UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, *et al.,*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1-02-01361 (HHK)
CHRISTINE TODD WHITMAN, Administrator, U.S. Environmental Protection Agency, *et al.*	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPORT THEREOF

Plaintiffs Pennsylvania Municipal Authorities Association ("PMAA"), Tennessee Municipal League ("TML"), and City of Little Rock Sanitary Sewer Committee ("Little Rock") (hereinafter collectively "Plaintiffs") filed this case seeking judicial review of Defendants' Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency; Donald S. Welsh, Regional Administrator, U.S. Environmental Protection Agency, Region III; J.J. Palmer, Jr., Regional Administrator, U.S. Environmental Protection Agency, Region IV; and Gregg Cooke, Regional Administrator, U.S. Environmental Protection Agency, Region VI (hereinafter collectively "Defendants" or "EPA") action by several Regional Offices, contrary to the duly promulgated regulations and historical rule implementation by EPA Headquarters.

INTRODUCTION

The gravamen of Plaintiffs' argument is that EPA Regions III, IV, and VI adopted their own secret policies, contrary to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.,* ("CWA" or "the Act") and its implementing regulations, that (1) refused to allow municipal entities to construct and operate certain cost-effective treatment plant designs to process peak wet weather flows even though such facilities met all applicable effluent requirements, (2) refused to permit wet weather emergency discharges, and (3) imposed secondary treatment requirements on wet weather facilities. As a result of these illegal actions, hundreds of millions of dollars have been spent to modify plant designs and to file permit appeals. By EPA's own estimates, several hundred billion dollars will need to be expended if these unlawful Regional Office practices are not stopped.

EPA has moved aggressively through its Motion to Dismiss (hereinafter "Mot. to Dismiss") and request for a Rule 26 protective order regarding discovery to shield these actions from judicial review. EPA's Mot. to Dismiss asserts that this matter (1) lies within the exclusive jurisdiction of the Court of Appeals pursuant to CWA 509(b)(1)(E), (2) is not yet ripe for review, and (3) lacks finality. None of these claims is legally or factually accurate. In arguing these legal theories, Defendants failed to report the controlling D.C. Circuit decisions and asserted a number of factual positions that are directly contradicted by EPA's own records and admissions. Moreover, EPA's positions are contradicted by the allegations in the Complaint, which for the purposes of a motion to dismiss, must be deemed as true.

Using the allegations in the Complaint, documents, and EPA admissions, Plaintiffs will show that the issues involved in this case are final agency actions ripe for review in the federal district court. For the reasons stated herein, Defendants' Mot. to Dismiss should be denied.

STANDARD OF REVIEW

In order survive a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6), a complaint need only provide "a short and plain statement" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Amons v. District of Columbia*, 2002 U.S. Dist. LEXIS 21186 at 9-10 (D.D.C. 2002). When reviewing a motion to dismiss the court must accept as true all the factual allegations contained in the complaint. *See Id*. at 10. As a result, a complaint should not be dismissed for failure to state a cause of action unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Id.* at 9-10.

In deciding a Fed R. Civ. Proc. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court must accept as true all the factual allegations contained in the complaint. *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 195 (D.D.C. 2002). However, additional evidence may be considered by the court in rendering its decision. *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).[1]

STATUTORY AND REGULATORY BACKGROUND

This case primarily involves (1) whether EPA Regions can develop Regional mandates without undertaking rulemaking; (2) whether the Regional actions exceed EPA authority delegated by Congress under the Clean Water Act and (3) whether or not two longstanding EPA regulations – the secondary treatment rule (adopted in 1974) and the bypass rule (adopted in

[1] *Herbert* states: "The District Court may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. Pro. 12(b)(1) on the complaint standing alone. But where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. 974 F.2d at 197.

1979) – were intended to restrict certain actions for municipal entities as specified in permitting policies enacted by EPA Regions III, IV, and VI.

A. EPA ACTIONS UNDER SECTION 301

Section 301 of the Clean Water Act, 33 U.S.C. § 1311, is the regulatory provision that requires all point source discharges to have a permit and establishes the requirements for setting effluent limitations applicable to industrial and municipal discharges. As stated in *Dupont v. Train*, 430 US 112, 129 (1977), "[T]he language of the statute supports the view that § 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes or categories, and that they are to take the form of regulations." In setting such "categorical effluent limits," EPA does not have authority under the Act to dictate the type of technology or plant design that may be used to achieve effluent limitations. *See generally*, *AISI v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997).[2]

B. SECONDARY TREATMENT RULE

This rule, 40 C.F.R. Part 133, is the categorical effluent limitation applicable to municipal entities. *See generally* 33 U.S.C. § 1311(b)(1)(B). It only sets numeric pollutant limits for three

[2] EPA's lack of statutory authority to dictate how a treatment plant is designed has been well established for over 28 years, including (a) EPA's published legal opinion, *see In the matter of the National Pollutant Discharge Elimination System Permit for Blue Plains Sewage Treatment Plant*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. §125.36(m), No. 33 (October 21, 1975) at 12-13 ("The Congressional history demonstrates that EPA is not to prescribe any technologies" and that "it is not within authority of the Regional Administrator to define particular treatment methods.") Plaintiffs' Exhibit 2 (hereinafter "Pls. Ex."); (b) briefs submitted to the D.C. Court of Appeals, *see* EPA brief submitted in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) (hereinafter "*NRDC III*" ("However, the regulation [*e.g.,* the bypass regulation] imposes no limits on the permittee's choice of treatment technology and therefore does not 'dictate technology'."), Pls. Ex. 3; (c) Defendants' Mot. to Dismiss at 6 ("The 'secondary treatment' standards promulgated by EPA are thus expressed in terms of the limitations that must be achieved, and do not dictate the type or form of technology that may be used to attain the limitations."); and (d) 48 Fed. Reg. 52259 (November 16, 1983) ("the current secondary treatment regulation itself does not address the type of technology used to achieve secondary treatment requirements.")

parameters (BOD, TSS, and pH) that must be achieved in the discharge effluent. The rule sets no restrictions on the type of process or design that may be used to achieve the adopted effluent limits. *Accord,* Pls. Ex. 11 (Defendants' Response to Plaintiffs' First Request for Admissions, hereinafter "Admission #") at Admission 6; Mot. to Dismiss at 6. The rule was not intended to restrict blending, and therefore did not evaluate any costs associated with such a restriction in achieving secondary effluent limits. Admission 31; Pls. Ex. 22. Regarding facilities that only treat wet weather flow discharges (*e.g.,* operate intermittently in response to wet weather flows), EPA has historically concluded that the secondary treatment rule is inapplicable. Pls. Ex. 12 and 13. In the past, EPA has recommended that the limits for such facilities be based upon a BAT/BCT[3] analysis. (Pls. Ex. 12.)

C. BYPASS REGULATION

Pursuant to Section 301, EPA has also adopted regulations under 40 C.F.R. Part 122 to implement the adopted categorical effluent limits through the NPDES permit program, including the bypass regulation, 40 CFR § 122.41(m). *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982) (hereinafter *NRDC II*). The authority to establish such nationally applicable limitations under Section 301 via Federal Register notice and comment is restricted to the Administrator and is not

[3] BCT or "Best Conventional Pollution Control Technology" is the standard permittees must meet for discharge of conventional pollutants. *See BP Exploration & Oil v. EPA*, 66 F.3d 784, 790 (6th Cir. 1995). In developing the technology chosen as BCT the Administrator must weigh the cost of attaining effluent requirements against the benefit of the reduction achieved. *Id*. BAT or "Best Available Technology Economically Achievable" is the standard for toxic pollutants and a much more stringent requirement than BCT. *Id*. The Administrator must consider the following factors when setting BAT: the cost of achieving the standard, non-water quality environmental impacts, the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, and such other factors as the Administrator deems appropriate. *Id*. EPA regulations implementing these provisions in NPDES permits may be found at 40 CFR § 125.3.

delegated to any other entity. Admission 72; Pls. Ex. 10 (EPA Administrator's Delegations Manual) at 1-21.

The bypass rule was adopted by EPA to achieve two basic purposes: (1) ensure continued operation of equipment installed by a permittee and (2) to provide a defense to permit violations cause by events beyond the reasonable control of the permittee. 49 Fed. Reg. 37998 (Sept. 26, 1984). This regulation, like the secondary treatment rule, imposes no restrictions on the technology or plant design that may be employed to achieve applicable effluent limitations. *AISI,* 115 F.3d at 996. ("[B]y authorizing the EPA to impose effluent limitations only at the point source, the Congress clearly intended to allow the permittee to choose its own control strategy."); *Supra,* n. 2; Pls. Ex. 23 at 2.

