

Testimony of
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On behalf of
Tennessee Municipal League
Pennsylvania Municipal Authorities Association
New Jersey Association of Environmental Authorities
League of Kansas Municipalities
Coalition of Greater Minnesota Cities

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Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

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Introduction

Good morning Chairman Duncan, Congresswoman Johnson, and Committee members. My name is John Hall. I am the founder of Hall and Associates, a legal/regulatory firm specializing in Clean Water Act permitting and compliance matters. I hold a Masters in Environmental Engineering and a law degree and have over 25 years experience in addressing Clean Water Act issues. My practice focuses on the representation of municipalities and municipal organizations throughout the country. We have been involved in resolving the blending controversy since its inception in 1998. I am speaking today on behalf of the Tennessee Municipal League, Pennsylvania Municipal Authorities Association, League of Kansas Municipalities, New Jersey Association of Environmental Authorities, and the Coalition of Greater Minnesota Cities.

Particularly relevant to my testimony today is my tenure at EPA from 1980-84 in the Office of Water. During 1983-84, I was a project officer on the amendment of the secondary treatment regulations. As part of that effort, I prepared a detailed history of that regulation and am intimately familiar with the basis and background of that rule, as well as the bypass rule.

Background on Blending

Blending is used when the primary treatment facilities are designed to handle greater wastewater flows than biological treatment units can handle. Constructing larger primary treatment units was a common engineering practice promoted by EPA to process greater flows during wet weather that could otherwise be discharged without treatment. EPA guidance documents from the 1970's and thereafter identify this practice as cost-effective and safe. These facilities are designed to meet permit requirements while blending. These permit requirements ensure public health is protected.

Having spent my entire career addressing CWA permitting issues, I was quite surprised when several regional offices began asserting that blending was a prohibited plant design. It is a bedrock principle of the Clean Water Act that EPA may not dictate plant design or the selection of appropriate processes. In structuring the Clean Water Act, Congress has been quite clear that permittees may select the most cost effective means to ensure compliance with permit requirements. EPA has reiterated this position before courts, in issuing General Counsel Opinions and in publishing the secondary treatment and bypass regulations. Our clients contacted EPA Headquarters in late-1999 to get the matter resolved. EPA Headquarters acknowledged in writing that the regional blending prohibitions were never authorized by the Administrator and that state permitting authorities had considerable flexibility to permit blending as needed to address individual conditions. These acknowledgements, and other documents I reference in my testimony, have been provided to this Subcommittee for the hearing record as Appendix A.

EPA was in the process of issuing a clarification on blending when the advocacy groups began to assert that this was some type of regulatory rollback conjured up by the

Bush Administration and would allow the discharge of raw sewage. These groups published ads in newspapers, disseminated news articles, contacted reporters and filed thousands of objections with EPA making these assertions (Attachments 1 and 2). Dozens of Congressional offices relied on these misplaced assertions in sending a letter to the EPA objecting to EPA draft blending policy. HR 1126 was apparently a product of those representations. Blending, however, does not involve the discharge or dumping of raw or inadequately treated wastewater. The wastewater is treated to achieve all adopted public health protection requirements. I now address the substance of the advocacy group allegations.

Environmental Group Claims Regarding The Legality of Blending are Unsupported

The primary claims of various environmental activists are that (1) the secondary treatment rule mandates the use of biological treatment and (2) the bypass rule mandates that all flows must pass through all treatment processes. My submitted written testimony includes a detailed history of both rules for the Committee's review. The rule preambles, legal challenges to the rules, judicial decisions involving the rules plainly confirm that designing and operating a plant to blend as a means of processing greater peak flows is not and has never been prohibited under federal law. The secondary treatment rule does not even require the use of biological treatment let alone mandate that 100 percent of all flows be forced through biological treatment, particularly as this would degrade effluent quality. As stated by EPA in 1983 "the current secondary treatment regulation itself does not address the type of technology used to achieve secondary treatment requirements." 48 Fed. Reg. 52259 (November 16, 1983).

In promulgating the bypass rule, EPA expressly stated the following:

- The primary purpose of the rule is to ensure that the plant is operated as designed.
- It does not regulate plant design or selection of treatment processes.
- Split flow and seasonal operation of treatment units is not a bypass.
- The rule does not add any costs to plant operation or design not otherwise required by the secondary treatment regulation.

Through detailed record searches under the Freedom of Information Act, EPA confirmed that neither the bypass nor secondary treatment rules expressed any intent to prohibit blending during wet weather events (Attachment 3). EPA restated this position to various Congressional offices. The fact that the bypass rule does not prohibit blending makes perfect sense and explains why EPA federally funded blending facilities in Tennessee, Pennsylvania, New Jersey and elsewhere. If the activity were illegal under federal law, EPA could not have routinely grant-funded facilities with this design. The contrary assertions of various activist groups have no basis, whatsoever, in fact or law.

