



NATURAL RESOURCES DEFENSE COUNCIL

September 10, 2001

Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building (1101A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Whitman:

The Environmental Caucus of the Federal Advisory Committee on Sanitary Sewer Overflows has prepared the attached analysis of the position of the Association of Metropolitan Sewerage Agencies (AMSA) on the proposed sanitary sewer overflow rule as articulated in a letter to you dated June 8, 2001. We have attached ASMA's letter to this analysis for your convenience.

As you may know, the proposed sanitary sewer overflow rules were based on consensus recommendations of a Federal Advisory Committee that met for almost six years and which included AMSA. The proposed rule represents a true compromise for all those involved. The environmental caucus has adhered to our commitment to this consensus process and has continued to support proceeding with this proposal, despite the concessions that we made in agreeing to it. Unfortunately, AMSA has reneged on its commitment to support this proposal. As the attachment explains in more detail, AMSA's position is not sound legally and is environmentally unwise. The environmental community cannot and will not support a retreat from requiring secondary treatment for all sewage.

Once again, we urge you to move forward with the proposed rules announced in January.

Sincerely,

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G. Tracy Mehan, Assistant Administrator for Water
Edward Krenik, Associate Administrator for Congressional & Intergovernmental
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Mitchell E. Daniels, Jr., Director, Office of Management and Budget
Marcus Peacock, Associate Director, Natural Resources, Energy & Science,
Office of Management and Budget
Ken Kirk, Executive Director, AMSA

A SERIOUS RESPONSE TO AN ILL-CONSIDERED PROPOSAL

SEWER SYSTEM OPERATORS SUGGEST THAT EPA SHOULD SIGNIFICANTLY WEAKEN THE PRESENT LAWS AND RULES AGAINST SANITARY SEWER OVERFLOWS

(IN LETTER TO U.S. EPA, DATED JUNE 8, 2001)

It has been 7 years (1994-2001) since EPA took up the issue of aging, leaking "sanitary" sewers. EPA knows that sewer systems are spilling raw sewage into the land and water where people live. Most sewage spills can and should be avoided. The Clean Water Act set up a regulatory framework to assure that sanitary and industrial sewage is fully and properly conveyed to the treatment plants for complete treatment prior to discharge into the waters and other environments of the nation. When this delivery and treatment sequence is short circuited, environmental quality and public health are compromised.

The Clean Water Act of 1972 began with the premise that sewage is a dangerous substance that must, as a matter of public policy, be collected and fully treated prior to its discharge into local water bodies. That is still the law today. However, this basic premise is under intense attack from both inside and outside the US Environmental Protection Agency (EPA).

To assure that this national policy is implemented, Congress established several avenues to follow. First, the NPDES (national pollutant discharge elimination system) program was established. The key phrase here is "pollutant discharge elimination." This permit program reflected the Congressional goal of eliminating the discharge of undesirable pollutants into the natural environmental or in proximity to humans and other vulnerable animals. The NPDES program is designed to limit or, wherever possible, eliminate discharges into waterways to protect water quality. An NPDES permit can be obtained only for discharges authorized by the Act. All other discharges are prohibited.

Second, the federal government allocated billions of dollars of public funds to build the sewer system infrastructure throughout the nation and assist communities to meet the clean water goals. The infrastructure included the pipelines, sewage treatment plants and appurtenances (i.e. pump stations, etc.) to get the job done. As a result of this generous expenditure of federal dollars, the sewer system infrastructure for most communities is the largest single capital asset a town or city may own. EPA estimates that the nation's wastewater infrastructure is worth more than \$1 trillion. In exchange for receiving 75% or more of the construction cost of building this essential municipal service, the municipalities agreed to keep their systems well maintained and in good working order.

