 20, 2014 experts forum provides an excellent opportunity for all of us to further our commitment to working together for the benefit of the American public since it will focus on key issues of providing public health protection in a manner that is feasible from an engineering perspective. The EPA and the National Association of Clean Water Agencies have a long history of working cooperatively on approaches to improving the public health protection provided by municipal wastewater infrastructure in ways that are technically and economically feasible. We look forward to continuing to work with you on our common goal of achieving environmental and public health protection through cooperative dialogues and active engagement.

If you have any questions, please contact Andrew Sawyers, Director of the Office of Wastewater Management, at 202-564-0748.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy K. Stoner".

Nancy K. Stoner
Acting Assistant Administrator

Exhibit C



November 26, 2013

The Honorable Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Need for Nationwide Consistency on Implementation of the 8th Circuit's Iowa League of Cities Decision

Dear Administrator McCarthy,

As you are aware, on March 25, 2013, the 8th Circuit Court of Appeals issued a ruling in *Iowa League of Cities v. EPA* (Docket No. 11-3412) that vacated, on procedural and substantive grounds, the unadopted legislative rules set forth in two U.S. Environmental Protection Agency (EPA) guidance letters. The decision addressed EPA's reinterpretation and enforcement of three key federal rules (bypass rule, Secondary Treatment rule and Water Quality-Based Permitting rule) that apply nationwide.

Specifically, the Court held that EPA's prohibition of bacteria mixing zones in primary contact recreation waters, regardless of the degree of possible health risks, unlawfully eliminated state discretion to utilize such mixing zones and, therefore, constituted a revised rule that did not go through the proper rulemaking procedures under the Administrative Procedure Act (APA). The Court also found that EPA's blending prohibition, which restricted how municipalities could design facilities to address peak flow processing (thereby reducing CSO and SSO discharges or system backups), exceeded the Agency's statutory authority under the Clean Water Act (CWA) and was inconsistent with both EPA's secondary treatment rule and bypass rule (711 F.3d 844 (8th Cir. 2013)).

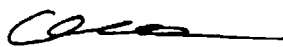
We understand that even though this decision came down more than seven months ago and was never stayed, clarification requests regarding the implementation of this decision have gone unanswered and EPA has yet to withdraw its prior objections to NPDES permits based on these now vacated policies. We also understand based on recent public comments from EPA officials that the Agency believes the decision to have binding legal effect only in the 8th circuit and that it will be applied to permittees elsewhere in the country on a case-by-case basis. We would note that Congress expressly granted the circuit courts original jurisdiction to review the NPDES regulations at issue under Section 509 of the CWA to ensure nationwide uniformity and that EPA regulations provide for only one circuit to render an opinion on a petition for review. Consequently, we believe there is no legal basis to assert that the 8th Circuit decision does not apply nationwide.

In closing, the Agency's attempt to modify nationally applicable NPDES rules without undertaking a rulemaking was struck down in no uncertain terms. The issues in this case have been causing delay and confusion for municipal entities throughout the country in addressing wet weather compliance and have greatly increased local costs, unnecessarily. For example, even by its own estimates, the municipal cost implication of implementing just one of these rule interpretations was estimated by EPA to exceed \$150 billion nationwide, with similar extraordinary costs associated with the other provisions. It is time to put that confusion and conflict to rest. Accordingly, we respectfully request confirmation that EPA will apply the *Iowa League of Cities* decision uniformly across the country and so advise its Regions and delegated States.

Sincerely,



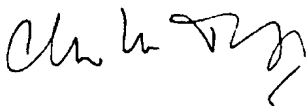
Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors



Clarence E. Anthony
Executive Director
National League of Cities



Matthew D. Chase
Executive Director
National Association of Counties



Chuck Thompson
Executive Director and General Council
International Municipal Lawyers Association



Ken Kirk
Executive Director
National Association of Clean Water Agencies

Exhibit D



May 30, 2014

Ms. Nancy Stoner
Acting Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Implementation of the 8th Circuit Court of Appeals Ruling in *Iowa League of Cities v. EPA*
(Docket No. 11-3412)

Dear Ms. Stoner:

Thank you for your response to our November 26, 2013 letter to U.S. Environmental Protection Agency (EPA) Administrator Gina McCarthy on implementation of the 8th Circuit Court of Appeals ruling in *Iowa League of Cities v. EPA* (Docket No. 11-3412). The issues raised in the case are critically important to our member communities, and it is essential that they clearly understand the Clean Water Act (CWA) requirements that apply to their facilities. Our organizations were disappointed by your April 2 response and believe that the EPA has unnecessarily created regulatory uncertainty regarding the practice of peak flow blending that will impose significant burdens on the nation's communities. We request that you provide additional justification for the EPA's decision not to apply the *Iowa League of Cities* decision nationwide.

It is our position that EPA has made a policy choice to limit application of the 8th Circuit's decision – a choice we strongly disagree with and believe is legally unsupported. EPA's decision in this instance is not simply a legal exercise; it has real consequences for and will bring real harm to communities across the country. EPA's piecemeal approach to implementing the 8th Circuit's ruling will only lead to a patchwork of interpretations on peak flow blending that will lead to greater confusion and result in more costly burdens for the nation's communities. Further, the EPA's decision in this case is contrary to the importance of consistently applying solutions throughout all the regions, which Administrator McCarthy has discussed with us, despite the fact that this case presents no exception to that principle. Applying inconsistent regulatory requirements with regard to blending – applying one set of rules to one community but a different set to another – is at odds with the 8th Circuit's ruling and is unacceptable.

In recent years, EPA has increasingly acknowledged the burden its water-related regulations place on communities nationwide. EPA has made, and we have applauded, significant strides toward alleviating some of these pressures with the development of the *Integrated Municipal Stormwater and Wastewater Planning Approach Framework* in June 2012 and recent work on a new *Financial Capability Assessment Framework*. These frameworks are intended to provide local governments with more control over the CWA investments they must make and to sequence investments in a way that will protect the environment, at a pace that is fiscally sustainable for the community. It is essential, however, that the CWA mandates that drive these investments are rational and consistently applied to ensure that communities will have certainty over the long-term. The issue of blending continues to be an area that has suffered from inconsistency and uncertainty in the long-term. Now, with the 8th Circuit ruling, the issue of blending has again become a moving target. It simply does not make sense to have a policy on blending that will lead to utilities in neighboring states in the same EPA Region having to meet different requirements.

