

The Need and Justification for Greater Regulatory Clarity Governing POTWs

U.S. EPA's longstanding position on private ownership of a municipal wastewater treatment system remains a barrier to greater private ownership of such facilities and should be changed.

Historically, EPA has taken the position that the ownership status of a municipal wastewater plant determines its regulatory status rather than the nature of the effluent being treated. This interpretation stems solely the Clean Water Act's (CWA or Act) use of the term "publicly owned treatment works" (POTW).

This memo offers an analysis of the Clean Water Act and its legislative history to determine whether a reinterpretation by EPA of the Act with regard to the term POTW would be legally defensible and afforded Chevron deference in the event of a future legal challenge.

Issue: Does the term "publicly owned treatment works" under the Act generically apply to municipal domestic sewage plants, regardless of ownership status? That is, was the intent of Congress clear when it used the term POTW? If not, would the Agency's reinterpretation, extending the term POTW to privately owned systems, be permissible?

Answer: Although a superficial reading of term "publicly owned treatment works" could logically lead one to conclude the term by its plain meaning excludes private ownership based on common usage, the legislative history offers some support for a broader more flexible interpretation.

This memo is divided into several sections. Section 1 presents a history of EPA's historical position and the regulatory hurdles involving the disposition of POTWs to private owners. Section 2 presents the legislative history and legal analysis. Section 3 sets forth the conclusion.

1. Introduction

Since its enactment, the CWA (and EPA's interpretation) has created significant disposition hurdles for POTWs and regulatory uncertainty related to their operations for community stakeholders and private owners involving the following:

- **Secondary treatment standards** – EPA's secondary treatment standards apply to the treatment of wastewater of POTWs, establishing technology-based effluent limits for BOD, TSS and pH, etc. Uncertainty remains what treatment standards apply to privately owned systems. 40 CFR 133
- **Industrial pretreatment program** – Despite the fact that many private companies operate pretreatment programs under disposition agreements, confusion exists whether the pretreatment program under Section 307(b) of the CWA applies only to POTWs and not privately-owned systems. The IPP requirements under the POTW status of the CWA could be replaced by RCRA requirements applicable to hazardous waste treatment, storage or disposal facilities. 40 CFR 117.13 and 40 CFR 403
- **RCRA domestic sewage exclusion** – EPA's RCRA exemption for "domestic sewage" is narrowly tailored to POTWs, potentially subjecting privately owned systems to RCRA liabilities. 40 CFR 261.4(a). RCRA itself does not limit the exclusion to a POTW specifically, but rather "domestic sewage."
- **Combined sewer overflow policy** – EPA CSO policy currently only applies to POTWs and not privately-owned systems. 40 CFR 403.3(p)

For each of these issues, the scope and definition of “publicly owned treatment works” is directly at issue. EPA’s position on this matter is outlined in substantive part in a 1987 Office of Water Memo, authored by Martha Prothro, then director of the water permits division, to EPA’s regional water division directors. The Prothro memo states:

On June 27, 1985, we sent you a draft document of questions and answers dealing with the NPDES permit and pretreatment implications of transactions that create private interests in municipal wastewater treatment works (i.e., privatization). In the draft memorandum we set out our conclusions on the applicable requirements for privatized facilities and discharges into such facilities and requested your comments.

Based on the comments we received, it is clear that there is a good deal of misunderstanding in this area, particularly with respect to the relevant Clean Water Act and NPDES requirements and legal constraints. For example, several commenters did not agree that ownership of the treatment works should be the determining factor in the appropriate limitations and whether pretreatment applied. These commenters suggested that any treatment plant treating primarily domestic waste should be regulated as a POTW (i.e., subject to limits based on secondary treatment, with contributors subject to pretreatment) regardless of whether it is publicly or privately owned. The Clean Water Act, however, does not allow for such approach. Under the Act, whether a facility is subject to secondary treatment (and its users to pretreatment) requirements or whether other technology-based limits (BAT, BCT) apply depends solely upon whether the plant is publicly or privately owned, and not on the nature of the wastes being treated. (emphasis added here) (underlining in original document)

The Prothro memo, often cited as EPA’s current position, provides a cursory and superficial interpretation the Clean Water Act, and was authored by the Office of Water, not the Agency’s General Counsel’s office or its lawyers.

