UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1 4 45 ROSS AVENUE
DALLAS, TX 75202-2733

NOV 20 2001

Mr. M. Darren O'Quinn
Dover & Dixon
425 West Capitol
37th Floor
Little Rock, AR 72201

Dear Mr. O'Quinn:

This is in response to your Freedom of Information request which we have numbered (6)RIN-02-00020.

There were no records located in the Compliance Assurance and Enforcement Division, Water Enforcement Branch of the Environmental Protection Agency related to your request.(Information pertaining to the permitting discharges of wet weather related peak flows.) If you have any questions concerning this response or your request, please contact the Freedom of Information Officer at (214) 665-6597.

Sincerely yours,

Robert V. Murphy
Chief
Water Enforcement Branch

EXHIBIT
TABBIES
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Index of Enclosures for 06RIN-00020-02

Permits

NPDES Permit No. TX0047295, City of Fort Worth, Village Creek Wastewater Treatment Facility, Issued July 24, 1998.

NPDES Permit No. TX0047295 Public Notice of Final Permit Decision and Response to Comments, City of Fort Worth, Village Creek Wastewater Treatment Facility, August 1, 1998.

TPDES Permit No. 10494-013, City of Fort Worth, Village Creek Wastewater Treatment Facility, Issued September 8, 1999.

NPDES Permit No. TX0034924, City of Houston, Almeda Sims Wastewater Treatment Facility, Issued July 5, 1996.

EPA Letter and Enclosures to Susan Zachos, Kelly Hart & Hartman, March 20, 1998, Freedom of Information Act Request HQ-RIN-00783-98.

EPA R5 Memo and Enclosures to William Hathaway, EPA R6, March 9, 1998, Response to Freedom of Information Act Request Submitted by Carie McKinney.

EPA R4 Letter and Enclosures to William Hathaway, EPA R6, June 29, 1998, Response to Freedom of Information Act Request Submitted by Carie McKinney.

Correspondence

EPA R6 Letter to Wilbert Molbert, City of Clear Lake, May 21, 1997, NPDES Permit No. TX0022543 - Potential Bypass Situation.

EPA R6 Letter to William Larrain, City of Port Arthur, May 21, 1997, NPDES Permit No. TX0047589 - Potential Bypass Situation.

EPA R6 Letter to James L. Harrington, City of Port Neches, May 21, 1997, NPDES Permit No. TX0022926 - Potential Bypass Situation.

EPA R6 Letter to Ivan Langford, Galveston Co. WCID No. 1, May 21, 1997, NPDES Permit No. TX 0023655 - Potential Bypass Situation.

EPA R6 Letter to Will Cole, City of Bridge City, May 21, 1997, NPDES Permit No. TX0025500 - Potential Bypass Situation.

EPA R6 Letter to Rich Malbrough City of LaMarque, May 21, 1997, NPDES Permit No. TX0023680 - Potential Bypass Situation.

EPA R6 Letter to Max Sanchez, Rock Lake State Hatchery, May 23, 1999, NPDES Permit No. NM0030155 - Potential Bypass Situation.

City of Port Arthur Letter to Sam Coleman, EPA R6, June 11, 2001, TPDES Permit No. WQ0010364.-001.

City of Port Neches Letter to Jack Ferguson, EPA R6, July 23, 1997, NPDES Permit No. TX0022926.

EPA HQ Letter to Congressman George W. Gekas, March 2, 2001, Response to Congressional Inquiry.

EPA HQ Letter to Senator Bill Frist, March 7, 2001, Response to Congressional Inquiry.

EPA HQ Letter to Congressman Frank Mascara, March 7, 2001, Response to Congressional Inquiry.

EPA HQ Letter to Congressman John Peterson, March 7, 2001, Response to Congressional Inquiry.

EPA HQ Letter to Congressman Tim Holden, March 7, 2001, Response to Congressional Inquiry.

EPA R6 Letter to Marysia Jastrzebski, Arkansas Department of Pollution, Draft Strategy for Discharges of Wet Weather-Related Peak Flows.

EPA R6 Letter to Marysia Jastrzebski, Arkansas Department of Pollution, Arkansas Proposed Permit for City of Clarksville, Arkansas, NPDES Permit No. AR0022187.

EPA R6 Memo and Enclosures to James Pendergast, Responses Freedom of Information Act Request Submitted December 11, 1997, by Carie McKinney of Kelly, Hart and Hallman regarding Permits for Wet Weather Facilities.

Electronic Correspondence and Attachments from Kevin Weiss to Tom Charlton, April 3, 1998, Tischler Letter - Reply.

EPA R6 Memo from to Brian Maas, November 30, 1999, December 2nd Meeting on Municipal Treatment.

Electronic Correspondence and Attachments from Brian Maas to Group, December 1, 1999, December 2nd Meeting on Recombination - Teleconference Information.

Electronic Correspondence from Kevin Weiss to Richard Wooster, December 29, 1998, December 21 Letter From Jack to Region 6 States Re: Permitting Wet Weather Facilities - Forwarded.

St. Bernard Parish Government Letter to Paula Roberts, LDEQ, May 6, 1999, Dravo and Munster LPDES Permit Application.

City of Baton Rouge Letter to LDEQ, June 3, 1998, City of Baton Rouge/Parish of East Baton Rouge North Wastewater Treatment Plant - WP0487/LA0036439 LPDES Permit Application.

City of Baton Rouge Letter to Sam Coleman, EPA R6, January 26, 1996, City of Baton Rouge and Parish of East Baton Rouge, Consent Decree Civil Action 88-191A North WWTP - Phase II Construction.

EPA R6 Meeting Report, December 14, 1995, NPDES Permit No. LA0036439, City of Baton Rouge Wastewater Treatment Plant.

EPA R6 Memo to File LA0036412, LA0036421, LA0036439 from Bradley Crawford, March 9, 1995, Meeting Summary - City/Parish of Baton Rouge.

City of Baton Rouge Letter to Myron Knudson, EPA R6, May 26,1994, City of Baton Rouge, Parish of East Baton Rouge, North Wastewater Treatment Plant Phase II Expansion, Consent Decree Civil Action 88-191A

General Information

EPA R6, Strategy for Permitting Discharges of Wet Weather-Related Peak Flows, December 16, 1998.

EPA R6, Sanitary Sewer Overflow Talk Notes.

EPA, Requiring PEFTFs to Meet 7-day Average Effluent Limits.

EPA R6, Potential Bypasses of POTWs, Richard Wooster.

EPA, NPDES Permit Requirements for Municipal Sanitary Sewer Collection Systems and Sanitary Sewer Overflows.

EPA HQ, NPDES Branch Chiefs' Meeting, Recombination/Blending of Peak Wet Weather Flows at POTWs, Jeff Lape.

EPA R6, Potential Bypasses of Publicly Owned Treatment Works (POTWs) in Texas, Richard Wooster.

EPA R6, City of Fort Worth: Village Creek WWTP: Wet Weather Bypasses, December 18, 1997, Richard Wooster.

EPA R4, Region 4's Position on Blending and Recombination.

EPA R6, Region 6's Position on "Blending and Recombination", Monica Burrell.

EPA R6, Excerpt from Unidentified Correspondence.

EPA R6, POTW Peak Flow Treatment Technology Considerations.

EPA R6, Meeting Agenda Regarding Munster WWTP Improvements Alternative Compliance Plan, February 24, 1999.

Featured Story, InsideEPA.com Today, EPA May Overrule Regions' Strict Interpretation of Clean Water Act, Printed October 16, 2000.

EPA R6, EPA Region VI6 Policy for Bypasses During Construction.

EPA R6, City/Parish of East Baton Rouge, Consent Decree, Brad Crawford or Jerry Saunders.

TOPIC: Potential Bypasses of Publicly Owned Treatment Works (POTWs)

BACKGROUND:
During exceptional rainfall events, infiltration and inflow to sanitary sewers may result in flows at a Publicly Owned Treatment Works (POTW) which exceed the facility's capacity for providing full treatment. Certain POTWs have been constructed and operated so as to divert a portion of the influent around biological treatment units for direct discharge, or for commingling with fully treated effluent followed by discharge. However, the Environmental Protection Agency has taken the position that such discharges are contrary to the Clean Water Act and the National Pollutant Discharge Elimination System Program. POTW operators argue that such discharges meet final effluent limitations and should therefore be permissible.

CURRENT STATUS:
On May 21, 1997, EPA Region 6 wrote to the directors of six (6) Texas POTWs [1] advising them of a potential inconsistency between the design/operation of their POTWs and the federal NPDES regulations. In reviewing the permit files for each of the facilities, EPA noted the apparent use of primary, or "stormwater," clarifiers at the plant to divert some portion of the influent wastewater from parts of the secondary treatment process. EPA's letter reiterated the NPDES permit prohibition of such "bypasses,"and cited the permit criteria under which bypasses may be allowed. To date, two of the facilities in question have responded negatively to the letters by telephone. Regional permitting staff anticipate further negative reactions from the other involved POTWs. Regional enforcement staff intend to follow up with each of the facilities to ensure it complies with its permit, including the prohibition of bypass.

In order to eliminate the bypass situation at the six POTWs in question (or at any POTW for that matter), steps must be taken to significantly reduce or eliminate infiltration and inflow to the collection system. Additionally, the biological treatment capacity of the plant may need to be expanded. If hydraulic overloading problems persist, or if expansion of the plant's biological treatment unit(s) is not feasible, adequate storage capacity must be added to contain the excessive hydraulic loading for later return to the headworks of the POTW. As a last resort, EPA will consider permitting discharges of partially treated waste provided all appropriate criteria are satisfied. In Region 6, only four (4) such permits have been issued. [2]

Notes
[1] Letter recipients: City of Port Neches; City of Clear Lake; City of LaMarque; City of Bridge City; Galveston County WCID No. 1; and, City of Port Arthur.

[2] Wet Weather Facility Permits issued to the City of Houston

Contact:
Richard A. Wooster (6WQ-PP), (214) 665-6473

NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM
ADJUDICATORY HEARING PROCEEDINGS

DECISIONS OF THE ADMINISTRATOR AND DECISIONS OF THE GENERAL COUNSEL

VOLUME 2

JANUARY 1976 - DECEMBER 1976
INCLUDING FURTHER PROCEEDINGS WITH RESPECT TO
VOLUME 1
DECISIONS OF THE ADMINISTRATOR

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

EXHIBIT
2

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

NO. 33

In the matter of the National Pollutant Discharge Elimination System Permit for Blue Plains Sewage Treatment Plant, Permit No. DC0021199, Washington, D. C., the presiding officer has certified seven issues of law to the General Counsel for decision pursuant to 40 C.F.R. 125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. 1

QUESTION PRESENTED

"May the permit legally contain immediately applicable provisions governing the disposition of the sludge generated by the subject facility? A. May the permit legally prohibit disposal of sludge by incineration? B. May the permit legally require that sludge disposal and waste water disposal be carried out on land?"

CONCLUSION

Pursuant to §402(a)(2) of the Federal Water Pollution Control Act, as amended (the "Act"), EPA is authorized to include in NPDES permits those conditions reasonably determined by the Regional Administrator to be necessary to insure compliance with §§301, 302, 306, 307, 308 and 403 of the Act. In addition, under §402(a)(1), the Agency may, "prior to the taking of necessary implementing actions relating to all such requirements", (i.e. §§301, 302,

306, 307, 308 and 403), include "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Under either of these provisions of §402, EPA may include permit conditions directly relating to sludge disposal if such conditions are shown to be necessary to the attainment of the effluent limitations that are included as conditions of the permit.

Such sludge-related conditions which are necessary to the attainment of effluent limitations imposed pursuant to §301(b)(1)(B) and 40 C.F.R. §133 or other applicable effluent requirements may be applied immediately. Moreover, any implementing steps shown necessary to meet the 1983 requirements of §301(b)(2)(B) or water quality related requirements of Section 302 may also be imposed in a presently issued permit, scheduled to expire beyond 1977.

DISCUSSION

Section 402(a)(1) of the Act authorizes the Agency to issue permits upon the condition that applicable requirements of other sections are met. Section 402(a)(2) requires that EPA impose conditions to assure compliance with the "requirements" of paragraph (a)(1). 40 C.F.R. §125.22(b) provides that permits are to include "such special conditions as are necessary to assure compliance with applicable effluent limitations".

In my opinion, as a general rule, these provisions of the statute and implementing regulations authorize a broad category of conditions including conditions on the operating procedures of a facility which are necessary to assure compliance with the enumerated statutory provisions. The Agency has

an interest in assuring that violations of restrictions on effluent discharge do not occur, an interest given statutory recognition by provisions of §402(a) authorizing imposition of conditions which assure compliance with those limitations. So long as there is a rational connection between the condition and the assured attainment of the effluent limitation, there is statutory authority to impose it. See Decision of the General Counsel, No. 19.

The present permit, I presume, principally focuses on the requirements of §301(b)(1)(B), i.e., secondary treatment for municipal facilities. As defined in 40 C.F.R. §133, secondary treatment requires the imposition of limitations on BOD, suspended solids, pH and fecal coliform.1/ If effluent limitations of a more stringent nature are required to attain applicable water quality standards, they must also be included pursuant to §301(b)(1)(C). Conditions must also be included in the permit to meet state certification requirements pursuant to §401. Finally, any other conditions may be imposed deemed necessary to comply fully with §§301, 302, 306, 307, 308 and 403 of the Act. Therefore, if a basis for an effluent limitation under any of these sections is found, any conditions necessary to implement such effluent limitation may also be included.

It is my view that if certain sludge handling conditions could be shown to influence the attainment of BOD, suspended solids or other permit limitations, such provisions are proper conditions in the permit. For example, if sludge disposal or handling at the facility adds to or, conversely, decreases pollutant loadings, conditions on that sludge disposal method may be incorporated in a permit if necessary to assure that effluent limita-

1/ Proposed amendments to 40 C.F.R. 133 would modify the pH limitation and eliminate the coliform limitation. See 40 Fed. Reg. 34522, August 15, 1975.

tions contained in the permit are met. However, I am doubtful that a factual nexus can be found between the levels of pollutant discharge at the Blue Plains facility and a requirement that sludge must be disposed of either by incineration or by land disposal or that waste water must be disposed on land. What is clear is that there is no independent basis in §402 or elsewhere in the FWPCA which authorizes the Regional Administrator to prohibit the disposal of sludge by incineration. Likewise, there is no independent authority which authorizes the Regional Administrator to include a condition that sludge disposal and waste water disposal must be directly carried out on land. A sludge-related condition specifying that disposal will not be permitted at the Blue Plains facility because of resulting contributions to the level of BOD or suspended solids discharged might be permissible, but a condition specifying where outside the confines of the Blue Plains facility that sludge disposal is to take place is not authorized.2/

There are other statutory grounds upon which sludge conditions may become issues in permit proceedings, although these grounds have not been raised in the referred question. For example, a state may attempt to require sludge disposal conditions for section 401 certification or such conditions may be proposed for consistency with a section 208 plan or for meeting requirements imposed pursuant to section 402(b)(6) by the Corps of Engineers. This opinion is not intended to resolve whether sludge conditions under these provisions would be appropriate.

2/ The question certified concerns the basis of authority for requiring land disposal of sludge. There is no indication that permittee has requested or may be subject to a Section 405 permit for present or planned sewage sludge activities which "would result in any pollutant from such sewage sludge entering navigable waters...." Section 405(a).

In the question certified, emphasis is placed on the word "immediately". I assume that the issue raised is whether conditions relating to disposal of sludge may be imposed in the permit which anticipate requirements of the Act which have not, as yet, taken effect.

I have previously concluded, in General Counsel Opinion, No. 2, that conditions may be imposed in a permit expiring beyond 1977 which are framed to insure compliance with §301(b)(2)(A). The equivalent 1983 level for municipal facilities is the requirement of §301(b)(2)(B) that there shall be achieved "not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in Section 201(g)(2)(A) of this Act." Therefore, I conclude that conditions may be included in a presently issued permit with an extended expiration date (i.e., post July 1, 1977) which are necessary to comply with the §301(b)(2)(B) "best practicable waste treatment technology" requirements.

