

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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ASSOCIATION OF METROPOLITAN )  
SEWERAGE AGENCIES, CALIFORNIA )  
ASSOCIATION OF SANITATION )  
AGENCIES, INC., MARYLAND )  
ASSOCIATION OF MUNICIPAL )  
WASTEWATER AGENCIES, INC., )  
SOUTH CAROLINA WATER QUALITY )  
ASSOCIATION, INC., TEXAS ASSOCIATION )  
OF METROPOLITAN SEWERAGE )  
AGENCIES, INC., VIRGINIA )  
ASSOCIATION OF MUNICIPAL )  
WASTEWATER AGENCIES, INC., )  
WEST VIRGINIA MUNICIPAL )  
WATER QUALITY ASSOCIATION, INC., )  
)  
                        Petitioners, )  
)  
v. )  
)  
UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY and CHRISTINE )  
T. WHITMAN, in her official capacity as )  
Administrator of the United States )  
Environmental Protection Agency, )  
)  
                        Respondents. )  
)

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**Case No. 03-1091  
(consolidated with No. 03-1087)**

**NONBINDING STATEMENT OF ISSUES OF ASSOCIATION OF  
METROPOLITAN SEWERAGE AGENCIES, ET AL.**

Pursuant to the Court’s orders of March 27 and April 1, 2003, petitioners, the Association of Metropolitan Sewerage Agencies, the California Association Of Sanitation Agencies, Inc., the Maryland Association of Municipal Wastewater Agencies, Inc., the South Carolina Water Quality Association, Inc., the Texas Association Of Metropolitan Sewerage Agencies, Inc., the Virginia Association of Municipal Wastewater Agencies,

Inc., and the West Virginia Municipal Water Quality Association, Inc., submit the following nonbinding statement of issues to be raised in this proceeding. All issues refer to the promulgation by Respondents of pollutant or pollutant parameter test procedures within 40 C.F.R. Part 136, 67 Fed. Reg. 69, 971 (Nov. 19, 2002).

1. Whether EPA acted arbitrarily and capriciously, or otherwise unlawfully, in promulgating test procedures for the analysis of pollutants or pollutant parameters that cannot accurately or reliably measure the pollutant parameters (toxicity) that such test procedures purport to measure.

Not by way of limitation of the above, whether EPA acted unlawfully in promulgating test procedures that are not reliable or accurate because:

(A) The accuracy of such test procedures cannot be determined.

(B) Such test procedures do not include Data Quality Objectives, in contravention of EPA's own guidelines.

(C) EPA's data validation for the test procedures was not performed in conformance to EPA's own guidelines developed for this specific data validation effort. Although EPA's Interlaboratory Validation Study was initiated pursuant to a specific protocol, EPA deviated from its own protocol and its deviations were uniquely or largely biased toward validation of the test procedures, without technical justification.

(D) EPA's evaluation of data was not in conformance with its own Data Quality Guidelines; and EPA did not provide an acceptable reason for such nonconformance.

2. Whether EPA acted arbitrarily and capriciously, or otherwise unlawfully, in promulgating test procedures for toxicity that are not capable of distinguishing

between (a) toxicity caused by the sample tested and (b) effects due to the natural response or unavoidable variations in the living test organisms.

3. Whether EPA acted arbitrarily and capriciously, or otherwise unlawfully, in promulgating test procedures for toxicity, the results of which do not demonstrate an accurate or reliable correlation between (a) toxicity in the laboratory environment reflected by the test and (b) toxicity in rivers or other surface waters after introduction of the water or waste tested.

Not by way of limitation of the above, whether EPA acted unlawfully in promulgating test procedures that bear no correlation to environmental toxicity:

(A) Where test toxicity is (a) marginal or low-level or (b) infrequent.

(B) Where EPA failed to identify a correlation for marine and estuarine test procedures, and for freshwater test procedures where there is high dilution by surface waters.