Additionally, your letter references an upcoming public health forum to "ask questions about the public health implications of various bypass and blending scenarios during wet weather events." The question of public health impacts from peak flow treatment and blending is one that has been settled, with no evidence of an increased risk to public health following blending events.

Neither the bypass nor secondary treatment rules are "health-based." Instead, the applicable pathogen-related requirements for municipal operations come from adopted water quality standards. Looking at the potential for health impacts associated with non-biological treatment scenarios during wet weather, *even when such treatment meets all applicable standards and permit limitations*, is contrary to the basic structure of the CWA. Examining public health impacts in the context of technology-based standards creates an entirely new compliance standard under the CWA and will have ramifications for all communities with treated combined sewer overflow discharges and for stormwater best management practices.

Given its potential outcomes, a number of our organizations plan to participate in the upcoming forum scheduled for June 19-20, and intend to submit reports and data to support the position that there is no increased public health risk. We are concerned that the outcome of the forum may lead to regulatory overreach, and therefore, we respectfully request clarification from EPA on the goals and desired outcomes of the forum.

In closing, we request that you provide additional justification for the decision not to apply the 8th Circuit decision on a national basis. Again, failure to do so creates an inconsistent and unpredictable regulatory environment for communities and clean water utilities across the country. We further request additional information on the intended goals and desired outcomes of the planned public health forum.

Nancy Stoner, Office of Water
May 30, 2014
Page 3

Sincerely,



Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors



Clarence E. Anthony
Executive Director
National League of Cities



Matthew D. Chase
Executive Director
National Association of Counties



Ken Kirk
Executive Director
National Association of Clean Water Agencies

cc: Gina McCarthy, Administrator, EPA
Bob Perciasepe, Deputy Administrator, EPA
Andrew Sawyers, Office of Wastewater Management, EPA

Exhibit E



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

JUN 30 2011

OFFICE OF
WATER

The Honorable Charles E. Grassley
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for your May 19, 2011, letter to Joyce K. Frank, Principal Deputy Associate Administrator for Congressional and Intergovernmental Relations, requesting clarification from the U.S. Environmental Protection Agency (EPA) on issues related to federal wet weather permitting and reporting requirements. Attached to your letter were four questions posed by the Iowa Water Environment Association (IWEA). You will find responses to these questions in an enclosure to this letter.

On June 1, 2010, the EPA announced, in the *Federal Register*, that it is considering whether to propose modifications to the National Pollutant Discharge Elimination System (NPDES) regulations, including establishing standard permit conditions that specifically address sanitary sewer collection systems and sanitary sewer overflows (SSOs). The Agency also indicated that it is considering whether and how it should resolve several longstanding issues that are the subject of a December 22, 2005 draft Peak Flows Policy. The Agency held four public listening sessions and a webcast and provided the public with an opportunity to submit additional information. In addition, the Agency has announced a workshop, open to the public, on July 14-15, 2011, in the Washington, D.C. area to further discuss these issues. We encourage any interested member of the public, including IWEA members, to attend the workshop.

Again, thank you for your letter. If you have further questions, please contact me or your staff may call Greg Spraul in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0255.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy K. Stoner", is written over a horizontal line.

Nancy K. Stoner
Acting Assistant Administrator

Enclosure

ENCLOSURE

Responses to Questions Posed by the Iowa Water Environment Association (IWEA)

1. May a state approve a bacteria mixing zone for waters designated for body contact recreation when permitting CSO or stormwater discharges? If so, under what circumstances? If not, what type of discharges and settings does this permitting prohibition apply to, and how are effluent limits determined in these circumstances?

A mixing zone is a limited area or volume of water around the point of discharge where initial dilution and secondary mixing of a discharge takes place and where numeric water quality criteria can be exceeded. The basic concept of a mixing zone is that it may be appropriate in some circumstances to allow for ambient concentrations above the criteria in small areas near point source outfalls as long as the designated use of the waterbody as a whole is protected.

According to the EPA regulations at 40 CFR 131.13, states may, at their discretion, include mixing zone policies in their state water quality standards, and such policies are subject to the EPA's review and approval. The EPA does not have additional regulations specific to mixing zones. Instead, the EPA has provided recommendations regarding the use of mixing zones in technical and policy guidance it has developed (e.g., Water Quality Standard Handbook: Second Edition (EPA-833-B-94-005a, 1994) and Technical Support Document for Water Quality-Based Toxics Control (TSD) (EPA/505/2-30-001, 1991)).

In order to protect human health, it has been the EPA's long-standing policy that mixing zones are not appropriate in circumstances where they may pose significant human health and environmental risks (considering all likely pathways of exposure) or where they may endanger critical areas (e.g., recreational areas, drinking water supplies, breeding grounds, and areas with sensitive biota). In a memorandum from Ephraim S. King, Director of the EPA's Office of Science and Technology, to William Spratlin, Director of the EPA's Region 7, Water, Wetlands, and Pesticides Division, dated November 12, 2008, the EPA explains that significant human health risks could be presented if a mixing zone for bacteria is established in a river or stream designated for primary contact recreation. This memo is included at the end of this enclosure. A primary contact recreation designation assumes that people are protected (i.e., not exposed to an unacceptable risk level) when swimming or engaging in other contact recreation activities at any point in the designated waterbody or segment. People recreating in or downstream from a bacteria mixing zone (where bacteria levels may be elevated above the criteria levels) may be exposed to greater risk of gastrointestinal illness than would be allowed by the state water quality criteria for protection of the recreation use. Therefore, the EPA's position, as stated in the memorandum, is that mixing zones that allow for elevated levels of bacteria in rivers and streams designated for primary contact recreation are inconsistent with the designated use and should not be permitted because they could result in significant human health risks.

Where mixing zones are prohibited, water quality-based effluent limits would be established at the end-of-pipe.

2. May a state approve the use of physical/chemical treatment processes, such as Actiflo (i.e., ballasted flocculation), to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of federal bypass or secondary treatment rule requirements? If not, what requirements must be demonstrated to allow use of such facilities to assist in processing peak wet weather flows without violating either the secondary treatment or bypass regulations?