The starting point for assessing conditions necessary to implement §301(b)(2)(B) is the formulation of "best practicable waste treatment technology" (BPWTT). As presently proposed the requirements of BPWTT are as follows:

> Publicly-owned treatment works employing treatment and discharge into navigable waters shall, as a minimum, achieve the degree of treatment attainable by the application of secondary treatment as defined in 40 C.F.R. 133 (Appendix C). Requirements for additional treatment, or alternative management techniques, will depend on several factors, including availability of cost-effective technology, cost and the specific characteristics of the affected receiving water body. ...Publicly-owned treatment works employing land application techniques and land utilization practices which result in a discharge to navigable waters shall meet the criteria for treatment and discharge.... "Alternative Waste Management Techniques for Best Practicable Waste Treatment", Proposed for Public Comment, U.S. EPA, March 1974.

The requirements of BPWTT apply to applicants for construction grant funds authorized by §201. Applicants for grants for municipal systems must have evaluated alternative waste treatment management techniques and selected the technique which will provide for the application of best practicable waste treatment technology. Alternatives must be considered in three broad categories: treatment and discharge into navigable waters; land application; and utilization practices and reuse of treated waste water. Thus, the choice of a particular disposition technique is dependent principally on grant fund authorization under §201 of the Act. Once all the alternatives have been explored and the method of treatment determined, then certain criteria must be met by the particular treatment method chosen. For example, if the Blue Plains facility were to choose to continue to discharge directly, in addition to secondary treatment, requirements for additional treatment or alternative management techniques depending on several factors including availability of cost effective technology, cost and specific characteristics of the affected receiving water body, might be imposed.

In order for conditions, including those related to the disposition of sludge, to be imposed in a presently issued permit, the conditions must be determined to be necessary to implement §301(b)(2)(B) or, alternatively, to achieve the water quality related goals of §301(b)(1)(C) and §302. Thus, if the applicable §303 water quality standards are set at levels consistent with the interim 1983 goal of water of sufficient quality to provide for

protection of fish, shellfish and wildlife and recreation in and on the water (§102(a)(2)), more stringent limitations are to be included in order to meet those standards (§301(b)(1)(C)). If, however, neither the limits based on BPWTT (§201(g)(2)(A) and §301(b)(2)(B)) nor those based on water quality standards (§301(b)(1)(C) and §303) will achieve that goal, then a permit now issued but expiring post-1977 may include conditions necessary to achieve that goal only if the procedural and substantive standards of §302 are satisfied. In either event, the legality of conditions relating to sludge disposal would depend, as I have stated above, upon the finding of a factual nexus between sludge disposal techniques and effluent quality.

ISSUE OF LAW NO. 2

QUESTION PRESENTED

"May the permit legally contain a moratorium to limit new growth to emergency needs pending achievement of water quality standards, in other words, a sewer-hookup ban?"

CONCLUSION

The permit may not require a sewer-hookup ban. However, the permit may contain provisions requiring an orderly or planned system of new sewer connections.

Second, the permit may contain a notice that under given conditions §402(h) would be implemented by the Administrator by seeking a court sanctioned ban on sewer-hookups in the event of violations of the permit.

Finally, provisions may be included in a permit implementing §402(b)(8) and 40 C.F.R. §125.26(b) which would require the publicly-owned treatment works to provide notice to the Administrator when there were any new additions of pollutants into the treatment works from a new source, that is, a source which would be subject to §306 of the Act if such source were directly discharging pollutants, or any new introduction of pollutants which exceed 10,000 gallons in any one day into such treatment works from a source which would be subject to §301 of the Act if it were direct discharger, or any substantial change of pollutants from a source introducing pollutants to the treatment plant at the time of issuance of the permit.

DISCUSSION

Section 402(h) of the Act provides that "in the event any condition of a permit for discharges from a treatment works (as defined in Section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated." This section provides authority to the Administrator, after a violation has occurred, to seek injunctive relief against any further pollutants being introduced into the public system which is in violation of its permit. This provision does not give direct authority to EPA to include in the permit a ban on future connections to the Blue Plains treatment system prior to violations of the permit. When the permit is being developed, conditions are to be imposed relating to

development of treatment capacity in order to meet secondary treatment requirements and water quality requirements to accommodate pollutant loadings.3/

However, on the basis of the §402(a)(2) provision requiring the imposition of conditions necessary to insure compliance with a permit, it is my opinion that the Administrator has authority to include in the NPDES permit conditions requiring orderly planning of new connections and management of connections to the system. The conditions might call for careful planning, engineering and management of new connections. For example, where the permittee had control upon the new connections to its system a general overall management system or comprehensive planning would be a legitimate condition to assure compliance with the effluent limitations in the permit.

Section 402(a)(2), as well as the potential responsibilities imposed on the Administrator in Section 402(h), authorizes the inclusion of a notice provision indicating to the permittee that the permitted system may be subject to injunctive relief to curtail additional contributions to the system once a violation of the permit has occurred.

Moreover, pursuant to 40 C.F.R. §125.26(b), as patterned after Section 402(b)(8), "if the permit is for a discharge from a publicly-owned treatment works, the Regional Administrator should require the permittee to

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3/ Thus the permit must contain limitations sufficient to insure that applicable water quality standards are met by July 1, 1977. Attainment of these water quality standards may entail restrictions in the amount of pollutants discharged. This may be attained either by a partial diversion of the effluent to land disposal, a higher level of treatment afforded the effluent or a ban on any new introduction of pollutants or some combination of these alternatives. Moreover, it is conceivable that the secondary treatment requirements for BOD, suspended solids, etc. may not be attainable without direct restrictions on flow from the treatment facility. Conditions directed at a controlled flow are clearly permissible permit requirements. These requirements may have the effect of a ban on new connections. The choice is up to the permittee. Not until the permit conditions are violated does EPA have the authority to insist that a ban be imposed.

provide notice to the Regional Administrator of the following: (1) any new introduction of pollutants into such treatment works from a source which would be a new source as defined in §306 of the Act if such source were discharging pollutants; (2) any new introduction of pollutants which exceeds 10,000 gallons on any one day into such treatment works from a source which would be subject to §301 of the Act if such source were discharging pollutants, and (3) any substantial change of volume or character of pollutants being introduced into such treatment works by a source introducing pollutants into such works at the time of issuance of the permit."4/

ISSUE OF LAW NO. 3

QUESTION PRESENTED

"May the permit legally prohibit the use of ferric chloride and alum in the sewage treatment process? That is, may the permit proscribe certain treatment methods?"

CONCLUSION

Pursuant to §402 of the Act the Regional Administrator has authority to include conditions limiting the discharge of ferric chloride and alum if these limitations relate to compliance with applicable water quality standards or are determined by the Regional Administrator to be pollutants, in addition to those regulated by the secondary treatment standards, requiring control and treatable in the municipal treatment plant by secondary treatment. He may not, however, prohibit them simply as an attempt to circumvent a particular treatment technique.

4/ Residences and other sources of domestic sewage are sources which are not publicly owned treatment works and therefore are subject to Section 301 and 306 requirements when they are direct dischargers.

DISCUSSION

As discussed previously, in accordance with §402(a) the Regional Administrator has authority to impose conditions which will insure compliance with §301, §302, §306, §307, §308 and §403 of the Act including conditions to prevent violations of water quality standards.

The basic parameters of secondary treatment are, as set forth in 40 C.F.R. §133, BOD, suspended solids, pH and fecal coliform. Neither ferric chloride nor alum are regulated. Therefore, limitations on either of these parameters must arise from a different statutory authority. For example, pursuant to Section 301(b)(1)(C) water quality standards might warrant provisions limiting or prohibiting ferric chloride and alum.

The preamble to the proposed secondary treatment standards provides that:

> . . .it is intended that permits will be issued to publicly owned treatment works which may impose effluent limitations applicable to pollutants other than biochemical oxygen demand, suspended solids, pH, and fecal coliform. Such limitations will reflect and take into consideration pretreatment requirements that may be imposed upon specific discharges pursuant to section 307, and such pretreatment requirements will take into account levels of reductions which will be attainable by a given municipal treatment plant by secondary treatment.
> 39 Fed. Reg. 10642 (April 30, 1973)

Thus, if the Regional Administrator finds that these pollutants are not within the established secondary treatment standards, he may, pursuant to his authority under Section 402(a), establish limits on these additional

pollutants. In so establishing these limits he must give consideration to such factors as the reduction levels attainable by a given municipal treatment plant by secondary treatment, as discussed in the proposed regulation

However, the Act does not authorize the prohibition of the use of ferric chloride and alum as a means of specifying a particular sewage treatment process. The Congressional history demonstrates that EPA is not to prescribe any technologies. EPA is to set effluent limitation guidelines after identifying applicable treatment technologies capable of attaining those effluent limits.

> The Committee expects that the identification will be in objective terms and will set out actual perfarmance [sic] levels for the classes and categories of point sources rather than prescribing specific control techniques, processes, or equipment . . ..
>
> [T]he Committee intends that the degree of reduction be specified in objective terms and that the incorporation of a specific process shall not be required. This means

> that the Administrator shall not prescribe a specific design or process in order to meet the requirements of best available demonstrated control technology but instead shall set out effluent limitations which are consistent with such best available demonstrated technology. Leg. Hist. 794-95.

Although this legislative history is directed at the development of industrial effluent limitations and guidelines pursuant to §304, Congress indicated that secondary treatment regulations were to be developed, as industrial limits were, based on available technology.

> The application of Phase I technology to industrial point sources is based on the control technologies for those sources and to publicly-owned treatment works is based upon secondary treatment. It is not based upon ambient water quality considerations. (Leg. Hist. p. 1461.)

Therefore, it is not within authority of the Regional Administrator to define particular treatment methods.

ISSUE OF LAW NO. 4

QUESTION PRESENTED

"Should the permit require that daily sewage flows to the Blue Plains plant be diverted to a land treatment system or a sewage farm?"

CONCLUSION

EPA has made a determination in defining "best practicable waste treatment technology" that land treatment systems and sewage farms are alternative treatment techniques. The appropriate treatment alternative is a determination

to be made pursuant to Section 201 of the Act. Once that choice has been made, conditions may be imposed on implementation of the chosen technique. A present permit may not require diversion to land treatment unless there is a direct nexus between that treatment and effluent limitations required in the permit.

DISCUSSION

As discussed supra, EPA is not authorized, except through the grant provisions of §201, to dictate what sewage method disposal a particular pl should follow. As provided in the BPWTT provisions, EPA may only insist on certain criteria once an alternative has been explored and selected to ensure that that treatment alternative will work sufficiently.

A requirement that sewage be diverted to land treatment is more pervasive than simply assuring that effluent limitations will be met at the Blue Plains facility under the 1977 permit. It would, in effect, dictate which treatment technique should be used by Blue Plains. It does not implement the effluent requirements at the facility. As indicated above, EI is not authorized to prescribe which treatment technique should be used b a particular facility except in terms of future requirements under BPWTT.

ISSUE OF LAW NO. 5

QUESTION PRESENTED

"Should the permit specify that the existing facilities at Blue Plai be used to entrap and treat the combined storm and sanitary sewer flows which occur during rainstorms?"

CONCLUSION

The present NPDES permit may not specify that the facilities at Blue Plains must entrap and treat combined storm and sanitary sewer flows. However, limitations and requirements may be imposed in combined sewer flows which ultimately might have the effect of diverting combined sewer flows to the treatment facility.

DISCUSSION

Pursuant to §301 and §402 the point sources from which the combined storm and sewage flows occur are subject to permit issuance and effluent limitations. In addition, water quality standards, §401 state certification requirements, §208 plans, or §402(b)(6) Corps of Engineers requirements, may necessitate the placing of various limitations, including zero discharge requirements, on combined sewer flows. Attainment of such limitations may entail the indirect treatment of combined sewer flows at a municipal plant such as Blue Plains. However, the method by which the permittee chooses to treat these combined sewage overflows may not be a subject of a specific provision in the Blue Plains permit. Permittee may not be required to divert these flows to Blue Plains. Such a provision is an attempt to require a specific treatment technique. The Regional Administrator may not, as indicated above, specify treatment techniques for particular discharges.

ISSUE OF LAW NO. 6

QUESTION PRESENTED

"May the permit legally contain a compliance schedule reflecting standards which would ensure the safe use of the Potomac estuary as a source of potable water supply, assuming that the existing water quality standards do not contain a drinking water standard?"

CONCLUSION

Such a condition or compliance schedule may be included in a permit

if it is premised on attaining §302 effluent limitations but such conditions would have to meet both the substantive and procedural requirements of §302, as indicated in the Opinion of General Counsel No. 2.

DISCUSSION

A condition in the NPDES permit in question related to a potable water supply cannot be based on existing water quality standards, according to the question presented. Moreover, compliance schedules directed at a viabl water supply may not be extrapolated from the secondary treatment requirements. However, §302 provides that

> Whenever...discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under Section 301(b)(2) of this Act, would interfere...with the attainment or maintenance of that water quality...which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations... shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

As I indicated in Opinion of General Counsel, No. 2, the legislative history ties §302 directly to the 1983 goal that "whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Section 101(a)(2). We concluded there that effluent limitations and compliance schedules may be fashioned in a permit presently issued but expiring after July 1977 which aim toward the 1983 interim water quality goal if BPT and BAT limitations, or in this case secondary treatment and BPWTT limitations, are insufficient for that goal. Thus, a permit extending beyond the 1977 date may contain conditions beyond the 1977 requirements directed toward compliance with the 1983 goal.

Such a permit may contain compliance steps that would assure proper implementation of BAT after the BPT requirements are complete and, secondly, §302 may be invoked to impose additional compliance steps. However, §302 provides for certain administrative proceedings prior to imposition of water quality related effluent limitations, i.e., it provides that stricter limitations can be required only after a hearing in which the Administrator determines the balance between economic and social cost of achieving the stricter controls and the social and economic benefits. Thus, in order for the present permit to contain as a condition a schedule of compliance aiming toward a future adequate water supply, the special procedural requirements of §302 must be observed.

ISSUE OF LAW NO. 7

QUESTION PRESENTED

"May the permit legally contain effluent limitations for viruses, refractory organics, heavy metals, chlorinated hydrocarbons, and other toxic substances?"

CONCLUSION

The pollutant parameters at issue may be restricted by effluent limitations either because they violate water quality standards or because they are deemed toxic pollutants for which conditions are set on a case-by-case basis prior to promulgation of standards under §307 if the Regional Administrator determines that they are necessary to achieve compliance with the Act.

DISCUSSION

As indicated above, there are several bases on which effluent limitations may be required for pollutants which are not regulated under the secondary treatment requirements. For example, if these substances violate water quality standards, they must be regulated.

Moreover, prior to the promulgation of standards under Section 307(a) the Administrator has the authority under Section 402(a)(1) to issue permits with such conditions as he "determines are necessary to carry out the provisions of the Act." Based on information now available to him, he could include in permits conditions on effluent discharge consistent with the need to protect the environment from toxic pollutants. The permit conditions on toxic effluents would be superseded when toxic standards for such pollutants take effect. See Opinion of General Counsel, No. 2.

Dated: 10/21/75

Robert V. Zener
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EPA brief in NRDC v EPA, 80-1607 DCCA

COMMENTS: John, We recovered the brief from Archives today -- the same day ~~I~~ we found it misfiled in the Solid Waste brief bank. Note that Eric Hostetler now replaces Eileen McD (who had replaced Wendy). Also, Carrie Wehling is ~~acting~~ filling in for me during the ~~next~~ month of October (paternity leave).

EXHIBIT
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attempt by the Agency to dictate technology, set de facto effluent limits, and arbitrarily impose significant economic costs that result in few environmental benefits. In particular, petitioners challenge the prohibition of bypass--except for essential maintenance--in situations in which the permit limitations are being met.

As will be shown below, the industry position is based upon an inappropriately restrictive interpretation of the relevant provisions of the Act and a misunderstanding of the effluent limitations development process. In fact, the bypass regulation furthers the Act's goal of eliminating the discharge of all pollutants into navigable waters while adequately recognizing the fact that unusual circumstances occasionally arise which will require a facility to bypass. Petitioners' position, in contrast, is that they should be allowed to discontinue the operation of their treatment systems at any time as long as the specific effluent limitations in their permits are met. This view, if accepted, would result in unnecessary discharges of pollutants that the Agency assumed would be eliminated when the permit limitations were established.

The Agency's conclusion that the Act supports the bypass regulation is reasonable and is entitled to deference from the Court. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778, 2782 (1984).