It is the expectation of the public that, as a consequence of the significant national investment, municipalities will carry out the tasks at hand – to collect sanitary waste, convey it to a well-operated sewage treatment facility and then discharge it in a way that protects both human health and environmental quality. The public also expects that municipal leaders will provide sufficient resources to keep the system, the collection system as well as the treatment plant, working properly. To date, many municipalities have not lived up to their end of the bargain. Good sewer operation and maintenance has not been the rule, but rather the exception. That would change if EPA's proposed sanitary sewer overflow (SSO) regulations are adopted, implemented, and enforced. This appears to be exactly what many sewer system operators across the nation fear and now actively oppose.

WHAT HAS BEEN LEARNED IN THE 29 YEARS SINCE THE CLEAN WATER ACT WAS PASSED?

1. **Sewage discharges are a major factor in determining water quality. Where sewage systems are run well, undesirable impacts are reduced.**

Bacteria are the largest cause of beach closings and advisories nationwide. For more than half of those closings and advisories, the cause is unknown and may be undetected or reported SSOs. For another 20%, sewage is clearly identified as the source of the closure. In many watersheds, communities use water from a river that is then discharged and used again by another community further down stream. If one community has a problem, the water downstream becomes impaired for the next user.

For example, it is estimated that the waters of the Ohio River are used and reused 3.7 times before it reaches the Mississippi River. For a fuller documentation of the relationship to sewage to beach closings, see the most recent release of *Testing the Waters* (NRDC, 2001).

2. **Sewage is an increasingly complex and hazardous mixture of wastes that has impacts on water systems and inhabitants in ways far beyond the imagination of those who conceived the Clean Water Act in 1972.**

For example, sewage discharges are still regulated using a small set of indicator factors that do not reflect the true composition and potential risk represented by sewage. National effluent standards control for BOD (biochemical oxygen demand), total suspended solids, and pH. While individual permits usually contain additional standards for bacteria and sometimes nutrients, national standards do not directly regulate the long list of pollutants contained in sewage including:

- pathogens
- heavy metals
- bodily fluids/blood
- toxic chemicals
- solvents
- grease
- pesticides
- human drugs
- industrial chemicals
- household chemicals
- hormone-disrupting chemicals
- poly-aromatic hydrocarbons (PAHs)
- nutrients such as nitrates and phosphates
- volatile organic chemicals (VOCs)

3. **Public expectations have risen over the past 30 years regarding the cleanliness of water supplies, recreational waters, and drinking water.**

For example, people expect to be able to enjoy the water resources near their homes, on vacation or on outings without fear that swimming or eating fish or shellfish will damage their health. Scientific studies have shown that people who come in contact with sewage-contaminated water via recreation have a higher incidence of illness and disease. When sewer systems fail to adequately treat and control sewage, it costs everyone, including an increased cost for safe drinking water. Drinking water utilities must test and treat water more when it becomes contaminated from sewage and sewage effluent.

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4. Public fears have increased as we learn more about the dangers sewage constituents pose to ecological health and public health.

For example, we know that chemicals present in sewage frequently affect the bio-chemical systems of organisms, impairing their development, immune systems and other bodily functions. We know today that sewage contains a growing number of human drugs that should not be released into the environment, but in fact are released in both raw and treated sewage. Such chemicals are contributing to antibiotic resistance in bacteria and developmental changes in wildlife in contact with these drugs. These chemicals are being detected in our drinking water supplies.

5. The permits and standards used to regulate sewage discharges have evolved over the years to reflect treatment capabilities of a specific treatment approach, e.g. secondary biological treatment. The treatment regulations for sewage are now being twisted into a weapon aimed at the heart of the Clean Water Act, e.g., the mandate to eliminate untreated waste releases and to keep raw sewage from contact with humans and the natural environment.

For example, the Clean Water Act specifically prohibits unpermitted discharges into the waters of the U.S. and mandates that the minimum treatment permissible is secondary treatment. Effluent standards for secondary treatment were designed based on the assumption of a well-operated and maintained sewer system using biological (activated sludge) treatment. Currently, EPA staff are actively working to reinterpret long-standing treatment requirements and give sewer system operators a lower set of mandates, which abandon the prohibition on untreated and unpermitted discharges and which do not provide adequate treatment for pathogens and other pollutants that would be removed much more effectively in an activated sludge treatment facility that meets current effluent standards.