The issues raised by this question are among those being actively considered as part of a broader effort to clarify the National Pollutant Discharge Elimination System (NPDES) regulations on wet weather permitting. These are also issues that EPA has attempted to address through the issuance of policy recommendations, and it is therefore important to place these questions in that context. On December 22, 2005, in the *Federal Register*, the Agency requested public comment on a draft Peak Flows Policy, which clarified that the bypass provision applies to wet weather diversions at wastewater treatment plants serving separate sanitary sewers. Further, the draft Policy explained how the NPDES authority should implement 40 CFR 122.41(m)(4)(ii) when it receives a request for approval of anticipated peak wet weather flow diversions at wastewater treatment plants serving separate sanitary sewer collection systems when the diverted flows are recombined with flow from the secondary treatment units prior to discharge. The approach in the draft policy is based on language in the bypass regulation that provides that if the NPDES authority determines that the criteria of 40 CFR 122.41(m)(4)(i) will be met, the NPDES authority may approve an anticipated bypass of peak wet weather flow diversions around secondary treatment units.

Although the 2005 draft Policy has not been finalized, the EPA maintains that the approach explained in the draft Policy continues to be a viable path forward for utilities to meet their obligations under the bypass regulation. Whereas the regulation itself establishes whether a particular diversion is a bypass, the draft Policy recommends guidance on implementing the bypass provision, including 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, and will continue to consider whether the 2005 Policy should be finalized or incorporated into the EPA's other potential wet weather rulemaking effort announced June 1, 2010 in the *Federal Register*.

3. Under what circumstances must a community report basement backups as violations of an NPDES permit or as unauthorized discharges? How are these events classified – as unpermitted discharges or another form of violation? Does this reporting requirement apply even if the basement backup cannot possibly reach waters of the U.S.?

The EPA believes that sewage backing up into buildings is a significant human health risk and may indicate systemic capacity and/or maintenance related problems in the collection system. These concerns exist apart from whether or not the untreated sewage is discharged to a water of the United States. A description of the extent of human health and environmental impacts caused by overflows and backups, along with other information, is provided in the Agency's *Report to Congress on the Impacts and Control of CSOs and SSOs* (EPA, 2004), downloadable at http://cfpub.epa.gov/npdes/cso/cpolicy_report2004.cfm.

NPDES permits establish reporting requirements for a permittee. The reporting requirements for a given permittee will depend on the specific language in their permit. The NPDES regulations establish standard permit conditions that provide minimum requirements for NPDES permits. One standard permit condition, when incorporated into a permit, requires permittees to report any instance of noncompliance to the NPDES authority. SSOs that result in discharges to waters of the United States constitute noncompliance, which the permittee must report under these provisions. In addition, sewage backups from sanitary sewer collection systems may be an indicator that the NPDES permittee is violating a permit condition requiring proper operation and maintenance of the collection system and may have to be reported as noncompliance.

The issue of appropriate reporting requirements for SSOs and basement backups is one that the Agency is actively considering as part of a rulemaking effort on wet weather permitting (See the June 1, 2010 notice in the *Federal Register*).

4. Are all sewer system overflows, regardless of cause or ability to control, considered violations of federal law? Where state rules establish "design conditions" for the proper sizing of a sewer system, may a state permit discharges that occur due to a greater storm event, so long as the system is being properly operated and maintained? If not, what sewer system design is considered acceptable to EPA?

SSOs are releases of untreated sewage from a municipal separate sanitary sewer collection system. SSOs that reach waters of the United States are point source discharges and are prohibited unless authorized by an NPDES permit. NPDES permits generally prohibit SSOs, although some States have issued permits that limit State enforcement if certain specified conditions are met. Such provisions represent a prospective exercise of enforcement discretion by the State regulatory authority, not an authorization of the discharge.

Exhibit F



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

SEP 14 2011

OFFICE OF WATER

The Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

Dear Senator Grassley:

Thank you for your July 27, 2011, letter forwarding a request that the U.S. Environmental Protection Agency (EPA) further clarify our responses to your May 19, 2011, letter. The Iowa Water Environment Association (IWEA) asked for further information in several areas related to wet weather permitting. I am enclosing responses to the additional questions IWEA raised in its letter to you.

The EPA acknowledges the importance to the public of a clear understanding of applicable Federal requirements. To further this objective, on several occasions, the agency has sought input from the public on how best to achieve this goal. Most recently, in June and July 2010, the EPA held four well-attended listening sessions at which the agency heard recommendations on how any potential rulemaking effort should address certain issues associated with sanitary sewer overflows (SSOs) and peak wet weather flows. These issues are at the heart of IWEA's two letters to your office. As a follow up to the listening sessions, on July 14-15, 2011, the EPA also held an SSO /Peak Flows Workshop in Washington, DC, which brought together EPA and state permitting authorities, municipal wastewater treatment plant and collection system experts, and environmental organizations, as well as over 75 members of the public, to offer recommendations to the Agency on the best path forward on these issues. A representative from the Iowa League of Cities participated as part of the expert panel at the Workshop.

Over the next few months, the EPA will be evaluating the recommendations made at the Workshop in order to determine what actions are necessary in the near and long term. In the meantime, if you have any questions or suggestions please contact me, or your staff may contact Greg Spraul in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0255.

Sincerely,

A handwritten signature in black ink, which appears to read "Nancy K. Stoner".

Nancy K. Stoner
Acting Assistant Administrator

Enclosure

Enclosure

Responses to Questions Posed by the Iowa Water Environment Association (IWEA)

1. Is IWEA's understanding of EPA's responses to Issue 2, as contained in this letter, accurate?

Yes. EPA's regulations at 122.41(m) define a "bypass" as an intentional diversion of waste streams from any portion of a treatment facility. The regulation provides that "bypasses" are expressly "prohibited," and the NPDES authority may take enforcement action against the permittee except for very limited exceptions. One of these limited exceptions is found at 40 CFR 122.41(m)(4)(i)(B). This provision enables a permitting authority to "approve"¹ – but not "authorize" – a bypass if the record supports that there are "no feasible alternatives" to the bypass such as through greater reductions of inflow and infiltration into the collection system, or building auxiliary treatment facilities.

2. Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.41(m)(4).

In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units.