A. Background of the Bypass Regulation

The bypass provisions of the NPDES regulation was first

proposed on August 21, 1978. 1/ The regulation was promulgated, substantially as proposed, on June 7, 1979. 2/ However, the Agency inserted in the regulation a comment stating that bypasses in order to perform essential maintenance would be allowed if effluent limitations were not exceeded. 3/ On June 14, 1979, the Agency proposed the Consolidated Permit Regulations. 4/ The NPDES regulations proposed were "virtually identical" to the final NPDES regulations promulgated on June 7, 1979. 5/

The Consolidated Permit Regulations were promulgated on May 19, 1980. 6/ Based on responses received during the public comment period, the bypass regulation underwent some modifications. The rule continued to prohibit bypass except as specifically defined in the exemptions allowed. Section 122.60(g)(2). Consistent with the previous regulation, the 1980 regulation allowed bypasses, that did not cause effluent limitations to be exceeded, only for "essential maintenance to assure efficient operation." 7/

In 1982, EPA proposed substantial changes to the bypass regulation. 8/ Any bypass that did not cause a violation of

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1/ 43 Fed. Reg. 37,078, 37093 (1978), 1979 C.I. # E (J.A. ____).

2/ 44 Fed. Reg. 32,854, et seq. (1979), 1979 C.I. # L (J.A. ____).

3/ 44 Fed. Reg. 32,906, 1979 C.I. # L (J.A. ____).

4/ 44 Fed. Reg. 34,244, et seq. (1979), 1980 C.I. # A (J.A. ____)

5/ Id. at 34,247.

6/ 45 Fed. Reg. 33,290 et seq. (1980), 1980 C.I. # I (J.A. ____).

7/ Id. at 33,448.

8/ 47 Fed. Reg. at 52,088, 1984 C.I. # 2 (J.A. ___) (Sec. 122.60(

permit limitations would be allowed. Monitoring requirements were added to assure compliance with permit conditions. 9/ The Agency received comments, both favorable and unfavorable, on these proposed changes to the bypass regulation. One commenter critical of the proposal stated that it appeared to negate the requirement that permittees properly operate and maintain their facilities. 10/ Another said that the proposal undermined the concept of technology based standards. 11/ A third commenter said that the permittee should be expected to provide the most effective wastewater treatment of which he was capable. 12/

On September 26, 1984, the Agency published the final bypass regulation. Section 122.41(m). 13/ This final regulation retained the provision in the pre-existing (1979) regulation prohibiting bypass where effluent limitations are not exceeded except for essential maintenance to assure efficient operation of the treatment facility. The preamble to the 1984 amendments explained the rationale for the Agency's deciding not to adopt the proposed amendments. 14/

9/ Id.

10/ Comment of Washington Department of Ecology. 1984 C.I. # 3 (J.A. ____).

11/ Comments of the Minnesota Pollution Control Agency. 1984 C.I. # 3 (J.A. ____).

12/ Comments of Michigan Department of Natural Resources. 1984 C.I. (J.A. ____).

13/ 49 Fed. Reg. 38,049, 1984 C.I. # 11 (J.A. _____).

14/ 49 Fed. Reg. 38,037, 1984 C.I. # 11 (J.A. _____).

B. The Bypass Regulation is an Integral Part of the Effluent Limitations Standard-Setting Process and is Consistent with the Act.

The preamble to the 1984 regulations explained that the Agency decided to retain the pre-existing restrictions on bypass in large part because the technology-based regulations that the Agency establishes "are predicated upon the efficient operation and maintenance of removal systems." 49 Fed. Reg. at 38,036, 1984 C.I. # 11 (J.A. ____).Specifically, the preamble explained:

> A number of the effluent limitations guidelines and standards upon which NPDES permits are based do not contain specific limitations for all of the pollutants of concern for the given industry. For example, in the aluminum forming industry, toxic metals such as cadmium, nickel, copper, lead and selenium found in this industry's wastewaters are not specifically regulated. The data available to EPA show that effective control of these pollutants can be obtained by controlling the discharge of the pollutants regulated by the standard ... to levels achievable by the model treatment technology upon which the effluent guideline limits are based.... If bypass of treatment equipment is allowed, there is no assurance that these unlimited pollutants will be controlled, even though those specifically limited still meet permit limitations.

49 Fed. Reg. 38,036-37.

The preamble pointed out that BPJ permits also are based upon the assumption that pollutants not specifically regulated will be removed by proper operation of the treatment system. The preamble noted that a similar situation may exist with respect to pollutants that the system may remove to "de minimis levels or levels which are difficult to accurately detect":

> Again the permit writer may determine that it is unnecessary to limit such pollutants which properly run treatment systems will

> remove. If bypasses of treatment equipment are allowed, it is possible that all pollutants of concern will not receive the level of control anticipated in the establishment of permit limitations.

49 Fed. Reg. 38,037. Thus, the bypass regulation is integrally related to the effluent limitations the Agency establishes in permits.

The Agency clearly has the authority to establish a bypass mechanism that restricts the occasions upon which permittees can simply suspend use of their treatment systems. The Clean Water Act does not guarantee permittees the right to bypass their treatment systems at will. Rather, the Act authorizes the Administrator to promulgate "such regulations as are necessary to carry out his functions under" the Act. Sec. 501(a). 15/ This authority, and the others in the Act, are to be directed towards the goal of eliminating the discharge of pollutants into navigable waters by 1985. § 101(a)(1). 16/

The Act provides the Agency with discretion to effectuate the Act's purposes that is "necessarily broad". 17/ The Agency's exercise of that discretion may not be disturbed by courts if the Agency's decisions represent "a reasonable accomodation of conflicting policies that were committed to the agency's care by the statute, . . . unless it appears from the

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15/ 33 U.S.C. § 1361(a).

16/ 33 U.S.C. § 1251(a)(1).

17/ California and Hawaiian Sugar Co. v. EPA, 553 F.2d 280, 289 (2d Cir. 1977); see also FMC Corp. v. Train, 539 F.2d 973, 978-79 (4th Cir. 1976).

statute or its legislative history that the accomodation is not one that Congress would have sanctioned." 18/ Since the bypass regulation and its relationship to the effluent limitations development process was not addressed, even tangentially, by Congress, the issue then is whether EPA's decision is reasonable in making this judgment. The Court is not to substitute its own reasoning for that of the Agency. 19/ The bypass regulation clearly passes muster under that standard.

The courts have recognized that the Agency can exercise broad discretion in deciding whether -- and if so, how -- to fashion a bypass regulation. 20/

C. Petitioners Have Not Demonstrated That the Bypass Regulation Is Unlawful or Unreasonable

Petitioners claim that the bypass regulation exceeds the Agency's authority under the Clean Water Act. Specifically, they charge that the regulation violates section 304 of the

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18/ Chevron, 104 S. Ct. at 2783, quoting United States v. Shimer, 367 U.S. 374, 382-383 (1961)).

19/ See, e.g., Train v. Natural Resources Defense Council, 421 U.S. 60, 87 (1975); Immigration and Naturalization Service v. Jong Ha Wang, 450 U.S. 139, 144 (1981).

20/ See, e.g., Marathon Oil Company v. EPA, 564 F.2d 1253, 1258 (9th Cir. 1977). In Marathon Oil, the bypass provision contained in the permit prohibited bypass except "(i) where unavoidable to prevent loss of life or severe property damage, or (ii) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of their permit." Id.

While the court remanded the permit to review the bypass provision it was simply for clarification. The court noted: "[w]e believe that the present [bypass] provision, if interpreted in line with the Administrator's comments, is adequate to meet the fears of petitioners." Id. at 1274.

Act 21/, which establishes procedures for developing effluent guidelines. Petitioners argue that regulation is inconsistent with section 304 in two respects. First, petitioners argue that the regulation dictates the technology a permittee must use, contrary to the intent of Congress. 22/ Second, petitioners claim that the regulation impermissibly sets *de facto* permit limits in addition to stated limits contained in effluent guidelines and NPDES permits. 23/

Petitioners' arguments misconstrue section 304 and its relationship to the bypass regulation. As noted above, the bypass regulation was not promulgated pursuant to the authority conferred by section 304. The bypass regulation is supplementary to any requirements contained in effluent guidelines or BPJ permit limitations. The promulgation of such a general regulation does not require the Agency to consider the factors listed in section 304. 24/

1. Bypass regulation does not dictate technology.

The specific "technology" that the Agency is accused of dictating is "full operation of the treatment system." 25/

21/ 33 U.S.C. § 1314.

22/ Br. at 156.

23/ *Id*. at 159.

24/ Even section 304 considerations would not completely eliminate the authority of EPA to limit technology choices available to industry: "[i]ndeed, the authority to prescribe limits consistent with the best practicable technology may be tantamount to prescribing that technology." *NRDC* v. *Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977) (emphasis added).

25/ Br. at 155.

However, the regulation imposes no limits on the permittee's choice of treatment technology and therefore does not "dictate technology." Thus, the bypass regulation does not undermine any congressional intent. Rather, the regulation requires only that, except for "essential maintenance," the equipment that the permittee has selected will be operated. As petitioners themselves concede, the regulation "does not prescribe what specific treatment technology must be in place, it . . . prescribe[s] how the treatment must be used." 26/

Petitioners couch their argument regarding "full operation of the treatment system" in a misleading manner, leaving the impression that a treatment facility must operate twenty-four hours per day. 27/ That is not the case. What the Agency originally intended, and still intends, is to ensure "proper pollution control through adequate design operation and maintenance of treatment facilities." 28/ "Design" operation and maintenance are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that facilities follow those requirements. It imposes no specific design and no additional burdens on a permittee. If the facility is required to use scrubbers two times a day, the bypass regulation does not require the facility to run scrubbers twenty-four hours per day. Likewise,

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26/ Id. at 155 n.1

27/ Id. at 155.

28/ 43 Fed. Reg. 37,080 (emphasis added), 1979 C.I. # E (J.A. ____)

if routine maintenance procedures allow for repairs during non-process operation, the bypass regulation does not require the treatment facility to run during the non-process time. 29/

2. The bypass regulation does not establish de facto effluent limitations.

When EPA establishes effluent limitations for industrial categories or individual plants, it often decides not to regulate specifically many pollutants that are found in the wastestreams. Generally, commenters request this approach because permittees' compliance costs are reduced by these decisions. Many pollutants not regulated specifically are removed incidentally by operation of the treatment systems used to remove the pollutants regulated specifically. 30/ The bypass regulation assumes that such decisions have been made.

Petitioners contend, erroneously, that the regulations set de facto effluent limitations. Their position is basically that, by restricting bypass where no effluent limitations for

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29/ 49 Fed. Reg. at 38,037, 1984 C.I. # 11 (J.A. ____).

30/ In the Aluminum Forming Industry Point Source Category (example provided by EPA at 49 Fed. Reg. 38,037), the Agency stated that the "complexity and cost of analyses for toxic pollutants found in the aluminum forming category wastewater has prompted EPA to develop an alternative method of controlling toxic pollutants. Instead of establishing specific effluent limitations for each of the seven toxic metals found in the category's raw wastewaters above treatability levels, the Agency is establishing effluent limitations for chromium, zinc, and aluminum as 'indicator' pollutants. The data available to EPA, show that control of the selected 'indicator' pollutants will result in substantial removal of cadmium, copper, lead, nickel, and selenium found in the wastewaters but not specifically limited . . . . . [In doing so] the Agency will reduce the difficulty, cost, and delays of pollutant monitoring and analyses that would result if pollutant limitations were established for each toxic pollutant." 48 Fed. Reg. at 49,132 (1983). (J.A. ____).

pollutants specifically limited in a permit are exceeded, EPA is establishing effluent limitations for those pollutants without making the findings required by section 304. 31/ Petitioners also contend that the Agency's rationale is unsound because, since EPA cannot prescribe a particular technology, the Agency cannot be certain that these "incidental" removals of pollutants not specifically regulated actually will occur. 32/

Petitioners' second contention demonstrably undermines their first. The Agency agrees that the incidental removal of pollutants not specifically regulated may not be uniform because permittees subject to the same effluent limitations on certain pollutants may elect to satisfy those requirements in various ways. Thus, the bypass regulation does not establish effluent limitations for pollutants removed incidentally. However, the Agency expects that many permittees will elect to utilize the Agency's model technology or technologies that operate in a similar manner. Thus, the Agency predicts that incidental removals will occur if permittees operate their systems in the expected manner and that these additional removals will result in further progress towards the Act's goal of eliminating the discharges of pollutants. That the bypass regulation can be expected to achieve unquantified removal of pollutants not regulated specifically in permits does not convert the regulation

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31/ Br. at 160.

32/ Id.

into one that requires the Agency to make the findings required to establish specific effluent limitations under section 304 or 306. Rather, it is a lawful exercise of the Agency's discretion to decide how best to implement the Act.

3. The Agency was not required to consider the costs and environmental benefits of the bypass regulation.

Petitioners' last challenge is that the regulation results in no significant environmental benefits while imposing substantial economic costs on industry. 33/ This argument assumes, erroneously, that the bypass regulation must be supported by a cost/benefit analysis. Petitioners also misconstrue the regulation and its effects and ignore the fact that the Agency considers costs and other effects when effluent limitations are established.

The Act does not require EPA to consider costs or benefits before promulgating general regulations such as the bypass regulation. Specific consideration of costs is undertaken only in developing effluent limitations and standards under the Act. 34/ The Agency, as a matter of public policy, must not be oblivious to the economic consequences of regulatory alternatives. However, as a matter of law, Congress was not concerned with costs in provisions such as this. Indeed, the Agency's choice here was rational within this legal framework.

33/ Br. at 161-165.

34/ Even where costs must be considered, they are not to be evaluated in a formal cost/benefit analysis. Senate Consideration of the Report of the Conference Committee [on S. 2770] (October 4, 1972), Leg. Hist. at 170.

The costs petitioners claim the bypass regulation imposes are those arising from the "continuous" operation of the treatment facility, including labor costs, materials, utility costs, wear and tear on the treatment system and "needless" consumption of energy resources. 35/ Petitioners suggest a gloomy picture of either scheduling routine maintenace during periods when systems are not operating or of waiting until the system breaks down. 36/ There is nothing wrong with the former approach, and the latter example is misleading. Routine maintenance should be performed during times when processes are not operating; such times are designed into the system. EPA could reasonably conclude that "[in]dustrial facilities usually experience periods of nonprocess operations during which the facility operator can carry out the recommended maintenance procedures." 37/ If the facility could not wait until a period of nonprocess operation, or the facility did operate continuously, the maintenance that had to be performed would be considered "essential" and not "routine"; thus it would be allowed by the exception in the bypass regulation. 38/

Another serious flaw in petitioners' argument with respect to costs is that, in promulgating an effluent guideline

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35/ Br. at 162.

36/ Id. at 163.

37/ 49 Fed. Reg. at 38,037, 1984 C.I. # 11 (J.A. ____).

38/ Id.

limitation or establishing a BPJ limit, the Agency considers fully the costs of operating treatment systems to the extent assumed by the bypass regulation. Thus, the bypass regulation itself imposes no costs. If petitioners or others believe that the costs for a particular effluent guideline limitation or permit limitation are excessive, these arguments are properly raised in the proceedings relating to those limitations, rather than in this litigation. 39/

Petitioners' final argument is that there is no record support for EPA's conclusion that incidental removal of pollutants will occur and that permittees' monitoring costs will be reduced. 40/ Once again, the Agency was not required to show environmental benefit before promulgating the bypass regulation. Moreover, as was true of costs, the bases for the Agency's belief that incidental removals will occur can be found in the records supporting particular effluent guidelines limitations. With respect to monitoring costs, these too, are estimated in connection with particular effluent limitations and in the support for BPJ permits. Moreover, little data should be required to support the Agency's conclusion that monitoring for five pollutants is substantially less costly than monitoring for ten pollutants.

39/ The Third Circuit confronted a similar issue in litigation over the Agency's general pretreatment regulations promulgated under the Act. NAMF v. EPA, 719 F.2d 624 (3d Cir. 1983), rev'd in part on other grounds sub nom., Chemical Manufacturers Association v. NRDC, 105 S. Ct. 1102 (1985). There, petitioners argued that the Agency had not considered the factors enumerated in section 304 before promulgating the combined wastestream formula. The Agency pointed out that costs were addressed in individual categorical rulemakings. The court concluded that the issue of the consideration of costs was not ripe for review until it was raised in the context of individual categorical rulemakings. NAMF v. EPA, 719 F.2d at 656.