Subsequently, in 2000, EPA issued guidance entitled “Guidance on the Privatization of Federally Funded Wastewater Treatment Works,” seeking to overcome these barriers. According to EPA, when federal grants have been used to fund the construction of a sewage treatment facility, the privatization transaction or disposition of the federally funded assets of the federal grantees must comply with the federal construction grant and property disposition regulations. As EPA explained the history:

As the pace of construction water pollution control facilities escalated in the 1970s, due to federal and state environmental legislation and EPA’s Construction Grant program, there was an increased interest by the private sector in wastewater operations. In the 1980s, the availability of tax incentives (tax-exempt debt, accelerated depreciation, and investment tax credits) for private investment in public utilities stimulated interest in the privatization of publicly owned wastewater treatment works (POTW). However, tax laws and Internal Revenue Service (IRS) rulings that affect privatization have been modified over the years. The Tax Reform Act of 1986 removed many of the tax incentives for public-private partnerships and reduced interest in certain types of privatization. In 1997, IRS Revenue Procedure 97-13 on Qualified Tax-Exempt Bonds allowed management contracts for up to 20 years instead of 5 year period previously allowed. This change provides a longer recovery period for any private investments in a POTW.

[D]isposition agreements require Agency review and approval prior to signing the contract. Under EPA’s administration of its property disposition and grant regulations, any concession

type payment or non-operational review payments to the local government results in the private entity encumbering the title or other interests in the asset. A privatization agreement that involves non-operational or periodic payments to the local government may be considered a contract operation type arrangement by some parties, however, EPA views these types of agreements as disposition agreement that must receive prior Agency approval.

If all components of the facility are sold to a private entity, the facility and any industrial dischargers to the facility would be regulated under the Clean Water Act and may be subject to requirements under the Resource Conservation and Recovery Act (RCRA). The private ownership status means that industrial pretreatment requirements under the POTW status of the CWA may be replaced by RCRA requirements. In such a situation, higher treatment costs may occur if the wastewater treatment facility is designated as a RCRA hazardous waste treatment, storage or disposal facility. When an asset sale occurs, the private entity will have to apply for a new NPDES permit under its own name. The permit limits under private ownership will likely be similar to those of the previous POTW's permit.

In light of the above limitations, the following provides a legal assessment were EPA to reinterpret the term POTW under the Act so that domestic waste treatment systems would be treated the same under the law, regardless of ownership.

2. Analysis

When the CWA was enacted, is it possible Congress used the term “publicly owned treatment works” generically and broadly to refer to treatment works primarily involved with the treatment of domestic sewage without regard to ownership? Unfortunately, neither the legislative history nor case law directly answers this question. Thus, EPA’s reinterpretation of the Act’s use of that term and, if such interpretation was subsequently challenged, would involve a case of first impression and decided based on a Chevron analysis:

The central question for the reviewing court under Chevron "is whether the agency's construction of the statute is faithful to its plain meaning, or, if the statute has no plain meaning, whether the agency's interpretation 'is based on a permissible construction of the statute.'" [A] court first asks "whether Congress has directly spoken to the precise question at issue. 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." [I]f the court finds that "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (citations omitted).

Shays v. FEC, 337 F. Supp. 2d 28, 47-49 (D.D.C., Sept. 18, 2004).

While courts ordinarily do not look to legislative history at Chevron step one, "reference to statutory design and pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *NRDC v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995); *accord Ethyl Corp. v. EPA*, 51 F.3d 1053, 1063 (D.C. Cir. 1995) (reviewing legislative history under Chevron step one and concluding that "at best, the legislative history is cryptic, and this surely is not enough to overcome the plain meaning of the statute"); *City of Cleveland v. Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1366 n.4 (D.C. Cir. 1995) ("We may consider a provision's legislative history in the first step of Chevron analysis to determine whether Congress' intent is clear from the plain language of the statute.").

