



Defending the Planet One Beat at a Time

**102 Dogwood Lane
Pittsburgh, Pennsylvania 15237**

February 5, 2004

VIA U.S. CERTIFIED MAIL & ELECTRONIC MAIL

Water Docket
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Ave., NW
Washington, DC 20460
ATTN: Docket ID No. OW-2003-0025

OW-Docket@epa.gov

Re: Docket ID No. OW-2003-0025; National Pollutant Discharge Elimination System (“NPDES”) Permit Requirements for Municipal Wastewater Treatment Discharges during Wet Weather Conditions (68 FR 63042)

Dear Sir or Madam:

The members of Rock the Earth, a national nonprofit corporation, hereby submit comments on the proposed policy regarding NPDES permit requirements for treatment plants in publicly owned treatment works (“POTW”) under peak wet weather flow conditions that was published in the Federal Register on November 7, 2003 (68 FR 63042 – 63052) (hereinafter the “proposed policy”). The stated purpose of this proposed policy is to: (1) propose an interpretation of the bypass provision (40 CFR Part 122.41(m)) as it applies to alternative wet weather treatment scenarios at POTW treatment plants that involve blending; and (2) draft guidance on how such an interpretation should be implemented.

Rock the Earth (“RtE”) is a Pennsylvania nonprofit corporation with a national membership of concerned citizens who believe that the waters of the United States are critical to the maintenance and health of a sustainable and healthy environment and ecosystem, and are important for all forms of life. RtE’s membership includes many environmental professionals who practice in the fields of science, engineering, law, and

public policy. Several members of RtE are potentially affected by the proposed policy in that the streams and watersheds from which their drinking water originates may be directly impacted by untreated sanitary bypasses permitted by the proposed policy.

RtE has reviewed the proposed blending policy, supporting documents, and many of the public comments contained in the docket, including statements of support from the Water Environment Federation (“WEF”) and the Association of Metropolitan Sewerage Agencies (“AMSA”). In submitting these comments, RtE recognizes that:

- there are considerable technical and financial challenges associated with the management of wet weather flows at many municipal POTWs;
- there is a need for consistent national policies regarding NPDES permitting requirements; and
- such policies must be flexible enough to provide for a case-by-case assessment of what is technically feasible and appropriate in any given municipality or watershed.

That being said, however, RtE is generally opposed to the proposed policy. It is our opinion that the proposed policy:

- does not comply with either the Congressional mandated statutory requirements or the intent of the Federal Water Pollution Control Act, 33 USC §§1251 et seq. (“Clean Water Act” or “CWA”);
- inadequately protects human health and the environment; and
- is beyond the authority of Assistant Administrator Mehan – blended bypasses, while functionally necessary under certain circumstances, are illegal under the NPDES permitting requirements of the Clean Water Act; any change in this status must be made through the regulatory process, not through an EPA policy document.¹

RtE is concerned that the policy, as written, will create exceptions to the NPDES permit provisions of the CWA and result in an overall increase in the total discharge of nutrients, pathogens, and other wastewater constituents to our nation’s waterways. Instead of providing regulatory and/or financial incentive for municipalities to be proactive in addressing wet weather

¹ “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress,” Chevron, U.S.A. v. National Resource Defense Council, 467 U.S. 837, 842-43 (1984); National Resource Defense Council v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977). An agency simply may not interpret a regulation in a way that contravenes a statute. League of Wilderness Defenders, 309 F.3d 1181, 1190. The wording of the statute, legislative history and precedents are clear: ***EPA does not have the authority to exempt categories of point sources from the permit requirements of Section 402 of the CWA, 33 U.S.C. §1342. Id. citing Costle***, at 1374. (emphasis added). The Tenth Circuit has similarly reached the same conclusion: “[w]e believe it contravenes the intent of [the CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point.” U.S. v. Earth Sciences, 599 F.2d 368, 373 (10th Cir. 1979)

flow issues, the proposed policy will, in effect, provide a legal basis for either maintaining the status quo or worse by allowing additional insufficiently treated discharges to our nation's waters; the proposed policy is a potential threat to the environment, human health, and the economy.² RtE members will be directly affected by the proposed policy, as many live in communities where wet weather bypasses regularly occur.³

RtE presents the following comments, questions, and concerns about the impacts of the proposed blending policy:

- RtE recognizes that the issue of overloaded POTWs during wet weather events is a common problem for many municipalities in the United States. While many municipalities have drafted wet weather abatement plans and invested in new technologies and infrastructure, many more have outdated sewage facilities; such facilities pose both a short term and long term threat to the environment and human health. The proposed rule provides no timetable for infrastructure upgrades and no regulatory incentive to do so.
- RtE recognizes that to require municipalities to build or expand facilities to address wet weather events may be prohibitively expensive and place an unfair and disproportionate economic stress on certain communities. RtE suggests that more investment and financial incentives are required at the federal level in order to address problems with our nation's aging wastewater infrastructure – ignoring the problem by means of legalized exceptions is not an adequate long term solution.
- RtE recognizes that there are circumstances where a blended bypass without secondary treatment is a far better option than overloading a biological treatment system to the point where that may be inoperable or at reduced efficiency for an extended period of time. The proposed rule, however, is far too vague in defining those circumstances, as noted in several comments by WEF⁴ and others.
- While RtE believes that the proposed policy stands in violation of the full intent of the Clean Water Act, RtE supports the adoption of explicit disinfection measures for blended effluent (response to EPA specific request for comment on principle 5 – question 3 at 68 FR 63050). Disinfection, however, should not be viewed as a long term solution, nor should the regulations be codified to legalize bypasses that have been disinfected – the only viable long term solution is the elimination or minimization of blended bypasses and combined sewer overflows through infrastructure investment and comprehensive

² Sewage discharges contribute to waterborne illnesses, impact fisheries and shellfish habitats, and are a leading cause of beach closures.

³ For example, several RtE members are served by the Allegheny County Sanitary Authority (ALCOSAN) which typically experiences 60 to 70 overflow events per year, which often result in health advisories against recreational contact with impacted waterways.

⁴ For example, what constitutes a “peak wet weather condition” under which such bypasses are permissible is undefined. See also, WEF comment 2 (infiltration and inflow calculations) and comment 3 (generally accepted practices and long term design criteria).

watershed management plans. The proper method for accomplishing this balanced goal should be through the regulatory process — not through an EPA policy document.

- Any regulation allowing for emergency bypasses and blending of untreated and treated effluent must be restrictive, limited in circumstances, scope and duration, must ensure that public health and safety are not compromised and must not create incentive for municipalities to neglect their statutory responsibilities under the federal Clean Water Act.
- The proposed national rule may potentially result in court challenges to more stringent state regulations and make it more difficult for states to negotiate improvements to municipal sanitary sewer systems.⁵

Therefore, in light of the lack of technical detail and standards contained within the proposed policy, as well as the lack of legal foundation to alter a central tenant of the federal CWA, we kindly request that EPA pursue such remedies through either a detailed and open rulemaking process, or more preferably, on a case-by-case basis in the periodic NPDES Permit review process for each municipality.

Thank you in advance for your attention to our concerns.

Sincerely,

Marc A. Ross
President
Rock the Earth

⁵ Comments from MI DEQ official. *EPA proposal would dilute sewage with treated wastewater*. Jeff Hart. Bay City Times. January 13, 2004. <http://www.mlive.com/news/bctimes/index.ssf?/base/news-2/107400878422140.xml>