NRDC's position regarding the bypass rule is particularly perplexing, as they participated in the bypass rule challenges in 1984-87 in the D.C. Circuit. *EPA v. NRDC*, 822 F. 2d 104 (D.C. Cir. 1987). In that case, EPA expressly stated that the bypass rule did not dictate plant design or the selection of any particular treatment process. EPA clarified that the rule was intended to prevent parties from turning off unit processes. Blending doesn't involve turning off any processes—rather, it promotes the maximum use of treatment processes. The bypass rule required, in EPA's words "design operation" – that is once you build a plant you must operate it consistent with the original design. Blending does that. The Court's opinion upheld EPA's description of how the bypass rule works. NRDC's claim that the bypass rule requires all flows to pass through all unit processes at all times is simply incorrect.

Regarding the additional assertion that biological treatment is essential to effectively reduce pathogens, in 1976 EPA specifically amended the secondary treatment rule to eliminate its pathogen reduction requirements as an unnecessary and environmentally detrimental aspect of that rule. EPA confirmed that pathogen reduction is *not* the focus of the secondary treatment rule and that "attainment of [pathogen requirements] necessitates the use of a separate, non-biological unit process specifically designed for disinfection" usually employing chlorine, a highly toxic substance. (40 Fed. Reg. 34522 (August 15, 1975) and 41 Fed. Reg. 30786 (July 26, 1976)). EPA determined that because public health protection needs are very site-specific, considering seasonal and other physical settings, states should address pathogen issues on a local basis through disinfection requirements and water quality standards application. States have done this for the past 30 years. Apparently, the activist groups want to return to a "one size fits all approach" which EPA rejected decades ago as environmentally unsound and wasteful of the nation's resources.

The claim that blending is a public health threat even if permit limits are met, is essentially an attack on existing state water quality standards. As part of EPA's recent BEACH Act regulations EPA rejected this position. 69 Fed. Reg. 67218, 67236 (November 16, 2004). Moreover, if increased pathogen reduction is needed under wet weather conditions, one still would not build more biological treatment or large holding basins. Several less costly, non-biological options exist to accomplish pathogen reduction as EPA has identified in its recent Report to Congress. (Report to Congress on the Impacts and Control of CSOs and SSOs, EPA Doc. 833-R-04-001, August 2004).

Nationwide Cost of Blending Prohibition

Congress and EPA have stated that wet weather flows should be transported to treatment facilities to avoid sewer overflows and basement backups. Treatment plants blend these peak flows to avoid washing out the biological system. It is widely understood that biological systems are ineffective in addressing such a dynamic change in plant conditions. For this reason, the costs associated with a blending prohibition are staggering (Attachment 4) (EPA summary of individual municipal costs and nationwide cost impacts). EPA has estimated that the nationwide costs will likely range between \$160 billion - \$210 billion. In contrast, the bypass rule adoption specifically stated that it

was not intended to impose any additional costs of treatment. As required by the 1995 Unfunded Mandates Act, such new costs must undergo a thorough review.

Effect on Clean Water Act Structure

Beyond imposing billions in new costs, there are severe ramifications with Congress declaring that blending is a prohibited bypass and requiring 100% of all flow to receive biological treatment, as promoted by HR 1126.

1. *The basic framework of the Act will be altered as uniform plant designs will be imposed and actual public health needs will be ignored.* Pathogen reduction needs are site specific and the Act allows states to consider local conditions in setting disinfection requirements. This saves energy and chemical usage. Under HR 1126, compliance with applicable water quality standards is no longer considered protective of public health and states and Professional Engineers may no longer select the optimum plant design for effectively processing peak wet weather flows.
2. *A blending prohibition promotes use of the least effective biological treatment systems, such as trickling filters because they are somewhat more tolerant of hydraulic surges. These processes generally produce poorer quality effluent than systems more sensitive to hydraulic surges. See CWA § 304(d)(4).*
3. *Use of innovative processes will be quashed.* Several new physical/chemical processes are available to address peak flows at a fraction of the cost of biological treatment, and they produce lower pathogen levels than biological treatment. Such processes are being used to effectively treat CSO flows entering shellfish waters. Communities will be forced to disregard new technologies, incur greater costs and the environment forced to accept a poorer effluent quality.

This entire controversy was caused by the unauthorized action of a few EPA regional offices. EPA Headquarters has been stymied in its attempts to rectify this situation by the misinformation campaign initiated by various environmental organizations. Blending has been and continues to be one of the most effective means for processing peak wet weather flows while maintaining a high quality effluent. Claims of public health threat or illegal operation are misplaced and disruptive of state programs that seek to minimize system overflows while ensuring effective plant operations under severe operating conditions.

I thank you for your attention to this important issue and I would be happy to answer any questions.