A recent EPA interpretation of the Act involving a similar long-standing agency position that was subsequently challenged involving *Trout Unlimited v. EPA*, 846 F.3d 492 (2nd Cir. 2017) offers some helpful insight on how the POTW issue might play out. In the Trout Unlimited case, the court was asked to reverse an EPA regulation that exempted inter-basin water transfers from the Clean Water Act program. At issue was whether a water transfer constituted a discharge of a pollutant from a “point source” under the CWA. On its face, the statutory language and legislative history weighed strongly in favor of permits. Thus, the plaintiffs argued that the case should be resolved at *Chevron* step one because the CWA unambiguously requires permits for water transfers. The case has a long history, but ultimately the 2nd Circuit Court sided with EPA, agreeing that the CWA was silent and that EPA’s interpretation was not unreasonable.

In analyzing the question, the court opined:

Even careful analysis of the Clean Water Act's legislative history does not help us answer the interpretive question before us. Although we are generally "reluctant to employ legislative history at step one of *Chevron* analysis," legislative history is at times helpful in resolving ambiguity; for example, when the "interpretive clues [speak] almost unanimously, making Congress's intent clear 'beyond reasonable doubt.'" But here Congress has not left us a trace of a clue as to its intent. The more than 3,000-page legislative history of the Clean Water Act appears to be silent, or very nearly so, as to the applicability of the NPDES permitting program to water transfers. As we noted in *Catskill I*, the legislative history does not speak to the meaning of the term "addition" standing alone, suggesting that the history is similarly silent as to the meaning of the broader phrase that includes this term, "addition . . . to navigable waters."

Finally and tellingly, neither the parties nor amici have pointed us to any legislative history that clearly addresses the applicability of the NPDES permitting program to water transfers. What few examples from the legislative history they have cited—such as the strengthening of the permit requirements in Section 301(b)(1)(C) to include water quality-based limits in addition to technology-based limitations, and broad aspirational statements about the elimination of water pollution and the need to regulate every point source by the report of the Senate's Environment and Public Works Committee, provide at most keyhole-view insights into Congress's intent. They do not speak to the issue before us with the "high level of clarity" necessary to resolve the textual ambiguity before us at *Chevron* Step One. The question is whether Congress has "directly spoken," to whether NPDES permits are required for water transfers—not whether it has made a stray or oblique reference to that issue here and there. (citations omitted)

Turning to the present question, Congress’s use of the term POTW in the CWA is similarly complex, with very few clues as to what Congress’ clear intent was. Similar to the water transfer issue, Congress has not “directly spoken” to the issue. In one respect the term appears clear and unmistakable with regard to public ownership as a requisite for seeking federal funding under the construction grants program, but for regulatory purposes (*e.g.*, treatment standards, pretreatment requirements, and CSOs) there is even greater ambiguity. With regard to its regulatory use, the term is often used interchangeably with municipal domestic sewage treatment and is commonly used to distinguish domestic sewage or conventional treatment from commercial and industrial waste.

As discussed below, the term “treatment works,” a defined term under the Act, appears many times alone without reference to ownership status, and there are other times (less numerous), where it is

connected with ownership status. In fact, the term “treatment works” is used over 200 times independently, without reference to private or public ownership; whereas, the term “publicly owned treatment works,” a subset of treatment works, is used only 66 times, and is not defined.

Ownership status appears particularly critical within the context of the former construction grants program under Section 201, where public ownership was central to the eligibility and role of federal financing of new treatment works. (“[I]t is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works”) (33 USC 1251(a)(4)); (“The Administrator is authorized to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works.”) (33 USC 1281(g)(1)). Thus, in such context, it seems clear with respect to those systems seeking federal financing, Congress intended their eligibility to be limited to local public bodies or municipal authorities (as opposed to private entities). This interpretation is consistent with EPA’s historic position on federal financing under the CWA. Importantly, however, this limitation is not inconsistent with the argument that a municipal sewage system could also be privately-owned; but it would simply not be eligible to apply for federal construction grants. That is, the ownership status determines not whether the system is a municipal treatment plant, but whether the system is eligible for public funding. This distinction is critically important for regulatory purposes.