WHAT IS GAINED IF WATER QUALITY PROTECTIONS ARE WEAKENED?

The public does not want and does not gain from weakened water quality and public health protections. The only beneficiaries of weak regulations are sewage treatment plant operators themselves. The 143 million residents of communities served by municipal sewer agencies want the sewage treated fully before it is discharged into the water and they want all necessary steps taken to prevent sewage from backing up into their streets, playgrounds, and homes.

What is the position of the sewage treatment plant operators?

1. They want to rewrite the rules and make it legal to discharge raw sewage into the environment. They want to avoid accountability. They want to avoid enforcement actions when they violate federal and state environmental laws intended to ensure the water is safe for its designated use.
2. They portray the proposed SSO policy as a new and unrealistic regulatory standard. In fact, the new SSO proposal imposes no additional liability on sewage treatment plant operators for overflows; rather, it merely requires enforcement of the present law that has been on the books for the past 29 years. Ironically, less than two years ago, the same sewer operators unanimously endorsed the proposed regulations they now describe as an unworkable program to regulate SSOs.
3. They want a guarantee that they can continue with "business as usual" without any risk of violations, penalties and enforcement actions when raw sewage is released into the environment.

4. They want more federal money to spend on infrastructure, but no accountability for actually doing the best possible job of keeping sewage in the pipes and treat it thoroughly. They want the money but no mandate.
5. The sewer system operators use extreme examples like hurricanes, tornadoes and earthquakes to argue that sewage cannot always be kept in the pipes. But enforcement actions are brought when there are repeated, serious sewage discharges, not when an Act of God causes an overflow. Repeated overflows happen when sewer systems are not well operated and maintained, which is the responsibility of the sewer system professionals. Operators seem to want to avoid liability as opposed to fix the sewer systems so that they function properly.

SEWER OPERATORS' MYTHS AS PRESENTED TO THE U.S. EPA, Dated June 8, 2001¹

OPERATORS' MYTH #1: Operators contend that EPA is proposing to retain an unachievable standard of "zero overflows" for collection systems. (Page 1)

THE TRUTH

1. The "zero discharge" terminology is a misrepresentation of the current EPA proposal. The collection system is held to the same performance criteria as the sewage treatment plant itself. For the sewage treatment plant, "upsets" and "bypasses" are regulatory terms to describe exceptional circumstances when EPA will "forgive discharges" of raw or partially treated sewage into the environment. It is still the burden of the sewer system operator to demonstrate that the circumstances leading to releases at the treatment plant were beyond their control and were truly exceptional conditions that warranted the release of raw sewage.

Similarly, the collection system must handle and convey all the sewage except during conditions of extreme natural events, such as major storms, earthquakes, etc. Keeping the sewage in the collection system is a fundamental function of the collection pipes if the sewer system is to function adequately. Thus, the proposed regulations "forgive" the release of raw sewage during extreme events. The performance expectations are exactly the same. Again, the burden is on the operator to demonstrate that the conditions causing the SSO were beyond the control and avoidance of the system.

Perfection is not required or expected. Competence is expected and required. If sewage is not kept in the sewer lines during normal conditions, operators are held liable and accountable.

OPERATORS' MYTH #2: The proposed SSO regulations take a new step by "establishing a separate NPDES permitting program for the collection system," apart from the permit given to the sewage treatment plant and "effectively disconnect the collection system from the treatment plant." "Under the draft proposal, collection systems will have their own NPDES permits with their own permit terms. This

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THE TRUTH

2. The only new permitting program envisioned under the proposed SSO rule is for satellite collection systems, i.e., those that are not owned by the sewage treatment plant. Collection systems that are owned by sewage treatment plants are already covered by an NPDES permit, but discharges from the collection systems are not authorized under those permits. Authorizing collection system discharges would be inconsistent with the Clean Water Act’s requirement that sewage must receive secondary treatment before it is discharged. Furthermore, NPDES permits are for treated discharges and the collection system is not intended to have discharges. The collection system is intended only to convey sewage to the treatment plant for treatment.

