

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IOWA LEAGUE OF CITIES

Petitioner,

v.

US ENVIRONMENTAL
PROTECTION AGENCY,

Respondent

No. 11-3412

DECLARATION OF F. PAUL CALAMITA

IN SUPPORT OF PETITIONER'S MOTION TO ENFORCE THE JUDGMENT

I, F. Paul Calamita, Esq. declare as follows:

1. I have been a full-time environmental attorney for 29 years.
2. I have served as General Counsel to the Wet Weather Partnership/formerly CSO Partnership for twenty-five years. The CSO Partnership was extensively involved in (1) the drafting of the 1994 CSO Policy, (2) the development of each EPA guidance document implementing the CSO Policy, and (3) the effort to reference the CSO Policy in Clean Water Act Section 402(q) in 1999.
3. I served as the lead lobbyist to have the CSO Policy referenced in Section 402(q).
4. The CSO Partnership rebranded as the Wet Weather Partnership but has continued its significant focus on CSO control regulation and related issues.
5. I have lectured nationally on the CSO Policy for 25 years.
6. I have represented numerous CSO communities in well over a dozen states (covering EPA Regions 1, 2, 3, 4, 5, 7, and 9) regarding the implementation of and their compliance with the CSO Policy.
7. I have served as the General Counsel to the Association of Missouri Wastewater Agencies (AMCA) since its founding in 2011. AMCA comprises several dozen public wastewater

system across the State of Missouri serving more than 90 percent of the sewered population of the State.

8. I represent a number of communities within the Eighth Circuit that blend peak wet weather flows and which plan to blend such flows as a way to maximize treated peak wet weather flows while minimizing untreated sewer overflows.
9. I have reviewed EPA's filing entitled Respondent's Opposition to Petitioner's Mandamus Motion, USCA Case # 11-3412, Docket No. 5074782 filed on September 9, 2021. My testimony addresses various factual and regulatory assertions which EPA made in that filing, in particular whether the CSO Policy specifies that blending must be regulated as a bypass, subject to a no feasible alternatives demonstration.

The CSO Policy Did Not – And Could Not Change EPA's Bypass Regulation

10. The CSO Policy is a non-regulatory administrative document, which EPA issued on April 19, 1994. As a mere administrative statement, it did not and could not change EPA's existing bypass regulation (or any other regulation). The subsequent inclusion of a reference to the CSO Policy in Clean Water Act Section 402(q) did not change the fact that the CSO Policy as an administrative document, could not modify (or adopt) and EPA regulation. The referencing of such document in Section 402(q) did not have the effect of changing any regulation, including the bypass regulation.
11. Accordingly, communities with combined and sanitary sewer systems are treated the same under the bypass regulation.

The CSO Policy Requires Blending Immediately and the Possibility of a Later Bypass

12. While the CSO Policy does not mention the word "blending" as I explain below, it effectively requires blending immediately as one key tool to maximize the treatment of peak wet weather flows at CSO treatment plants. Maximizing flows to the treatment plant is critical because otherwise, such flows would be discharged untreated from CSO outfalls in the sewage collection system. Through blending, peak flows are treated and comply with discharge effluent limitations and conditions. The alternative to CSO blending is to release such flows out CSO outfalls without any treatment.
13. In requiring the immediate maximization of treatment of peak wet weather flows, the CSO Policy expressly does not require a no feasible alternatives analysis (NFA). Clearly, EPA knew how to require an NFA – as it does in its discussion in the CSO Policy of a CSO bypass (Section II.C.7). To the contrary, the CSO Policy does not require an NFA for a CSO community to maximize flow through the plant by blending.
14. The CSO Policy establishes both technology-based requirements – the Nine Minimum Controls ("NMCs") – and water quality compliance requirements to be achieved through Long-Term CSO Control Plans.

15. “The NMCs are controls that can reduce CSOs and their effects on receiving water quality, do not require significant engineering studies or major construction, and can be implemented in a relatively short period (e.g., less than approximately two years).” US EPA Guidance for the Nine Minimum Controls at 1-7 (emphasis added).
16. While the CSO Policy (and implementing guidance documents) does not mention or otherwise restrict blending, the Policy does require as Nine Minimum Control number 4 the “maximization of flow to the POTW for treatment.” CSO Policy, Section 1.6. Such maximization is routinely accomplished through blending. Typically, a treatment plant may have substantially greater primary than secondary capacity (because USEPA historically funded facilities that way). Thus, during peak wet weather, they can route excess flows around secondary treatment, recombine that flow with flows that went through secondary, and then disinfect the recombined flows and discharge same in full compliance with the facility’s NPDES permit limits.
17. This maximization of treatment capacity in the short term (as soon as possible, but no later than two years according to EPA) is a completely different exercise than a CSO Bypass – which the Policy contemplates will be addressed years after the maximization of flows for treatment at the treatment plant because the CSO Policy contemplates CSO Bypass being addressed as part of the Long-Term Control Plans. CSO Policy Section II.C.7 (“For some CSO-related permits, the study of feasible alternatives in the control plan may provide sufficient support for the permit record and for approval of a CSO-related bypass in the permit itself, and to define the specific parameters under which a bypass can legally occur.”).
18. EPA’s assertion that an NFA is required for CSO blending directly contradicts EPA’s long-standing position that the maximization of flows (Nine Minimum Control Measure 4) does not require “significant engineering studies” and should be accomplished as soon as possible but less than two years. An NFA is a significant engineering study of feasible engineering alternatives.
19. While the CSO Policy and EPA implementing guidance documents do not mention blending, they do address CSO bypass in a way that makes clear that a CSO bypass is diverted flow which *is not recombined and not discharged out the main plant outfall* but, instead, is discharged out of a separate outfall to which the facilities final effluent limits do not apply.
20. For example, in US EPA’s CSO Guidance for Permit Writers (1995), EPA states (emphasis added):