As stated by EPA, the bypass rule simply implements the effluent guidelines established under Section 301 (*e.g.,* secondary treatment rule) and does not add any additional requirements or costs not already imposed by the adopted effluent guidelines. 53 Fed. Reg. 40609 (Oct. 17, 1988) ("the bypass provision merely 'piggybacks' existing requirements, it does not itself impose costs that have not already been taken into account in development of categorical standards"); *see also*, EPA brief submitted in *NRDC* at 190; Pls. Ex. 3.[4]

The costs to preclude or restrict blending were not considered under the bypass rule. Admission 25; Pls. Ex. 22 at 3. EPA has explicitly stated in the Federal Register that the bypass rule does not prohibit blending as a method to process peak wet weather flows.[5] EPA

[4] In their brief (at 189, 190), EPA stated, "'Design'" operation and maintenance are those requirements developed by the designer of whatever treatment facility a permittee uses. The bypass regulation only ensures that facilities follow those requirements. *It imposes no specific design and no additional burdens on a permittee."* (Emphasis added.)

[5] "Under EPA regulations, the intentional diversion of waste streams from any portion of a treatment facilities, including secondary treatment, is a bypass. For a POTW a bypass does not refer to flows or portions of flows that are diverted from portions of the treatment system but that meet all effluent limits for the treatment plant upon

Headquarters has never issued a public notice specifically stating that blending is prohibited at POTWs. Admission 14; Pls. Ex. 23.

D. PERMIT ISSUANCE AND EMERGENCY OUTFALLS

EPA regulations require the Administrator to issue determinations on permit applications, denying or issuing such permits. 40 C.F.R. § 124.6. Such denials or approvals must be done in accordance with the adopted regulations. *See City Ocean Action v. York*, 57 F.3d 328, 333 (3rd Cir. 1995) ("An agency is bound by the express terms of its regulations until it amends or revokes them."); *Platt College of Commerce, Inc. v. Cavazos*, 796 F. Supp. 22, 26 (D.D.C. 1992) ("An agency is, of course, bound by its own regulations"). NPDES rule require that all discharge locations, including constructed emergency discharge locations, be identified in the permit application. 40 C.F.R. § 122.21. While certain actions may be prohibited under federal law, EPA has adopted no regulations that allow it to refuse to permit emergency outfalls.

The preamble to EPA's permit application guidelines states that the bypass and upset rules authorize emergency (untreated) discharges, and such discharges may receive permits. *See* 64 Fed. Reg. 42434, 42442 (Aug. 4, 1999);[6] *accord*, Admission 58 ("Dischargers into waters of the United States from sanitary sewer systems may be authorized or approved in an NPDES

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recombining with non-diverted flows prior to discharge." 58 Fed. Reg. 4994 (Jan 19, 1993) (providing notice of availability for Draft CSO policy); Dec. 22, 1992 Draft CSO Policy at 24, Pls. Ex. 14.

[6] As stated in the EPA preamble:

> '[E]mergency' or 'accidental' discharges from locations within municipal sewage collection systems not identified in the permit [] would not automatically receive the protection of the permit-as-a-shield provision [under CWA § 402(k), 33 U.S.C. § 1342(k)]. Rather, the legal status of these discharges is specifically related to the permit language and the circumstances under which the discharge occurs. The Agency notes that NPDES permit regulations do provide limited relief under the bypass and upset provisions of 40 CFR 122.44(m) and (n), respectively, for such discharges.

permit"). Finally, EPA has historically permitted SSO discharges under the NPDES program and authorized discharges from such facilities, as long as the bypass rule provisions are met. Admission 54; Pls. Ex. 15.

E. JUDICIAL REVIEW UNDER SECTION 509 OF THE CLEAN WATER ACT

Section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), grants the Court of Appeals sole jurisdiction to review challenges to rules adopted by the Administrator to implement Section 301 of the Act (*i.e.,* adoption of categorical effluent limits and the NPDES rules used to implement the categorical effluent limits). *Train*, 430 US at 136. Regarding challenges to the NPDES regulation promulgation, the D.C. Circuit concluded that Section 509(b)(1) was applicable because EPA's statutory basis for adopting these rules was Section 301 and the rules, like the guidelines, have national impact. *NRDC II* at 405 n. 15; *see also*, *Chrysler Corp. v. EPA*, 600 F.2d 904, 909 (D.C. Cir. 1979) ("Review under section 509(b)(1) depends upon whether the Administrator acted under Section 301, not on an exaggerated reading of its review grant"). These are major rulemaking initiatives undertaken solely by the Administrator and delegated to no one in the Regions. *Train*, 430 US at 128; Admission 72.

The provision ensures that challenges to such rules are reviewed in the Court of Appeals based upon the administrative record developed during rulemaking. Section 509(b)(2) does not allow piecemeal challenges to the rules to occur via enforcement or permit proceedings, *see* 33 UCSC § 1369(b)(2). Section 509(b)(1), however, does not provide for exclusive review of subsequent agency interpretation of adopted rules because challenging a rule interpretation is not the same thing as challenging the validity of the rule itself. *Utah Power & Light Co., v. EPA*, 553 F.2d 215, 218 (D.C. Cir. 1977) ("[C]hallenges to the validity of certain agency regulations

are directly reviewable in the Court of Appeals, whereas challenges to interpretations of those regulations are not"); *American Farm Bureau v. EPA*, 121 F.Supp. 2d 84, 91-92 (D.D.C. 2002);[7] *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 282-285 (1978); *League of Wilderness Defenders v. Forsgren,* 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) (Section 509(b)(1) not relevant to review of rule interpretation).[8] Such rule interpretations frequently at issue in enforcement cases are not challenges to the rules themselves, and therefore may be brought in district court. *Adamo Wrecking Co.*, 434 US at 282-285.[9]

STATEMENT OF THE CASE

The instant case presents a new and more egregious wrinkle on EPA's oft-tried use of "guidance documents" in order to avoid rulemaking strictures:[10] various EPA Regional Offices (*e.g.,* Regions III, IV, and VI), intent on imposing their own more restrictive treatment requirements on municipal wet weather flow management, adopted and implemented secret

[7] *American Farm Bureau* addressed application of a section of 21 U.S.C. § 346a(h)(1) that was for all practical purposes, identical to Section 509(b)(1)(E) of the Clean Water Act finding rule application to be outside the scope of the review provision. 121 F.Supp 2d at 93.

[8] As stated in *NRDC II* at 404 n.14, "[I]t is clear . . . that Congress intended that some actions under the CWA not be subject to direct review in a court of appeals."

[9] There are many CWA enforcement cases that have considered regulatory interpretation disputes. *See e.g.*, *U.S. v. Smithfield Foods Inc*., 191 F.3d 516 (4th Cir. 1999); *West Penn Power Co. v. Train*, 522 F.2d 302, 309 (3rd Cir. 1975).

[10] As stated by the D.C. Circuit in *Appalachian Power v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000):

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and another and so on . . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations . . . . The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

policies known to be directly at odds with historical rule interpretation, Administrator decisions, General Counsel memoranda, and briefs filed by EPA with the D.C. Circuit Court of Appeals regarding these rules. *See generally,* Plaintiffs' Complaint at ¶¶ 89 – 196.[11] Defendants have provided the court with a number of primary documents that embody these secret regional policies. Defendants' Exhibits 1-9 (hereinafter "Defs. Ex."). Using these policies as gospel, the Regional Offices began to aggressively inform the regulated community and NPDES-approved state agencies within their Regions that certain wet weather treatment practices (*e.g.,* blending,[12] permitting of emergency outfalls) were forbidden by federal regulation.[13] (*See generally,* Complaint at ¶¶ 141 - 196.)

These Regional Offices mandated that specific plant designs be used to process wet weather flows, regardless of the extraordinary costs involved and whether other cost-effective designs could achieve applicable effluent limits. Such dictates were contrary to the statute and the Administrator's express conclusion that the CWA does not allow EPA to dictate plant design and allows the permittee to select the most cost-effective method to achieve applicable effluent limits.[14] (*See* Complaint at ¶¶ 43 – 55; 275 – 282.) As a result, many unknowing municipalities

[11] *See also Barrick Goldstrike Mines Inc. v. Browner,* 215 F.3d 45, 48-49 (D.C. Cir. 2000) (where the District Court was directed to consider a challenge by a mining company regarding a "final agency action" rendered by a "rulemaking preamble," "guidance" documents, and a letter that revised existing regulations and restricted their operations).