OPERATORS’ MYTH #3: “The draft proposal specially negates the use of the existing NPDES permit bypass and upset defenses for collection systems discharges and offers significantly more limited, after-the-fact defenses.” (Page 2)

THE TRUTH

3. First, the collection system never had the availability of the existing NPDES bypass and upset defenses since both these defenses apply specifically to the operation of the sewage treatment plant.

Second, the existing bypass and upset defenses are themselves after-the-fact defenses since they are defenses that the operator must show are supported by the facts, after the event occurs. The proposed regulations would create provisions for collection systems parallel to the existing defenses for upset and bypass.

The defenses suggested for SSO occurrences rely upon the capacity, management, operation and maintenance (C-MOM) concept. C-MOM is actually a pre-emptive set of activities that the operators can implement in advance and can be cited as evidence that events were extreme and beyond the control of the operator. They are no more “after-the-fact” than the existing upset and bypass provisions. Indeed, the defenses provided for SSOs are actually established by “before-the-fact” actions.

OPERATORS’ MYTH #4: “The zero discharge standard is technologically impossible and scientifically unsupportable.” (Page 2)

THE TRUTH

4. The truth is that there is no “zero discharge” standard. Discharges from the collection system are simply prohibited and have been since the Clean Water Act was enacted. The draft proposal would not change the existing legal standard, which is not a technology-based standard, but instead a public policy-based prohibition on discharges of untreated sewage, which are hazardous to human health and environment.

It is worth noting that the entire SSO Federal Advisory Committee agreed, by consensus, that the goal of the SSO regulations is the elimination of SSOs from collection systems.

OPERATORS' MYTH #5: "EPA lacks the scientific basis to prohibit all overflows based on an assumption that any given overflow from a collection system will contain pollutants at levels that violate the CWA or water quality standards." (Page 2)

THE TRUTH

5. The Clean Water Act prohibits SSO discharges that have not had the benefit of secondary treatment. Scientific studies demonstrate that exposure to untreated and inadequately treated sewage commonly causes gastroenteritis (fever, vomiting, and diarrhea) and can cause dysentery, cholera, meningitis, hepatitis, hookworm, and a host of other serious illnesses. Releases of raw or diluted sewage are dangerous and the law has reflected this understanding for that past 29 years.

OPERATORS' MYTH #6: "The draft proposal establishes a zero discharge standard for collection systems without showing that this represents an attainable level of performance. Given the Agency's acknowledgment that eliminating overflows is impossible, the standard is at odds with EPA's own understanding of the physical limitations under which collection systems operate." (Page 2-3)

THE TRUTH

6. As noted above, discharges of untreated sewage are generally prohibited under the Clean Water Act. Collection systems are considered to be part of the sewage treatment plant (STP) system under the CWA. The STP is authorized to discharge waste that has received secondary treatment. The collection system is not authorized to discharge. Nonetheless, the draft proposal would exercise enforcement discretion to forgive violations that occur as a result of a sanitary sewer overflow caused by an extreme and uncontrollable event. Barring such an extreme and uncontrollable event, however, sewage is intended to be kept inside the collection pipes and delivered to the STP for treatment. That is the performance standard set for collection systems.

Since there are sewer systems in the nation that claim they do not have SSOs (more than half of those responding to the last AMSA survey), then it is clear that the goal is not unattainable. For extreme events, all systems are given a defense, are "forgiven," when sewage spills out of the system. This is consistent with EPA's understanding of the physical limitations of collection systems.