3. May a state utilize a "design storm" approach to authorize an untreated discharge from a collection system, under conditions where the "design storm" is exceeded? If not, what rule prohibits this approach?

Section 301(a) of the Clean Water Act prohibits the discharge of pollutants to waters of the United States except in compliance with certain provisions of the CWA. These requirements include Section 402 of the CWA which establishes the NPDES program under which EPA or an authorized NPDES State may issue a permit authorizing a discharge, provided the permit contains applicable technology-based effluent limitations and any more stringent effluent limitations necessary to meet applicable water

¹ 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.

quality standards (See CWA Section 301(b); 40 CFR 122.44). Sanitary sewers serving a municipal sewage treatment plant are considered to be part of the publicly owned treatment works under the CWA and sanitary sewer overflow (SSO) discharges must meet effluent limitations based upon secondary treatment as defined by 33 U.S.C. 1311(b)(1)(B) and any more stringent limitations necessary to meet water quality standards. As a practical matter, untreated SSOs cannot meet effluent limitations based upon secondary treatment (and, in many cases, applicable water quality-based effluent limitations). Thus, NPDES permits typically prohibit SSOs. In addition to such specific prohibitions, some state NPDES authorities have chosen to include provisions in permits that limit state enforcement of SSOs if certain specified conditions are met. Where this has occurred, such provisions represent a prospective exercise of enforcement discretion, not an authorization of the discharge.

The issue of whether certain SSOs that are caused by extreme wet weather conditions or by such conditions that are beyond the reasonable control of the POTW operator should be excused or protected by an affirmative defense is one that EPA anticipates evaluating if it moves forward with a federal rulemaking.

Exhibit G

Title VIII of ANILCA requires the Secretaries to administer a subsistence priority on public lands. The scope of this program is limited by definition to certain public lands. Likewise, these regulations have no potential takings of private property implications as defined by Executive Order 12630.

The Secretaries have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. The implementation of this rule is by Federal agencies and there is no cost imposed on any State or local entities or tribal governments.

The Secretaries have determined that these regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988, regarding civil justice reform.

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Title VIII of ANILCA precludes the State from exercising subsistence management authority over fish and wildlife resources on Federal lands unless it meets certain requirements.

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects. The Bureau of Indian Affairs is a participating agency in this rulemaking.

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not a significant regulatory action under Executive Order 13211, affecting energy supply, distribution, or use, this action is not a significant action and no Statement of Energy Effects is required.

Drafting Information—William Knauer drafted these regulations under the guidance of Thomas H. Boyd, of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Taylor Brelsford, Alaska State Office, Bureau of Land Management; Nancy Swanton, Alaska Regional Office, National Park Service; Dr. Glenn Chen, Alaska Regional Office, Bureau of Indian Affairs; Jerry Berg, Alaska Regional Office, U.S. Fish and Wildlife

Service; and Steve Kessler, USDA—Forest Service provided additional guidance.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

For the reasons set out in the preamble, the Federal Subsistence Board proposes to amend 36 CFR part 242 and 50 CFR part 100 for the 2007–08 regulatory year. The text of the amendments would be the same as the final rule for the 2005–06 regulatory year (70 FR 13377) as modified by Federal Subsistence Board actions January 10–12, 2006.

Dated: December 5, 2005.

Thomas H. Boyd,

Acting Chair, Federal Subsistence Board.

Steve Kessler,

Subsistence Program Leader, USDA—Forest Service.

[FR Doc. 05–24353 Filed 12–21–05; 8:45 am]

BILLING CODE 4310–65–P; 3410–11–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 123

[EPA–HQ–OW–2005–0523, FRL–8013–9]

National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Peak Wet Weather Discharges From Publicly Owned Treatment Works Treatment Plants Serving Separate Sanitary Sewer Collection Systems

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability and request for comment.

SUMMARY: Today, EPA is inviting comment on a draft policy regarding NPDES permit requirements for peak wet weather discharges from publicly owned treatment works (POTW) treatment plants serving separate sanitary sewer collection systems. Regulatory agencies, municipal operators of wastewater facilities, and representatives of environmental advocacy groups have expressed uncertainty about the appropriate

regulatory interpretation for such situations. Today's draft policy describes both an interpretation of regulations, as well as guidance to implement such an interpretation. EPA's intention is to ensure that NPDES requirements be developed and applied in a nationally-consistent manner that improves the capacity, management, operation and maintenance of POTW treatment plants and separate sanitary sewer collection systems and protects human health and the environment.

DATES: Comments must be received or postmarked on or before January 23, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2005–0523, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- E-mail: Comments may be sent by electronic mail (e-mail) to OW-Docket@epa.gov, Attention Docket ID No. EPA–HQ–OW–2005–0523. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

- Mail: Send an original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OW–2005–0523.

- Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. EPA–HQ–OW–2005–0523. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2005–0523. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information

whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or through e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: For questions about the substance of this draft policy, contact Kevin Weiss (e-mail at weiss.kevin@epa.gov or phone at (202) 564-0742) at Water Permits Division, Office of Wastewater Management, U.S. Environmental Protection Agency (Mailcode 4203M), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. Submitting CBI

Do not submit information that you consider to be CBI electronically through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code or Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

3. Docket Copying Costs

You may copy 266 pages per day free of charge. Beginning with page 267, you will be charged \$0.15 per page plus an administrative fee of \$25.00.

Acronyms Used

CSO Combined sewer overflow.
EPA Environmental Protection Agency.
I/I infiltration and inflow.

NPDES National Pollutant Discharge Elimination System.

POTW Publicly owned treatment works.

SSO Sanitary sewer overflow (this does not include CSOs).

II. Background

EPA has received requests from many stakeholders to clarify the NPDES requirements for discharges from POTW treatment plants serving separate sanitary sewers where peak wet weather flow is routed around biological treatment units and then blended with the effluent from the biological units prior to discharge and where the final discharge meets permit effluent limitations based on the secondary treatment regulation (40 CFR Part 133) or any more stringent limitations necessary to attain water quality standards. On November 7, 2003, EPA requested public comment on a proposed policy addressing this issue. Under the proposed interpretation in the November 7, 2003 proposed policy, a wet weather diversion around biological treatment units that was blended with the wastewaters from the biological units prior to discharge would not have been considered to constitute a prohibited bypass if the six criteria specified in the November 7, 2003 proposed policy were met.