[12] As described in the Complaint, the term blending, slipstreaming, or recombination "generally refers to the practice where peak wet weather flows exceeding the capacity of a treatment unit (*e.g.,* biological unit) are routed around that unit, blended together with the effluent from that unit prior to discharge and the blended flows meet applicable permit effluent limitations at the final discharge location." (Complaint at ¶ 56.)

[13] *See, e.g.,* Pls. Ex. 16, letter from the Tennessee DEC to the Tennessee Municipal League ("EPA [Region IV] has given us very direct explicit instruction on implementation of 40 C.F.R. § 122.41(m).") *See also*, Pls. Ex. 16; Defs. Ex. 1-3, 4, 6.

[14] Section 218, 33 U.S.C. § 1298, of the Clean Water Act also directs EPA to approve only the most "cost effective" project when federal funds are used. "Cost effectiveness," as defined under federal regulations, is the least cost method selected by the discharger to achieve applicable effluent limitations. 40 C.F.R. § 35, App. A.

were forced to expend additional monies to conform to the new Regional Office regulatory interpretations. (*See generally,* Complaint at ¶¶ 127 – 134, 154, 172, 189; Pls. Ex. 17, EPA estimate of costs on municipalities imposed through enforcement action.)[15]

The proper interpretation of national standards is at issue – the regulations do not provide for differing standards based upon EPA Regional geographical location. 40 C.F.R. Part 133, 40 C.F.R. § 122.41(m). Yet what EPA Headquarters indicated the regulations allowed and that other EPA Regions not only authorized, but also encouraged, [16] was prohibited by EPA Regions III, IV and VI. These Regions, however, were not delegated the authority to amend or ignore the nationally adopted regulations. (Complaint at ¶¶ 244-255, 261-266, 270-273; Admission 72; Pls. Ex. 10.)[17]

EPA Headquarters issued numerous letters agreeing that (1) the regulations did not prohibit blending as a wet weather flow management design practice and (2) the rules in question

[15] EPA Region VI acknowledged this cost impact. *See* Complaint at ¶ 189 (an e-mail from EPA Region VI stated that a "number of folks have spent, and are spending, fairly significant sums to correct and eliminate these conditions in our Region"); Defs. Ex. 7.

[16] The other EPA Regional Offices (as well as the EPA Headquarters' program offices responsible for the rules and the EPA Administrator) did not agree with these novel rule reinterpretations or that previously permitted and federally grant-funded treatment plant designs were now "unlawful." (Complaint at ¶¶ 115 – 126; 135 – 141.) EPA Region I provided grants to study how blending can be used to maximize peak flows to the treatment plant. (Pls. Ex. 18.)

[17] EPA's own Delegations Manual clearly states that the Regions do not have such authority. Section 1-21.2a(1) of the Delegations Manual unequivocally states that the Regional Administrators are not delegated authority to establish more restrictive requirements than specified in the existing rules; they are only delegated to issue:

> Proposed and Final Rulemaking documents which correct previously published documents, make *nonsubstantive* changes to previously published documents, amend or change regulations *without affecting their stringency, applicability, burden of compliance, or compliance costs*. (Emphasis added.)

Pls. Ex. 10.

never intended to prohibit blending or considered the costs of such a prohibition. (Complaint at ¶¶ 115 – 126; *see, e.g.,* Pls. Ex. 7, 14, 20, 21, 22, 23.)[18]

Despite the EPA Headquarters correspondence, the Regional Offices simply refuse to change their unauthorized practices. For example, Pls. Ex. 24, correspondence from Region IV on May 11, 2002 states, "[W]e are also preparing to object to a draft permit from South Carolina that allows blending. We have not changed our position on this. . . ." EPA Headquarters refuses to reign in these Regions, despite knowing that permit denials and enforcement actions were proceeding using these unlawful Regional policies. (S*ee* Pls. Ex. 21 acknowledging that Regional Offices are implementing differing rule interpretations.) Due to the continued application of unlawful policies by EPA Regions III, IV, and VI and inaction by EPA Headquarters, this action has been brought.[19]

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION TO ADDRESS PLAINTIFFS' CLAIMS

A. REVIEW OF RULE INTERPRETATION IS NOT WITHIN THE COURT OF APPEALS' EXCLUSIVE JURISDICTION

EPA has alleged that Section 509(B)(1)(E) regarding review of administrator rulemakings should be read broadly to encompass the Regional actions at issue. Courts have addressed how to interpret statutory provisions that grant exclusive jurisdictional review of

[18] EPA Headquarters recently estimated that a national prohibition on blending would cost municipalities up to three hundred billion dollars ($300,000,000,000). Pls. Ex. 19.

[19] How can the regulations have two diametrically opposed interpretations while being implemented? To date, the Defendants in the case have tried to evade any efforts to identify what EPA believes the standard to be under its regulations. We know what EPA has historically said. See 40 C.F.R. Part 133; *NRDC III* at 123; Pls. Ex. 3; Complaint at ¶¶ 67-68; Pls. Ex. 22 and 23. Yet Defendants refuse to state their position– refusing to potentially narrow the issues and appropriately respond to requests for admissions. In all its filings to date and discussions of CWA statutory and regulatory background, it is remarkable that Defendants have refused to alert the Court as to what it believes the appropriate legal standards to be with respect to blending. *See, e.g.,* Admissions 9, 10, and 17.

certain agency actions. Pursuant to *T.R.A.C. v. FCC,* 750 F.2d 70 (D.C. Cir. 1984), where a statute contains an explicit requirement for Court of Appeals review of "all final agency actions," plaintiffs may not avoid that jurisdictional mandate of Congress by artfully pleading "*ultra vires*" in district court. *See Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1077 (3rd Cir. 1989) (where statute "explicitly provide for review of certain actions and *explicitly denies review for anything else*," then district court does not have jurisdiction over *ultra vires* actions) (emphasis added). Subsequent D.C. Circuit decisions, *e.g., Cutler v. Hayes,* 818 F.2d 879, 888 n61 (D.C. Cir. 1987) and *American Farm Bureau,* 121 F.Supp.2d at 91-92, discussed how *T.R.A.C.* was tailored to apply to statutes that provide less pervasive declarations of judicial review, such as the Clean Water Act:

> [W]here a statute contains no 'single, overarching provision governing judicial review,' but instead subjects 'discrete agency actions' to specialized review provisions, actions taken under sections silent as to appellate review are 'directly reviewable in a district court under some appropriate head of jurisdiction, for courts of appeals have only such jurisdiction as Congress has chosen to confer upon them (citations omitted).'

American Farm Bureau, 121 F.Supp.2d 91-92.

The Supreme Court and other circuits have similarly taken the view that exclusive review provisions must be read narrowly. *Adamo Wrecking*, 434 U.S. 282-283; *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992); *American Paper Institute, Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989); *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2nd Cir. 1976). As the Clean Water Act contains no "single overarching provision governing judicial review," the appellate court does not obtain jurisdiction by inference but only through an explicit demonstration that the "discrete agency action" is mandated for appellate review. *Nader v. EPA*,

859 F.2d 747, 754 (9th Cir. 1988) *citing Cutler*, 818 F.2d at 888 n61; *see also*, *Chrysler Corp. v. EPA,* 600 F.2d at 909, 910; *American Farm Bureau*, 121 F.Supp.2d at 91-92.[20]

Section 509(b)(1)(E) only grants exclusive jurisdiction to review challenges to promulgated regulations. The D.C. Circuit decisions regarding the scope of Section 509(b)(1) review specifically recognize that Section 509(b)(1) only provides review of "six specified categories of action under the CWA" and that the court's "decision as to the CPRs [*e.g.,* NPDES rules] does not turn 509(b)(1) into a comprehensive review provision Congress did not intend it to be." *NRDC II*, 673 F.2d at 404 n.14. Thus EPA's argument that because the Court of Appeals has exclusive jurisdiction to review the administrator's initial bypass rule adoption, *a fortiori*, the Court of Appeals must have exclusive jurisdiction over the Regional Offices' subsequent rule interpretation that the "bypass" rule precludes "blending" or emergency outfall permitting is completely misplaced. (Mot. to Dismiss at 22-23.)[21]

Subsequent rule "interpretations" are not the exclusive domain of the Courts of Appeals. *Utah Power & Light*, 553 F.2d at 218; *League of Wilderness Defenders*, 309 F.3d at1190 n.8[22]

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[20] *See Bracco Diagnostics v. Shalala*, 963 F.Supp. 20, 28 (D.C. Cir. 1997). In distinguishing the claim at bar from a substantive attack on the regulations the court wrote:

> The issue in this case is whether the FDA policy of allowing similar ultrasound contrast agents to be regulated according to inconsistent standards and procedures is arbitrary, capricious, an abuse of discretion or unlawful. The issue is not, as defendants suggest, whether this court has jurisdiction to approve FS069 as a medical device or to act in aid of that jurisdiction by issuing an injunction. If it were, concededly the court of appeals, not this court, would have jurisdiction. Citations omitted. In the absence of a clear congressional directive vesting jurisdiction over an APA challenge to the FDA's policies and procedures in the court of appeals, however, jurisdiction rests here.