“The CSO Control Policy outlines a process for a “CSO-related bypass” whereby, under certain circumstances, the permit writer may allow wet weather flows to receive primary clarification at the POTW and then be discharged, without these flows being subject to secondary treatment requirements.”

https://www.epa.gov/sites/default/files/2015-10/documents/csopermitwriters_full.pdf

21. The CSO Policy also clearly defines a CSO Bypass as being a discharge of partially treated flow separate from the main plant discharge. See CSO Policy Section II.C.7 as follows (emphasis added):

7. Maximizing Treatment at the Existing POTW Treatment Plant. In some communities, POTW treatment plants may have primary treatment capacity in excess of their secondary treatment capacity. One effective strategy to abate pollution resulting from CSOs is to maximize the delivery of flows during wet weather to the POTW treatment plant for treatment. Delivering these flows can have two significant water quality benefits: First, increased flows during wet weather to the POTW treatment plant may enable the POTW to eliminate or minimize overflows to sensitive areas; second, this would maximize the use of available POTW facilities for wet weather flows and would ensure that combined sewer flows receive at least primary treatment prior to discharge.

22. EPA's CSO Permit Writer's Guidance goes on to state (emphasis added):

"As part of the consideration of possible adverse effects resulting from the bypass, the permit writer must determine that the bypass must not cause exceedance of WQS."

https://www.epa.gov/sites/default/files/2015-10/documents/csopermitwriters_full.pdf

23. The example of discharging peak CSO flows with "at least primary treatment prior to discharge" is not blending (which is the discharge of peak wet weather flows from the main plant outfall in compliance with all effluent limitations and conditions). Further, a concern regarding water quality standards (WQS) compliance would not apply to blending which, by definition, must meet the facility's existing permit limitations - which are already designed to ensure WQS compliance under 40 C.F.R. § 122.44(d). Put another way, there are no WQS compliance concerns from blending because the plant's discharge permit must be complied with, whereas with a CSO Bypass, a flow that is discharged separately from the main plant discharge, there is an open question about whether that partially treated separate discharge will meet applicable WQS requirements.
24. These references in EPA's Permit Writers Guidance make clear the distinction between blending (maximization of peak treatment for discharge of all flow out the main plant outfall, consistent with the applicable NPDES Permit) and a bypass – which is a discharge of peak wet weather from a separate plant outfall. The two actions are not the same.

Asserting That Blending is a Form of a Bypass at a CSO Treatment Plant Makes No Sense

25. CSO systems are required to comply with technology-based effluent limitations to maximize flow through the treatment plant.
26. EPA's assertion that such flow maximization via blending can only be allowed if there are no feasible alternatives to routing flows around treatment plant hydraulic bottlenecks would limit the ability to maximize flows for treatment and impair communities' ability to minimize CSOs from the outset.