EPA received significant public comment on the proposed policy, including over 98,000 comments opposing the policy due to concerns about human health risks. On May 19, 2005, EPA indicated that after consideration of the comments, the Agency had no intention of finalizing the 2003 proposal. On July 26, 2005, Congress enacted the FY 2006 Department of the Interior, Environment, and Related Agencies Appropriations Act (P.L. 109-54). Section 203 of the Appropriations Act provides that none of the funds made available in the Act could be used to finalize, issue, implement or enforce the November 7, 2003 proposed blending policy.

In October of 2005, the Natural Resources Defense Council (NRDC) and the National Association of Clean Water Agencies (NACWA) provided EPA with their joint proposal recommending further action that the Agency should take regarding the blending issue. The NRDC/NACWA recommended approach includes an interpretation of the bypass regulation that is significantly different from the November 7, 2003 proposal, in that it would clarify that the bypass provision would apply, in all instances, to wet weather diversions at POTW treatment plants serving separate

sanitary sewers. Today's draft policy invites comment on this interpretation, as well as the recommended guidance to implement the interpretation, and reflects the approach of the NRDC/NACWA recommendation.

III. General Information

A. Draft Policy

If the draft policy is made final, the following statement will be announced by EPA.

Draft Memorandum

From: Benjamin H. Grumbles, Assistant Administrator, Office of Water.

To: Regional Administrators, Region I-X, Granta Y. Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance.

Subject: National Pollutant Discharge Elimination System Permit Requirements for Peak Wet Weather Discharges from Publicly Owned Treatment Works Treatment Plants Serving Separate Sanitary Sewer Collection Systems

Introduction

Many municipalities currently have situations in which high peak influent flows during significant wet weather events exceed the treatment capacity of existing secondary treatment units. In these situations, wet weather flows are sometimes diverted around secondary treatment units and then either recombined with flows from the secondary treatment units or discharged directly into waterways from the treatment plant. This policy only applies to peak wet weather diversions around secondary treatment units that occur at publicly owned treatment works (POTW) treatment plants serving separate sanitary sewer systems that are recombined with flow from the secondary treatment unit. The process by which wet weather diversions can be approved in National Pollutant Discharge Elimination System (NPDES) permits for POTW treatment plants serving combined sewer systems was previously outlined in the 1994 CSO Policy, 59 FR 18,693–18,694 (April 19, 1994). Nothing in this policy addresses the requirements for POTW treatment plants serving combined sewer systems.

While EPA recognizes that peak wet weather flow diversions around secondary treatment units at POTW treatment plants serving separate sanitary sewer conveyance systems may be necessary in some circumstances to prevent temporary loss of function of secondary treatment units, the Agency and stakeholders have been concerned for some time that peak wet weather

flow diversions could have adverse environmental or public health impacts because of the higher expected pollutant load of diverted flows.

Accordingly, EPA strongly discourages reliance on peak wet weather flow diversions around secondary treatment units as a long-term wet weather management approach at a POTW treatment plant serving separate sanitary sewer conveyance systems and that such diversions should be minimized to the maximum extent feasible taking into account the factors discussed in this policy. EPA anticipates that, over time, the need to undertake peak wet weather flow diversions at POTW treatment plants serving separate sanitary sewer conveyance systems can be eliminated from most systems in a variety of ways, such as by enhancing storage and treatment capacity and reducing sources of peak wet weather flow volume. EPA expects that aggressive efforts by POTW treatment plant operators in consultation with NPDES authorities can lead to dramatic reductions in the volume and duration of peak wet weather flows and can improve the treatment and quality of peak wet weather flow discharges. EPA also believes that the involvement of the general public will improve the assessment of various options to minimize peak wet weather flow diversions.

In recent years there has been substantial confusion regarding the regulatory status of peak wet weather flow diversions around secondary treatment units at POTW treatment plants serving separate sanitary sewer conveyance systems. In some cases, such diversions have been considered a bypass and held to the criteria of the NPDES bypass regulation (40 CFR 122.41(m)). In other cases, diversion scenarios around secondary treatment units at POTW treatment plants have been constructed and permitted at facilities without consideration of the bypass regulation criteria.

In 2003, EPA proposed a policy to clarify the regulatory status of peak wet weather flows that are combined with secondary effluent, a practice known as blending. 68 FR 63,042 (Nov. 7, 2003). In that proposed policy, EPA stated that if certain procedures were followed, peak wet weather flow blending would not be considered a bypass under 40 CFR 122.41(m). The Agency received over 98,000 comments on the proposed policy and on May 19, 2005 indicated that it no longer intended to pursue further action on the proposal.

Applicability of the Bypass Regulation to Blending

This policy provides the Agency's interpretation that the 40 CFR 122.41(m), the bypass regulation, applies to peak wet weather diversions at POTW treatment plants serving separate sanitary sewer conveyance systems that are recombined with flow from the secondary treatment units. If the criteria of 40 CFR 122.41(m)(4)(i)(A)–(C) are met, NPDES authorities can approve peak wet weather flow diversions around secondary treatment units in a NPDES permit for discharges from a POTW treatment plants as an anticipated bypass under 40 CFR 122.41(m)(4)(ii).

This policy:

- Interprets the provisions of 40 CFR 122.41(m)(4) as they apply to peak wet weather flow diversions around secondary treatment units at POTW treatment plants serving separate sanitary sewer systems where the diverted flow is recombined with flow from the secondary treatment units prior to discharge;

- Interprets the term "no feasible alternatives" in 40 CFR 122.41(m)(4)(i)(B) as it applies to such peak wet weather flow diversions;

- Does not apply to discharges or overflows prior to the headworks of a POTW treatment plant; dry weather diversions; diversions around primary or tertiary treatment units; or diverted flow that is not recombined with flow from the secondary treatment units prior to discharge;

- Promotes use of measures to provide the highest possible treatment to the greatest possible peak wet weather flow; and

- Promotes reporting and public notification of peak wet weather diversion events.

A combination of approaches can be used to achieve the goals of this policy. These approaches include:

- Ensuring full utilization of available secondary treatment capacity;
- Reducing infiltration and inflow (I/I);

- Maximizing the use of the collection system for storage;

- Providing off-line storage; and
- Providing sufficient secondary treatment capacity.