[21] All of the Section 509(b)(1)(E) review cases cited by EPA involved challenges to rules promulgated by the Administrator immediately after their adoption. Mot. to Dismiss at 21-25. None of the Clean Water Act cases involve subsequent review of rule interpretations, or attempts by Regional Offices to expand the scope of the adopted rules with no notice, comment or adherence to other rulemaking prerequisites. Thus all of the cases cited by EPA are distinguishable and inapplicable.

[22] As stated by the 9th Circuit in *League of Wilderness Defenders*, 309 F.3d at 1190 n. 8:

Challenging the Regions' superimposing requirements via rule interpretation is not a challenge to the underlying rule itself. *Id*.; s*ee also*, *California v. Reilly*, 750 F. Supp 433, 436 (E.D. Cal. 1990), *citing Chen Fan Kwok v. INS*, 392 U.S. 206, 210-212 (1968) (simply because a claim is related to an issue that is within exclusive jurisdiction of Courts of Appeals, does not provide for exclusive jurisdiction of the issue). Thus, Section 509(b)(1) is not implicated when the issue before the court is whether or not the agency application of the rule is consistent with the rule adoption and statutory authority. There is no case cited by Defendants holding to the contrary.

Finally, such an expansive reading of 509(b)(1)(E) jurisdiction would preclude the ability to defend against arbitrary and inappropriate rule interpretation in enforcement actions, due to Section 509(b)(2), contrary to admonitions by the Supreme Court in *Adamo Wrecking*. *See also*, *NRDC II* at 406-407.[23] By EPA's own admission, review of rule interpretations is available in enforcement and permit proceedings and therefore, exclusive 509(b)(1) jurisdiction cannot apply in this instance, by its own terms. (Mot. to Dismiss at 28, 35.)[24] Review of regulatory interpretation is routinely done in enforcement cases, confirming that exclusive jurisdiction in the Court of Appeals is not applicable to such issues. *Adamo Wrecking Co*, 434 U.S. at 282-285

> It is far from clear that review of this regulation would be precluded by Section 1369(b) . . . . However, we do not reach the Forest Service's argument regarding Section 1369(b) because we do not invalidate the regulation. Rather, we reject the Forest Service's interpretation of the regulation and give it a construction consistent with its administrative history, case law, and governing statute.

[23] In deciding that the NPDES rules should be subject to exclusive review under Section 509(b)(1) on *NRDC II*, the court believed that parties would have received full notice of the rule requirement before any enforcement action was possible. "Each Individual subject to the CPR's [Consolidated Permitting Regulations, *e.g.,* NPDES permit regulations] will of necessity have participated in a permit proceeding before being punished for violating the conditions specified in his permit. A polluter charged with violating these conditions will certainly be on notice of the duty he is alleged to have breached. As EPA puts it, "the possibility of an EPA 'sneak attack' resulting in criminal sanctions with no notice to the victim other than the filing of a complaint appears to have been controlling in *Adamo*. That factor is absent here." *NRDC II* at 407. The EPA "sneak attack" via reinterpretation of existing rules and refusing to permit emergency outfalls to force violations of the Act is precisely what is occurring here.

[24] EPA's claim of exclusive 509(b)(1) jurisdiction would also preclude review of the issues before the court in state court because any such challenge would have to have been brought in Federal Circuit Court.

(District courts may review whether the scope of an adopted rule is intended to cover a particular discharge condition); *supra* n. 8.

Since (1) this case does not challenge any existing regulation, (2) review of Regional Office rule interpretation is not specifically identified as subject to 509(b)(1)(E), and (3) exclusive circuit court jurisdiction to such actions would improperly preclude the ability to challenge such illegal behavior in an enforcement case, district court review is available.

B. COURT OF APPEALS § 509(B)(1) CRITERIA ARE INAPPLICABLE TO CURRENT CASE

Although EPA argues exclusive appellate court jurisdiction exists due to 509(b)(1)(E), nowhere does EPA demonstrate that the actions at issue fall within the specific terms of 509(b)(1)(E). Section 509(b)(1)(E) sets forth three criteria that must be met to trigger Court of Appeals exclusive jurisdiction over challenges to EPA actions.[25] First, there must be an action of the Administrator. Second it must involve an "effluent limitation or other limitation" authorized under CWA Sections 301, 302, or 306, 33 U.S.C. §§ 1311, 1312, or 1316. Third, there must be an "approval or promulgation" of the effluent limitation or other limitation. The Regional actions at issue meet none of these requirements.

As set forth below, it is clear from EPA's admissions and documents that the requirements being imposed by the Regional Offices have never been part of any agency rulemaking. Therefore, the Court of Appeals has no jurisdiction over this matter. Furthermore,

[25] The statute sets forth the standard for "Review of Administrator's actions:"

> (1) Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States . . . .

33 U.S.C. § 1369(b)(1)(E).

in looking beyond the admissions, it is clear from the Complaint, case law, EPA regulations, as well as EPA's own Delegations Manual, that this case does not involve action of the Administrator appealable under CWA § 509(b)(1).

(1) EPA ADMITS THERE IS NO FACTUAL BASIS FOR COURT OF APPEALS JURISDICTION IN THIS CASE

EPA argues that Section 509(b)(1)(E) is the basis for Court of Appeals jurisdiction and that there is no jurisdiction in district court because plaintiffs claim a "rule" has been adopted. Mot. to Dismiss at 20. The following relevant admissions and documents refute this claim.[26]

(1) EPA admitted that Regional Administrators lack authority to impose more restrictive regulatory requirements than those adopted by the Administrator (Admission 72);

(2) EPA admitted that no records of the secondary treatment rule indicate any intent to prohibit blending of primary and biological wastewater as long as final limits are not exceeded (Admission 30; Pls. Ex. 22 and 23);

(3) The Administrator has never determined that blending is precluded by the bypass regulation (Admissions 14, 20, 21; Pls. Ex. 23);

(4) The cost of precluding or limiting blending was not assessed under either the secondary treatment or bypass regulations (Admission 24; Pls. Ex. 22);

(5) Regions III, IV, and VI restricted blending in enforcement and permitting actions, claiming that the bypass rule justifies such restrictions (Admissions 33, 35, 36; Pls. Ex. 25 at p. 4);

(6) Regions informed states and private parties that blending was prohibited and continued to impose blending restrictions through permit and enforcement actions even after EPA Headquarters indicated that the bypass rule did not govern the ability to blend (Admissions 37, 38; Defs. Ex. 1-9);

(7) EPA regulations allow emergency discharges to be permitted (Admissions 54, 57, 58);

[26] The Court may wish to consider that these admissions and documents produced directly refute EPA's repeated assertions that no information relevant to Section 509(b)(1) jurisdiction could be uncovered through discovery. These admissions prove EPA's request for protective order was not substantially justified and was only as attempt to shield relevant information from Plaintiffs and the Court.

(8) EPA Region III and IV refuse to permit emergency discharges (Defs. Ex. 4 [last unnumbered page] and 9); and

(9) EPA Headquarters never issued a Federal Register notice specifically stating that blending is prohibited (Admission 14; Pls. Ex. 23).