40/ Br. at 164-65.

X

EPA PROPERLY EXCLUDED VIOLATIONS OF WATER QUALITY LIMITATIONS FROM THE UPSET DEFENSE

The upset provision addresses exceptional and unintentional situations of noncompliance with technology-based permit effluent limitations. 1/ It is available as an affirmative defense to permittees in an enforcement proceeding, and is not to include instances of noncompliance caused by operational error, inadequate or improperly designed treatment facilities, lack of preventive maintenance, or careless or improper operation. 2/ Industry petitioners challenge EPA's upset regulation for restricting the defense to violations of technology-based permit limitations. Petitioners argue that the Agency acted arbitrarily in excluding water quality-based permit limitations from the scope of the regulation by failing to consider certain available data. Additionally, they claim that the Agency cannot rely on prosecutorial discretion in dealing with violations of water quality-based limitations. As will be shown below, the upset provision is consistent with the terms and structure of the Clean Water Act as well as court decisions which have addressed the issue.

1/ "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. 40 C.F.R. § 122.41(n)(1)(1984).

2/ Id. § 122.41(n)(4).

EPA was correct in determining to treat water quality-based effluent violations differently from technology-based violations. The Clean Water Act is clear in its efforts to afford special treatment to water quality. To grant an upset defense for water quality-based violations would frustrate that congressional intent. EPA has properly considered the competing interests involved in making the determination and has used reasonable judgment in exercising its discretion under the Act. Its actions were neither arbitrary nor capricious and are entitled to great deference from the court. See Chevron USA, supra. As such, the court must uphold the upset provision as a proper exercise of Agency authority under the Clean Water Act.

A. Background of EPA's Upset Provision.

The upset provision was first contained in the August 21, 1978, proposed rules, 3/ as a result of the Ninth Circuit decision in Marathon Oil Company v. EPA. 4/ In Marathon, the Court stated (in the context of oil platforms) that using the 1977 standard of BPT these technology-based effluent limits could only be met 97.5 percent of the time in deck drainage cases and 99 percent in produced water cases. 5/ The court then remanded the individual permits to the Agency to insert upset provisions in these technology-based permits to take into

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3/ 43 Fed. Reg. 37,078, 37,094 (1978), 1979 C.I. # E (J.A. ___).

4/ 564 F.2d 1253 (9th Cir. 1977).

5/ Id. at 1273.

account the limitations inherent in the technologies that were the basis for the effluent limitations. 6/ The Agency decided to include the upset terms in the NPDES regulations so they would apply to all permits rather than merely the individual permits before the court. Under that first proposal, an upset would have been available to a permittee as an affirmative defense if it could prove the specific cause or causes of the upset, the facility was being properly operated and maintained at the time of the upset, the facility submitted 24 hour notice describing the upset and the permittee took sufficient remedial measures to reduce the adverse impact of the upset. 7/

When the final NPDES regulations were published on June 7, 1979, 8/ the upset provision had been redrafted for clarity. The section was revised to indicate that a violation attributable to operational error or lack of preventive maintenance did not constitute an upset. In response to comments that the provision would impede state efforts to impose stricter requirements, the provision was clarified to show that the upset defense would be available only for violations of technology-based limitations. One week later, on June 14, 1979, the Agency proposed the Consolidated Permit

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6/ Id.

7/ 43 Fed. Reg. at 37,094, (1978) 1979 C.I. #E (J.A. ____)

8/ 44 Fed. Reg. 32,854, et seq. (1979). 1979 C.I. #L (J.A. ____)

Regulations. 9/ This proposal was virtually identical to the June 7, 1979, final NPDES regulations. 10/

The Consolidated Permit Regulations were promulgated in final form on May 19, 1980. 11/ Changed from the proposal was the requirement that the facility was, at the time of the upset, being operated in a "prudent and workmanlike manner and in compliance with applicable operation and maintenance procedures." 12/ It was revised to read that "[t]he permitted facility was at the time being properly operated." 13/

The November 1982 proposal included significant changes to the upset provision. 14/ The Agency acknowledged that the Marathon Oil rationale for upsets in technology-based effluent limitations, as a matter of law, did not apply to water quality-based effluent limitations. 15/ Yet, EPA's proposal stated there was "no reason to penalize a discharger that [could] prove that

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9/ 44 Fed. Reg. 34,244, et seq. (1979), 1980 C.I. # A (J.A. ____).

10/ A comment in the final NPDES regulations which stated that the defense was available only for technology-based limitations and not those based on water quality standards, State laws, or health or environmentally-based toxic pollutant standards did not appear in the proposed Consolidated Permit Regulations. Compare 44 Fed. Reg. 32,906, (1979) 1979 C.I. # L (J.A.____), with 44 Fed. Reg. 34,289, (1979) 1980 C.I. #A (J.A.__).

11/ 45 Fed. Reg. 33,290 et seq. (1980), 1980 C.I. #I (J.A. ____).

12/ 44 Fed. Reg. at 34,289, (1979) 1980 C.I. #A (J.A. ____).

13/ 45 Fed. Reg. at 33,448, (1980) 1980 C.I. #I (J.A. ____).

14/ 47 Fed. Reg. 52,072 et seq. (1982), 1984 C.I. #2 (J.A. ____).

15/ Id. at 52,079.

an upset occurred and that water quality standards were met despite its non-complying discharge." 16/ Thus, the Agency proposed to delete the term "technology-based" from the regulations, making it applicable to all limitations. The defense to a water quality-based effluent violation required the permittee to show that water quality standards were met in all stream segments for all pollutants or parameters which the upset could have affected. 17/ The proposal further modified the regulation by deleting the word "specific" from the requirement of the permittee to identify the "specific cause(s)" of the upset.

On September 26, 1984, the Agency published the final NPDES regulations. 18/ These final regulations rejected virtually all of the changes proposed in 1982. The only change that was retained was removing the word "specific" from the requirement that the permittee identify the "specific cause(s)" of the upset. 19/ The final regulation was, in other respects, identical to the final Consolidated Permit Regulations published in 1980.

16/ Id.

17/ Id. at 52,089.

18/ 49 Fed. Reg. 37,998 et seq. (1984), 1984 C.I. #11 (J.A. ____).

19/ Id. at 38,038.

B. The Upset Defense Properly Excludes Violations of Water Quality-Based Limitations

The gravamen of petitioners' complaint is that the rationale supporting the upset defense for technology-based effluent limitations is equally applicable to water quality-based effluent limitations. They claim that since water quality limits must be met through the same means as technology-based limits, i.e., through pollution control equipment, then the same performance concerns that the Agency is addressing through the upset defense should logically be extended to violations of water quality based limits. While appealing on its face, this rationale is flawed for several reasons.

The authority for the upset defense is derived generally from the Agency's authority to establish technology-based effluent limits under sections 301, 304 and 306 (NSPS) of the Act. Under those sections, EPA must develop increasingly stringent effluent guidelines based on the increasingly improving technological capabilities of treatment plants in order to achieve the total elimination of the discharge of pollutants, which is the ultimate goal of the Act. 20/ However, inherent in the establishment and progression of more technologically advanced effluent limitations, is the acknowledgement of the limitations of operating that technology.

20/ § 101(a)(1), 33 U.S.C. § 1251(a)(1).

EPA recognized that there may be "an exceptional incident in which there is a temporary and unintentional noncompliance with effluent limitations because of factors beyond the reasonable control of the permittee". 21/ That recognition led EPA to develop the upset defense.

Petitioners misread the rationale of the line of cases that first required upset provisions. 22/ In Marathon Oil, the Ninth Circuit focused upon the fact that a facility utilizing the 1977 standard of BPT was only expected to meet deck drainage standards 97.5 percent of the time and produced water standards 99 percent of the time. 23/ Those were the percentages that the Agency had determined plants were able to meet based on the technological standard (BPT) in place. Likewise in FMC Corp., the Fourth Circuit found that plants using the 1977 standards could only meet the monthly limits 97 to 98 percent of the time, and daily limits 99.5 to 100 percent of the time. 24/ Since the effluent limitations guidelines themselves acknowledged that the model technology would not allow permittees to meet the limitations 100 percent of the time, permits which did not allow for upsets were

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21/ 49 Fed. Reg. at 38,038, (1984) 1984 C.I. #11 (J.A. ____).

22/ See, e.g., Marathon Oil Company v. EPA, 564 F.2d 1253 (9th Cir. 1977); FMC Corp. v. Train, 539 F.2d 973 (4th Cir. 1976).

23/ Marathon Oil, 564 F.2d at 1272.

24/ FMC Corp., 539 F.2d at 985.

requiring a higher level of control than BPT. 25/ Technology-based limits can only require what technology can achieve. As a result, both courts held that the very nature of the BPT effluent standards [implementing section 301(b)(1)(A) of the Act], required the Agency to provide an upset provision for those permit "violations" beyond the control of the permittee. 26/ In both instances, the courts were ruling on the issue of the capability of technology and the ability of treatment plants to meet technology-based limits in the context of BPT. These cases have no applicability to water quality-based effluent limitations implemented under section 301(b)(1)(C) of the Act. 27/

Next, the mandate in section 301(b)(1)(A), is that there be "achieved effluent limitations" which apply BPT (emphasis added). The standard in section 301(b)(1)(C) is to achieve "any more stringent limitations" necessary to meet, inter alia, water quality standards (emphasis added). Petitioners argue that the operative word in each section is "limitation," and therefore EPA was unreasonable in permitting an upset defense for one "limitation" (technology-based) but not the other "limitation" (water quality-based). Their

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25/ Marathon Oil, supra at 1272.

26/ Id. at 1272-73; FMC Corp., supra at 986.

27/ 33 U.S.C. § 1311(b)(1)(C).

position overlooks key differences between the two which make the upset defense inapplicable to water quality-based limitations.

Congress made it clear that technology-based and water quality-based effluent limitations involve different considerations. Congress expected water quality-based limitations would in most cases be "more stringent" than the technology-based limits. 28/

> [A]ny point source will be required to have effluent limitations which are consistent with the water quality standards and consistent load limits for the receiving waters. Thus, if the best practicable control technology is inadequate to meet the water quality standards and load limits, a more stringent requirement would be imposed upon the given point source. 29/

Technology-based limitations are themselves restricted to the technological and economic achievability of the controls. In

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28/ Id.

29/ Comments of Rep. Clausen, House Debate on H.R. 11896, (March 27, 1972), Leg. Hist. at 378. The House of Representatives' comments are important for it was the House version of section 301(b)(1)(C) which ultimately was adopted. "H.R. 11896 requires that if the application of 'best practicable control technology currently available' is not sufficient to meet water quality standards, further and more stringent controls must be imposed. This is more restrictive than the requirement of the [Senate] . . . . H.R. 11896, will assure that water quality standards are met, and that even if such 'best practicable control technology currently available' is not sufficient to meet water quality standards, each point source will still be required to be so equipped to further enhance the quality of our waters. In other words we require the upgrading of our waters to a much greater degree than does S.2770." Comments of Chairman Blatnik, Id. at 353.

contrast, a water quality-based effluent limitation is not based on technological or economic feasibility considerations. These limitations are required by water quality standards which are promulgated by either the state or EPA and approved by EPA. 30/ Technological and economic considerations may be taken into account in establishing or revising the water quality standard. 31/ They are not, however, considered in the permit proceedings.

Upsets are, by definition, rare occurrences. 32/ While acknowledging this, petitioners continue to describe it as the most common of occurrences. The Agency acknowledges that upsets may occur, that failures of pollution control equipment may occur on water quality limited stream segments. 33/ Yet, the simple fact remains that Congress intended these more stringent limitations to be met at all times. 34/

30/ Section 303, 33 U.S.C. § 1313.

31/ 33 U.S.C. § 1313(c).

32/ "'Upset' means an exceptional incident . . . ." 40 C.F.R. § 122.41(m)(1) (1984) (emphasis added).

33/ 49 Fed. Reg. at 38,038, (1984) 1984 C.I. #11 (J.A. ___).

34/ "The Committee emphasizes that this section [301] is not to be construed as reducing any water quality or effluent requirements imposed as a result of the Federal Water Pollution Control Act prior to enactment or State law. In fact, the Administrator is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability." S. Rep. No. 414, 92nd Cong. 1st Sess., 43, (1971) Leg. Hist. at 1461 (emphasis added).

The nature of water quality standards is completely different from technology-based limitations. They are "established to protect uses of the water," 35/ while technology-based limitations are designed to reduce the discharge of pollutants as technological capabilities increase. 36/ Water quality uses include public water supplies, protection and propagation of fish and wildlife, recreation, agricultural and industrial water supplies and navigation. 37/ Technology-based limitations are not designed to address those concerns.

Thus, the upset provision, as adopted by EPA, is consistent with the plain language and legislative intent of the Clean Water Act in that it recognizes the inherent limitations of technology and makes no provision for violations of water quality-based effluent limitations. Additionally, cases which have construed the need for an upset provision are quite clear that they are required only in dealing with limitations based solely on technology. Finally, the Agency acted properly in balancing competing policy considerations in the development of the regulation.

35/ 49 Fed. Reg. at 38,038 (emphasis added). 1984 C.I. #11 (J.A. ___).

36/ See S. Rep. No. 914, 92d Cong., 1st Sess. 42 (1971), Leg. Hist. at 1461.

37/ Section 303(c)(2), 33 U.S.C. § 1313(c)(2).

C. EPA Properly Concluded That The Necessary Showing To Support A Water Quality-Based Upset Provision Was Not Practical

Industry petitioners state that the "failure" of the Agency to consider "possible alternatives" to the showing EPA deemed would be necessary to support an upset defense for violations of water quality-based limitations renders the ultimate decision arbitrary and deserving of a remand. The decision on the scope of the upset provision was based, as set out above, on a legal construction, rather than practical burdens. However, even in considering the practical aspects of a water quality-based upset provision EPA acted reasonably.

Petitioners fault the Agency for not "analyzing possible alternatives" complaining that the Agency's decision that it would be "impractical" to require permittees to attempt to prove that water quality standards were met during an upset, did not consider other, less costly, burdensome or technical alternatives. The Agency's rationale began with the following list of what would be necessary for the defense:

> Any defense for upsets must ensure that water quality standards are achieved at all times throughout the upset . . . . [It] would require a showing that water quality standards continued to be achieved in all stream segments, and for all pollutants, potentially affected by the discharge. Permittees would be required to begin monitoring the receiving waters as soon as the upset occurred and to continue to monitor until it was certain that the upset could no longer cause a violation of the water quality standards in the stream segment . . . . [P]ermittees

Court should refuse to consider arguments raised in Petitioners' brief that were never presented to EPA during the rulemaking process. 40/

However, even if EPA had been presented with these alternatives, they are all inapplicable. 41/ The Agency put forward its determination of what was required to prove that water quality standards were met. There were no lesser alternatives. The Agency exercised the "broad policy-making

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40/ See, e.g., Glass Packaging Institute v. Regan, 737 F.2d 1083, 1093 n.54 (D.C. Cir. 1984); Washington Association for Television and Children v. FCC, 712 F.2d 677, 680-81 (D.C. Cir. 1983); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

41/ Petitioners now urge that the data will be readily available, or that mathematical modeling techniques could be utilized to assess a water quality related upset defense. Water quality-based violations require immediate monitoring. Petitioners refer to the Agency's Water Quality Planning and Management regulations, 50 Fed. Reg. 1,774 et seq. (1985) (J.A. ___), (to be codified at 40 C.F.R. Part 130), as support for the proposition that the water quality data necessary to support an upset defense may already be available to permittees. Br. at 177. These regulations, however, set out the "planning and management activities to be undertaken by States and local governments to establish their water quality goals and standards and to develop programs which will meet those goals." 50 Fed. Reg. at 1,774 (emphasis added). These regulations and procedures are in no way designed to address immediate responses to upsets. They refer to obtaining information for States to plan and set priorities. These regulations simply do not address the concern EPA had that upsets could not be properly monitored. Finally, Petitioners suggest that a single sample would be adequate to show compliance with water quality standards. Br. at 177. This proposal would seriously minimize the importance that Congress and EPA have placed on the maintenance of water quality. To suggest that a single sample is adequate following the Agency rationale set forth in the Federal Register and summarized above is, at best, inappropriate.

discretion granted it by Congress." 42/ Petitioners have failed to show that EPA acted arbitrarily or in excess of its authority.