As mentioned above, the issue of ownership also comes into play with respect to EPA’s regulatory requirements, including secondary treatment standards and management of CSOs. (“The Administrator shall . . . publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 212 of this Act) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works.) (33 USC 1317(b)(1)); ([T]he determination of the priority to be given each category of projects for construction of publicly owned treatment works . . . shall include . . . correction of combined sewer overflows.”) (33 USC 1295). It is important to understand these references in historical context.

At the time the CWA was enacted, Congress was concerned primarily with addressing two broad types water pollution (1) commercial and industrial wastes and (2) domestic sewage. With regard to the latter, there were many cities in the early 1970s that were simply without any centralized waste collection and treatment system, and Congress was committed to providing funding for those communities. Congress’s primary focus was to help those communities construct new domestic treatment works through new federal funding and establish a system for equitable recoupment of tax payer funds from private commercial and industrial interests that discharged into such centralized municipal waste treatment systems.

Here’s a glimpse into the debate involving Section 204(b) of the Act that required a “system of charges to assure that each recipient of waste treatment services within the applicant” as a condition of federal funding:

A major new condition for receiving a grant relates to the establishment of user charges. This section specifically provides that the Administrator shall not approve any grant for publicly owned treatment works, after June 30, 1973 unless the applicant has adopted or will adopt a system of user charges to assure that each recipient of waste treatment services within his jurisdiction, as determined by Administrator, will pay its proportionate share of operation, maintenance (including replacement) and expansion costs. The applicant’s jurisdiction means his entire service area.

The Committee believes it is essential to the successful operation by public agencies that a system of fair and equitable user charges be established. The Committee recognizes that differing circumstances and conditions in local areas may call for especially designed systems and has therefore proposed that the Administrator promulgate general criteria and that such general criteria allow for variations to meet local conditions. This section contains standards the Committee believes should be taken into account by the Administrator; foremost among these is the underlying objective of achieving a local system that is self-sufficient.

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In connection with industrial users of publicly owned systems, the Committee desired to establish within the user charge system an arrangement whereby industrial users would pay charges sufficient to bear their fair portion of all costs including the share of Federal contributions for capital construction attributable to that part of the cost of constructed facilities attributable to use by industrial sources. It is the Committee's view that it is inappropriate in a large Federal grant program providing a high percentage of construction funds to subsidize industrial users from funds provided by the taxpayers at large. Accordingly, the bill imposes an obligation on the part of publicly owned systems to incorporate into their user charge schedule a component to recover, without interest, that proportion of the total Federal grant to the community for construction purposes attributable to industrial users. The committee recognizes that there will be some administrative difficulties involved in establishing classes of industrial users and has left to the local system the obligation to set up an effective and equitable system, subject to the approval of the Administrator, inasmuch as the establishment of such a system is a precondition to Federal grants.

92 Cong. House Report 911, FWPC72 Leg. Hist. 20. This excerpt reinforces the notable distinction between how Congress intended to treat centralized municipal systems versus industrial users that discharged to the same systems. One of the major purposes was to assure self-sufficiency on the part of local treatment works through the use of an ad valorem tax, something only government entities have the authority to impose. Congress was intent on helping local communities establish a sustainable centralized treatment system, based on equitable charges of its various users.

At the time of CWA's passage, all or virtually all domestic waste treatment systems were owned by municipalities or municipal authorities. As noted earlier, private treatment works were predominantly understood by Congress to be industrial or commercial in nature. It is not at all clear how many, if any, private treatment works were involved in municipal domestic sewage treatment.

Reference to the term "private" in the text of the Act appears a total of 48 times, all within the context of private research, private property, private educational institutions, and nonprofit private agencies. In 1972, the Act contained not a single reference to privately owned treatment works,

which is understandable given the fact that the private sector was essentially nonexistent for purposes of treating and managing municipal sewage. The record, containing thousands of pages of hearing, floor debates and committee reports, contain few references to private treatment works.