No rule adopted by the Administrator has ever restricted blending or the ability to permit emergency outfalls, and the Regional Administrators possess no authority to adopt or amend rules to impose their own more restrictive requirements. Thus, there is no current Administrator promulgated rule being challenged either directly or by "implication" as deemed admitted by EPA. Therefore, Section 509(b)(1)(E) cannot be applicable.

(2) <u>THERE HAS BEEN NO ACTION OF THE ADMINISTRATOR</u>

In its Mot. to Dismiss, EPA repeatedly acknowledges that only the actions of EPA Regions, not the Administrator are at issue in this case. Mot. to Dismiss pp. 25, 29, 30, and 32. EPA cites to CWA § 509(b)(1)(E), but appellate court exclusive jurisdiction under this section only applies to actions of the Administrator in promulgating rules. *Supra* p. 15-16;[27] CWA § 509(b)(1)(E); *see also*, *Mianus River v. EPA*, 541 F.2d 899, 902-903 (2nd Cir. 1976) (actions of others are not the actions of the Administrator); *California v. Reilly*, 750 F. Supp. 436. The Seventh Circuit similarly held that § 509(b) jurisdiction does not exist where the Regional Administrator, not the Administrator, undertook the action. *South Holland Metal Finishing Co.*

[27] In its Mot. to Dismiss EPA cited to both Section 509(b)(1)(E) and (F), and plaintiffs repeatedly stated that Section 509(B)(1)(F) was inapplicable to the claims raised. Plaintiffs' Reply to EPA's Motion for Stay at 12; Plaintiffs' Surreply at 4. Subsequently, EPA agreed it was only relying on subsection (E) of § 509(b)(1) in its response to Plaintiffs' request for costs. EPA Response to Plaintiffs' Motion for Costs p. 3 ("EPA argued that this Court lacks subject matter jurisdiction over allegations of unlawful rulemaking because the courts of appeals, pursuant to Clean Water Act section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), have exclusive jurisdiction over challenges to alleged EPA rulemaking under the Clean Water Act relating to limitations on the discharge of sewage").

v. EPA, 97 F.3d 932, 936 (7th Cir. 1996),[28] *citing American Paper Institute, Inc.*, 882 F.2d 288-289.

Moreover, EPA has adopted regulations that specify when agency activities may give rise to Section 509(b)(1) jurisdiction. The regulations could not be clearer – it requires an action by the Administrator or any official exercising authority delegated by the Administrator. 40 C.F.R. §§ 23.1(b), 23.2. As previously discussed, there has been no delegation by the Administrator providing for EPA Region III, IV, and VI to develop and impose their own more restrictive across-the board Regional prohibitions. *See* Admission 72.

As set forth in the Complaint, the challenged Regional actions address substantive changes that effect stringency, burden of compliance, and costs of the existing rules. *See generally*, Complaint at ¶ 132, 133, 173. EPA confirmed enormous costs were imposed by the Regional policies at issue. Pls. Ex. 19; *accord,* Pls. Ex. 17; Defs. Ex. 7. Nowhere in the Delegations Manual is the authority set forth for Defendant Regional Offices to undertake any of the challenged actions on behalf of the Administrator. In fact, the EPA Delegations Manual clearly states that the Regions have not been delegated such authority. *See* fn.17, *infra.* Thus, EPA's claim that all Regional actions are imputed to be actions of the Administrator for the

[28] In its Motion to Stay Reply at 5, Defendants asserted that *American Paper Institute* does not support subject matter jurisdiction because the Court of Appeals determined that the Region's statements did not constitute rules and had no independent legal or precedential effect. Defendants' spin is at odds with the 7th Circuit's subsequent description of the *American Paper Institute* decision in *South Holland*:

> EPA argued that the policy statement was not reviewable under Section 509(b)(1)(E) of the Clean Water Act . . . . We agreed and determined that Section 509(b)(1)(E) did not cover Region V's policy statement. Initially, we noted that, under Section 509(b)(1), it is the EPA Administrator's actions that are reviewable and that Region V is not the "Administrator" of the EPA . . . . Since Region V's interpretive ruling has not been adopted by the EPA, the ruling cannot be considered the 'Administrator's action.'

97 F.3d at 936. Contrary to EPA's claim, this case does not stand for the proposition that Regional policies mandating specific permit requirements are never final agency action.

purposes of Section 509(b)(1) jurisdiction is simply false. EPA Mot. to Dismiss at 19-23; Defendants' Reply in Support of Motion for Stay at 4.[29]

The Administrator has not delegated authority to EPA Regions III, IV, and VI to adopt Region-specific requirements more stringent than the promulgated national regulations. Regions lack authority to declare unlawful through secret policies that which federal law allows. Consistent with 40 C.F.R. § 23.2, these Regional actions are not actions of the Administrator subject to § 509(b)(1) review. Thus, this court has subject matter jurisdiction over this suit.

(3) THERE HAS BEEN NO PROMULGATION OF AN EFFLUENT LIMITATION OR ANY OTHER LIMITATION

CWA § 509(b)(1)(E) jurisdiction is also predicated on the underlying fact that the Administrator "promulgates" an effluent limitation or other limitation under CWA §§ 301, 302, or 306. *Accord, NRDC II* at 405 n.15. Such action occurs via Federal Register notice. The Complaint alleges that there was no *promulgation* of a rule limiting blending or precluding emergency discharge permitting (Complaint at ¶¶ 244-45, 247-48, 250-51, 260-61, 270-71 at 49-52) and that the various Regions did not have the authority to promulgate a rule. *Id.* at ¶¶ 244, 247, 250, 261, 270, 282 at 49, 51-53. These allegations, which must be taken as true for purposes of Defendants' Mot. to Dismiss, in and of themselves reflect that § 509(b)(1) is inapplicable. Moreover, Defendants agree the allegations are true. Admissions 14, 19, 72. A more restrictive interpretation of an existing rule, embodied in various unpublished Regional

[29] In briefing its Motion for Stay of Proceedings, EPA claimed that *Crown Simpson Pulp Co. v. Costle*, 455 U.S. 193, 194-5 (1980); *Defenders of Wildlife v. Browner*, 191 F. 2d 1159, 1161 (9th Cir. 1999); *Puerto Rico Aqueduct & Sewer Auth. V. EPA*, 35 F.3d 600, 602 (1st Cir. 1994) (hereinafter "*PRASA*"); and *American Petroleum Institute v. EPA*, 787 F.2d 965, 969 (5th Cir. 1986), stood for the proposal that final actions taken by EPA Regional Administrators that have binding legal effect are imputed to the Administrator for the purposes of judicial review. Defendants' Reply in Support of Motion for Stay at 4. However, all these cases reflect that where the Administrator appropriately delegated authority, the actions of the Region are deemed the action of the Administrator for purposes of judicial review (*e.g.,* Regional Office permit issuance). All these cases involve challenges of NPDES permits or EPA vetoes thereof, reviewable under 509(b)(1)(F), a situation totally different than the matter before this Court (unlawful adoption of Regional permit policies more restrictive than the adopted rules).

policy statements is not Section 301 rule "promulgation." Thus, an essential element for Section 509(b)(1)(E) jurisdiction ("promulgation") does not exist.

(4) A PROHIBITION ON BLENDING OR EMERGENCY OUTFALL PERMITTING IS NOT AN EFFLUENT LIMITATION

It is well established that the Clean Water Act does not grant EPA authority to direct how facilities are designed to meet effluent limits. *AISI*, 115 F.3d at 996 ("[B]y authorizing the EPA to impose effluent limitations only at the point source, the Congress clearly intended to allow the permittee to choose its own control strategy"). Plaintiffs have alleged that the Regions, by prohibiting blending and emergency outflows, are dictating how municipalities may design their wastewater treatment works to meet effluent limits. Complaint ¶¶ 85, 279, 281 at 18, 50, 53. The Complaint further alleges that challenged actions of "EPA Regions III, IV, and VI and [are] [sic] beyond the authority set forth by the Clean Water Act . . ." and that the "Clean Water Act does not provide the authority for EPA to dictate to a POTW how the treatment plant is to be designed or operated." *Id.* at ¶¶ 279, 282 at 53. EPA's own Office of General Counsel opinions and filings with the D.C. Circuit confirmed that authority to set effluent limitations does not provide EPA authority to dictate plant design. Complaint ¶ 43 at 11; Pls. Ex. 2 and 3. EPA's Mot. to Dismiss at 6 acknowledges that the primary rule governing municipal wastewater discharges, the secondary treatment rule, does not dictate how one may achieve compliance. Moreover, it is apparent that a refusal to process a permit in order to bolster enforcement actions (Defs. Ex. 9) is certainly not an effluent limit; it is simply a refusal to act to obtain an advantage in court.

