



Association of
Metropolitan
Sewerage Agencies

**TESTIMONY OF THE
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
(AMSA)**

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Presented by

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SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

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**Testimony of Christopher Westhoff
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on behalf of the
Association of Metropolitan Sewerage Agencies**

Introduction

Good morning Chairman Duncan, Congressman Costello, Congressman Thompson, and members of the Committee, my name is Chris Westhoff. I am an Assistant City Attorney for the City of Los Angeles and I have served as General Counsel to the City's Department of Public Works for over 20 years. I am also a Board member of the Association of Metropolitan Sewerage Agencies ("AMSA") and serve as AMSA's Secretary and as Chair of AMSA's Legislative Policy Committee. AMSA represents nearly 300 clean water agencies across the country. AMSA's members treat more than 18 billion gallons of wastewater each day and service the majority of the U.S. sewered population.

On behalf of AMSA and the City of Los Angeles, I would like to thank you, Chairman Duncan, and the members of this Committee for your continued commitment to clean water issues – in California and nationwide. Your dedication to solving the challenges our communities face across the nation, including in Los Angeles, is essential to achieving the goals of the Clean Water Act.

Our nation's streams, rivers, lakes and oceans are cleaner today than they have been in over half a century. This has been accomplished by the unparalleled efforts of the many cities, special districts, municipalities, and industries that discharge treated effluent into the waters of the United States. The backbone of the transformation of America's waters has been the Federal Clean Water Act.

Hundreds of billions of dollars have been spent by the federal government, states, industries, and cities around the country to bring our nation's waters to their current condition. And, we must continue to spend billions more to maintain the improvements we have achieved to date and to continue moving forward in the pursuit of improving the quality of our receiving waters.

Without question, the efforts of the governmental regulators entrusted with enforcement authority under the Clean Water Act – and in cases, the actions of citizens and environmental organizations stepping in when governmental regulators neglected to act – have contributed to our national water quality improvements. However, the natural tension between appropriate governmental regulatory action and citizen enforcement frequently has placed permitted entities like my City in a losing battle.

The drafters of the Clean Water Act clearly saw governmental enforcement against permitted dischargers as the critical element in the ultimate success of the intent of the Act. In the Act itself, citizen enforcement was designed to play a secondary, supplementary role, allowed only when the appropriate governmental regulators failed to diligently prosecute a permit holder for violations.

Yet today, the combination of court precedent and the U.S. Environmental Protection Agency's ("EPA's") narrow interpretation of its own regulations has skewed the intent of Congress concerning citizen enforcement. Today, permitted dischargers like my City, in California and across the country, routinely suffer the indignity, negative publicity, and substantial financial burden of having to respond to third party lawsuits brought by environmental activist groups for substantially the same violations addressed in prior enforcement actions by our regulators.

The concept of “double jeopardy” is fundamental in American jurisprudence. While not rising to the level of actually violating this foundational cornerstone, when a permitted discharger has already answered to its governmental regulator in an enforcement action, it is patently unfair for the permit holder to be required to address the same issues in a third party lawsuit filed under the citizen suit provisions of the Clean Water Act. When regulators diligently enforce, citizen suits should be precluded.

Nonetheless, Los Angeles just finished six years of litigation initially filed in 1998 by a third party citizen group, the Santa Monica Baykeeper, and ultimately joined years later by the EPA and the U.S. Department of Justice. This citizen suit was brought notwithstanding the fact that the City had settled an enforcement action for the same violations with our state permitting entity in the month immediately prior.

Because of its size and reputation, Los Angeles may not engender a lot of sympathy when it finds itself as the victim of a lawsuit filed by an environmental group. However, if it can happen to Los Angeles, it can happen to any other permitted discharger – industrial, special district, or municipality – large or small across this nation.

Los Angeles has a municipal wastewater collection system that consists of close to 7,000 miles of pipe ranging from six inches to over 12 feet in diameter. In the winter of 1998 Los Angeles experienced an “El Nino” climatic condition which resulted in one of the wettest winters in 120 years of recording such statistics. In the month of February 1998 alone, we received over 14 inches of rain, the rainiest February on record. To put this in perspective, the average total rainfall for a year in Los Angeles is just over 15 inches.