D. EPA May Use Prosecutorial Discretion in Implementing the Upset Defense

Petitioners' final argument is that EPA may not rely on prosecutorial discretion in lieu of providing a formal upset provision. As an initial matter, that is not what the Agency is doing. Industry petitioners again cling to the mistaken belief that they are entitled to an upset defense for water quality-based effluent violations. That clearly is not the case. EPA has never held that the upset defense was required for water quality-based violations. 43/ What the Agency is stating is that even though not required to, it will utilize its prosecutorial discretion in dealing with upsets of water quality-based limits. 44/

The cases cited by petitioners as support for their position that EPA cannot rely on prosecutorial discretion in implementing the upset defense are readily distinguishable.

42/ American Radio Relay League, Inc. v. FCC, 617 F.2d 875, 879 (D.C. Cir. 1980).

43/ Even in the November 18, 1982, proposed rulemaking that would have provided for an upset defense for water quality-based effluent violations, the Agency stated that the "same rationale" which supports the upset provision "does not apply to effluent limitations based on water quality standards." 47 Fed. Reg. at 52,079.

44/ See 44 Fed. Reg. at 34,289, 1980 C.I. # A (J.A. ____). 49 Fed. Reg. at 38,039, 1984 C.I. # 11 (J.A. ____).

Both Marathon Oil, supra, and American Petroleum Institute v. EPA, 661 F.2d 340 (5th Cir. 1981), dealt with situations where the Agency sought to use enforcement discretion instead of providing formal upset provisions for technology-based limitations. Both courts ruled that the Agency was required to provide formal upset provisions. Therefore, the Agency's attempt to use prosecutorial discretion to deal with upsets was held to be inappropriate. As mentioned above, that is not the situation here.

The Clean Air Act cases relied on by petitioners 45/ are also inapposite. They relate solely to violations of technology-based limitations due to the inability of the source, in any circumstance, to meet those limitations. 46/ As discussed above the same rationale does not apply to water quality-based effluent limitations. Thus, even though it is not required to, the Agency has stated that it will provide industry with the added protection of its exercise of prosecutorial discretion.

Petitioners note that EPA's exercise of prosecutorial discretion cannot protect them from a possible citizen's suit under section 505(a)(1), 33 U.S.C. § 1365(a)(1). Petitioners are correct. However, that violations may be prosecuted,

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45/ Br. at 178-79.

46/ Bunker Hill Co. v. EPA, 572 F.2d 1286, 1302 n.35 (9th Cir. 1977); Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427, 432-33 (D.C. Cir. 1973), cert. denied, 416 U.S. 969 (1974).

either by EPA or others, has no bearing on whether EPA acted reasonably in not permitting the upset defense for water quality-based limitations and EPA's expression of intent to exercise prosecutorial discretion was gratuitous. Such exercise does not vitiate a violation in any event and thus the fact that there may be violations prosecuted does not affect the validity of the regulation.

In sum, EPA has properly limited the upset defense to violations of technology-based effluent limitations. The statute, legislative history and case law support the Agency's determination. The regulation and its underlying rationale evidence a proper exercise of discretion by EPA, and may not be overturned as arbitrary and capricious. Finally, the potential of citizen's suits exists with or without the Agency's stated plan to exercise prosecutorial discretion. This Court should uphold the upset provision.

XI

EPA'S VETO REGULATIONS ARE CONSISTENT WITH THE AGENCY'S AUTHORITY UNDER THE CLEAN WATER ACT

Industry petitioners argue that the words "outside the guidelines and requirements" of the Act, found in section 402(d)(2) 1/ which supports EPA's authority to veto permits

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1/ The full text of section 402(d)(2) reads as follows:

> (2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if

(footnote continued on next page)

cc: Steve Sweeney/DC/USEPA/US@EPA, Richard Alonso@EPA, Kevin Bell@EPA, Joel Blumstein/R1/USEPA/US@EPA, Kathy Callahan/R2/USEPA/US@EPA, Jon Capacasa/R3/USEPA/US@EPA, Jose Cisneros/R5/USEPA/US@EPA, Sam Coleman/R6/USEPA/US@EPA, Mike Cook/DC/USEPA/US@EPA, Betsy Devlin@EPA, Becky Dolph/CNSL/R7/USEPA/US@EPA, Patrick Durack/R2/USEPA/US@EPA, William Early@EPA, Atal Eralp@EPA, Jack Ferguson/R6/USEPA/US@EPA, Stephen Field@EPA, Jackson Fox/R10/USEPA/US@EPA, Gail Ginsberg/R5/USEPA/US@EPA, Scott Gordon/R4/USEPA/US@EPA, Ken Greenberg/R9/USEPA/US@EPA, William Hathaway/R6/USEPA/US@EPA, Randy Hill/DC/USEPA/US@EPA, Gale Hutton/WWPD/R7/USEPA/US@EPA, Roger Janson/R1/USEPA/US@EPA, Paulette Johnsey/R6/USEPA/US@EPA, Jeff Lape/DC/USEPA/US@EPA, Ira Leighton/R1/USEPA/US@EPA, Susan Lepow/DC/USEPA/US@EPA, Bub Loiselle/R10/USEPA/US@EPA, John Lyon@EPA, Brian Maas@EPA, Nancy Marvel/R9/USEPA/US@EPA, Mike Mcghee@EPA, David McGuigan/R3/USEPA/US@EPA, Mary Mindrup/WWPD/R7/USEPA/US@EPA, Doug Mundrick/R4/USEPA/US@EPA, Linda Murphy/R1/USEPA/US@EPA, Robert Murphy/R6/USEPA/US@EPA, Terry Oda/R9/USEPA/US@EPA, Barbara Pace/R6/USEPA/US@EPA, George Pavlou/R2/USEPA/US@EPA, Oscar Ramirez/R6/USEPA/US@EPA, Michael Risner/ENF/R8/USEPA/US@EPA, Robert Robichaud/R10/USEPA/US@EPA, Carol Rushin/ENF/R8/USEPA/US@EPA, Eric Schaeffer@EPA, Charles Sheehan/R6/USEPA/US@EPA, Diane Sipe/ENF/R8/USEPA/US@EPA, Randy Smith/R10/USEPA/US@EPA, Gerry Sotolongo/R1/USEPA/US@EPA, Nina Spiegelman/R9/USEPA/US@EPA, Chris Sproul/R9/USEPA/US@EPA, Martha Steincamp/CNSL/R7/USEPA/US@EPA, Alexis Strauss/R9/USEPA/US@EPA, Charles Sutfin/DC/USEPA/US@EPA, Peter Swenson/R5/USEPA/US@EPA, Jo-Lynn Traub/R5/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Jane Watson/R6/USEPA/US@EPA, Mary Wilkes/R4/USEPA/US@EPA, Rob Wood/DC/USEPA/US@EPA, Moraff.Ken@EPA.GOV

Fax to:

Subject: Re: DECEMBER 2ND MEETING ON MUNICIPAL TREATMENT RECOMBINATION -Reply -Reply -Reply

Alan:

I frankly do not understand your argument. Please see below for my responses (in italics) to the specific points in your message.

Gary

MORRISSEY.ALAN@epamail.epa.gov on 11/24/99 02:55:31 PM

MORRISSEY.ALAN@epamail.epa.gov on 11/24/99 02:55:31 PM

To: Gary Prichard/R5/USEPA/US@EPA, Steve Sweeney/DC/USEPA/US@EPA

EXHIBIT

4

cc: Richard Alonso@EPA, Kevin Bell@EPA, Joel Blumstein/R1/USEPA/US@EPA, Kathy Callahan/R2/USEPA/US@EPA, Jon Capacasa/R3/USEPA/US@EPA, Jose Cisneros/R5/USEPA/US@EPA, Sam Coleman/R6/USEPA/US@EPA, Mike Cook/DC/USEPA/US@EPA, Betsy Devlin@EPA, Becky Dolph/CNSL/R7/USEPA/US@EPA, Patrick Durack/R2/USEPA/US@EPA, William Early@EPA, Atal Eralp@EPA, Jack Ferguson/R6/USEPA/US@EPA, Stephen Field@EPA, Jackson Fox/R10/USEPA/US@EPA, Gail Ginsberg/R5/USEPA/US@EPA, Scott Gordon/R4/USEPA/US@EPA, Ken Greenberg/R9/USEPA/US@EPA, William Hathaway/R6/USEPA/US@EPA, Randy Hill/DC/USEPA/US@EPA, Gale Hutton/WWPD/R7/USEPA/US@EPA, Roger Janson/R1/USEPA/US@EPA, Paulette Johnsey/R6/USEPA/US@EPA, Jeff Lape/DC/USEPA/US@EPA, Ira Leighton/R1/USEPA/US@EPA, Susan Lepow/DC/USEPA/US@EPA, Bub Loiselle/R10/USEPA/US@EPA, John Lyon@EPA, Brian Maas@EPA, Nancy Marvel/R9/USEPA/US@EPA, Mike Mcghee@EPA, David McGuigan/R3/USEPA/US@EPA, Mary Mindrup/WWPD/R7/USEPA/US@EPA, Doug Mundrick/R4/USEPA/US@EPA, Linda Murphy/R1/USEPA/US@EPA, Robert Murphy/R6/USEPA/US@EPA, Terry Oda/R9/USEPA/US@EPA, Barbara Pace/R6/USEPA/US@EPA, George Pavlou/R2/USEPA/US@EPA, Oscar Ramirez/R6/USEPA/US@EPA, Michael Risner/ENF/R8/USEPA/US@EPA, Robert Robichaud/R10/USEPA/US@EPA, Carol Rushin/ENF/R8/USEPA/US@EPA, Eric Schaeffer@EPA, Charles Sheehan/R6/USEPA/US@EPA, Diane Sipe/ENF/R8/USEPA/US@EPA, Randy Smith/R10/USEPA/US@EPA, Gerry Sotolongo/R1/USEPA/US@EPA, Nina Spiegelman/R9/USEPA/US@EPA, Chris Sproul/R9/USEPA/US@EPA, Martha Steincamp/CNSL/R7/USEPA/US@EPA, Alexis Strauss/R9/USEPA/US@EPA, Charles Sutfin/DC/USEPA/US@EPA, Peter Swenson/R5/USEPA/US@EPA, Jo-Lynn Traub/R5/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Jane Watson/R6/USEPA/US@EPA, Mary Wilkes/R4/USEPA/US@EPA, Rob Wood/DC/USEPA/US@EPA

Subject: Re: DECEMBER 2ND MEETING ON MUNICIPAL TREATMENT RECOMBINATION -Reply -Reply -Reply

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Gary, your comment suggests that you believe the concept of "recombination" is limited to only municipalities. Please see my response to Steve Sweeney.

No, my comment was only responding to Jack Ferguson's comment regarding the 85% removal requirements.

With regard to municipalities, your comment appears to assume the appropriate compliance point is the end of the pipe. This position is not consistent with the positions the Agency has taken in the past.

My understanding of the Agency's position has been that permittees are free to design and construct whatever WWTP they choose and that, so long as the permittee (a) properly operates and maintains the WWTP ,(b) maximizes its use of the WWTP that it has designed and constructed (i.e, it does not divert wastestreams away from available treatment processes) , and (c) meets its technology and water quality based effluent limitations at the point of discharge, the Agency both as a matter of law and policy does not attempt to evaluate the "appropriateness" of the treatment methods that the permittee has designed and constructed. See , e.g., General Counsel Opinion No. 33, Issue of Law No. 3 (October 21, 1975) ("it is not within the authority of the Regional Administrator to define particular treatment methods"). If EPA is unsatisfied with he treatment technologies that are being used to meet technology and water quality based effluent limitations, EPA's only recourse is to develop more stringent technology or water quality

baswed limits. See General Counsel Opinion No. 41, Issue of Law No. II (June 1, 1976) ("while the Agency cannot specify abatement technologies to be employed under [Sections 301 and 306 of the CWA], the use of a particular treatment system may be a predictable consequence of the limitation imposed on the discharge of specific pollutants.)

This view , which is consistent with Congressional intent (see NRDC v. U.S. EPA, 822 F.2d 104, 123 D.C. Cir. 1987) (stating that CWA legilative history makes clear that Congress did not intend for EPA to "dictat[e] specific treatment technologies" for dischargers but rather intended that EPA "impos[e] end-of-the-pipe discharge limitations"; see also AISI v. EPA, 115 F.3d 979, 996 (D.C. Cir. 1997) ("by auhthorizing the EPA to impose effluent limitations only at the point source, the Congress clearly intended to allow the permittee to choose its own control strategy"), is also frequently reflected in a wide array of sources pertaining to the bypass regulation. See , e.g., 53 FR 40609 ("The bypass provision does not dictate how users [dischargers] must comply because it does not dictate what pretreatment [treatment] technology the user [discharger] must install. Instead, the bypass provision merely requires that the user [discharger] operate the technology it has chosen."); NRDC, 822 F.2d at 123 ("the bypass regulation does not, in fact, dictate that a specific treatment technology be employed; instead, the regulation requires that a system be operated as designed and according to the conditions of the NPDES permit."). In fact, the bypass regulation was challenged in 1984 based upon the argument that EPA was attempting to use the bypass regulation to dictate the treatment technology that a permittee must construct. EPA's response, which is worth quoting in full, was:

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1. Bypass regulation does not dictate technology

The specific "technology" that the Agency is accused of dictating is "full operation of the treatment system." However, the regulation imposes no limits on the permittee's choise of treatment technology and therefore does not "dictate technology." Thus, the bypass regulation does not undermine any congressional intent. Rather, the regulation requires only that,, except for "essential maintenance," the equipment that the permittee has selcted will be operated. As petitioner's themselves concede, the regulation "does not prescribe what specific treatment technology must be in place . . . it prescribe[s] how the treatment must be used."

Petitioner's couch their argument regarding "full operation of the treatment system" in a misleading manner, leaving the impression that a treatmetn facility must operate twenty-four hours per day. That is not the case. What the Agency oringianlly intended, and still intends, is to insure "proper pollution control through adequate <u>design</u> operation and maintenance of treatment faciltieis." "Design" operation and maintenance are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that faciltieis follow those requirements. It imposes no specific design and and additional burdens on a permittee. If the faciltiy is required to use scrubbers two times a day, the bypass regulation does not require the facility to run scrubbers twenty-four hours per day. Likewise, if routine maintenance procedures allow for repairs during non-process operation, the bypass regulation does not require the treatment facility to run during the non-process time.

You state in your comments that the position that effluent limits apply at the end of pipe "is not consistent with the positions the Agency has taken in the past." I am aware that, under 122.45(h), EPA can require monitoring of internal wastestreams where monitioring at the point of discharge is "impractical or infeasible" (because, for example, the end of pipe is inaccessible or because wastes at the point of discharge are so dilute as to make monitoring of the pollutant impractible of impossible) under 122.45(h). Clearly, monitoring at the point of discharge under a "recombination" scenario is neither "impractical nor infeasible." Consequently, I don't believe that 122.45(h) provides any support for the proposition that EPA can impose effluent limits on internal wastestreams. I also am not aware of any other legal basis for doing so. It would be useful if you could provide examples of instances in the past where the Agency has taken that it is approrpiate to impose effluent limitations on intertnal wastestreams.

Nor is it consistent with
section 101 and 301 of the CWA.

I do not understand how allowing a permitting authority to allow "recombination" in a specific permit is inconsistent with Sections101 or 301. Certainly, it would be inconsistent with those provisions if the bypass regulation explcitly defined the term "treatment facility" in a way which would preclude permittees from designing a treatmet facility that , by design, provides different levels and typesof treatment to different flows during different (e.g., peak flow) conditions . However, the regulation does not provide any such defintition which would limit a permittee's freedom tin designign and constructing treatment faciltieis of their choosing. Instead, as described above, EPA has repeatedly stated that the bypass regulation was not intended to place any limitations on a permittee's freedom to design and construct a treatmetn facility of its own choosing.

Some people have been criminally convicted for
such activity.