Based upon the allegations in the Complaint and EPA's own interpretation of the scope of the regulatory authority granted by Congress, the Regional actions could not have been

undertaken pursuant to CWA § 301, § 302, or § 306, because these sections of the Act do not authorize such action. Inasmuch as the Regional actions at issue are not "effluent limitations or other limitations" under Section 301, Section 509(b)(1)(E) jurisdiction is inapplicable.

Given these established facts and allegations in the Complaint, it is clear that this case does not involve action of the Administrator (only Regional Administrators), the more restrictive Regional policies were never approved or promulgated by the Administrator, the Regional Office restrictions imposed on blending or emergency discharge permitting were not contained in any adopted Section 301 effluent limit (secondary rule) or any regulation adopted to implement Section 301 effluent limitations (bypass rule). Consequently, review of these Regional policies and final agency actions cannot be governed by Section 509(b)(1)(E).

C. THE PROVISIONS OF THE APA APPLY SINCE THERE IS NO REVIEW UNDER THE CLEAN WATER ACT

When no judicial review provision exists for a specific agency action, then the federal district court will have jurisdiction over the claim. *See* 5 U.S.C. § 704; *American Farm Bureau*, 121 F.Supp. 2d at 92. In fact, EPA admits that the provisions of the Administrative Procedure Act apply if there is no exclusive appellate court jurisdiction. Mot. to Dismiss, p. 23. Analysis of whether a specific statute precludes review under the APA, courts start with the "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), . . . [which] may be overcome 'only upon a showing of clear and convincing evidence of a contrary legislative intent.'" *Traynor v. Turnage*, 485 U.S. 535, 542 (1987) (*quoting Abbott Labs v. Gardner*, 387 U.S. 136, 141 (1967). Even where review of certain actions are not provided for by statute, the presumption of reviewability, "is needed to protect against 'freewheeling agencies meting out their brand of

justice in a vindictive manner' . . . . Thus, where agency action contravenes a specific statutory prohibition and results in the overstepping of the agency's delegated powers, judicial review is not barred." *Lepre v. Dept. of Labor*, 275 F.3d 59, 72 (D.C. Cir. 2001) (*quoting*, *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968)); *see also*, *Safari Club*, 1994 U.S. Dist. LEXIS 18183 at 18 (D.D.C. 1994) ("This Circuit has found standing where a party asserts the legal right not to be injured by *ultra vires* executive action").

EPA has no authority for imposing differing Regional dictates, cannot dictate plant design, and cannot refuse to permit an emergency outfall. All of these actions are *ultra vires* and directly contradict the statutory mandate governing EPA action. Plaintiffs have an inherent right to see that these unlawful actions cease. Since no review provisions of the CWA apply, the Administrative Procedure Act is applicable and district court jurisdiction is available.[30]

II. EPA ACTIONS ARE FINAL AND SUBJECT TO REVIEW JURISDICTION

EPA has argued that even if district court jurisdiction is available, the matter should not be reviewed because it is not "final" agency action. EPA is attempting to characterize the Plaintiffs' claim as "pre-enforcement review" or review of policies not yet adopted (Mot. to Dismiss at 28, 29). This legal argument also lacks merit, and the factual characterization is grossly incorrect. As stated by the court in *State of Arizona v. Shalala*, 121 F.Supp. 2d 40, 48 (D.D.C. 2000) *rev'd on other grounds,* "[I]t is well established that an interpretive document issued without formal notice and comment rulemaking can qualify as final agency action" (citations omitted).

[30] Moreover, the Declaratory Judgment Act and Federal Question jurisdiction apply to allow judicial review of the challenged Regional policies in federal district court. *See e.g., Borg-Warner Protective Services Co. v. EEOC*, 81 F.Supp 2d 20, 28 (D.D.C. 2000).

Title 5 U.S.C. § 704 provides for judicial review of final agency action for which there is no adequate remedy in court. An agency action is final if it marks the consummation of the agency's decision-making process and the action determines rights or obligations or resolves issues from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). As the D.C. Circuit stated in *Ciba Geigy Corp. v. EPA*, 801 F.2d 430, 435-436 (D.C. Cir. 1986), the real inquiry is, "whether the agency's position is 'definitive' and whether it has direct and immediate . . . effect on the day-to-day business of the parties challenging the action."

A guidance document or policy may be considered final if, on its face, it expresses final or mandatory positions. *See, e.g., General Electric Company v. Environmental Protection Agency,* 2002 U.S. App. LEXIS 9507, 14 (D.C. Cir. 2002) ("Our cases likewise make clear than an agency pronouncement will be considered binding as a practical matter if it *either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding*" (emphasis added)); *Appalachian Power,* 208 F.3d at 1023;[31] *McClouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988); *State of Arizona*, 121 F.Supp. 2d at 48. Furthermore, a series of documents may crystallize an agency's position on an issue and constitute final agency action. *See Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 50 (D.C. Cir. 2000) (holding that interpretive statements in a rulemaking preamble, a guidance document, and a letter from a branch chief constitutes final agency action); *Ciba Geigy Corp.*

[31] The criteria set forth by the D.C. Circuit in *Appalachian Power v. EPA*, 208 F.3d 1021, 1020 (D.C. Cir. 2000) to demonstrate whether a policy document should be considered "binding" is: "if an agency acts as if a document issued . . . is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or state permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding'." *See also General Electric* 2002 U.S. App. LEXIS 9607 at 15 ("A document will have practical binding effect . . . if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as . . . denial of an application.") EPA's Mot. to Dismiss at p. 32 seeks to distinguish this line of cases because the "policies" at issue here were not issued by the Administrator and do not have nationwide impact. The case law provides no such *sine qua non* to determine that agency action is final.

(holding that a "series of steps taken by EPA" culminating in a letter from an EPA official stating the agency's position constitutes final agency action).

The documented pattern of EPA Regional office action in the this case is the same: (1) develop a written internal policy specifying the Regional Office mandates; (2) distribute those mandates to delegated states; (3) declare a practice (*e.g.,* blending) unlawful under permit objection letters; (4) initiate enforcement actions consistent with the policy; and (5) ensure delegated states follow the policy and deny or proscribe the prohibited practice (*e.g.,* blending or emergency outfall permitting).

The Regional adoption of such policies, whether labeled interim[32] or otherwise, used to impose requirements upon NPDES States and the regulated community, are final actions subject to court review. The fact that the EPA Regions did not publish a final document fully informing the public of their "Regional standards" only makes their actions that much more egregious.[33]

The Complaint is replete with references to the final nature of the Regional policies and their imposition of requirements upon approved NPDES States and the regulated community

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[32] Defendants seek to insulate judicial review of the EPA Region III policy on the basis that the Region stamped "Interim" on the policy the Region imposed on the regulated community. *See* EPA Mot. to Dismiss at 30. Such assertion is ludicrous. *See, e.g., General Electric* 2002 U.S. App. LEXIS 9607 at 7 (citing *Appalachian Power* the court states that "The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."); *accord, American Trucking Association Inc. v. Reich*, 955 F. Supp. 4, 7 (D.D.C. 1997) (An agency's own characterization of a document is not determinative of finality or ripeness, the effect of the agency's conduct is.)

[33] *See NRDC v. EPA*, 22 F.3d 1125, 1132-1133 (D.C. Cir. 1994):

> Thus, the absence of a formal statement of the agency's position, as here, is not dispositive: An agency may not, for example, avoid judicial review 'merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation.' *quoting, Ciba-Geigy Corp*., 801 F.2d at 438 n.9. Accordingly, the fact that the EPA did not promulgate a formal rule codifying its conditional approval policy for SIP submittals other than those addressed in the I/M Rule is irrelevant to finality. Further, that the decision as set forth in the three documents constitutes final agency action is clear from the EPA's subsequent conditional approval of non-I/M committal SIPs (specifically NOx RACT submittals) under authority of those documents.

without undertaking the requisite rulemaking. As such, the court need not look beyond the four corners of the Complaint to find the factual underpinnings setting forth the finality of the EPA Regional mandates upon Plaintiffs. *American Farm Bureau*, 121 F. Supp. at 106.

