SCHEDULED FOR ORAL ARGUMENT ON MAY 19, 2005

Case No. 04-5073

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

v.

MICHAEL O. LEAVITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
Case No. 1-02-CV-1361

REPLY BRIEF OF INTERVENOR ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

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GLOSSARY

CWA	Clean Water Act
EPA	United States Environmental Protection Agency
J.A.	Joint Appendix
NPDES	National Pollutant Discharge Elimination System
POTW	Publicly Owned Treatment Works

SUMMARY OF THE ARGUMENT

The EPA Regions' actions of adopting and applying policy positions that restrict or prohibit blending, which are directly at odds with the CWA and EPA regulations, constitute facial violations of the "clear and mandatory" language of CWA § 501(a), 33 U.S.C. § 1361(a), as well as EPA's own regulations and other materials governing delegated powers. The EPA Regions' actions are therefore *ultra vires*, giving rise to the District Court's subject matter jurisdiction under Leedom v. Kyne, 358 U.S. 184 (1958).

ARGUMENT

I. The EPA Regions' Actions are *Ultra Vires* because Blending is Authorized under the CWA and EPA Regulations.

Appellants' and Intervenor's Complaints alleged that the CWA and its implementing regulations authorize the practice of blending, as repeatedly made clear by EPA's own interpretation and implementation of the statute and regulations. See Intervenor's Cmplt. ¶¶ 42-127; Pls. Cmplt. ¶¶ 35-126; J.A. As pointed out in Intervenor's Initial Brief, the EPA Regions are therefore without authority to impose binding, substantive requirements via "policies" that increase the stringency, applicability, burden of compliance, or compliance costs of those existing regulations. See Intervenor's Br. at 7-10.

Appellee's response never denied, or even addressed, this issue. Instead, Appellee merely asserted in conclusory fashion that blending "implicates" the

bypass rule and the EPA Regions have the delegated authority to interpret the CWA and EPA regulations. See Appellee's Br. at 18-19, 45-48. Appellee's arguments are unavailing. Blending is fully consistent with, and does not "implicate," the bypass rule. The EPA Regions consequently lack authority to adopt and apply policy positions that prohibit blending under the false pretext of "delegated authority." Their *ultra vires* actions violate CWA § 501(a), 33 U.S.C. § 1361(a), as well as EPA's own regulations and materials governing delegated powers.

A. Blending is Authorized by the Secondary Treatment Rule.

The CWA regulates discharges from POTWs through the imposition of effluent limitations based on "secondary treatment," which EPA has defined in terms of the numeric limitations set forth at 40 C.F.R. Part 133. EPA admits that the secondary treatment rule was not intended to prohibit the practice of blending. Pls. Dismissal Response, Ex. 11 at Admissions 29-30; J.A.

As EPA concedes, the secondary treatment rule does not dictate the treatment process that a POTW must use to meet the limitations. Appellee's Br. at 10; see also 68 Fed. Reg. 63042, 63046 (Nov. 7, 2003). The rule does not require that all wastewater flows receive biological treatment and does not preclude the use of non-biological facilities. See 68 Fed. Reg. at 63046. Instead, EPA recognizes that the basic decisions regarding technology or an alternative management technique are left to the permittee's own case-by-case, cost-effective

analysis. See 68 Fed. Reg. at 63046; 48 Fed. Reg. 52258, 52260 (Nov. 16, 1983). Consequently, POTWs may design and operate a treatment process that utilizes blending (combining biological and non-biological treatment processes) during peak wet weather flows to meet effluent limitations.

B. Blending is Authorized by the Bypass Rule.

The bypass rule prohibits the "intentional diversion of waste streams from any portion of a treatment facility." 40 C.F.R. § 122.41(m). EPA admits that the bypass rule was never intended to restrict blending:

> EPA has no documents from the promulgation of the bypass provisions that indicate that the bypass rule was intended to preclude the use of blending as a wet weather flow management option.