Are you saying that permitting authorities have been criminally convicted for authroizing "recombination" in a permit or are you saying that permittees have been criminally convicted for complying with a permit that specifically authorized recombination? I am guessing that what people have been criminally convicted of is for diverting flows around otherwise avaiable treatment units , which is a far different scenario than the recombination scenario here which involves diverting flows around fully maximized (and therefore unavailable) biological treatment units, in a manner consistent with the design of the treatment facility as the permittee described in the permit application, and in the manner authorized by the permitting authority in the permit.

I agree with Jack Ferguson of
Region 6. Any discharger may choose to
split his waste streams and use different
parallel treatment processes. In such cases
a discharger has elected to use different
"facilities and systems of treatment and
control." See, 40 CFR 122.41 (e).

I am not sure how the 40 CFR 122.41(e) requirement to properly operate and maintain treatmetn facilties is relevant here.

Thepermit must require monitoring, "to assure
compliance with permit limitations"
(emphasis added), 40 CFR 122.44(I). Often
people make the mistake of misreading the
term of "permit limitations" to be
synonymous with the term "numeric effluent
limitations." They are not synonymous.
Courts have reached this same result, see
the City of Portland and City of Atlanta cases.

I don't understand how the fact that EPA has the authority to impose and enforce narrative water quality based effluent limits (the issue involved in both the Portland and Atalanta cases) is relevant here.

Monitoring is required to determine
compliance with all permit conditions and
limitations. The " proper operation and
maintenance" and "bypass" permit
conditions, 40 CFR 122.41 (e) and (m) are

"permit conditions" as authorized by 402 (a)(2) of the CWA. CWA 309 (a) and (d) provide for enforcement of any violation of "any permit condition" in a permit issued pursuant to CWA 402.

I agree but, again, don;t understand the relevance. Neither 402(a)(2) not 309(a) or (d) shed any light on what is the "treatment facility" for purposes of the bypass regulation and so neither shed any light on whether a permitting authority could authorize "recombination" in situations where the permittee has described teh "treatmetn facility" as one designed and consturcted to provide different levels oand types of treatment tunder diferent conditions.

Internal waste stream monitoring is allowed before the mixing of other waste stream. 40 CFR 145 (h). Separate monitoring of each facility is necessary to determine compliance with each facility with all permit conditions as well as CWA 302 (b)(2). Such compliance monitoring after the mixing of the different facility waste streams is infeasible.

Compliance monitoring after mixing is only infeasible if you assume that EPA has authority to impose effluent limits on internal wastestreams (such that each wastestream within a treatment facility must independently meet effluent limits). As discussed above, I am not aware of any legal basis fthat would allow EPA to impose such limits. Are you?

As pointed out in my response to Steve Sweeney, to do otherwise, would have the effect of doubling the pollutant loading legally discharged.

I don;t understand the basis for this statement. Under a recombination scenario, the permittee would have the same effluent limits at the point of discharge as it would have if there was no recombination. How will this result in doubling the allowable loading of pollutants?

I look forward to our meeting on Decmber 2 when these issues can be discussed.

>>> <Prichard.Gary@epamail.epa.gov> 11/24/99 09:18am >>>

Also, don't forget that the % removal requirement is a 30-day limit and so it is quite possible that a treatment system that is designed to only provide treatment from primary clarifiers to peak wet weather flows (which presumably will only happen a small percentage of time during any 30-day period) could meet the 85% removal requirement. And, if it can't meet the 85% removal requirmement--or whatever lower % removal requirement is included in the permit--that would be the basis for an

enforcement action to require the discharger to construct treatment facilties capable of meeting the limit. The point is, it is the limits that drive the need for use of a particular treatment technology, not the bypass regulation.

CN=Steve Sweeney/OU=DC/O=USEPA/C=US@EPA on 11/24/99 07:59:31 AM

To: Richard Alonso@EPA, Kevin Bell@EPA, Joel Blumstein/R1/USEPA/US@EPA, Kathy Callahan/R2/USEPA/US@EPA, Jon Capacasa/R3/USEPA/US@EPA, Jose Cisneros/R5/USEPA/US@EPA, Sam Coleman/R6/USEPA/US@EPA, Mike Cook/DC/USEPA/US@EPA, Betsy Devlin@EPA, Becky Dolph/CNSL/R7/USEPA/US@EPA, Patrick Durack/R2/USEPA/US@EPA, William Early@EPA, Atal Eralp@EPA, Jack Ferguson/R6/USEPA/US@EPA, Stephen Field@EPA, Jackson Fox/R10/USEPA/US@EPA, Gail Ginsberg/R5/USEPA/US@EPA, Scott Gordon/R4/USEPA/US@EPA, Ken Greenberg/R9/USEPA/US@EPA, William Hathaway/R6/USEPA/US@EPA, Randy Hill/DC/USEPA/US@EPA, Gale Hutton/WWPD/R7/USEPA/US@EPA, Roger Janson/R1/USEPA/US@EPA, Paulette Johnsey/R6/USEPA/US@EPA, Jeff Lape/DC/USEPA/US@EPA, Ira Leighton/R1/USEPA/US@EPA, Susan Lepow/DC/USEPA/US@EPA, Bub Loiselle/R10/USEPA/US@EPA, John Lyon@EPA, Brian Maas@EPA, Nancy Marvel/R9/USEPA/US@EPA, Mike Mcghee@EPA, David McGuigan/R3/USEPA/US@EPA, Mary Mindrup/WWPD/R7/USEPA/US@EPA, Alan Morrissey@EPA, Doug Mundrick/R4/USEPA/US@EPA, Linda Murphy/R1/USEPA/US@EPA, Robert Murphy/R6/USEPA/US@EPA, Terry Oda/R9/USEPA/US@EPA, Barbara Pace/R6/USEPA/US@EPA, George Pavlou/R2/USEPA/US@EPA, Gary

Subject: Re: FW: Draft USEPA Guidance on Wet Weather Issues
Date: Fri, 01 Mar 2002 09:12:44 -0500
From: Weiss.Kevin@epamail.epa.gov
To: jhall@hall-associates.com

----- Forwarded by Kevin Weiss/DC/USEPA/US on 03/01/02 09:13 AM -----

Bruce Goff
<bruce.goff@epa.state.oh.us>

02/28/02 04:38 PM

To: Kevin Weiss/DC/USEPA/US@EPA
cc:
Subject: Re: FW: Draft USEPA Guid Wet Weather Issues

Did you see the 6 page article in the February issue of the Water Environment Federation' s Water Environment & Technology Journal that discusses this issue in detail. The article mentions that the USEPA Regions, US Justice and US HQ aren't in harmony on this issue. The article mentions that some USEPA Regions and US Justice have taken a very stringent position on the matter.

It looks like this may be the case with US Region 5 and US Justice. They are suing the city of Cambridge in US Court and t one of the issues is "blending". For years during some wet weather periods Cambridge has blended primary effluent with their tertiary quality effluent. The permit required that final effluent limits be met even during blending. This is something that Ohio EPA approved in the construction permit and recognized in the city's NPDES permits since 1988. Region 5 and US Justice have pursued this as part of the complaint against the city and reportedly don't "recognize" the USEPA blending letters as applying to the city. One of the US attorneys reportedly said the letters only apply to CSO communities. If the case isn't settled, it looks like a US Judge may be given the opportunity to interpret USEPA's bypass rule and the CWA and how they apply to blending.

>>> <Weiss.Kevin@epamail.epa.gov> 1/30/02 >>>

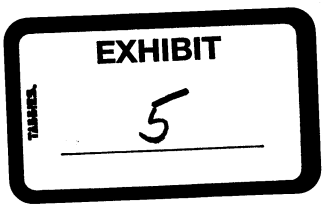
Bruce:

Thanks - I have a few comments in bold below.

Bruce Goff
<bruce.goff@epa.state.oh.us>

01/29/02 06:08 PM

To: Kevin Weiss/DC/USEPA/US@EPA
cc:
Subject: Re: FW: Draft USEPA Guidance on Wet Weather Issues



Thanks for reply.

There's been some confusion on this, but maybe it is getting resolved. I note that the proposed USEPA rule on SSOs had this " Some State and municipal representatives noted that they believed different NPDES authorities were interpreting the applicability of the bypass and upset provisions (at 40 CFR 122.41(m) and (n)) to SSOs differently. "

I agree there is plenty of unclarity, confusion.

The rule proposed to include language:

" Neither the bypass or the upset provisions at §(m) and (n), respectively, apply to these discharges"

We are going propose this language because the proposed SSO prohibition (which is based on the bypass and upset provisions, and contains very similar standards (i.e., no feasible alternatives) is intended to take the place of the bypass and upset provisions for SSOs. Once the SSO prohibition is in place, there is no need for the bypass and upset provision to apply, so we were going to clarify that they no longer apply.

Similarily the proposed reporting requirements say "You do not have to report sanitary sewer overflows under § 122.41(l) if the sanitary sewer overflows are reported under this section." However, we interpret 122.41 to currently establish reporting requirements for SSOs, its just in the future, when new reporting requirements are in place, 122.41(l) will no longer apply.

Over the years I've seen different and conflicting statements on this issue. For example in USEPA Region 6 Draft SSO Guidance it says:

" Some have questioned whether a SSO is an illegal bypass. In the 1989 National Combined Sewer Overflow Control Policy, EPA interprets the bypass
provisions under 40 CFR 122.41 to apply only to those flows which reach the headworks of the treatment facility, but do not receive full treatment. Flows which discharge prior to reaching the headworks are not bypasses and cannot be authorized under the bypass provisions in EPA's regulations. Rather, such discharges must be authorized separately by an NPDES permit. Because SSOs, like CSOs, never reach the headworks, the analysis would be the same for SSOs. In addition, SSOs, unlike CSOs, may be unintentional. Diversions must be intentional, however, to meet the definition of bypass in the regulations to see 40 CFR 122.41(m)]. " This can be viewed at:

http://www.epa.gov/earth1r6/6en/w/sso/ssodraft.txt

Then there is a statement in the "Risk Management Research Plan For Wet Weather Flows" November 1996 National Risk Management Research Laboratory,
U. S. Environmental Protection Agency; see

http://www.epa.gov/ednnrmrl/repository/wwfplan/wwfrp108.htm#I6

"For combined sewer systems, EPA decided bypasses occur only from

the process areas on the plant side of the headworks. Therefore, in the CSO context, secondary treatment requirements are only applicable to discharges from the WWTP, not discharges from CSO outfalls that occur before reaching the headworks of
the treatment works. This interpretation was upheld by the court in Montgomery Environmental Coalition v. Costle, (1980). EPA has not clarified whether SSOs should be addressed in a similar or different manner than CSOs.

Again, I agree we have been unclear, (and, at least at the Regional level, contradicatory) in the past. The draft guidance we are working on now is an effort to clear up the issue. As you point out, it doesn't help (from a clarity perspective) that we have different standards for CSOs (BAT/BCT, not part of the POTW) and SSOs (secondary treatment, part of the POTW).

I'm sure I read similar statements in some earlier USEPA Position Papers on SSOs, but I didn't have them handy.

Part of the problem with 40 C.F.R. § 122.41(m) and using its language in NPDES P. and applying it to SSOs is the term "intentional". While maybe it could be argued that an an SSO out an overflow pipe on a lift station or a manhole is "intentional", many SSOs do not come out of overflow pipes. They come out the top of manhole covers, back up in peoples basements, or simply overflow the pump station wet well.

I hope my comments are considered. I'm particularly interested in the issue of internal bypassing of primary effluent directly to the stream at POTWs handling combined sewage. We have several POTWs in the state that were designed with this feature many years ago with the state's blessing. It was felt it was better to get as much flow into the treatment works as possible so at least primary treatment and maybe disinfection could be accomplished. If the POTW is told this is "illegal", one alternative could be to simply not pump the flow into the wwtp, adjust some regulators and have the sewage bypass from a CSO on the collection system. As part the NMC's and in LTCP's we want to see more of the CSOs get treatment. If you can't have the wwtp handle part of the wet weather flow, this seems to be contradicting what we are trying to achieve. I am seeing where states are handling this differently. For CSO communities, Michigan and Indiana seem to require that all flow that gets into the wwtp has to be blended and meet the same final effluent limits as during dry weather. On the other hand I've seen some information that indicates that some other states will allow a primary bypass that would have effluent limits specifically for the bypass, e.g. 30% removal of BOD and TSS.

I think this is by far the biggest and toughest issue in the draft guidance. Some of us would like to make this primarily a State call, based on State design requirements and WQBELs, while others at EPA think it better if EPA and citizens have authority to require more stringent requirements. Anything you can send on OH (or other States') design/ decision-making criteria would help. Thanks.

>>> <Weiss.Kevin@epamail.epa.gov> 1/29/02 >>>

Bruce:

Thanks for the comments. I wanted to respond to your first comment about a discharge from an emergency outfall on a sanitary sewer system being bypasses. I have to agree that EPA has been unclear on this issue in the past as it applies to SSOs, but I am not aware of any statement in a SSO Strategy that contradicts this. Chapter X of the

EMS guidance (from 1996) say: "The legal status of [SSOs] is specifically related to the permit language and the circumstances under which the discharge occurs. Many permits authorize these discharges when there are no feasible alternatives, such as when there are circumstances beyond the municipality (similar to the concepts in the bypass regulation at 40 CFR 122.41(m))." This seems to imply to me that the bypass provision applies. The 2000 enforcement strategy guidance doesn't address this, and isn't suppose to change the EMS guidance.

Region 5 issued a letter to WI in May of last year which also indicated that "Alternatively, some permits have characterized discharges from municipal sanitary sewer systems as "bypasses" subject to conditions consistent with those governing "bypass" at 40 C.F.R. § 122.41(m)." Granted, we don't apply the bypass provision to CSOs (wet or dry), but we apply a different statutory technology-based standard. Hope this helps.

Bruce Goff

<bruce.goff@epa.state.oh.us>

01/29/02 10:47 AM

To: Kevin Weiss/DC/USEPA/US@EPA

cc: l.eichmiller@asiwpca.org

Subject: Re: FW: Draft USEPA Guidance on Wet Weather Issues

Saw email below. I think our state EPA headquarters is going to comment also. Comments/questions I have (These are my comments-not the state of Ohio's) :

1) The memo says "EPA considers an emergency outfall located within a municipal sanitary sewer collection system to be part of a POTW". This is different thinking from what USEPA has said about collection system overflows in the past. SSOs and dry weather CSOs were in the past considered unpermitted discharges and not subject to the bypass provisions of the NPDES Permit. This was discussed in USEPA SSO strategy. Has something changed?

2) USEPA needs to distinguish between overflows on interceptors with combined sewers tributary to the interceptor and CSOs. Many think an interceptor that receives combined discharges is a combined sewer and any overflow from the interceptor is a CSO and should be authorized in the permit. These interceptors also have lift stations and main lift stations at or just ahead of the POTW that overflow. Some states call these SSOs and not CSOs and some say they are CSOs. USEPA needs to clarify this.

Comments on Wet Weather Treatment Scenarios at Publicly Owned Treatment Works:

1) This problem with blending all stems from the USEPA definition of bypass in CFR 122.41(m). They need to get this definition changed to allow any bypasses that is specifically authorized by the NPDES Permit.

Then by policy/guidance they can talk about what types of bypasses can be authorized by the permit. Without the rule change this will always be an issue with attorneys, US Justice Dept, etc.. Third parties can also file complaints. We don't need the courts deciding what CFR 122.41(m) means.

There are all kinds of combinations of bypassing of units at treatment plants. For example some wwtps with high wet weather flows may bypass some of the secondary flow around the tertiary units. Some wwtps may bypass some of the screened raw flow around secondary to their tertiary units and still meet effluent limits. Some wwtps may bypass raw screened flow around primaries to secondary. Some treatment plants during high wet weather flow bypass some of the activated sludge units. Instead of 24 hr. detention time at DAF, during weather high flows may only receive 2 hours treatment bypassing some of the aeration basins. Some plants during high flow may temporarily shut off aeration in some or all basins to settle solids in the basin to prevent solids washout. There are all kinds of combinations. USEPA's definition of bypassing " of any portion of the treatment works" is too restrictive. If all flow that goes into the treatment works is treated to some level and is eventually discharged at one point that still meets permit limits, it shouldn't make any difference how flows are routed and distributed in the treatment works.