A. THE COMPLAINT ALLEGES AND EPA ADMITS REGIONAL BLENDING ACTIONS ARE FINAL

(1) BLENDING ALLEGATIONS AND ADMISSIONS REFLECT FINALITY

The Complaint alleges that EPA imposed binding requirements upon Plaintiffs without undergoing rulemaking (Complaint ¶ 2 at 4); Plaintiffs are adversely impacted by the "Regional mandates,"[34] Plaintiffs must change their conduct or risk costly sanctions (*see, e.g.,* Complaint ¶¶ 16-17, 267 at 7, 38, 42 and 51), and that states must conform their permitting practices to these Regional dictates subject to EPA vetoing or objecting to state permits (*see, e.g.,* Complaint ¶¶ 18, 26, 142-45, 160, 165, 181, 184, 210, 215-16, 228, 232 at 7-8, 29, 32-33, 36-37, 42-44, 46-47). Plaintiffs are further adversely impacted in that the Regions have been enforcing these Regional mandates. (Complaint ¶¶ 31-33, 144, 191-94 at 9, 29, 39). Furthermore, the imposition of these requirements is costly, requiring the expenditure of hundreds of millions of dollars by the Plaintiffs to comply with the Regional mandates. *See, e.g.,* Complaint ¶¶ 17, 28, 132-134, 154, 156, 171-73, 189 at 7-8, 28, 31, 34, 38. Plaintiff TML are further adversely impacted in that they are appealing state issued permits based upon the EPA Regional mandates – with the permits appeals being stayed pending EPA resolution of the issue. (Complaint ¶¶ 27, 166-67 at 8, 33). These allegations address every aspect of finality.

[34] For example, the Complaint alleges that Plaintiffs are adversely impacted by the Regional mandates imposing prohibitions on blending, permitting of emergency outfalls and the imposition of secondary treatment SSO standard (Complaint ¶¶ 15, 25 at 6-8).

EPA's admissions also reflect that the challenged Regional actions are final. EPA admits that Regions III, IV, and VI prohibit blending – having informed states and the regulated community of such position (Admissions 33, 38, and 43)[35] and that these Regions have objected to state draft or preliminary NPDES permits that would allow blending. Admission 35; *see also,* Pls. Ex. 6 and 26.[36] Permit appeals in Region IV are being stayed pending EPA clarification of whether blending can be approved in NPDES permits. Admission 40. EPA further admits that Regions III and VI have asserted in enforcement actions that blending is prohibited. Admission 36. The Regions clearly have not only developed these restrictive policies, they are actively implemented.

As noted above, EPA has released dozens of documents confirming that the Regions have repeatedly denied permits and imposed the more restrictive requirements based upon rule interpretation contained in their "policy" statements. Pls. Ex. 1, 6, 16, 24, 26, 29, 31, 33, 34, 35, 36; Defs. Ex. 1, 3, 4, 6, 7. Enforcement actions continue to force communities to adhere to these positions. Pls. Ex. 5 and 17.

The Regions have specifically stated that they will continue denying permits under this regulatory interpretation. Pls. Ex. 6 and 26; *see also,* Pls. Ex. 24 (Region IV objecting to two state blending permits and prepared to object to a third since, "[w]e have not changed our position [on blending]." Thus there is no doubt that the *Regional* positions are "definitive,"

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[35] A letter from EPA's counsel regarding the admissions, refers to the "fact that Regions III, IV and VI have taken the position that blending is a bypass. . . . " February 21, 2003, Letter from E. Hostetler to John Hall at 9 n.5, Pls. Ex. 27. Such prohibition by these Regions has been readily acknowledged by EPA counsel in public meetings. *See* Pls. Ex. 25 ("Sweeney [*e.g.,* EPA counsel Steve Sweeney] indicated that these Regions have taken the position blending is a prohibited bypass . . . .") Why both counsel would claim that the Regions' position are not "final" knowing that the position is precisely as stated in the Complaint is dumbfounding and wastes our resources as well as the Court's in considering this issue.

[36] Most recently (*i.e.,* on March 8, 2003), EPA Region VI objected to the State of Arkansas draft permit provision that would have allowed Little Rock to use blending to process peak wet weather flows. Pls. Ex. 26.

"binding," and have "a direct and immediate effect on the day to day business of the parties challenging the action." *Ciba Geigy Corp.,* 801 F.2d at 436. Therefore, the actions are final.

(2) REGIONAL BLENDING POLICIES MANDATE ADHERENCE

The documents expressing Regional policies on blending on their face express final, mandatory positions confirming final agency action has been taken. Defs. Ex. 1-9; *see General Electric* 2002 U.S. App. LEXIS at 15 (explicit mandatory language is sufficient to establish final agency action); *Appalachian Power,* 208 F.3d at 1020.

Region III correspondence states: "[i]t is U.S. EPA's policy that 'slipstreaming' or 'internal bypassing' of treatment units (whether those units are for primary or secondary treatment), constitutes illegal bypassing, and *is not allowed*." (Emphasis added.) Defs. Ex. 1.[37] The "Interim" Region III Guidance states, "SSO discharges *shall not be permitted* in NPDES permits . . . ." (Emphasis added.) Defs. Ex. 9.

EPA Region IV policy memorandum states: "[T]he blending of a secondary effluent and a primary effluent is *not permittable*, since this would constitute a bypass of the required secondary treatment units. Sanitary Sewer Overflows (SSOs), including discharges from pump stations, manholes and other sewer appurtenances, *are violations of the Act and cannot be permitted* . . . ." (Emphasis added.) Defs. Ex. 4.[38]

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[37] The letter further stated that "slipstreaming would be prohibited bypassing under the Borough's NPDES permit" and that "[s]uch bypassing could subject the Borough to additional federal enforcement." *Id.*

[38] A February 4, 2002 letter from Tennessee DEC to EPA Headquarters states that Region IV, in over viewing Tennessee's NPDES permits, are "insistent" that blending is prohibited under the bypass regulation. Pls. Ex. 28 at 2; Complaint ¶ 179 at 36. Region IV has also declared that all states, including the State of Tennessee, will be bound by their decision to prohibit blending until EPA Headquarters addresses the issue in a rulemaking or final guidance. Defs. Ex. 4 at 2; Pls. Ex. 24.

EPA Region VI December 1998 policy on blending established mandatory design requirements for processing peak flows.[39] ("Any diversion of wastewater from any portion of a treatment facility *is defined as a 'bypass'* . . . biological treatment system *must have* ability to treat at least 97% of flow . . . peak flow treatment *must be* a credible 'secondary type treatment system'.") (Emphasis added.) Defs. Ex. 5.[40] Given the mandatory language stated in these documents, which embody Regional policies, final agency action has occurred.

In summary, as stated in the Complaint and demonstrated by documents and admissions, EPA Regions III, IV, and VI have made it clear that they will not approve permits that allow for blending and have aggressively enforced that position. Admissions 33, 35, 37. Thus, their position is not "merely tentative" but demands compliance. These are not actions taken by an agency that is still formulating policy but the actions of an agency that has arrived at a final stance. EPA Regional approach has caused millions of dollars in additional plant construction and estimated to impose over $300 billion if not discontinued. Pls. Ex. 17 and 19. These are the actions of an agency from which legal consequences flow.[41] Like the agency actions in *Barrick, GE, Appalachian Power, NRDC,* and *Ciba Geigy Corp.*, the policies developed and implemented by Regions III, IV, and VI are final agency actions within the meaning of 5 U.S.C. 704.

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[39] The very next year, Little Rock was informed that it was the subject of a criminal investigation and potential criminal indictment because it blended its effluent and failed to report the blending activities as an illegal bypass. Complaint ¶ 191 at 39.

[40] A November 23, 1999 Region VI e-mail regarding blending states that Region VI had "told municipalities that have 'designed' their treatment system with such a system, that any such diversion must be reported as a bypass and is generally prohibited under the standard permit (regulatory) language." (Pls. Ex. 1.)

[41] EPA argument that finality cannot exist because the Administrator has not adopted these policies or taken other action is absurd (Mot. to Dismiss at 30-33). The APA contains no such prerequisite for judicial review. Taken to its logical conclusion, such a finding would shield secret policies or other illegal coercive behavior from court review because the Administrator did not authorize the action. The cases cited by EPA do not stand for such a proposition. Secret policies, contrary to statutory and regulatory authority are subject to judicial review, regardless of who develops them. *Bowen v. New York,* 476 US 467, 485 (1988); *American Trucking Association,* 955 F.Supp at 7.

