that state. I selected the MSA as the geographical unit because it is already used in the law and should discourage ''cherry picking'' without reducing coverage on a state-wide basis. Finally, if a company terminates coverage and a beneficiary is currently receiving treatment, this bill requires the HMO to provide 90 days of coverage to allow the patient to continue to receive such treatment. This will ensure that patients under active treatment will have a few additional months to make the transition to another doctor or health plan.

Mr. Speaker, what Medicare HMO's did in my district—and what they are doing across the country—is unreasonable and irresponsible. The Medicare HMO Improvement Act is a reasonable approach which will provide badly needed protection to older Americans. I invite my colleagues to join me as co-sponsors.

IN MEMORY OF HAL WALSH

HON. PETER DEUTSCH

OF FLORIDA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 6, 1999

Mr. DEUTSCH. Mr. Speaker, I rise today to recognize and commemorate the many contributions Hal Walsh made to the Key West community. Hal was the executive director of Truman's Little White House Museum and a columnist for the Key West Citizen newspaper.

Hal came to Key West from New York City in 1993 after a career as a stock broker. His lifelong interest in American history drew him to the Truman Little White House Museum. In addition to his dedicated service as museum director, Hal was also an active member of the Lambda Democrats and was a founder of the Key West Gay and Lesbian Center. He never hesitated to keep me apprised of how politicians on every level of government were doing—right or wrong—regarding issues of concern to the gay community. He was an articulate and passionate advocate who was never afraid to speak his mind.

Hal's other affiliations include being first vice president of Old Island Restoration Foundation and a member of the Lower Keys Friends of Animals. His devotion to his cocker spaniels, Savannah and Sachem, rang clear in his weekly newspaper column which often included their antics.

A Key West Citizen editor Bernie Hun wrote, ''Hal Walsh was a big man in every sense . . . in generosity and spirit.'' He will be truly missed by those whose lives he touched.

MUNICIPAL BIOLOGICAL MONITORING USE ACT OF 1999

HON. JOEL HEFLEY

OF COLORADO

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 6, 1999

Mr. HEFLEY. Mr. Speaker, in this new Congress, I am again introducing the Municipal Biological Monitoring Use Act (''MBMUA'' or ''Biomonitoring Bill''). This bill amends the federal Clean Water Act (''CWA'' or ''Act''). I would respectfully request its consideration this year as separate legislation or in connection with other bills to amend the CWA.

The purpose of this legislation is to ensure that our nation's wastewater, stormwater and combined sewer facilities owned by local governments are not unfairly exposed to fines and penalties under the federal Clean Water Act when biomonitoring or whole effluent toxicity tests conducted at those facilities indicate an apparent test failure.

Similar legislation applicable to sewage treatment facilities was introduced in previous Congresses. In recent years, various offices of EPA have sought to apply WET test limitations to municipal separate storm sewer systems, combined sewer overflows, and other wet weather facilities. Therefore, as in the last Congress, this bill would also apply to wet weather facilities owned by local or state governments.

Enforcement of biomonitoring test failures is a concern of local governments nationwide. Where whole effluent toxicity is a NPDES permit limit, the limit is defined as a test method as provided in EPA regulations at 40 C.F.R. part 136. Any permit with whole effluent toxicity tests expressed as a discharge limit is subject to enforcement by EPA or a state delegated to implement the NPDES permit program, or under the Act's citizen suit provisions. Fines and penalties for such tests failures are up to $27,000 per day of violation. These tests are known, however, for their high variability and unreliability. Furthermore, because the source of WET at any given facility is usually not known until the tests are conducted, local governments are unable to take appropriate action to guarantee against test failure, and hence permit violation, before such violation occurs.

The bill we reintroduce today would retain the use of biomonitoring tests as a management or screening tool for toxicity. Our bill would, however, shift fine and penalty liability from liability for test failures to liability for failure to implement required procedures for identifying and reducing the source of WET when detected. In so doing, this legislation would in the long-run strengthen environmental protection by removing the enforcement disincentive for its use.

BACKGROUND

EPA or delegated states regulate wastewater discharges from sewage treatment, separate storm sewers and combined sewer systems through the NPDES permit program. NPDES permits include narrative or numeric limitations on the discharge of specifically named chemicals. Treatment facilities can be and are designed and built in order to assure compliance with such chemical specific limitations before a violation occurs. Compliance is determined by conducting specific tests for these specifically known chemicals.