EPA recognizes that these approaches, alone or in combination, may not be sufficient in some cases to enable a POTW treatment plant to process its peak wet weather flows through its secondary treatment units. In such cases, a POTW treatment plant operator may have no feasible alternative to peak wet weather flow diversions around

secondary treatment units. This policy sets forth a process for determining whether or not such feasible alternatives to peak wet weather flow diversions exist. If the NPDES authority determines that there are no feasible alternatives to peak wet weather flow diversions around secondary treatment units at the treatment plant using the analysis set forth in this policy, then the NPDES authority may approve peak wet weather flow diversions around secondary treatment units at a POTW treatment plant serving separate sanitary sewer conveyance systems as an anticipated bypass in accordance with 40 CFR 122.41(m) in a new or renewed NPDES permit. The only flow that can be approved as an anticipated bypass around secondary treatment units is flow that is anticipated to exceed the peak flow capacity of the secondary treatment unit(s) even after implementation of the feasible technologies and approaches identified via the process outlined in this policy. NPDES authorities should include an implementation schedule in the permit for the feasible technologies and approaches that would need to be implemented and the associated flow volumes. In NPDES permits with such implementation schedules, the approval of any anticipated bypass would be contingent upon the permittee's performance of the implementation schedule. This implementation schedule would be considered a permit condition as opposed to a schedule of compliance under 40 CFR 122.47.

A thoughtful public planning process at the local level is important to minimize or eliminate overflows in the collection system, minimize I/I into the collection system, maximize treatment of all flows, and improve wet weather flow management. EPA recommends that POTW treatment plant operators work with their NPDES authorities and local communities to proactively minimize peak wet weather influent flow volume and improve effluent quality, reduce the frequency and volume of diversion events, and improve the structural integrity and capacity of collection systems and the reliability of POTW treatment plants.

The use of diversions around secondary treatment units at POTW treatment plants serving separate sanitary sewer conveyance systems to manage peak wet weather flows is not necessary in many cases and cannot be approved if feasible alternatives are identified through the analysis described herein. Accordingly, on permit renewal, the presumption by the NPDES authority would be against the utility's continued use of diversions to

manage peak wet weather flows. This presumption could be overcome by the POTW treatment plant operator again demonstrating that there are no feasible alternatives to such diversions through updating and resubmission of the utility analysis described in this policy, ensuring that the submission identifies any changes at the facility, progress made in relevant areas, any new circumstances, the timing of ongoing projects or construction, or I/I reduction schedules. Timely permit renewals for facilities that employ peak wet weather diversions around secondary treatment units at the POTW treatment plant should be a priority. Because of the importance of regular analysis of the ongoing need to utilize diversions at a particular facility, NPDES permits for facilities that employ or seek to employ peak wet weather diversions around secondary treatment units at their treatment plant should be timely renewed rather than administratively continued.

The determination of what constitutes a 'peak wet weather event,' during which the use of a peak wet weather diversion may be approved by a NPDES authority as an anticipated bypass, will be a site-specific determination. Certainly, EPA does not expect diversions at POTW treatment plants serving separate sanitary sewer conveyance systems to be used for routine rain events. EPA also cannot reasonably estimate or endorse an 'acceptable' number of anticipated bypasses (e.g., five per year). Such a one-size-fits all approach would not recognize the site-specific nature of peak wet weather diversions and could lead to excessive use of diversions in some communities. Rather, it is EPA's intention through this policy to ensure that POTW treatment plant operators, NPDES authorities, and the general public evaluate what constitutes a peak wet weather event for a POTW treatment plant for which there is no feasible alternative to a peak wet weather diversion, based upon past diversions, opportunities for eliminating or reducing diversions, and future considerations. Where such peak wet weather diversions at a POTW treatment plant cannot be feasibly avoided, additional technologies (e.g., providing supplemental biological or physical/chemical treatment) and approaches should be used to maximize treatment of diverted flows where feasible. EPA does not support the use of peak wet weather diversions around secondary treatment units at POTW treatment plants when the peak flows are largely due to poor (or lack of) collection

system maintenance or the lack of investment in or upgrades to treatment capacity.

Under this policy, NPDES authorities and POTW treatment plant operators need to ensure that all flows that will be diverted from the secondary treatment units in peak wet weather events receive a minimum of primary treatment and any supplemental treatment or technology shown feasible using the factors outlined in this policy. All discharges from POTW treatment plants serving separate sanitary sewer conveyance systems must meet effluent limitations, including the 85 percent removal requirement (unless the discharge from the POTW treatment plant meets the requirements of 40 CFR 133.103(d) (less concentrated influent wastewater for separate sanitary sewers)) and other secondary treatment requirements and any more stringent limitations necessary to meet water quality standards. Failure to meet effluent limitations is a permit violation. NPDES authorities should ensure that the facility, including when diverting, does not have the reasonable potential to cause or contribute to non-attainment of any water quality standards.

EPA recognizes that some POTW treatment plants may be implementing technologies more advanced than or supplementary to secondary treatment. The Agency encourages the use and permitting of such technologies (e.g., membrane, tertiary) where they produce a higher quality effluent. In the case where a POTW treatment plant is using, or plans to use, technology that is more effective in baseline pollutant removal than is required to meet secondary treatment-based permit limits, the NPDES authority should take that improved baseline performance into consideration when determining whether peak flow diversions at a POTW treatment plant are approved and under what conditions.

