



Enforcement Alert

Volume 3, Number 4

Office of Regulatory Enforcement

April 2000

Clean Water Act Prohibits Sewage 'Bypasses'

Recent Court Ruling Upholds Narrow Exceptions to Federal Rules

The Clean Water Act, Section 402, prohibits wastewater dischargers from "bypassing" untreated or partially treated sewage (wastewater) prior to treatment at a publicly owned treatment works (POTW) facility.

The law defines a bypass as an

"intentional diversion of waste streams from any portion of a treatment facility" (40 CFR 122.41(m)(1)).

Untreated wastewater contains *E. coli* bacteria and other pathogens, which can cause a variety of infections in people who come in contact with water that has been contaminated. Untreated wastewater also is harmful for aquatic organisms and wildlife.

Only under exceptional and specified limitations do EPA's bypass regulations allow for a facility to bypass some or all of the flow from its treatment process.

As explained later in this issue, these limitations were recently upheld by a federal district court opinion in *United States v. City of Toledo, Ohio*, 63 F.Supp 2d 834 (N.D. Ohio, 1999). **In short, the court ruling requires construction when greater plant capacity is needed to avoid bypasses, and construction is feasible.**

The Clean Water Act requires wastewater dischargers to have a National Pollutant Discharge Elimination System (NPDES) permit. NPDES permits typically establish pollution limits, compliance monitoring and reporting requirements, and include bypass provisions.

Bypasses are prohibited by the Clean Water Act unless a NPDES permittee can meet all of the following criteria:

- The bypass was "unavoidable

to prevent loss of life, personal injury or severe property damage";

- There were no "feasible alternatives" to the bypass, such as "the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance"; and finally,

- The permittee must have submitted notice of the bypass to the director of the permitting authority (normally the authorized State, an autho-

About

Enforcement Alert

"*Enforcement Alert*" is published periodically by the Office of Regulatory Enforcement to inform and educate the public and regulated community of important environmental enforcement issues, recent trends and significant enforcement actions.

This information should help the regulated community anticipate and prevent violations of federal environmental law that could otherwise lead to enforcement action. Reproduction and wide dissemination of this newsletter is encouraged.

See Page 2 for useful compliance assistance resources.

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"Bypasses" of wastewater prior to treatment at a publicly owned treatment works (as shown above) are prohibited (U.S. EPA photo).

rized Tribal authority or the applicable EPA Region).

Under Section 309(d) of the Clean Water Act, EPA is authorized to seek civil penalties of up to \$27,500 per day

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for each NPDES permit violation, and may take other civil enforcement actions that may include mandatory injunctions.

“No Feasible Alternatives” Criteria Challenged But Upheld by Federal Court

Of the three bypass exception criteria, the second one requiring that there be “no feasible alternatives” (see page 1) to the bypass has been the most challenged.

However, a federal district court recently ruled that a municipality cannot claim that it had no feasible alternatives to a bypass if it failed to take feasible steps to construct adequate treatment or storage capacity.

In the case of *United States v. City of Toledo, Ohio*, 63 F.Supp 2d 834 (N.D. Ohio, 1999), EPA argued that Toledo’s frequent bypasses during routine wet weather events violated Toledo’s NPDES permit (which included the bypass regulatory language) and the Clean Water Act. Furthermore, EPA argued that the City of Toledo had “feasible alternatives” to the bypass by simply constructing additional treatment capacity or adding storage facilities.

Toledo argued that the “no feasible alternatives” criteria to the bypasses should be based on the system’s current capacity. Therefore, the court had to determine the meaning of the “no feasible alternatives” test for bypasses. As noted, the City of Toledo argued that it needed only to establish it had “no feasible alternatives” to bypassing based on existing treatment (and storage) capacity.

In its opinion, the court found that “any bypass which occurs because of inadequate plant capacity is unauthorized...to the extent that there are ‘feasible alternatives,’ including the construction or installation of additional treatment capacity.” Simply put, the court ruling requires construction when greater plant capacity is needed to avoid bypasses and construction is feasible.

As to the plain language of the regulation, the court noted that the words “use of auxiliary treatment facilities,” suggest that the regulation contemplates development of “increased storage capacity.”

As to prior case law, the court found that the bypass cases cited to the court “construed the bypass exception narrowly.” (See 63 F.Supp 2d at 839). Finally, the court noted that its opinion is consistent with EPA interpretations, particularly as found in EPA’s *Combined*

Sewer Overflows: Guidance for Permit Writers, published September 1995 (<http://www.epa.gov/owm/sectstm.htm>).

The Toledo opinion underscores the importance to the regulated community of assessing whether each sewage system has adequate treatment and/or storage capacity. If not, facilities must take all feasible steps necessary to secure the needed capacity to avoid bypassing.

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Useful Compliance Assistance Resources

Water Enforcement Division:
<http://www.epa.gov/oeca/ore/water/>

**Office of Wastewater
Management:**
<http://www.epa.gov/OWM/>

Audit Policy Update:
<http://www.epa.gov/oeca/ore/auditupd.html>

Compliance Assistance Centers:
<http://www.epa.gov/oeca/main/compass/>

EPA’s Small Business Gateway:
<http://www.epa.gov/smallbusiness/>