2) USEPA needs to address the issue of internal bypassing at treatment works at POTWs with combined sewers. There are POTWs that split flows with some flow during wet weather receiving only primary treatment and sometimes disinfection. The flow is not blended with final effluent to meet any permit limits. Every state and USEPA Region is handling this differently. USEPA's CSO strategy mentions this as an acceptable way to maximize treatment of wet weather flow. The alternative (if this practice is "illegal") is to not pump as much flow into the wwtp and have it overflow on the collection system.

CFR 122.122.41(m) needs to address this issue of an internal bypass with a direct discharge of primary effluent if the wwtp is handling more wet weather flow to meet the NMC to maximize the amount of flow to the wwtp, i.e. not doing it to comply with a LTCP. A change in the definition as discussed above would address this. The state should be able simply allow this in a permit to encourage the wwtp to handle more wet weather flow rather than have it simply go out a CSO.

3) For a POTW with combined sewers is a bypass at the headworks an "illegal" bypass? For some POTWs the overflows occur on the interceptor upsewer of the wwtp. For some the overflow may only occur just at the headworks of the wwtp. If the interceptor becomes full or surcharged during extreme wet weather events the wwtp may not be able to pump all flow into the treatment works, or the flow may be so high for so long that they must cut back to prevent solids from washing out of biological processes.

Bruce E. Goff, P.E. Supv.
Division of Surface Water/Permit Section
Ohio EPA
Southeast District Office
2195 Front Street Logan, Ohio 43138
phone: (740) 380-5238
FAX: (740) 385-6490

>>> Linda Eichmiller <l.eichmiller@asiwpca.org> 12/21/01 >>>
We have finally got to the point where USEPA is requesting comments on their
OWM draft guidance -- Merry Christmas! Please send your comments to

Kevin
at USEPA with a copy to me. I will keep the Task Force leadership in the
loop. If you feel that the Task Force or the Association needs to do something (or get together with or without USEPA on a conference call) let
me know. The comment deadline is January 21.

-----Original Message-----
From: Weiss.Kevin@epamail.epa.gov [mailto:Weiss.Kevin@epamail.epa.gov]
Sent: Friday, December 21, 2001 2:18 PM
To: L.Eichmiller@ASIWPCA.org
Subject: Draft Guidance - Wet Weather Issues

Linda:

We are working on draft guidance that we would like State input on. Please let me know if you could forward this to the State NPDES Directors. Thanks.

Attached for your review and comment is a draft memorandum that provides Environmental Protection Agency guidance regarding National Pollutant Discharge Elimination System requirements specifically related to publicly owned treatment works (POTWs) and wet weather conditions for the following three situations:

1) Discharges from emergency overflow structures located within municipal sanitary sewer collection systems;

2) Discharges from physical/chemical treatment processes used exclusively for treating peak excess flows in a
sanitary sewer collection system; and

3) Wet weather treatment scenarios at POTW treatment plants.

(See attached file: cover.wpd)(See attached file: Wet weather issues.wpd)

We are asking for comments by January 21. Thanks and have a great and blessed holidays.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

SEP 05 2002

Mr. Alton Boozer, Chief
Bureau of Water
SCDHEC
2600 Bull Street
Columbia, SC 29201-1708

SUBJECT: Objection to NPDES Permit
WCRSA/Mauldin Road WWTP, NPDES No. SC0041211

Dear Mr. Boozer:

This letter responds to your July 9, 2002, request for the Environmental Protection Agency (EPA) to review and comment on the proposed draft National Pollutant Discharge Elimination System (NPDES) permit for the Western Carolina Regional Sewer Authority (WCRSA) Mauldin Road Wastewater Treatment Plant (WWTP). We are continuing our review of this permit within the 90-day review period provided by 40 C.F.R. §123.44(a), as previously discussed with your staff. In accordance with the EPA/SCDHEC Memorandum of Agreement (MOA), we have concluded our review and have identified an issue which serves as an objection to the issuance of this permit.

The Mauldin Road WWTP permit application schematic identifies a wet weather treatment train consisting of a 15 million gallon (MG) equalization basin, an 8 MG daily/wet weather flow equalization basin, and a 12 MG emergency storage basin. This wet weather treatment train will route wet weather flows around the aeration and final clarification. It is proposed that this flow will receive primary treatment, be equalized, disinfected, filtered, and then will be blended with the tertiary facility effluent prior to discharging to the Reedy River.

Given this scenario, in a letter dated May 22, 2002, EPA offered two permitting strategies to address the wet weather flow. The first alternative was for WCRSA, the permittee, to report the wet weather flows that are routed around the biological treatment units of the WWTP as either bypasses or upsets. We understand that the permittee does not want to utilize this option. In consideration of the second alternative, if WCRSA intends for the peak flow facility to achieve a level of treatment equivalent to secondary, then the proposed permit must be revised to include appropriate limitations and monitoring requirements consistent with secondary treatment for each treatment train.

EXHIBIT
6

NOTE

Subject: Controls for Peak Flows at POTW Plants

From: Stephen Sweeney, OGC/WLO

To: Gary Prichard, ORC/Region V
Ross Brennan, OW/OWM
Alan Morrissey, OECA/ORE
Kevin Weiss, OW/OWM

On February 26, 1998, the Region V Water Management Division Director sent a memorandum to Eric Schaeffer, Mike Cook, and Susan Lepow seeking input from Headquarters regarding interpretation and application of NPDES regulations under a specific set of circumstances associated with operation of a POTW treatment plant. The circumstances -- rerouting and recombination of peak, wet weather flows exceeding the capacity of biological (secondary) clarifiers -- are predicted to occur with increasing frequency given provisions of the 1994 CSO Control Policy that call for maximizing flows to the POTW plant for primary treatment. You have requested OGC input; the following provides our analysis based on discussions with you to date.

The Problem

POTWs want to route excess peak (wet weather) flows around the biological "secondary" treatment unit (e.g., activated sludge) and recombine such flows with "secondarily treated" waste waters prior to discharge. The POTWs estimate the recombined flows would still meet effluent limits for secondary treatment, which are expressed, in part, as weekly and monthly average values.

The Issue

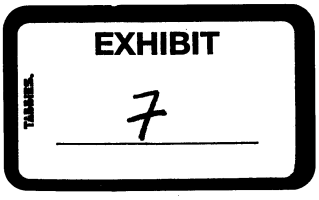
Whether the peak flow routing and recombination constitutes "bypass" under federal NPDES regulations?

Suggested Interpretations

In our discussions, various offices have proposed essentially two different ways to answer this question. Those two approaches are detailed below. After reviewing relevant regulatory provisions, preambles, and caselaw, we believe that the two approaches are not mutually exclusive and, ultimately, recommend a hybrid approach.

Approach 1 ("Always a Bypass"): Yes, rerouting and recombination constitutes bypass because waste streams are intentionally diverted from the biological portion of the treatment facility during wet weather.

A. Bypass means the intentional diversion of waste streams from any portion



The draft permit does include the monthly 85% minimum removal requirement for BOD_5 and Total Suspended Solids (TSS) from the influent headworks through the effluent filters of the wet weather side stream process; however, it does not impose the remaining secondary treatment standard requirements on this treatment train prior to blending. EPA's objection lies in that the permit does not include the secondary treatment numeric limits for BOD_5 and TSS and that the percent removal limit in the permit only applies to the first four uses of this treatment train. Also, the monitoring location for the wet-weather treatment train should be given a distinct outfall serial number, i.e., 001a, to more clearly define it in the permit.

As per 40 C.F.R. § 123.44(c), EPA objects to the issuance of this permit. Should the objections expressed above not be addressed within 90 days of receipt of this letter, jurisdiction to issue the permit will transfer to EPA. We ask that you redraft the permit and submit a proposed final NPDES permit to EPA for review under the provisions of Section III.B.3 of the MOA. If you have any questions, please contact Gina Fonzi, P.E. of my staff at (404) 562-9301 or fonzi.gina@epa.gov .

Sincerely,

Beverly H. Banister, Director
Water Management Division

cc: Ray T. Orvin, Jr., Executive Director, WCRSA
Jeff deBessonet, SCDHEC
Kevin B. Smith, EPA, OLS

NOTE

Subject: Controls for Peak Flows at POTW Plants

From: Stephen Sweeney, OGC/WLO

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The Issue

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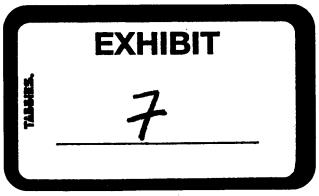
Suggested Interpretations

In our discussions, various offices have proposed essentially two different ways to answer this question. Those two approaches are detailed below. After reviewing relevant regulatory provisions, preambles, and caselaw, we believe that the two approaches are not mutually exclusive and, ultimately, recommend a hybrid approach.

Approach 1 ("Always a Bypass"): Yes, rerouting and recombination constitutes bypass because waste streams are intentionally diverted from the biological portion of the treatment facility during wet weather.

A. Bypass means the intentional diversion of waste streams from any portion



of a treatment facility. 40 CFR 122.44(m). Under the CSO Control Policy, "treatment facility" means the POTW treatment plant. The majority of the time a POTW is operational (dry weather conditions), flows pass through biological treatment, also known as secondary clarifiers, thus, biological treatment constitutes a "portion of the treatment facility."

B. CSO Control Policy refers to "CSO-related bypass" in the discussion of one component of Long Term Control Plans: Maximizing Treatment at the Existing POTW Treatment Plant.

The Policy explains that, for "some CSO-related permits, the study of feasible alternatives in the control plan may provide sufficient support for the permit record and for approval of a CSO-related bypass in the permit itself." 59 Fed. Reg. at 18693. The Policy also explains that, for "approval of a CSO-related bypass, the long-term CSO control plan, at a minimum, should provide justification for the cut-off point at which the flow will be diverted from the secondary treatment portion of the treatment plant, and provide a benefit-cost analysis demonstrating that the conveyance of wet weather flow to the POTW for primary treatment is more beneficial than other CSO abatement alternatives such as storage and pump back for secondary treatment, sewer separation, or satellite treatment." Id.

C. The bypass regulation explicitly allows a permittee to allow a bypass which does not cause effluent limitations to be exceeded, but only if it is also for essential maintenance to assure efficient operation. 40 CFR 122.41(m)(2). Rerouting and recombination of flows may not be necessary "for essential maintenance" under the circumstances POTWs would seek to reroute and recombine. The primary purpose for recombination would be to ensure compliance with monthly average limits, which would not be met if rerouted flows were discharged prior to recombination.

D. NPDES permits indirectly regulate discharges of some pollutants based on the assumption that all treatment processes will be operated at all times and under all conditions, even though permittees are not required to monitor for such indirectly regulated pollutants. In deciding not to establish categorical pretreatment standards for some pollutants, EPA relies on biological treatment of industrial wastes at a well-operated POTW achieving limitations based upon secondary treatment. Authorization of "removal credits" is also based on comparison of influent and effluent at the POTW plant.

Approach 2 ("Not a Bypass"): No, rerouting and recombination is not a bypass provided the permit application explicitly describes the circumstances during which the rerouting/recombination would occur, and the permit contains provisions recognizing those circumstances.

A. Bypass means intentional diversion of waste streams from any portion of the treatment facility. The bypass regulation does not define the term "treatment facility." The CSO Control Policy does not specify that the reference to

"treatment facility" in the bypass regulation means POTW treatment plant under all operating conditions.

B. Neither the CWA nor NPDES regulations specify particular treatment technology or treatment processes. Nothing in NPDES regulations requires that all flows entering a POTW actually receive secondary treatment, only that such flows meet limits based upon secondary treatment. NPDES permits impose numeric effluent limitations "end-of-pipe," except when derivation of such limitations is infeasible.

The D.C. Circuit sustained the bypass regulation against an industry challenge that the provision dictated specific treatment technologies and prescribed specific, uniform "best technology." NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987). The Court interpreted the bypass provision merely to require that the applicable treatment technology "be operated as designed." 822 F.2d at 124. See also AISI v. EPA, 115 F.3d 979, 996 (D.C. Cir. 1997)(in rejecting water quality-based regulation of internal waste streams, the Court noted that "by authorizing the EPA to impose effluent limitations only at the point source, the Congress clearly intended to allow the permittee to choose its own control strategy.")

C. NPDES permit application regulations require a topographic map depicting the "facility," including each of its "discharge structures." 40 CFR 122.21(f)(7). The permit applicant, therefore, has the opportunity to depict its "facility."

D. EPA's April 1996 policy on "Scope of Discharge Authorization and Shield Associated with NPDES Permits" explains that material submitted during the application process and information in the public record accompanying the permit provide important bases for authorization to discharge. The policy is premised on the availability of information to the permit writer (including waste streams, operations, and processes), who relies on that information in development of a permit.

E. The bypass regulation addresses facility operation, not facility design. "The regulation thus requires permittees to operate their entire treatment facility at all times." 40 Fed. Reg. 37998, 38036 (Sept. 26, 1984).

The 1984 bypass preamble explained that "[s]easonal effluent limitations which allow the facility to shut down a specific pollution control process during certain periods of the year are not considered to be a bypass. Any variation in effluent limits accounted for and recognized in the permit which allows a facility to dispense with some unit processes under certain conditions is not considered bypassing." 40 Fed. Reg. at 38037.

F. Whether a recombined discharge complies with limits does not answer the question of whether a bypass exists. The "bypass not exceeding limitations"

provisions [40 CFR 122.41(m)(2)] are not relevant to determining whether the wet weather routing pattern is still the "treatment facility."

OGC Recommendations

The bypass regulation is not a model of clarity on these issues, so OGC recommends preparation of written guidance explaining any resulting Agency decisionmaking in order to inform affected parties. We believe that the recommendation described below can be accomplished through guidance, i.e., without a change in existing regulations, because it harmonizes the regulation and case law. As indicated above, both approaches derive from the text of the regulations; thus, the two approaches are not mutually exclusive.

We believe the better reading of applicable regulations and case law would be a hybrid of the two approaches that:

- If the permit (or, at least, the permit application) is silent on peak flow routing circumstances, then the better reading of the bypass regulation would be Approach 1. Thus, rerouting excess flows and recombining prior to discharge would constitute "bypass" unless the permit application describes that the "treatment facility" operates (by rerouting and recombination) under peak flow conditions.

- If, however, the permit application identifies the different operating conditions (associated with "normal" and with "peak" flows) and if the permit accounts for the differential conditions in the permit, then Approach 2 represents a better reading of the bypass regulation as interpreted through case law. A permit application describing differential operation of a "treatment facility" during peak flow conditions should characterize the effluent under both "normal" and "peak flow" routing conditions. Authorization of such discharges, however, need not apply evaluation criteria for approved anticipated bypass at 40 CFR 122.41(m)(4)(ii).

- If peak flow effluent (rerouted and recombined) differs significantly from normal flow effluent, seasonal effluent limitations may be necessary for water quality-based effluent limitations. Seasonal effluent limitations would not be necessary, however, for compliance with the technology-based secondary treatment standard because all flows that pass through the headworks of a POTW plant would need to meet limits based upon secondary treatment prior to discharge.

- Given the Agency's assumptions (and underlying administrative record) regarding removal of toxic pollutants at well-operated POTW plants achieving secondary treatment, any EPA guidance discussing rerouting/recombination should also address any data needs necessary for calculating removal credits. For example, the Agency should determine, as a technical matter, whether

POTWs with such configurations will be able to rely on the national database (the 40 POTW study used to support the removal credits rulemaking) or whether such POTWs must develop individualized databases to determine toxic pollutant removal efficiencies under peak flow/recombination conditions. In addition, the Agency will need to consider whether to adjust nationally-applicable determination regarding "pass through" for the purposes of establishing categorical pretreatment standards.

- We are available to discuss.

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

OCT 17 2002

OFFICE OF
WATER

Gary Cohen
Hall & Associates
Suite 203
1101 15th Street, N.W.
Washington, D.C. 20005-5004

Dear Mr. Hall:

This is in response to your Freedom of Information Act request of September 17, 2002. The United States Environmental Protection Agency (EPA) has assigned this request the number HQ-RIN-02511-02. In your letter, you requested EPA's records pertaining to comments on a memorandum dated December 21, 2001 entitled "Review of Memorandum Addressing NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions".