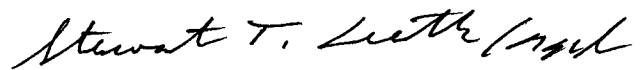
4. Whether EPA acted in violation of the U.S. Constitution's Fifth Amendment due process provisions, or otherwise unlawfully, in promulgating test procedures for toxicity (a) that deprive affected persons of fair notice of the nature of conduct that is or will be prohibited by law, (b) where the test results often are within the bounds of demonstrated test variability, and (c) that require data on the dose-response relationship of such test procedures, and require an evaluation of the validity of such relationship, without providing criteria for whether such relationship demonstrates an acceptable test.

5. Whether EPA acted arbitrarily and capriciously, or otherwise unlawfully, in promulgating chronic toxicity test endpoints that are different from (more sensitive

than) the endpoints in the rulemaking proposal, not in response to public comment and not otherwise as a rational extension of the proposal.

6. Whether EPA acted arbitrarily and capriciously, or otherwise unlawfully, in promulgating test procedures for toxicity that, due to their inherent variability, do not permit affected persons to determine whether they are able to certify that measured test results are “true and accurate” as required in EPA’s existing, legally-required documentation.

Respectfully submitted,



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David E. Evans (D.C. Cir. No. 48602)  
Stewart T. Leeth (D.C. Cir. No. 46079)  
McGUIREWOODS LLP  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-4719

Counsel for  
ASSOCIATION OF METROPOLITAN  
SEWERAGE AGENCIES, CALIFORNIA  
ASSOCIATION OF SANITATION  
AGENCIES, INC., MARYLAND  
ASSOCIATION OF MUNICIPAL  
WASTEWATER AGENCIES, INC.,  
SOUTH CAROLINA WATER QUALITY  
ASSOCIATION, INC., TEXAS  
ASSOCIATION OF METROPOLITAN  
SEWERAGE AGENCIES,  
VIRGINIA ASSOCIATION OF  
MUNICIPAL WASTEWATER  
AGENCIES, INC., WEST VIRGINIA  
MUNICIPAL WATER QUALITY  
ASSOCIATION, INC.,

OF COUNSEL

Alexandra Dapolito Dunn (D.C. Cir. No. 428526)  
General Counsel  
Association of Metropolitan Sewerage Agencies  
1816 Jefferson Place, N.W.  
Washington, D.C. 20036-2505  
(202) 533-1803  
ASSOCIATION OF METROPOLITAN  
SEWERAGE AGENCIES

F. Paul Calamita  
Christopher D. Pomeroy  
AQUALAW PLC  
801 E. Main Street, Suite 1002  
Richmond, VA 23219  
(804) 716-9021  
VIRGINIA ASSOCIATION OF  
MUNICIPAL WASTEWATER  
AGENCIES, INC., WEST VIRGINIA  
MUNICIPAL WATER QUALITY  
ASSOCIATION, INC., MARYLAND  
ASSOCIATION OF MUNICIPAL  
WASTEWATER AGENCIES, INC.,  
SOUTH CAROLINA WATER QUALITY  
ASSOCIATION, INC.

Roberta L. Larson  
SOMACH, SIMMONS & DUNN  
Hall of Justice Building  
813 Sixth Street, Third Floor  
Sacramento, CA 95814  
(916) 446-7979  
CALIFORNIA ASSOCIATION OF  
SANITATION AGENCIES

Dated: April 28, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of April, 2003, I caused a copy of the foregoing Petition for Review to be sent, via first-class mail, postage prepaid, to each of the following:

The Honorable Christine T. Whitman  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

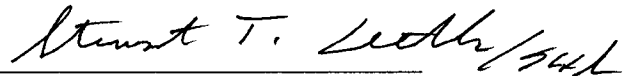
James N. Christman  
Hunton & Williams  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074

The Honorable John Ashcroft  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Stephen J. Sweeney, Esquire  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W., 2355A  
Washington, DC 20460

Alan Greenberg, Esquire  
U.S. Department of Justice  
999 19<sup>th</sup> Street, Suite 945  
Denver, CO 80202

Correspondence Control Unit  
Office of General Counsel  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

  
Stewart T. LeBlanc/SLB