Congressman Williams (PA) offered an amendment that required the EPA to approve all “treatment works, whether publicly or private owned” before being constructed. 92 Cong. House Debates 1972; FWPC72 Leg. Hist. 8. But this was a reference to “treatment works” broadly and appears to have included industrial, commercial and sewage or a subset of those.

Governor Anderson of Minnesota submitted the following testimony:

The House should also be commended for raising the federal share of funding sewage treatment works to 75 percent. Minnesota still has 346 municipalities with no collection systems or combined treatment facilities. Seventy-eight percent of these towns have less than 500 people. They must, therefore, depend on larger governmental units to finance the cost of such facilities. And we would appreciate your assurance that section 211 of this bill will allow grants to these existing municipalities for collection systems.

92 Cong. House Debates 1972; FWPC72 Leg. Hist. 7. Again, the primary focus here is on the type of waste (domestic sewage) and funding needed to help these communities. The focus is not whether they are privately or publicly owned, as the operating assumption at the time is that such systems were under public ownership.

As noted above, the element of ownership also appears to come into play for purposes of treatment standards. The legislative history is devoid of a full explanation for this dual scheme. However, at the time, the Philadelphia Bar Association raised concerns regarding the applicability of secondary treatment standards to publicly owned but not privately owned treatment works:

The Committee is disturbed that S. 2770, HR 118951 and HR 11896 would apply a looser standard to “publicly owned treatment works” than to other dischargers. Under Section 301 of each of those Bill, sewage plants in operation or construction by January 1, 1976 will not be required to provide better than secondary treatment if they are publicly owned. We see no justification for perpetuating such a lax standard. In Pennsylvania, for example, sewer plants – whether publicly or privately owned – are typically required to provide at least tertiary treatment, as a condition to any new expansion. Further, we know of no adequate basis for distinguishing between publicly owned and privately owned sewer works. It is particularly unreasonable to apply the more lax standard to public sewer works, which are eligible for substantial Federal assistance to defray the cost of attaining modern treatment standards. Inadequately treated municipal sewer wastes are a major cause of the degradation of streams in more populated areas of the Nation and, therefore, full compliance by existing plants should be mandated.

92 Cong. House Report 911; FWPC72 Leg. Hist. 20. In only one other isolated reference to this dual scheme, the House offered the following:

Subsection (b) of section 301 establishes a technological basis for the determination of effluent limitations for any discharge of pollutants provided that such limitations, at a minimum, are, when applied to all point sources, adequate to meet existing or new water quality standards as provided under section 303. Subsection (b) requires that all point sources of discharge of pollutants, other than publicly owned treatment works, achieve not later than January 1, 1976, effluent limitations requiring the use of the best practicable control technology currently

available. Publicly owned treatment works in existence on January 1, 1976, or those approved for construction grants prior to June 30, 1974, must meet effluent limitations based upon secondary treatment as defined by the Administrator.

It has been argued before the Committee that privately owned point sources should not be held to a strict standard than publicly owned treatment works which are required to meet secondary treatment or the equivalent. This argument was rejected by the Committee. Secondary treatment as considered in the context of a publicly owned treatment works is generally concerned with suspended solids and biologically degradable, oxygen demanding materials (BOD). Such a standard in the minds of some, if applied to effluents containing materials other than suspended solids and BOD, would be an empty standard. Best practicable control technology currently available might mean "secondary treatment" for some effluents but it is not a synonym for secondary treatment. (emphasis added)

92 Cong. House Report 911; FWPC72 Leg. Hist. 20. Congress' above response is notable for the following reasons. First, it's notable that Congress referenced private treatment interests as "privately owned point sources" as opposed to "privately owned treatment works." This may superficially appear to be a rejection of the application of secondary standards to privately owned treatment works, but the term "point source" (as opposed to "treatment works") was commonly used to reference private industrial and commercial wastes, not domestic sewage. Second, it also is clear that Congress understood that "publicly owned treatment works" were "generally concerned with suspended solids and biologically degradable, oxygen demanding materials," which is tantamount with municipal domestic waste, not industrial or commercial wastes. Here, this passage reflects it is the nature of the influent rather than the ownership status per se that was central to Congress's intent regarding the appropriate and applicable standard. This directly contradicts the central thesis of the Prothro Memo that it was the ownership status rather than the type of waste treatment that determines the treatment standards.

