

Enforcement, 20 F.3d 1418, 1427 (6th Cir. 1994).

The bypass regulation does not dictate that any specific treatment technology be employed. Instead, the regulation requires that a system be operated as designed and according to the conditions of the NPDES permit. See *NRDC v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). For example, seasonal effluent limitations which allow the facility to shut down a specific pollution control process during certain periods of the year are not considered to be a bypass provided the variation in effluent limits is accounted for and recognized in the permit which allows a facility to dispense with some unit processes under certain conditions. See 49 FR 37998, 38037 (September 26, 1984).

As noted earlier, all NPDES permits are required to contain a prohibition on bypasses consistent with or more stringent than 40 CFR 122.41(m). See 40 CFR 123.25 (note). The bypass provision at 40 CFR 122.41(m) defines bypass to mean the intentional diversion of waste streams from any portion of a treatment facility. However, the term "treatment facility" is not defined in the bypass regulation. Today's action requests public comment on: (1) A proposed interpretation of the bypass regulations regarding the term "treatment facility" as it relates to the treatment plant at a POTW; and (2) draft guidance on how NPDES authorities can characterize the "treatment facility" in a specific permit for a POTW treatment plant to account for the flow routing scenario. The Agency's proposed policy would be restricted to POTW treatment plant discharges under peak wet weather conditions where flows in excess of the biological or advanced treatment units are routed around the biological or advanced treatment units and blended with the wastewaters from the biological units (or other advanced treatment units) prior to discharge, and where the final discharge would meet effluent limitations based upon the secondary treatment regulations and any more stringent limitations necessary to meet water quality standards.

3. Combined Sewer Overflow Control Policy

EPA has provided guidance on the planning, selection and implementation of controls to meet technology- and water quality-based requirements for CSOs under the NPDES program in the National CSO Control Strategy, 54 FR 37370 (September 8, 1989), and the CSO Control Policy, 59 FR 18688 (April 19, 1994). The 1994 CSO Control Policy provides comprehensive guidance for

developing site-specific NPDES permit requirements for combined sewer systems to address wet weather CSO discharges from designed overflow points. The Wet Weather Water Quality Act of 2000 amended the CWA to provide that each permit, order or decree issued after December 15, 2000, for a discharge from a municipal combined sewer shall conform to the CSO Control Policy. 33 U.S.C. 1342(q)(1).

Under the CSO Control Policy, permittees with combined sewer systems were to immediately undertake a process to accurately characterize their sewer systems, to demonstrate implementation of nine minimum controls identified in the Policy, and to develop and implement a long-term CSO control plan that would ultimately provide for compliance with the requirements of the CWA. See 59 FR 18688 (April 19, 1994). The CSO Control Policy identifies EPA's major objectives for long-term control plans.

When developing the CSO Control Policy, EPA recognized that some POTW treatment plants may have primary treatment capacity in excess of their biological treatment capacity. See 59 FR 18693, column 2. The Policy indicates that 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. This strategy can maximize the use of available POTW facilities for wet weather flows and ensure that combined sewer flows receive at least primary treatment prior to discharge. In addition, this strategy may enable the permittee to eliminate or minimize overflows to sensitive areas. In recognition of the significant water quality benefits of maximizing flow to the POTW treatment plant, the CSO Control Policy includes it as a minimum element of a long-term control plan.

To further the objective of maximizing treatment at the POTW treatment plant, the CSO Control Policy provides guidance on the use of an NPDES permit to recognize approval of anticipated bypasses where the criteria of the bypass provision for such approvals are met. The CSO Control Policy clarifies that normally it is the responsibility of the permittee to document, on a case-by-case basis, compliance with 40 CFR 122.41(m) in order to have an anticipated bypass approved in a permit. The Policy indicates that for some CSO-related permits, the study of feasible alternatives in the long-term control plan, along with other information in the permit record, may provide sufficient support for approval

of a CSO-related bypass in the permit, and to define the specific parameters under which a bypass can be approved. The Policy provides that where a permit includes an approval of a CSO-related bypass, the permit would define the specific wet weather conditions under which a CSO-related bypass would be allowed and would also specify what treatment, monitoring, and effluent limitations would apply to the bypass flow.

The Policy provides that permits with approved bypasses should also make it clear that all wet weather flows passing the headworks of the POTW treatment plant will receive at least primary clarification, solids and floatables removal and disposal, and disinfection where necessary, and any other treatment that can reasonably be provided.

The CSO Policy further indicates that the "no feasible alternatives" requirement of the bypass regulation can be met if the record shows that the secondary treatment system is properly operated and maintained, that the system has been designed to meet secondary limits for flows greater than the peak dry weather flow, plus an appropriate quantity of wet weather flow, and that it is either technically or financially infeasible to provide secondary treatment at the existing facilities for greater amounts of wet weather flow. See 59 FR 18694, column 3. The feasible alternative analysis should include, for example, consideration of enhanced primary treatment—*e.g.*, chemical addition and non-biological secondary treatment. *Id.* Other bases supporting a finding of "no feasible alternatives" may also be available on a case-by-case basis. As part of its consideration of possible adverse effects resulting from the bypass, the permitting authority should also ensure that the bypass will not cause exceedances of water quality standards. *Id.*

D. Water Quality Criteria for Bacteria

In 1986, EPA published Ambient Water Quality Criteria for Bacteria—1986, which contained EPA's recommended water quality criteria for bacteria for protection of bathers from gastrointestinal illness in recreational waters. The water quality criteria established levels of indicator bacteria, namely *Escherichia coli* (*E. coli*) and enterococci, that demonstrate the presence of fecal pollution and which should not be exceeded in order to protect bathers in fresh and marine recreational waters. Prior to its 1986 recommendations, EPA recommended specific levels of fecal coliforms to be