NPDES permits may also include limits to control the unspecified, unexpected, and unknown toxicity of the sewage plant effluent which is referred to as whole effluent toxicity or WET. The authority for biomonitoring tests was added to the Clean Water Act by the 1987 amendments. Since then, EPA has issued regulations describing biomonitoring or WET test methods under Part 136, permit requirements under Part 136, and enforcement policies for the use of WET tests as a monitoring requirement or as a permit effluent limitation at POTWs. Compliance with WET as limits is determined by the results of biomonitoring or WET tests.

Biomonitoring or WET tests are conducted on treatment plan effluent in laboratories using small aquatic species similar to shrimp or minnows. The death of these species or their failure to grow or reproduce as expected in the laboratory is considered by EPA to be a test failure and therefore a permit violation.

Where such tests are included in permits as effluent limits, these test failures are subject to administrative and civil penalties under the CWA of up to $27,000 per day of violation. Test failures also expose local governments to enforcement by third parties under the citizen suit provision of the Act.

WET test failures can also trigger toxicity identification and reduction evaluations that include additional testing, thus exposing local governments to additional penalties if these additional tests are expressed as permit limits and also fail. The use of biomonitoring test failures as the basis for fines and policies is the issue which this bill addresses.

WET TEST ACCURACY CANNOT BE DETERMINED

EPA recognizes that the accuracy of biomonitoring tests cannot be determined. An October 18, 1995 FEDERAL REGISTER preamble document issued by the Agency in promulgating test methods determined that: ''Accuracy of toxicity test results cannot be ascertained, only the precision of toxicity can be estimated.'' (EPA, Guidelines for Establishing Test Procedures for the Analysis of Pollutants, 40 C.F.R. Part 136, 60 FR 53535, October 16, 1995.)

While the Agency cannot determine the accuracy of such tests, EPA still requires local governments to certify that WET test results are ''true, accurate, and complete'' in Discharge Monitoring Reports (''DMRs'') required by NPDES permits. This is a true Catch–22 requirement.

Laboratory biomonitoring tests are known to be highly variable in performance and results. Aquatic species used as test controls may die or fail to reproduce normally during test performance through no fault of the POTW or its effluent. False positive tests occur frequently. Yet test failure is the basis for assessing administrative and civil penalties.

EPA also recognizes that WET is episodic and usually results from unknown sources. These unknown sources can include synergistic effects of chemicals, household products such as cleaning fluids or pesticides, and illegal discharges to sewer systems. Even a well-managed municipal pretreatment program for industrial users cannot assure against WET test failures.

The inaccuracy and high variability of WET tests is the basis of a judicial challenge to EPA Part 136 WET test methods brought by the Western Coalition of Arid States (''WESTCAS'') in 1996. This litigation was settled by the Agency in 1998 but is still under court jurisdiction and supervision. Under the settlement, EPA agree to conduct additional tests as to the validity of WET testing and the test methods in Part 136. The responsibility for this new effort to justify the technical basis of WET testing is split between the EPA Office of Research and Development and the EPA Office of Water.

Scientific method blank or blind testing for WET tests was conducted by WESTCAS in 1997 preceding the settlement with EPA. These blind tests were conducted by a series of qualified laboratories throughout the United States. The purpose of these blind tests was to quantify the natural level of biological variability in test organisms and the variability inherent in the test procedures themselves.

Without the knowledge of the participating laboratories, all of the samples tested contained no reference toxicants of any kind, i.e. The samples were pure dilution water.

The results of these tests is highly revealing. Thirty-five per cent of the tests failed. Failure in this case means that toxicity was reported in non-toxic water samples. The 35% false positives among these tests demonstrated the high inaccuracy of the test methods used and the inappropriateness of their use as an enforcement weapon. Had any of these false positives occurred in actual samples from municipal facilities, they would have been subject to fines and penalties of up to $27,000 for each violation of a permit limit.

Even if WET tests are improved, their use as enforcement tools is fundamentally unfair because the source of WET is usually unknown and cannot be controlled before test failures as permit violations, occur.

MUNICIPAL WASTEWATER FACILITIES

Municipal sewage treatment and combined facilities are designed to control specific chemical pollutants. Stormwater facilities are less able to control even specific chemicals. In any event, these local government facilities are not designed to control WET, especially in view of the fact that POTWs cannot be assured of knowing the specific nature of influent discharged to these facilities. To guarantee against these test failures before they occur, local governments would have to build sewage treatment facilities using reverse osmosis, micro filtration, carbon filtration or ion exchange, at great expense to citizen rate payers and with potentially very little benefit to the environment.