Further reinforcing the notion that Congress used the term POTW interchangeably with municipal sewage treatment, the same House Report discusses the Act's pretreatment standards:

It should be understood that [Section 307] authorizes the Administrator to prohibit the discharge of certain industrial and commercial wastes which are unavoidably detrimental to municipal treatment works and to require treatability studies on those pollutants for which there is inadequate existing information available to assess treatability in municipal systems. It is not intended that private pre-treatment facilities be required as a substitute for adequate municipal waste treatment works. The administrator would be expected to prohibit the discharge of any industrial pollutants which adversely affect the functions of treatment works. Conversely there may be industrial wastes which stimulate the performance of conventional treatment works, or which are consistent with alternative control strategies. The latter should be identified. For example, the Committee's hearing indicated that in some cities, the discharge of residue for the production of beer has greatly assisted in the production of commercial fertilizers. (emphasis added)

Once again, as reflected in the above, municipal treatment was construed synonymously with domestic sewage treatment or "conventional treatment works," which at the time was almost exclusively provided by public authorities.

It wasn't until five years later, in 1977, when Congress amended the Act to recognize and expressly include the term and provisions for some "privately owned treatment works." This is the first and only time that term appears in the Act. Under this amendment, Congress allowed small private

treatment works to have access to federal grant funding under limited circumstances. Senator Randolph commented:

A major policy change, which I did propose, permits Federal grants for construction of privately owned treatment works where a public body, not the person but a public body applies on behalf of a number of such units where we can be assured that they are properly operated and maintained and will be more cost effective than the central systems, the large massive systems which we have in the cities which are not applicable to the rural sections of the country.

95 Cong. Senate Debates 1977; CWA77 Leg. Hist. 14. A lengthy floor colloquy between Senators Muskie, Chafee, Stafford and Domenici ensued involving the purpose of this provision during markup, wherein the scope and applicability to private systems was debated at length. What is clear from the legislative history, as reflected in the above passage by Senator Randolph and floor debates, was that Congress intended public funding be made available to small private treatment works where no “central systems” or “large massive systems . . . in the cities,” was available. Large privately owned domestic treatment systems were not even contemplated by Congress, which is consistent with the fact that private ownership of large domestic systems was nonexistent. This also reinforces that it was the nature and type of treatment system that mattered most, and ownership class was a secondary consideration.

Almost 20 years after the 1975 Amendments, Congress attempted to amend the CWA in 1995, defining “publicly owned treatment works” to expressly included privately-owned systems and authorized the sale of publicly owned wastewater assets to qualified private entities. Such efforts, however, were unsuccessful.

3. Conclusion

EPA has historically construed the term “publicly owned treatment works,” an undefined term under the CWA, as applicable only to domestic sewage treatment systems under ownership of municipalities or other public authorities. In contrast to investor-owned community drinking water systems in 1972 (for which there were many), history and the legislative record are largely devoid of any privately-owned community wastewater systems engaged primarily in the business of treating domestic sewage.

Based on the legislative history, it appears clear that public ownership was critical to the issue of eligibility for public funding under the construction grants program. However, the issue of ownership as a central and determining factor is less clear in terms of the regulatory standards applicable to domestic waste treatment works, as Congress often used the term interchangeably with municipal or conventional sewage treatment provided by a community. In this context, the term POTW was used by Congress primarily to distinguish domestic sewage waste treatment from industrial or commercial wastes (under private ownership) that would be discharged to municipal waste treatment systems (at the time, exclusively under public ownership).