In response, I have enclosed the following:

1. January 22, 2002 letter from MI Department of Environmental Quality
2. Letter from NJ, Department of Environmental Protection
3. February 12, 2002 letter from New York State Department of Environmental Conservation
4. January 29, 2002 letter from Oregon Department of Environmental Quality
5. January 17, 2002 letter from Wisconsin Department of Natural Resources
6. January 22, 2002 email from Carl Parrott, Oklahoma Department of Environmental Quality
7. January 18, 2002 email from Eric Beck, Rhode Island Department of Environmental Management
8. January 18, 2002 memorandum from South Carolina Department of Health and the Environment.
9. February 5, 2002 email from Tom Killeen, Louisiana Department of Environmental Quality
10. January 29, 2002 email from Bruce Goff, Ohio Environmental Protection Agency

EXHIBIT
8

11. January 31, 2002 letter from Pennsylvania Department of Environmental Quality

12. February 8, 2002 letter from Natural Resources Defense Counsel

13. January 10, 2002 letter from the Association of Metropolitan Sewerage Agencies

14. February 12, 2002 letter from Lower Paxton Township, Pennsylvania

15. February 19, 2002 letter from Tennessee Water Quality Managers Association

16. March 7, 2002 letter from Water Environment Federation

17. February 13, 2002 email from Nancy Stoner to Kevin Weiss

18. February 20, 2002 email from Kevin Weiss to Nancy Stoner

19. February 21, 2002 email from Susan Bruninga, reporter for BNA, to Kevin Weiss.

20. February 21, 2002 email from Kevin Weiss to Susan Bruninga.

We are unable to provide with the following documents because they are exempt from mandatory disclosure by virtue of 5 U.S.C. 552(b).

A. February 4, 2002 memorandum from Eric Hall, Michael Wagner, EPA Region 1

B. January 12, 2002 comments from EPA Region 2

C. Comments from Rebecca Hanmer, EPA Region III

D. January 18, 2002 comments from EPA Region 4

E. Markup and comments of December 21, 2001 draft memorandum from EPA Region 5

F. January 12, 2002 memorandum from Jane B. Watson, Ph.D, EPA Region 6

G. February 7, 2002 comments from EPA Region 7

H. January 25, 2002 comments from EPA Region IX

I. February 7, 2002 comments from EPA Region 10

J. February 27, 2002 comments EPA's Office of Regulatory Enforcement

K. March 7, 2002, comments from EPA's Office of General Counsel

L. February 14, 2002 comments from Jim Laity of the Office of Management and Budget

You may appeal this denial by addressing, within 30 days of your receipt of this letter, your written appeal to the Freedom of Information Officer (A-101), United States Environmental Protection Agency, 1200 Pennsylvania Avenue N.W., Washington, D.C. 20460.

Please call me at (202) 564-0612 if you have any questions regarding our response.

Sincerely,

Benita Best-Wong, Chief
Municipal Branch

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

MAY 14

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John C. Hall
Hall & Associates
Suite 203
1101 15th Street, N.W.
Washington, D.C. 20005-5007

RE: Freedom of Information Act Request
03-RIN-01133-99

Dear Mr. Hall:

This is in response to your Freedom of Information Act ("FOIA") request of March 26, 1999, regarding information relating to the blending of effluent flows under wet weather conditions pursuant to a National Pollutant Discharge Elimination System (NPDES) permit in general, and specifically as it relates to the Upper Moreland/Hatboro Joint Sewer Authority NPDES permit, along with related information.

Enclosed you will find copies of some of the documents responsive to your request.

We are unable to provide you with the documents, or portions of documents, which have been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. § 552(b)(5), which covers interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency and/or 5 U.S.C. § 552 (b)(7) as records or information compiled for law enforcement purposes. In addition, I have determined that the public interest would not be served by the release of this information at this time. An itemized list of the withheld material, along with the basis for withholding, is provided on the enclosure to this letter.

In your letter you also requested the list of all the permittees in Pennsylvania that have applied for an NPDES permit under which blending of effluent streams prior to discharge during wet weather periods was approved or denied. The Agency has no record responsive to this request.

EXHIBIT
TABBIES
9

You may appeal this partial denial by submitting a written appeal to:

Freedom of Information Officer (A-101)
United States Environmental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460

This appeal must be submitted within 30 days of receipt of this partial denial. Your appeal should refer to the RIN number referenced above, the date of this determination, and my name, title and address.

Please contact Brian Trulear, of the PA/DE Branch, Office of Watersheds in the Water Protection Division, at (215) 814-5723 should you have any questions concerning this matter.

Sincerely,

W. Michael McCabe
Regional Administrator

Enclosure

ENCLOSURE TO FOIA REQUEST
03-RIN-01133-99
LIST OF WITHHELD INFORMATION

1. Hard copy of computer message, dated March 5, 1999, from Stephen Field, Chief, Water and General Law Branch, Office of Regional Counsel (ORC), Environmental Protection Agency (EPA), Region III, to Evelyn MacKnight, Chief, PA/DE Branch, EPA, Region III and Brian Trulear, Environmental Engineer, Water Protection Division, EPA, Region III, commenting on a draft letter to Upper Moreland-Hatboro Joint Authority (UMHJA) regarding an upcoming meeting. One page. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

2. Notes of meeting with Evelyn MacKnight, Steve Field, Brian Trulear and Deane Bartlett, Attorney, ORC, EPA, Region III, dated February 25, 1999, by Deane Bartlett, re: status of UMHJA permit objection. One page. This document is protected under the Deliberative Process and Attorney-Client Privileges of 5 U.S.C. § 552(b)(5).

3. Notes of telephone conversation with Steve Sweeney, Attorney, Office of General Counsel (OGC), EPA Headquarters (HQ), Washington, D.C., dated February 22, 1999, by Deane Bartlett, re: bypass. One page. This document is protected under the Deliberative Process and Attorney-Client Privileges of 5 U.S.C. § 552(b)(5).

4. Fax dated January 14, 1999, from Gary Prichard, Attorney, EPA, Region V, to Deane Bartlett, including two documents. 1) Memorandum, dated February 26, 1998, from Jo Lynn Traub, Director, Water Division, U.S. EPA, Region V, to Eric V. Schaeffer, Director, Office of Regulatory Enforcement, Michael B. Cook, Director, Office of Wastewater Management and Susan G. Lepow, Associate General Counsel, re: Combined Sewer Overflows Policy - Region 5 Position on Recombination prepared in advance of a meeting to discuss recombination. Three pages. 2) Memorandum, dated February 20, 1998, from Gail C. Ginsberg, Regional Counsel, to Jo Lynn Traub, re: legal analysis and discussion of Office of Enforcement and Compliance Assurance (OECA) position on bypass. Nine pages. These documents are inter-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

5. Notes of conference call with Steve Sweeney, dated December 8, 1998, by Deane Bartlett, re: discussion of bypass and Combined Sewer Overflows (CSO)/Separate Sewer Overflows (SSO) proposals. Three pages. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

6. Hard copy of a computer message, dated December 1, 1998, from Philip Yeany, Attorney, ORC, EPA, Region III, to Deane Bartlett, re: draft OGC opinion on recombination. One page. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

7. Hard copy of a computer message, dated November 23, 1998, from Steve Sweeney, to Deane Bartlett, attaching a document from Stephen Sweeney, to Gary Prichard, Ross Brennan, OWM, Alan Morrissey, Office of Enforcement Compliance Assurance (OECA)/Office of Regulatory Enforcement (ORE) and Kevin Weiss, OWM, undated, re: the OGC views on controls for peak flows at POTW. Four pages (double sided). These documents are inter-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

8. Hard copy of a computer message, dated November 23, 1998, from Richard Alonso, Attorney Advisor, OECA, ORE, Water Enforcement Division, EPA HQ, to Deane Bartlett, re: permittee request to allow a wet weather facility to discharge after some primary treatment. One page. This document is inter-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

9. Hard copy of a computer message, dated November 23, 1998, from Steve Sweeney, to Richard Alonso, re: approved anticipated bypasses. One page. This document is inter-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

10. Notes of conference call with Martha Blasberg, Attorney, Office of Chief Counsel, Pennsylvania Department of Environmental Protection (PADEP), Southeast Regional Office, Conshocken, PA, Deane Bartlett, Jim Newbold, Chief, Water Permits, PADEP, Southeast Regional Office and Brian Trulear, dated November 19, 1998, by Deane Bartlett, re: reflecting strategy discussions regarding resolution of EPA's objection to draft UMHJA NPDES permit. Two pages. This document is inter-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

11. Hard copy of computer messages: 1) dated December 8, 1997, from Philip Yeany, to Brian Trulear and Evelyn MacKnight, forwarding a message dated December 3, 1997, from Steve Sweeney, to Philip Yeany, re: EPA Region 5 and Region 9's position on bypasses. One page. These messages are inter-agency records containing deliberations and conclusions and therefore are exempt under 5 U.S.C. § 552(b)(5). These messages are also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

12. Hard copy of a computer message, dated November 17, 1997, from Gary Prichard, to Joseph Theis, Attorney Advisor, OECA, Atal Eralp, Engineer, OECA/ORE and Alan Morrissey, attaching a memorandum. Attached memorandum is undated, from Michael G. Smith, Associate Regional Counsel, Office of Regional Counsel and Jose Cisneros, Chief, Water Enforcement and Compliance Assurance Branch, to Brian Maas, Director, Water Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, re: interpretations of the bypass regulations. Two pages. Attached to the memorandum is a document entitled, "Outline of Region 5 Argument regarding Bypass," undated, author unknown. Five pages. These documents are intra-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). These documents are also records or information compiled for law enforcement purposes and are protected under 5 U.S.C. §552(b)(7). These documents are also protected under the Attorney-Client Privilege and Attorney-Work Product (because it relates to referral of a case to the Department of Justice) of 5 U.S.C. § 552(b)(5).

13. Notes on conference call among EPA Headquarters, EPA Region 3, PADEP and representatives of UMHJA, dated July 2, 1997, by Deane Bartlett, re: UMHJA permit objection. Three pages. This document contains the thoughts of the author and is therefore an intra-agency record containing deliberations and conclusions exempt under 5 U.S.C. § 552(b)(5).

14. Notes, dated June 30, 1997, on conference call with Kevin Weiss, Kevin Bell, Environmental Scientist, OECA/ORE, Water Enforcement Division, Evelyn MacKnight and Brian Trulear by Deane Bartlett, prior to meeting/conference call among EPA Headquarters, EPA Region 3, PADEP and UMHJA re: permit objection. One page. This document is protected under the Attorney-Client Privilege and the Deliberative Process Privilege of 5 U.S.C. § 552(b)(5).

15. Hard copy of a computer message, dated June 18, 1997, from Deane Bartlett, to Evelyn MacKnight, explaining the results of a meeting with PADEP regarding EPA's objection to UMHJA's permit. One page. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

16. Hard copy of a computer message, dated June 6, 1997, from Kevin Weiss, to Evelyn MacKnight and Brian Trulear, re: topics for meeting with UMHJA (which was held on July 2, 1997) with analysis of those topics. Two pages. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

17. Hard copy of a computer message, dated June 5, 1997, from Deane Bartlett, to Evelyn MacKnight and Brian Trulear, re: topics for a meeting with UMHJA with analysis of those topics. One page. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

18. Notes, dated June 5, 1997, on conference call with Kevin Weiss and Steve Sweeney by Deane Bartlett, re: strategy for upcoming meeting with UMHJA. Two pages. This document is protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

19. Notes, dated June 4, 1997, on telephone call with Kevin Weiss, by Deane Bartlett, re: UMHJA request for meeting with Office of Water, EPA Headquarters. Two pages. This document is protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

20. Notes, dated June 4, 1997, on telephone conversation with Martha Blasberg, by Deane Bartlett, re: discussion of limits in UMHJA permit. This document is protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

21. Notes on meeting with Jim Newbold, Doug White, Attorney, PADEP, Martha Blasberg, Steve Field, Chris Pilla, Acting Branch Chief, NPDES, Brian Trulear and Evelyn MacKnight, dated April 28, 1997, by Deane Bartlett, re: resolution of EPA objection to UMHJA permit. One page. This document is protected under the Attorney-Client Privilege and the Deliberative Process Privilege of 5 U.S.C. § 552(b)(5).

22. Notes, dated March 26, 1997, on telephone conversation with Martha Blasberg, by Deane Bartlett, re: matters related to EPA objection to UMHJA permit. One page. This document is protected under the Attorney-Client Privilege and the Deliberative Process Privilege of 5 U.S.C. § 552(b)(5).

23. Document, untitled, dated March 10, 1997, written by Brian Trulear, re: background on UMHJA permit objection and UMHJA request for public hearing. Two pages. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

24. Hard copy of a computer message, dated January 31, 1997, from Brian Trulear to Lynnette Elser, Environmental Protection Specialist, Water Protection Division, EPA Region III, discussing EPA HQ questions regarding facts related to the UMHJA NPDES permit amendment to which EPA Region III objected. One page. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

25. Hard copy of two computer messages, both dated January 30, 1997, from Brian Trulear, to Lynnette Elser, discussing EPA HQ questions regarding facts and analysis related to the UMHJA NPDES permit amendment to which EPA Region III objected. One page. These documents are intra-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

26. Hard copy of a computer message, dated November 20, 1996, from Carol Amend, Associate Director of Compliance and Enforcement, Water Protection Division, EPA Region III, to Joe Piotrowski, Associate Director of Watersheds, EPA Region III, Evelyn MacKnight, Robert Koroncai, Chief, VA/WV Branch, Water Protection Division, EPA Region III, Elaine Harbold, Environmental Scientist, EPA Region III, Lynnette Elser, Lori Reynolds, Chief, NPDES Branch, Water Protection Division, EPA Region III, re: request from Tim Drier, PADEP, Pittsburgh, requesting EPA position on a request from a permittee to bypass treatment limits during wet weather. One page. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

27. Hard copy of a computer message, dated November 20, 1996, from Bill Colley, Environmental Engineer, Water Protection Division, EPA Region III, to Lynnette Elser, re: PADEP questions regarding diversion of wet weather flows from treatment facility. Three pages. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

28. Memorandum, undated, from Bertam C. Fey, Acting Regional Counsel (Region not specified) and Jo Lynn Traub, Director, Water Division, to Susan Lepow, Associate General Counsel, EPA HQ, requesting Headquarter's Office of General Counsel's legal opinion on the bypass regulation at 40 CFR 122.41(m). Five pages. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5). This document is also protected under the Attorney-Client Privilege of 5 U.S.C. § 552(b)(5).

29. Draft letter, undated, author unknown, to Tim V. Drier, Regional Manager, Water Management, PADEP, Pittsburgh, responding to his March 12, 1997 letter (released) concerning bypass, combined sewer overflow and separate sewer overflow. Six pages. Letter never finalized. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

30. Document entitled "Discussion Options for Permit in Upper Moreland-Hatboro," undated, author presumed to be Kevin Weiss. Two pages. Also attached is a document entitled "notes on scenario 2 options," undated, author unknown explaining position on #2 option. These documents are inter-agency records containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

31. Notes, undated, by Deane Bartlett, re: the State and Headquarters' position on recombination. One page. This document is protected under the Attorney-Client Privilege and the Deliberative Process Privilege of 5 U.S.C. § 552(b)(5).

32. Notes on a meeting with Steve Field and Evelyn MacKnight, undated, by Deane Bartlett, re: resolution of UMHJA permit objection. One page. This document is protected under the Attorney-Client Privilege and the Deliberative Process Privilege of 5 U.S.C. § 552(b)(5).

33. Notes of EPA internal meeting, undated, by Deane Bartlett, re: February 4, 1997 letter from John Hall to Kevin Weiss. One page. This document is protected under the Attorney-Client Privilege and Deliberative Process Privilege of 5 U.S.C. § 552(b)(5).

34. Document entitled "Issues from Upper Moreland - Hatboro 1/27/97 letter," undated, author presumed to be Brian Trulear re: analyses of CSO and SSO policy. Two pages. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).

35. Untitled document, undated, author presumed to be Brian Trulear, analyzing information requested and received from Upper Moreland-Hatboro in 1997 and analyzing information needed to evaluate proposal for blended effluent. Handwritten notes, by Deane Bartlett, are on the bottom half of this document re: I/I and cost analysis. One page. This document is an intra-agency record containing deliberations and conclusions and therefore is exempt under 5 U.S.C. § 552(b)(5).