The CWA and EPA regulations (40 C.F.R. §122.44(d)(1)(iv)) require that toxicity be determined based on actual stream conditions. An EPA administrative law judge decision issued in October, 1996, confirmed this interpretation in ruling:

> Although some form of WET monitoring may be legally permissible, there must be a reasonable basis to believe the Permittee's discharge could be or become acutely toxic. In addition, the proposed tests must be reasonably related to determining whether the discharge could lead to real world toxic effects. The CWA objective to prohibit the discharge of ''toxic pollutants in toxic amounts'' concerns toxicity in the receiving waters of the United States, not the laboratory tank.

In the Matter of Metropolitan-Dade County, Miami-Dade Water and Sewer Authority, NPDES Permit No. FL00224805.

In actual practice, however, NPDES permits often restrict species for WET tests to a limited number of standard species which may not be representative of the stream-specific conditions to which local facilities discharge. This situation can also result in false test results. The failure to allow for the use of indigenous test species is a particular concern to POTWs discharging to ephemeral streams located in Western states where nationally uniform species could not survive.

POTWs cannot be assured of knowing what substances are discharged to their facilities, as can industrial dischargers. They are community systems with thousands or even millions of connections, absolute control over which is not feasible. The inability of sewage treatment facilities to know the cause of WET failures so that the appropriate controls can be installed before test failures occur is fundamentally unfair because the local governments owning these plants do not have notice of what they must do to conform their behavior to the requirements of law. Constitutional fair notice in such situations is critical, and critical to fundamental fairness under the American legal system, whether at the federal or state level.

There is less basis for making WET test failures subject to fines and penalties for storm water-related discharges because local governments are able to exercise even less control over such storm sewer systems and over combined sanitary and storm sewage systems.

EPA may say that WET test failures often are not enforced under the Agency's exercise of administrative discretion. However, the opportunity for such enforcement remains, especially as more permittees are faced for the first time with enforceable WET permit limits and where an enforcement action is based on one or more alleged permit violations.

The Agency should not rely on a lack of enforcement or enforcement discretion to justify this fundamentally unfair enforcement method. Any legal requirement that is not based on fair notice lacks credibility and undermines basic due process principles whether enforcement occurs once or many times. Additionally, third party suits are not subject to the exercise of EPA review and discretion.

WET TESTS CAN BE USED AS EARLY-WARNING MANAGEMENT TOOLS

Procedures for locating and reducing the source toxicity can require accelerated testing which would expose local governments to additional penalty liability. Thus, the Agency's insistence on making WET tests subject to penalties has become counter-productive to preventing toxicity.

Nothing in the Clean Water Act requires EPA to make WET testing an enforceable permit limitation. As originally conceived by EPA personnel who developed biomonitoring test protocols, these tests, when made reliable, could be used as a screening or management tool for detecting WET, rather than for enforcement purposes. Since the 1987 amendments, however, through regulations and enforcement policies, EPA has persisted in making WET test failures violations of permit limitations even though these tests are technically unsound and fundamentally unfair for enforcement purposes. It is for these reasons that a legislative solution is necessary.

ALTERNATIVE, LEGISLATIVE SOLUTION NEEDED

One legislative alternative would make WET testing a monitoring-only permit requirement. Another alternative would shift the enforceability of WET permit requirements from WET tests failures to local government failure to implement a tiered compliance process and schedule for locating and reducing the source of toxicity.

The bill we reintroduce today adopts the second alternative and retains the use of WET as an enforceable part of the Clean Water Act by:

Amending Sections 303 and 402 of the CWA to prohibit the finding of a violation under the strict liability provisions of the Act for a failure of a WET test conducted at publicly owned treatment works, municipal separate storm sewer systems, and municipal combined sewer overflows, including control facilities, and other wet weather control facilities;

Requiring that criteria for WET must employ an aquatic species that is indigenous to the type of waters, a species that is representative of such species, or such other appropriate species as will indicate the toxicity of the effluent in the actual specific receiving waters. Such criteria must take into account the natural biological variability of the species, and must ensure that the accompanying test method accurately represents actual instream conditions, including conditions associated with dry and wet weather;

Authorizing NPDES permit terms, conditions or limitations to include enforceable procedures for further analysis, toxicity identification evaluation (''TIE'') or toxicity reduction evaluation (''TRE'') for WET where an NPDES permit authority determines that the discharge from the applicable facility causes, has the reasonable potential to cause, or contributes to an instream excursion above a narrative or numeric criterion for WET. Our bill would also direct that the NPDES permit must allow the permittee to discontinue such procedures, subject to future reinitiation of such procedures upon a showing by the permitting authority of changed conditions, if the source of such toxicity cannot, after thorough investigation, be identified; and

Requiring the use of such NPDES permit terms, conditions or limitations only upon determination that such terms, conditions or limitations are technically feasible, accurately represent toxicity associated with wet weather conditions, and can materially assist in an identification evaluation or reduction evaluation of such toxicity.