OPERATORS' MYTH #7: "AMSA believes that an appropriate standard can be developed specifically for collection systems, given the decision to issue NPDES permits for the collection system independent of the treatment plant." (B, Page 3)

THE TRUTH

7. EPA has not proposed to grant NPDES permits specifically for collection systems. To allow such discharges for sewage that has not received secondary treatment would be a direct violation of the Clean Water Act. It would also create a perverse set of incentives that would reward sewage treatment plant operators that discharge raw sewage from pipes while applying more stringent secondary treatment standards to waste that reaches its intended destination, i.e., the treatment plant.

OPERATORS' MYTH #8: AMSA believes that by using the approach of "best management practices" along with special consideration for the "unique characteristics" of SSOs, that EPA could craft a technology-based permit process for SSOs. (B, Page 3)

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It is worth noting that the entire SSO Federal Advisory Committee agreed, by consensus, that the goal of the SSO regulations is the elimination of SSOs from collection systems.

THE TRUTH

8. The C-MOM concept for managing collection systems is already a “best management” approach for “minimizing the potential for overflows”, which AMSA states is its goal. Furthermore, the Clean Water Act already sets a technology-based discharge requirement for sewage, the requirement of secondary treatment.

As for the “unique characteristics” approach for SSO, given the demonstrably dangerous and environmentally damaging nature of sewage generally, secondary treatment is the bare minimum treatment that should ever be authorized. For many systems, secondary treatment is insufficient and advanced treatment systems are necessary to protect public health or aquatic life.

OPERATORS’ MYTH #9: C-MOM is problematic because it requires two different types of activities to achieve the desired ends. MOM is a day-to-day, management based effort while capacity requires long-term planning and potentially large capital investments. AMSA is developing a “best management approach” to describe a MOM program and any “non-recurring overflows that occur after MOM implementation would be deemed unavoidable under the standard.” AMSA is also working on a capacity program, modeled on the CSO program. Again, any SSOs that occur that are beyond the capacity program’s ability to control would be deemed unavoidable and beyond the system’s capacity.” (C, Page 3-4)

THE TRUTH

9. First, there is nothing inconsistent about doing both day-to-day management and long-term planning, which well-run businesses do as a matter of course. However, AMSA’s “best efforts” approach is not consistent with the Clean Water Act. The Clean Water Act requires dischargers to meet certain standards – technology standards and water quality standards as incorporated into an NDPEs. When those standards are not met, the discharger has violated the Act. AMSA is seeking preferential treatment so that sewage treatment operators would have free reign to violate Clean Water Act requirements that all other dischargers are required to meet. AMSA’s approach is also dangerous because discharges of untreated sewage resulting from inadequate planning, operation, or maintenance would increase.

OPERATORS’ MYTH # 10: AMSA believes that peak excess flow treatment facilities (PEFTFs) should be governed by special considerations and exempted from the secondary treatment requirement. It proposes a less than secondary removal requirement for PEFTFs. (D, Page 4)

THE TRUTH

10. PEFTFs are often facilities that do nothing more than store the first portion of a storm event, but then overflow without any controls as the storm continues. The PEFTF will give the appearance of “treatment” but will clearly not be secondary or “equivalent” to secondary treatment. In most instances, it will not be any treatment at all merely, a known and predesignated SSO location. The PEFTF will be the illusion of treatment that will support the excuse for permitting SSOs in the collection system.

OPERATORS' MYTH #11: The EPA draft SSO regulations contain a number of positive principles that, with adjustment, could form the basis for an effective and environmentally beneficial SSO control program. EPA should amend the existing draft regulations to incorporate the ideas suggested by AMSA and move ahead with the rule-making process. (Page 5)

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11. There are no environmental benefits to be gained by the AMSA proposals. The only beneficiaries are the sewer system operators who will no longer be held responsible for ensuring that wastewater is actually treated before it is discharged into our waterways and into streets, playgrounds, and basements. AMSA's proposals are inconsistent with both the goals and the language of the Clean Water Act. They will invite litigation instead of a consensus solution to the problem of sanitary sewer overflows.

Respectfully prepared by the Environmental Caucus of the Sanitary Sewer Overflow Federal Advisory Committee to the U.S. EPA
September 10, 2001

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