No Feasible Alternatives Analysis Process

An authority's determination as to whether or not there is a feasible alternative to peak wet weather diversions at a POTW treatment plant serving a separate sanitary sewer collection system should be made using the following inputs and criteria, which are based on 40 CFR 122.41(m)(4)(i)(A)-(C) and 40 CFR 122.21(j). At the time of NPDES permit application or NPDES permit renewal:

1. POTW treatment plant operators seeking approval of peak wet weather diversions at a treatment plant as an anticipated bypass should submit a

comprehensive analysis (utility analysis) to the NPDES authority that:

a. Documents current treatment plant design capacity for all treatment units, the maximum flow that can be processed through those units, and the feasibility of increasing such treatment capacity and related costs;

b. Estimates the frequency, duration, and volume of current wet weather diversions, and evaluates alternatives to reduce the frequency, duration, and volume of such occurrences and related costs;

c. Estimates the potential for future peak wet weather diversions based upon information such as predicted weather patterns, population growth, and projected treatment plant and collection system changes (e.g., upgrades, extensions, deterioration) and evaluates options for reducing diversions based on these variables;

d. Assesses existing storage within the collection system or on-site and options for enhanced utilization or expansion (taking into account physical and technological considerations) of storage to reduce the frequency, duration, and volume of peak wet weather diversions, and the related costs;

e. Assesses other ways to reduce peak wet weather flow volumes, such as limiting collection system extensions or slug loadings from indirect dischargers;

f. Evaluates technologies (such as supplemental biological treatment, physical chemical treatment, ballasted flocculation, deep bed filtration, or membrane technology) that are or could be used to provide additional treatment to peak wet weather flows or peak wet weather diversions at the POTW treatment plant and the costs of implementing those technologies;

g. Evaluates the extent to which the permittee is maximizing its ability to reduce I/I throughout the entire collection system (i.e., not only the portions operated by the utility, but also portions operated by any municipal satellite community), including the use of existing legal authorities, potential improvements in the timing or quality of such efforts, and options for obtaining or expanding legal authorities to reduce I/I from satellite collection systems;

h. Evaluates peak flow reductions obtainable through implementation of existing Capacity, Management, Operations, and Maintenance (C-MOM) programs and potential improvements in the timing or enhancement of those programs and the related costs; or, if no such program exists, reductions obtainable through the development and implementation of a C-MOM program and the related costs;

i. Assesses the community's ability to fund the peak wet weather flow improvements discussed in the utility analysis, taking into consideration: current sewer rates, planned rate increases, and the costs, schedules, anticipated financial impacts to the community of other planned water and wastewater expenditures, and other relevant factors impacting the utility's rate base, using as a guide EPA's CSO Guidance for Financial Capability Assessment and Schedule Development, EPA 832-B-97-004;

j. Proposes a protocol for monitoring the recombined flow at least once daily during diversions for all parameters for which the POTW treatment plant has daily effluent limitations or other requirements (e.g., monitoring only requirements) and ensures appropriate representative monitoring for other monitoring requirements of the permit, the total volume diverted, and the duration of the peak wet weather diversion event; and

k. Projects the POTW treatment plant effluent improvements and other improvements in collection system and treatment plant performance that could be expected should the technologies, practices, and/or other measures discussed in the utility analysis be implemented.

2. For any POTW treatment plant operator seeking approval in an NPDES permit for an anticipated bypass under this policy, the NPDES authority should:

a. Make the utility analysis publicly available with other draft permit information for public review and comment;

b. Review and evaluate the utility analysis and require measures to be undertaken to provide the highest possible treatment to the greatest possible peak wet weather flow, taking into account the full range of economic, environmental, public health, and engineering considerations;

c. Review and approve or deny the peak wet weather diversions based on the determination of whether there are feasible alternatives to those diversions using the analysis set forth in this policy;

d. Include a permit provision recognizing any approved peak wet weather diversions as anticipated bypasses, and specify the conditions for allowing such diversions;

e. Include a permit provision requiring any POTW treatment plant operator that has an approved anticipated bypass to provide notice of the peak wet weather diversion event consistent with 40 CFR 122.41(m)(3);

f. Include a permit provision requiring the operator of any POTW treatment plant that has an approved anticipated bypass to monitor the recombined flow at least once daily during diversions for all parameters for which the POTW treatment plant has daily effluent limitations or other requirements (e.g., monitoring only requirements), the total volume diverted, and the duration of the peak wet weather diversion event. For parameters for which the permit establishes non-daily effluent limitations, include in the permit monitoring requirements sufficient to yield data representative of the final blended discharge, in order to ensure compliance with applicable effluent limitations. See 40 CFR 122.48(b);

g. Describe in the permit Fact Sheet prepared under 40 CFR 124.8(b) how the peak wet weather event was calculated, the reason for allowing peak wet weather diversions, and any requirements for such peak wet weather diversions;

h. Ensure that permit load limitations account for the anticipated flow into secondary treatment units during both wet and dry weather conditions;

i. Include permit provisions for public notification (e.g., via utility website) of the peak wet weather diversion event within 24 hours of the inception of each event; follow up public notification of the duration and volume of the event within 48 hours of its cessation; and for public review of the POTW treatment plant operator's peak wet weather flow diversion practices upon request;

j. Include permit provisions requiring the control authority with an approved pretreatment program to review, and revise if necessary, local pretreatment limits for indirect dischargers to take into account peak wet weather diversion events (e.g., significant industrial users with batch discharging);

k. If the discharge will be to sensitive receiving waters (i.e., waters used for recreation; drinking water; shellfish beds; waters formally designated by state or federal authorities as requiring special consideration or protection; waters with threatened or endangered species), ensure that the impact of any peak wet weather diversion events on these waters is minimized and additional caution exercised as permit limitations are set; and

l. Rigorously review each and every POTW permit renewal request that seeks continued approval of peak wet weather diversions to ensure that a comprehensive utility analysis consistent with section 1 above is submitted and evaluated and that peak wet weather diversions are approved only when no feasible alternatives to

them are identified through the process set forth in this policy.

3. EPA will:

a. Use this policy in making NDPES permitting decisions for all POTW treatment plants serving separate sanitary sewer conveyance systems in non-authorized states;

b. Review permits in NPDES authorized states within the timelines specified in 40 CFR 123.44 for all POTW treatment plant operators seeking approval for diversions pursuant to this policy to ensure that they are consistent with this interpretation of the regulations;

c. Ensure that enforcement actions are taken, where appropriate, against POTW treatment plant operators that fail to move forward expeditiously to meet their legal obligations as determined consistent with this policy; and

d. Ensure that monitoring data received concerning peak wet weather diversions at POTW treatment plants is available to the public on EPA's website in a searchable and correctable database.

Dated: December 19, 2005.