WET testing should be used as a management tool to locate and reduce WET. The assessment of penalties for test failures or the potential for assessment has become a recognized disincentive for the use of WET tests, including accelerated testing to locate and reduce toxicity.

This bill would assure the use of these tests as tools to prevent pollution by respecting their technical limitations, eliminating penalties for test failures, and preserving the enforceability of procedures to locate and reduce whole effluent toxicity when detected.

I urge my colleagues to join me in cosponsoring this legislation and I urge its consideration and enactment in this Congress.

H.R. —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Municipal Biological Monitoring Use Act''.

SEC. 2. BIOLOGICAL MONITORING.

(a) BIOLOGICAL MONITORING CRITERIA.—Section 303(c)(2) of the Federal Water Pollution Control Act (33 U.S.C. 1313(c)(2)) is amended—

(1) by inserting after the third sentence of subparagraph (B) the following: ''Criteria for biological monitoring or whole effluent toxicity shall employ an aquatic species that is indigenous to the type of waters, a species that is representative of such species, or such other appropriate species as will indicate the toxicity of the effluent in the specific receiving waters. Such criteria shall take into account the natural biological variability of the species, and shall ensure that the accompanying test method accurately represents actual in-stream conditions, including conditions associated with dry and wet weather.'';

(2) by striking the period at the end of subparagraph (B) and inserting the following: '';

except that for publicly owned treatment works, municipal separate storm sewer systems, and municipal combined sewer overflows (including control facilities) and other wet weather control facilities, nothing in this Act shall be construed to authorize the use of water quality standards or permit effluent limitations which result in the finding of a violation upon failure of whole effluent toxicity tests or biological monitoring tests.''; and

(3) by adding at the end the folowing:

''(C) Where the permitting authority determines that the discharge from a publicly owned treatment works, a municipal separate storm sewer system, or municipal combined sewer overflows (including control facilities) or other wet weather control facilities causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criterion for whole effluent toxicity, the permit may contain terms, conditions, or limitations requiring further analysis, identification evaluation, or reduction evaluation of such effluent toxicity. Such terms, conditions, or limitations meeting the requirements of this section may be utilized in conjunction with a municipal separate storm sewer system, or municipal combined sewer overflows (including control facilities) or other wet weather control facilities only upon a demonstration that such terms, conditions, or limitations are technically feasible accurately represent toxicity associated with wet weather conditions, and can materially assist in an identification evaluation or reduction evaluation of such toxicity.''

(b). INFORMATION ON WATER QUALITY CRITERIA.—Section 304(a)(8) of such Act (33 U.S.C. 1314(a)(8)) is amended by inserting '', consistent with subparagraphs (B) and (C) of section 303(c)(2),'' after ''publish''.

(c) USE OF BIOLOGICAL MONITORING OR WHOLE EFFLUENT TOXICITY TESTING.—Section 402 of such Act (33 U.S.C. 1342) is amended by adding at the end the following:

''(q) USE OF BIOLOGICAL MONITORING OR WHOLE EFFLUENT TOXICITY TESTING.—

''(1) IN GENERAL.—Where the Administrator determines that it is necessary in accordance with subparagraphs (B) and (C) of section 303(c)(2) to include biological monitoring, whole effluent toxicity testing, or assessment methods as a term, condition, or limitation in a permit issued to a publicly owned treatment works, a municipal separate storm sewer system, or a municipal combined sewer overflow (including a control facility) or other wet weather control facility) permit term, condition, or limitation shall be in accordance with such subparagraphs.

''(2) RESPONDING TO TEST FAILURES.—If a permit issued under this section contains terms, conditions, or limitations requiring biological monitoring or whole effluent toxicity testing designed to meet criteria for biological monitoring or whole effluent toxicity, the permit may establish procedures for further analysis, identification evaluation, or reduction evaluation of such toxicity. The permit shall allow the permittee to discontinue such procedures, subject to future reinitiation of such procedures upon a showing by the permitting authority of changed conditions, if the source of such toxicity cannot, after thorough investigation, be identified.

''(3) TEST FAILURE NOT A VIOLATION.—The failure of a biological monitoring test or a whole effluent toxicity test at a publicly owned treatment works, a municipal separate storm sewer system, or a municipal combined sewer overflow (including a control facility) or other wet weather control facility shall not result in a finding of a violation under this Act.''.