Pls. Dismissal Response, Ex. 23 at 1.

Like the secondary treatment rule, "[t]he bypass rule does not dictate that any specific treatment technology be employed." 68 Fed. Reg. at 63048; 53 Fed. Reg. 40562, 40609 (Oct. 17, 1988) ("The bypass provision does not dictate how users must comply."). As stated by EPA, the rule:

> merely 'piggybacks' existing requirements, it does not itself impose costs that have not already been taken into account in the development of categorical standards.

53 Fed. Reg. at 40609. Because the bypass rule imposes no additional requirements or costs beyond those imposed by the applicable effluent limitations,

there are no grounds for an interpretation of the bypass rule that would restrict blending, as the secondary treatment rule contains no such restriction.

Moreover, EPA has explicitly confirmed that blending is not within the scope of the bypass rule's prohibition. For example, when EPA revised the NPDES regulations in 1984, it declared:

> 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. Any variation in effluent limits accounted for and recognized in the permit which allows a facility to dispense with some unit processes under certain conditions is not considered bypassing.

49 Fed. Reg. at 38036-37 (Sept. 26, 1984). In its brief submitted to this Court in NRDC v. EPA, 822 F.2d 104 (D.C. Cir. 1987), involving a challenge to the bypass rule, EPA explained:

> [T]he regulation imposes no limits on the permittee's choice of treatment technology and therefore does not "dictate technology" . . . [T]he regulation requires only that, except for "essential maintenance," the equipment that the permittee has selected will be operated.
>
> . . . [W]hat the Agency originally intended, and still intends, is to ensure "proper pollution control through adequate design operation and maintenance of treatment facilities." "Design" operation and maintenance are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that a facility follows those requirements. It imposes no specific design and no additional burdens on a permittee.

Pls. Dismissal Response, Ex. 3 at 190; J.A. Likewise, EPA's brief informed the Court that the bypass regulation imposes no additional costs beyond those considered by EPA in the development of categorical standards (i.e., the secondary treatment rule). Id. at 193-95.

In sum, EPA has repeatedly affirmed its position that the bypass rule does not prohibit blending, dictate or limit plant design, or impose any additional costs or burdens on regulated entities. The rule plainly cannot be interpreted and applied by the EPA Regions as a basis for their *ultra vires* attempt to prohibit or restrict blending.

C. EPA's Implementation of the Secondary Treatment and Bypass Rules Allows Blending.

Consistent with regulatory history of these rules and the well understood restriction on EPA's authority to dictate or proscribe treatment technology, blending is a common POTW design that: (1) EPA has funded through federal grants, (2) EPA has permitted over the past thirty years, and (3) EPA has never indicated is not an allowable activity. See 68 Fed. Reg. at 63046 (recognizing that blending is routinely employed by POTWs during peak wet weather conditions); Intervenor's Cmplt. ¶¶ 54-59; J.A. The rules were never intended by EPA to regulate, and have not been applied by EPA to proscribe, blending as a means for processing wet weather flow.

Blending is therefore an allowable plant design and operational practice under the CWA and EPA regulations. The EPA Regions have no authority to prohibit blending under the guise of "policies" or their delegated authority to interpret the CWA and EPA regulations. Their actions are *ultra vires* in express violation of the clear statutory mandate of CWA § 501(a), 33 U.S.C. § 1361(a), which provides only the EPA Administrator, not the Regions, with rulemaking authority.

CONCLUSION

For the reasons set forth above, as well as in Appellants' and Intervenor's Initial Briefs and Appellants' Reply Brief, Intervenor respectfully requests that the Court grant the previously requested relief. See Intervenor's Br. at 10.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(A)(3)(B) AND
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Dated: _____

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing *Reply Brief of Intervenor Association of Metropolitan Sewerage Agencies* were served via first class mail this 16th day of March, 2005, upon the following:

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