Benjamin H. Grumbles,
Assistant Administrator, Office of Water.
[FR Doc. E5-7696 Filed 12-21-05; 8:45 am]
BILLING CODE 6560-50-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AT90

Endangered and Threatened Wildlife and Plants; Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse; Correction

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; correction.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a correction to the proposed rule to revise critical habitat for the endangered Perdido Key beach mouse (*Peromyscus polionotus trissyllepsis*) and Choctawhatchee beach mouse (*Peromyscus polionotus allopheys*), and designate critical habitat for the endangered St. Andrew beach mouse (*Peromyscus polionotus peninsularis*) published in the *Federal Register* on December 15, 2005. The proposed rule was published with an incorrect electronic mail address for submission of comments.

DATES: We will accept comments from all interested parties until February 13, 2006. We must receive requests for public hearings in writing by January 30, 2006.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, U.S. Fish and Wildlife Service, 1601 Balboa Avenue, Panama City, Florida 32405, (telephone 850-769-0552; facsimile 850-763-2177).

SUPPLEMENTARY INFORMATION: On December 15, 2005, a document entitled "Endangered and Threatened Wildlife and Plants; Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse" was published in the *Federal Register* (70 FR 74426) with an incorrect electronic mail address for submission of comments.

Correction

In the *Federal Register* of December 15, 2005, on page 74426, in the first column, correct item 3 in the **ADDRESSES** section to read: 3. You may send comments by electronic mail (e-mail) to floridabeachmouse@fws.gov.

Dated: December 16, 2005.

Sara Prigan,
Federal Register Liaison Officer.
[FR Doc. E5-7701 Filed 12-21-05; 8:45 am]
BILLING CODE 4310-55-P

Exhibit H



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

NOV 12 2008

OFFICE OF
WATER

MEMORANDUM

FROM: Ephraim S. King, Director
Office of Science and Technology

TO: William Spratlin, Director
Water, Wetlands and Pesticides

SUBJECT: Initial Zones of Dilution for Bacteria in Rivers and Streams
Designated for Primary Contact Recreation

I understand that Region 7 is receiving inquiries regarding the appropriateness of initial zones of dilution (i.e., mixing zones¹) for bacteria criteria in rivers and streams designated for primary contact recreation. This memorandum provides our perspective on this issue. In brief, the presumption in a river or stream segment designated for primary contact recreation is that primary contact recreation can safely occur throughout the segment, and, therefore that bacteria levels will not exceed criteria throughout the segment. Given this, mixing zones that allow for elevated levels of bacteria in rivers and streams designated for primary contact recreation are inconsistent with the designated use and should not be permitted because these could result in a significant health risk. For example, effluent from a wastewater treatment plant that increases bacteria levels ten-fold may be associated with risk that far exceeds those that have been measured in epidemiological studies and judged to be acceptable for protection of human health.

EPA's long-standing policy to ensure protection of human health has been that initial zones of dilution are not appropriate where they may pose "significant health

¹ A mixing zone is a limited, defined area in a waterbody where an effluent discharge undergoes initial dilution and secondary mixing. States and Tribes have discretionary authority to include policies on mixing zones in their water quality standards. 40 C.F.R. 131.13. Such policies are subject to EPA approval. *American Wildlands v. Browner*, 260 F.3d 1192, 1195 (10th Cir. 2001). EPA does not have "mixing zone" regulations; instead, EPA's recommendations regarding mixing zones are expressed in technical and policy guidance. E.g., Water Quality Standards Handbook: Second Edition (EPA-833-B-94-005a, August 1994); EPA's Technical Support Document for Water Quality-based Toxics Control, March 1991 (TSD). The basic concept of a mixing zone is that it may be appropriate to allow for ambient concentrations above the criteria in small areas near outfalls under certain circumstances so long as the existing and designated use of the water body as a whole is maintained. EPA's Water Quality Standards Handbook: Second Edition (EPA-833-B-94-005a, August 1994), Page 5-1. Regarding mixing zones for bacteria, an important consideration is that there are not significant health risks associated with establishing a mixing zone, considering likely pathways of exposure. EPA's Water Quality Standards Handbook: Second Edition (EPA-833-B-94-005a, August 1994), Page 5-7 to 5-8.

risks"² or where "they may endanger critical areas (e.g., drinking water supplies, recreational areas (emphasis added), breeding grounds, areas with sensitive biota)".³ Such a "significant health risk" could be presented where an initial zone of dilution for bacteria is established in rivers and streams designated for primary contact recreation. This is because recreational uses are typically designated for the whole waterbody or segment and people are assumed to be protected for swimming and other contact recreation activities at an acceptable risk level throughout the waterbody or segment. The underlying principle of these zones is that the designated use will be attained even though there is the potential for organisms to be exposed above the protective criteria level. For aquatic life uses, EPA has been clear in stating that initial zones of dilution should be restricted to avoid exposures leading to an acute endpoint of lethality. With respect to recreation and human health protection, the acute endpoint is gastrointestinal illness. People recreating in or downstream from an initial zone of dilution (where bacteria levels may be elevated above the criteria levels) may be exposed to greater risk of the acute endpoint of gastrointestinal illness than would be allowed by the criteria the State adopted to protect the recreational use of the water.

In large rivers in particular, an assumption of complete, immediate mixing may not be appropriate. EPA has recognized that zones of incomplete lateral mixing may extend for the equivalent of many channel widths downstream before uniformly mixed conditions are attained, if indeed they ever are. This means that there could be areas or plumes of higher bacterial concentrations in the ambient water far from the initial discharge point. Because the fate and transport of bacteria in these areas or plumes can be difficult to reliably predict in a river system (in part because of the day-to-day variability in weather conditions and flow), these areas or plumes of higher bacterial concentrations may migrate into various portions of the water segment, including near shore areas. Because people swimming in such an area may ingest water containing high concentrations of bacteria and potentially pathogens -- we cannot envision a circumstance where discharges that elevate bacteria levels beyond criteria can be viewed as protective of the primary recreation use in fresh, flowing waters like rivers and streams.

I hope this clarification is helpful. If you have any questions or need additional information, please do not hesitate to contact me or have your staff call Amy Newman at 202-566-0723.

² EPA's Water Quality Standards Handbook: Second Edition (EPA-833-B-94-005a, August 1994). Page 5-7 to 5-8. EPA's Technical Support Document for Water Quality-based Toxics Control (EPA-505-2-90-001, March 1991). Page 34.

³ EPA's Technical Support Document for Water Quality-Based Toxics Control (EPA-505-2-90-001, March 1991). Page 70.