Needless to say, the City's wastewater collection system was overtaxed and experienced overflows during this rainy winter. Close to 50 million gallons of wastewater spilled from the City's pipes in Winter 1998. The good news in this experience was that even with the incredible amount of rain we experienced, the wastewater that spilled from the system was confined to six distinct locations in the City – and projects to remediate these six locations were already underway. I know 50 million gallons seems like a large number, but to give you a frame of reference, Los Angeles transports close to 190 billion gallons of wastewater a year – so even in this extraordinarily wet year, the City still only spilled less than ½ of one percent (.005 percent) of all the wastewater collected that year, and kept 99.995 percent of the wastewater in the pipes.

The City's permitting regulator sought to enforce against the City for these spills as well as other small spills caused by root and grease blockages. In September 1998, the City agreed to settle the enforcement action by agreeing to a Cease and Desist Order from the regulator and paying an \$850,000 penalty (\$200,000 in cash and \$650,000 in environmental projects). Further, Los Angeles agreed to construct major sewer projects totaling over \$600 million on an accelerated schedule of just over six years. One project alone was the largest single public works project ever awarded by the City of Los Angeles at just over \$250 million for a 12 foot diameter mainline sewer tunnel. This project was built in a compressed timeframe through the simultaneous use of four tunnel boring machines, the first time this was ever done.

In October of the same year, the Santa Monica Baykeeper held a press conference and announced their lawsuit concerning the exact same sewer spills addressed by the Cease and Desist Order issued by the City's permitting regulator just one

month before. You may wonder why the Baykeeper's suit was not precluded by our prior settlement. Because all they had to allege is that the City would have future spills – while our remediation projects were underway – and their case could proceed. To complicate matters, in January 2001, the EPA, through the Department of Justice, filed yet another lawsuit – this one covering the same spills as the Cease and Desist Order and the Baykeeper lawsuit, and adding on small spills that had occurred between 1998 and 2001.

It is important to note that in the six years since the 1998 “El Nino” winter, Los Angeles has had only four wet weather related spills. All other spills during that time frame have been caused by root and grease blockages. Also, in the six years since 1998, the average yearly volume of wastewater spilled out of the Los Angeles collection system has been one ten thousandth of one percent (.000001%) of the total volume collected. That is a pretty good batting average in any league except the Clean Water Act. You see, EPA's interpretation of its own Clean Water Act regulations is that all spills from a separate sanitary sewer collection system are flatly prohibited, regardless of volume, cause, or impact on water quality.

Even with our comprehensive maintenance program, a municipal wastewater collection system works at its heart like your pipes at home – only our systems are dramatically larger with more potential spill points. When do you call Roto Rooter® out to your house, before or after you have a backup? And, unlike a homeowner who can stop running water when they have a blockage in their line to prevent a spill out of a toilet, sink or bathtub; the wastewater in our pipes keeps coming 24 hours a day, seven days a week, and 52 weeks a year.

EPA has publicly documented that even the best run, best maintained separate City sewer systems will overflow. And yet, using a strained regulatory and legal analysis, EPA and enforcement authorities take a strict liability approach to these inevitable overflows. This makes every community with separate sewers an easy target for enforcement by third party plaintiffs.

The hard dollar cost to my City of our recent citizen suit experience – and let me reiterate that we were sued after we had been diligently enforced against by our regulator – reads like this: City’s outside attorney fees, almost \$5 million; Baykeeper attorney fees, \$1.6 million; other citizen intervenors attorney fees, over \$400,000; penalties, \$800,000 (cash), \$8.5 million (environmental projects). And this figure does not account for the incredible amount of staff time spent supporting the litigation effort and diverting staff from their core responsibilities. I can attest that this duplicative citizen suit did not yield additional environmental benefit to the citizens of Los Angeles – although it is the citizens’ money that ultimately pays for needless litigation and attorneys fees through rising sewer rates.

Let me be clear. No one is asking that citizen suits go away. As responsible environmental stewards, we realize that the citizen suit provision of the Clean Water Act is a powerful and necessary tool – to fill enforcement gaps. Where a regulator is not diligently enforcing the Clean Water Act, citizen suits are a critical and important secondary source of Clean Water Act enforcement. However, where Congress’ intended prime Clean Water Act enforcer has done or is doing its job, municipalities need protection from redundant third party lawsuits that will raise the cost of the clean water services we provide.

Let me conclude by stating that AMSA would welcome the opportunity to work with this Subcommittee to discuss ways to focus future third party lawsuits against municipalities where Congress intended them – where there is an enforcement gap. I note that some of the witnesses today will offer the Subcommittee specific reforms to begin this dialogue. We will be pleased to contribute to the process.

Again, I thank you for your attention to this important issue. At this time, I would be happy to answer any questions.