ON IMPEACHMENT

HON. PATSY T. MINK

OF HAWAII

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 6, 1999

Mrs. MINK of Hawaii. Mr. Speaker, my constituents who ask me to vote for impeachment do so on the assumption that the President has been found guilty of perjury.

They ask me to apply the law to the President the same as I would apply for ordinary citizens.

I have analyzed my views in accordance with this direction.

I say with no doubt whatsoever, that the Articles of Impeachment or the record which accompanied it make no specific finding of facts as to exactly what statement was given under oath that forms the basis of the crime of perjury.

There are many suggestions and innuendoes and assumptions, but there is no specific listing of proof upon which the Judiciary Committee relied to make its recommendation to impeach and remove the President from office.

The Judiciary Committee takes the position that they are not required to provide the House with any degree of specificity. They interpret their report on impeachment as merely a referral of various and sundry allegations to the Senate and accordingly forfeited their duty to examine the facts independently and decide exactly what facts support the allegations of perjury. I believe that this view of our Constitutional duty is an abdication of our sworn responsibility.

If this House is prepared to remove the President from office it must do so on the basis of specific findings of criminal behavior. It cannot be on generalized allegations with a hope that the Senate will determine whether crimes have been committed.

I agree with my constituents who ask us to apply the same law to the President as would be applied to ordinary people.

Ordinary citizens would be given the specific basis underlying the charge of perjury.

The President has not been provided this information. He has been presumed guilty of perjury because he will not admit to it. How does this square with the rule of law?

I believe that it is the duty of the courts under which the President was required to provide sworn testimony to review the statements and to make a prompt determination as to which of the charges of perjury is sustainable.

What if the Courts refuse to charge the President of the crime of perjury as some commentators suggest? If he is driven out of office before the Court makes this finding, how will this House remedy this ultimate penalty?

To vote for these Articles of Impeachment is to vote to remove the President from office without any of us knowing what exactly he testified to under oath amounted to perjury. At the minimum this must be elaborated in the Articles of Impeachment so that the Public and the Senate may know what the specific charges are and so that the President may defend himself.

When I vote against these Articles of Impeachment, I will do so because I cannot allow this House to avoid its Constitutional duty to enumerate its allegations of perjury before recommending impeachment.

No President is above the law. He is at least entitled to the same protection that applies to each of us if we should be charged with criminal conduct.

People who are charged with crimes must be informed of the specific charges.

Without that, the call for the rule of law is an empty and hollow gesture.

IMPEACHMENT OF PRESIDENT CLINTON

HON. JOHN F. TIERNEY

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 6, 1999

Mr. TIERNEY. Mr. Speaker, I shall be voting against each of the articles of impeachment. I am convinced that impeachment is not in the best interest of the country and its citizens. President Clinton's conduct—inappropriate and wrong as it was—does not reach the threshold necessary to constitute the kind of high crimes and misdemeanors envisioned by the founding fathers and subsequent interpreters of the Constitution.

I have reached this decision after reviewing applicable law and precedence, after considering the views of academics, and after weighing the comments of constituents. A vote for impeachment ought to be a matter of conscience, but it should also not be unmindful of the strong opinion of the governed. Impeachment in this case would essentially undo the results of two popular elections.

As my colleague HOWARD BERMAN has stated, ''That the President's conduct is not impeachable does not mean that society condones his conduct. Rather, it means that the popular vote of the people should not be abrogated for this conduct—when the people clearly do not wish for this conduct to cause the abrogation. * * * Conduct that may not be impeachable for the President * * * is not necessarily conduct that is acceptable in the larger society.''

Indeed the President is not blameless for the sorry state of affairs now before us. His actions were, as he admitted, indefensible, and his obfuscation of facts has been ''maddening.'' It would be entirely appropriate, I believe, for either or both bodies of Congress to strongly rebuke the President for his conduct and his lack of judgment.

It is regrettable that the leadership of the majority party, in the face of overwhelming public sentiment not to impeach—and in defiance of a fair number of its own party who have said that impeachment is not the appropriate course—has seemingly chosen to politicize this most serious matter. There is reason to believe that enormous pressure has been exerted on rank and file members of the majority party to support impeachment. The Republican leadership has compounded the situation by refusing to allow for a vote on the motion to censure the President—something that again its own members have said should be permitted. Leading members of the majority would have us believe they are acting out of conscience. Yet they would deny other members that same right. This sets the stage for bitter and needlessly divisive recriminations in the months ahead as the 106th Congress begins to confront the issues on our national agenda.