



Congress of the United States
House of Representatives
Washington, DC 20515

January 7, 2004

The Honorable Mike Leavitt
Administrator
U.S. Environmental Protection Agency
1101A, Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Leavitt:

We are writing regarding the Environmental Protection Agency's (EPA) proposed policy entitled "National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Wastewater Treatment Discharges During Wet Weather Conditions," which was published in the Federal Register on November 7, 2003 (68 FR 63042) (EPA Water Docket, ID# OW-2003-0025). This policy would address the engineering design practice of "blending" at publicly owned treatment works (POTWs) during periods of high flow caused by rainfall or snowmelt. Briefly, "blending" involves mixing partially treated and fully treated effluent during peak wet weather flows to avoid overloading a facility's treatment units. The facility continues to meet its NPDES permit limits while engaging in this practice.

We are pleased that EPA sees the need for, and has finally articulated, a national policy on the practice of blending, and has reaffirmed, in its proposed guidance document, its longstanding position that blending is an acceptable and protective means for addressing peak wet weather flows at POTWs (see 68 FR 63049-50). This longstanding practice offers a sound environmental alternative to discharges of untreated sewage into our nation's waters by ensuring that peak excess flows receive proper treatment that, without blending, would not be achieved.

We agree with EPA that blending is a well-recognized, and widely used, plant design practice for managing peak wet weather flows in a manner that is both protective of human health and the environment and protective of a POTW's treatment units (see 68 FR 63042, 63045-46).

In addition, we agree that blending is not a prohibited "bypass" and could be authorized in an NPDES permit, as long as effluent limitations based on secondary treatment or any more stringent limitations necessary to attain water quality standards are met (see 68 FR 63049).

Unfortunately, however, the proposed blending policy also includes statements that are inconsistent with the policy clarifications noted above and create new back-door regulatory-type requirements by imposing new conditions on the use of blending.

For example, although the proposed policy acknowledges that the Clean Water Act (CWA) does not dictate the plant design to be used by a POTW to meet effluent limitations, the proposed policy would provide the permit writer authority to approve facility design, based on "generally accepted practices and long-term design" criteria. This standard is found nowhere in CWA regulations and is so ambiguous as to provide the permit writer complete authority to dictate plant design, which is beyond the authority granted in the CWA.

Similarly, although the proposed policy acknowledges that blending is not a prohibited practice, it purports to preclude blending for discharges into "sensitive" areas, including waters designated as public drinking water supplies, with shellfish beds, or for primary contact recreation, if physically possible and economically achievable. States determine the level of protection assigned to water bodies when they establish designated uses. The discharge limitations necessary to protect those water bodies are based on criteria established by States and incorporated into State water quality standards. If EPA believes that the State water quality standards are not protective, Section 303 of the CWA provides EPA with the authority to disapprove standards and impose Federal standards on a State, after a notice and comment rulemaking. EPA has no authority to establish more stringent water quality standards for a State through this or any other non-regulatory, non-binding guidance document.

Further, the proposed guidance appears to impose requirements on POTWs relating to operation and maintenance, infiltration and inflow, and monitoring that may go beyond existing regulatory requirements. Moreover, the proposed policy states that, if these additional requirements are not met, EPA would "continue" to interpret the "intentional diversion of waste streams from any portion of a treatment facility" at a facility to be a "bypass," subject to the restrictions of the bypass provisions in the facility's permit (68 FR 63050). This language eviscerates the proposed policy's intended clarification by stating that, if these new requirements are not met, blending will be considered an illegal bypass (see *id.*).

EPA's proposed blending policy is non-binding guidance and is not legally binding on any non-Federal entity. EPA cannot, through non-binding guidance, make blending illegal. Nor can EPA, by non-binding guidance, impose any new back-door requirements. This attempt to impose back-door requirements constitutes a rulemaking, without notice and comment, in violation of the Administrative Procedure Act.

The text of the proposed policy improperly attempts to impose legal consequences for failure to comply with the new back-door requirements outlined in it. Consequently, the proposed policy is an improper attempt at back-door regulation and should be revised to clearly state that it merely presents a safe harbor. The issue of back-door regulation has been a long-standing concern, as noted in House Report 106-1009, "Non-Binding Legal Effect on Agency Guidance Documents" (Oct. 26, 2000). A copy of House Report 106-1009 is enclosed for the record.

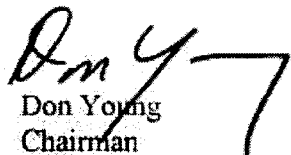
Finally, by structuring the proposed policy as a prohibition on blending, and by establishing new back-door regulatory-type requirements to be imposed at the discretion of the permitting authority, this proposed policy will lead to less, not greater, national consistency. As proposed, the policy invites the EPA Regions to ignore the policy and prohibit blending.


NPDES requirements, including those regarding blending, need to be applied in a nationally consistent manner. We note that some EPA regional interpretations have departed from this objective, by refusing to allow some utilities to flexibly design their wastewater treatment facilities to process wet weather flows, or (in the case of Regions III, IV, and VI) by initiating enforcement actions on utilities that blend. We are concerned that, despite EPA's intent to ensure national uniformity through this policy, some EPA Regions apparently intend to continue prohibiting blending. It is inappropriate to allow blending in some Regions, and prohibit it in others. This policy should make it clear to the Regions EPA's position that blending is an acceptable practice, and EPA needs to take further steps to ensure that the blending policy is implemented in a reasonable and consistent manner nationally.


The proposed national blending policy is an important step towards a reasonable and protective means for addressing peak wet weather flows at POTWs. The final policy should clarify that, as long as existing regulatory requirements and NPDES permit limits are met, blending constitutes an environmentally safe practice.

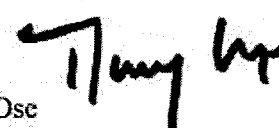
If you have any questions about this letter, please contact Susan Bodine or Jon Pawlow at (202) 225-4360, or Danielle Hallcom at (202) 226-2067.

Sincerely,


Don Young
Chairman
Committee on Transportation
and Infrastructure


Tom Davis
Chairman
Committee on Government Reform


John J. Duncan, Jr.
Chairman
Subcommittee on Water Resources
and Environment


Doug Osc
Chairman
Subcommittee on Energy Policy,
Natural Resources, and
Regulatory Affairs

Enclosure