27. Asserting that before maximizing flow through the system a treatment plant has to prepare and obtain approval of an NFA makes no sense – in the interim, the plant would not be maximizing flow and untreated sewage would be discharged from the collection system that could have been treated consistent with all permit limits. The assertion that blending is a form of a bypass has no basis in the CSO Policy, its implementing Guidance's, or common sense. Such an interpretation would create a conflict within the Policy as to the management of peak wet weather flows with NMC 4 commanding that flows for treatment at the plant be maximized immediately (without significant engineering studies) versus EPA's position that such flow maximization can only come later as part of a bypass demonstration that includes an NFA (which is a significant engineering study of long-term control alternatives). EPA is mixing apples and oranges.
28. EPA's stated position, "NFA before blending of any CSO-related flow," creates an irreconcilable conflict with the CSO Policy requirement that each treatment plant maximize the treatment of peak wet weather flows. It does not say to maximize flows "in accordance with an approved NFA to the extent flow will be routed around any portion of the treatment plant." The Policy simply commands that flow be maximized from the very outset without such qualification. Thus, EPA's regulatory position, as explained in the Kloss Declaration and related correspondence, constitutes a major substantive (and impermissible) amendment to the CSO Policy.
29. The NMCs are *non-capital* best management practices to be implemented within two years of the issuance of the Policy (April 1994). See CSO Policy Part II.B. EPA's position that an NFA is required would necessarily involve consideration of capital alternatives such as storage, increased capacity, and sewer separation through an extensive public participation process and agency review and approval process before blending could occur. Such a position is irreconcilable with the NMC maximization of flow (immediately) requirement.
30. For these reasons, the CSO Policy does not prohibit blending nor require an NFA before blending at a CSO treatment plant. In fact, Nine Minimum Control Number 4 (maximization of flow through the treatment plant) requires blending "as soon as practicable" (*Id.*) following the issuance of the CSO Policy. EPA knew how to require an NFA in the CSO Policy, which they did for CSO Bypass (separately discharged flow), but which they expressly did not for blending – which is a part of NMC 4 – maximization of flow treated at each treatment plant.
31. Notwithstanding any written public policy or rule, EPA has demanded an NFA for CSO blending in a number of enforcement actions that I am aware of. In none of those cases did the defendant community volunteer to provide an NFA. During these negotiations EPA treated blending as a bypass and this position was not negotiable. In each case, EPA and/or the Department of Justice insisted that an NFA be submitted.

EPA's Position That the ILOC Decision Does Not Apply to CSO Communities Within the Eighth Circuit Will Have an Immediate Impact on CSO Systems.

32. EPA claims that “Petitioner has not provided evidence that any of its member has been harmed by, or is threatened with certainly impending harm from, anything EPA has done with respect to its position that facilities governed by 33 U.S.C. § 1342(q)(1) and the CSO control policy are beyond the scope of ILOC. Petitioner merely alleges, without evidence, that ‘several Iowa Communities that presently utilize blending, as necessary to limit CSO overflows, cannot do so without violating federal law or incurring increased costs of compliance.’” (Resp., at 12). EPA’s assertion is simply incorrect.
33. Consider that every federal/State (National Pollution Discharge Elimination System) permit for CSO (and non-CSO) systems in the State of Missouri include the following condition:
- “Blending, which is the practice of combining a partially-treated wastewater process stream with a fully-treated wastewater process stream prior to discharge, is not considered a form of bypass. If the permittee wishes to utilize blending, the permittee shall file an application to modify this permit to facilitate the inclusion of appropriate monitoring conditions”
- NPDES permit number MO-0023043; St. Joseph, Water Protection Facility (December 1, 2020), Section D.9, Page 7 of 12.
34. EPA Headquarters’ position that CSO blending is a form of bypass directly contradicts this NPDES permit provision which EPA Region 7 has reviewed and concurred with. Because their NPDES permits specifies that “blending is not considered a form of bypass” these CSO systems know they don’t have to perform no feasible alternative analyses to blend peak wet weather flows. Instead, they simply have to notify the Missouri Department of Natural Resources so that additional blending-specific monitoring provisions can be added to the permit. A no feasible alternatives analysis is expressly not required by the permit. The Kloss declaration appears to directly and impermissibly contradict this statewide NPDES permit language.
35. Further, CSO communities in Missouri and throughout the Eighth Circuit would have to undergo the expense and delay of a no feasible alternative analysis rather than using what has almost always been the most cost-effective solution of blending – which maximizes flow using existing infrastructure (rather than implementing more expensive alternatives).
36. No feasible alternative analyses have taken extensive engineering time and expense and, in some cases, have taken many months if not years for EPA to review and approve. Such a process imposes significant transaction costs on communities including planning, design, engineering, legal support, public outreach, etc.
37. I am unaware that EPA has ever taken a formal position that the referencing of the CSO Policy in Section 402(q) of the Clean Water Act triggered a change in how blending (or a

bypass) will be handled in comparison to sanitary sewer system. I also believe that the Policy's treatment of the bypass regulation is generally consistent with EPA's typical implementation of the bypass regulation. As the lobbyist who pushed that provision through Congress, I have paid extremely close attention to all agency actions that relate to the CSO Policy.

38. As General Counsel to the Association of Missouri Wastewater Agencies, I negotiated the "Blending ... is not considered a form of bypass" language in the Missouri NPDES permits. Obviously, neither I, nor Missouri DNR, nor EPA Region 7 (which agreed to this language) were aware of any EPA policy to the contrary of this permit condition.

Rules Regarding the Management of Peak Wet Weather Flows Should be Equitably Applied Nationwide.

39. It is grossly unfair and legally infirm in my view for EPA to assert different rules for almost identical facilities in different parts of the country. Either EPA can regulate how facilities meet their discharge limits (inside the fence line) or it can't. Treatment plants outside the Eighth Circuit should not be subjected to EPA specifying the type of treatment they must employ to comply while facilities within the Eighth Circuit can choose for themselves. Such an administrative construct undermines the rule of law and offends fundamental fairness.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of September, 2021.



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