B. THE COMPLAINT ALLEGES AND EPA ADMITS REGIONAL PROHIBITIONS ON PERMITTING EMERGENCY OUTFALLS ARE FINAL

Like its position regarding blending, Defendant Regions III and IV have, in contravention of the federal regulations and directives from EPA Headquarters, developed Regional policies prohibiting the permitting of SSOs. It is not debated that if an outfall is permitted, the upset and bypass provisions of the NPDES regulations become available for any discharge from that outfall (except to the extent that an approved NPDES State imposes more stringent requirements under state law). 40 C.F.R. § 122.41(m) and (n). EPA Regions III and IV will not permit SSO emergency outfalls, which according to such Regions would preclude the use of the upset and bypass defenses, even if the facility would otherwise meet the criteria as set forth in the regulations.[42] Defs. Ex. 4 and 9.

(1) PROHIBITION OF PERMITTING EMERGENCY OUTFALL ALLEGATIONS AND ADMISSIONS REFLECT FINALITY

Similar to the bypass issue, the Complaint alleges that EPA Regions III and IV imposed a prohibition against the permitting of emergency outfalls upon Plaintiffs without undergoing rulemaking (Complaint ¶ 2, 209, 212, 215, 217, 260-65, 284-85 at 4, 42-44, 51, 53); Plaintiffs are adversely impacted by the "Regional mandates," Complaint ¶¶ 15, 25 at 6-8; Plaintiffs must change their conduct or risk costly sanctions (*see, e.g.,* Complaint ¶¶ 16-17, 260 at 7 and 51) and states must conform their permitting practices to these Regional dictates subject to EPA vetoing or objecting to state permits (*see, e.g.,* Complaint ¶¶ 18, 26, 210 at 7, 8, 42-44, 214-16, 219).

[42] Contrary to the Regional assertions regarding the applicability of the upset and bypass defenses, EPA preamble states that such defenses would, nevertheless, be available. 64 Fed. Reg. 42434 (Aug. 4, 1999). Defendants' refusal to provide a substantive response to Plaintiffs' Request for Admissions regarding EPA's position precludes the narrowing of the issue at this time. Admission No. 62.

Plaintiffs are further adversely impacted in that the Regions have been enforcing these Regional mandates. (Complaint ¶¶ 211-12, 217, 260, 290 at 42-44, 51, 54.) EPA also admits that unless the discharge is permitted, it is illegal under the CWA. Admission 59. Thus, it is clear that "legal consequences flow" from the Regions' refusal to permit such discharges.

(2) REGIONAL POLICIES REGARDING PERMITTING OF EMERGENCY OUTFALLS MANDATE ADHERENCE

EPA Region III has declared that all SSO discharges must be eliminated – no exceptions. On March 12, 1997, Region III published a guidance document setting forth its position once more:

> SSO discharges *shall not be permitted* in NPDES permits, but corrected thru enforcement action, e.g. Administrative order . . . SSOs *shall not be included in NPDES permits* in order not to weaken enforcement actions for their correction. *See* Region III Interim Guidance for Sanitary Sewer Overflow and NPDES Permits.[43] (Emphasis added.)

Defs. Ex. 9; Complaint ¶ 212 at 42-43. Region III has informed EPA Headquarters of its position regarding emergency outfalls. Defs. Ex. 8 ("[T]his Region prefers to treat SSOs as illegal and not permit them *for any reason*") (emphasis added); Complaint ¶ 211 at 42.

Region IV will not permit SSO outfalls in a municipal NPDES permit unless a biological treatment plant meeting secondary treatment standards is constructed. Region IV spelled out this policy in a memorandum to EPA Headquarters. Defs. Ex. 4. Sanitary Sewer Overflows (SSOs) that include discharges from pump stations, manholes and other sewer appurtenances, "are violations of the Act and *cannot be permitted*" (emphasis added), since they do not provide a minimum of secondary treatment. Defs. Ex. 4 (at last unnumbered page); Pls. Ex. 29 at 2 ("[A]ll

[43] This is precisely the type of collusion that the 3rd Circuit in *Bethlehem Steel* said would not be tolerated. *See, Bethlehem Steel Corp. v. EPA*, 683 F.2d 994, 1010 (3rd Cir. 1980).

treatment trains at a POTW must provide secondary treatment" (emphasis added)); Pls. Exhibit 30 ("[A] peak flow handling facility with . . . blending . . . must be designed to achieve secondary treatment standards" (emphasis added)); Pls. Exhibit 31 (the Region IV letter "tells the state to instruct the [municipality] to choose between two options" – have the pre-blended effluent meet secondary treatment or report blending as an illegal bypass).[44] This is precisely the type of mandatory language that the D.C. Circuit has found to constitute "final agency action." *Supra* p. 24, 28.

The absolute refusal to permit SSOs, as evidenced in Regional documents, is final and binding. The legal consequences of this policy can be seen in the multiple enforcement actions instituted by the EPA and its refusal to approve permit applications providing for SSOs. In fact, the refusal to permit was specifically intended by the EPA Regions to *bolster enforcement actions* (*i.e*. promote greater liability under the Act.) These are clearly final agency actions. *General Electric,* 2002 U.S. App. LEXIS at 14; *Appalachian Power,* 208 F.3d at 1023; *Barrick,* 215 F.3d at 50.

C. THE COMPLAINT ALLEGES AND EPA ADMITS FINAL AGENCY ACTION IN IMPLEMENTING SECONDARY TREATMENT, INSTEAD OF BAT/BCT UPON SSOS

The third issue before the court is whether the SSO permitting standard should be based on BAT/BCT or the secondary treatment regulations. EPA Headquarters has vacillated between the two standards and as a result, EPA Regions have used both in permitting SSOs. Complaint ¶ 221-225 at 45-46.

[44] In contrast to the Regional prohibitions imposed by Regions III, IV, and VI, EPA Region I states that not only is such approach authorized, only the combined or blended wastewater (*i.e.,* the final effluent) needs to meet the secondary treatment standard and, accordingly, is authorized without being subject to the bypass prohibition. Pls. Ex. 32, Attachment 1 at 1-1 (EPA Region 1 CSO Application Guidance).

In the past EPA has permitted SSOs using BAT/BCT. For example, a 1996 letter from EPA Headquarters to Region VI states that the BAT/BCT standard should be used in permitting SSO discharges from a POTW in Houston, Texas. Pls. Ex. 12.[45] This position has seemingly changed over the years with no rulemaking on EPA's part and no effort to reconcile two different standards used by different EPA Regions around the nation to permit the same condition.

(1) REGIONAL IMPOSITION OF SECONDARY TREATMENT STANDARD ALLEGATIONS AND ADMISSIONS REFLECT FINALITY

The Complaint alleges that EPA Regions, without undertaking the requisite rulemaking, adopted and implemented a standard (*e.g.,* imposition of secondary treatment standard on SSOs) upon approved NPDES States and the regulated community. (Complaint ¶¶ 2, 269-272, 284-85 at 4, 52-53.) Plaintiffs are adversely impacted by the "Regional mandates." (Complaint ¶¶ 15, 29, 274 at 6, 8; 52.) These actions are final – as the Complaint alleges that Plaintiffs must change their conduct or risk costly sanctions (*see, e.g.,* Complaint ¶¶ 16-17 at 7) and that states must conform their permitting practices to these Regional dictates subject to EPA vetoing or objecting to state permits (*see, e.g.,* Complaint ¶¶ 18, 26, 228, 230-34 214-16, 219 at 7-8, 43-44, 46-47). Plaintiffs are further adversely impacted in that the Regions have been enforcing these Regional mandates. (*See e.g.,* Complaint ¶ 274 at 52.)

EPA's admissions further reflect the finality of the Regional positions. EPA admitted that, "EPA Regions III and IV require that the permitting of SSOs can only be undertaken if a

[45] This letter from EPA Headquarters is directly at odds with EPA's assertion that the issue was fully addressed in the 1989 CSO policy and sets forth EPA's standard that wet weather discharge facilities must meet secondary treatment. Mot. to Dismiss at 11. Furthermore, in 1995, EPA Headquarters' briefing material titled "SSO Questions and Answers" indicates that the CWA does not indicate whether secondary treatment or BAT/BCT is applicable to SSOs, that CSOs are determined by EPA to be subject to BAT/BCT, and that "EPA has not clarified whether SSOs should be addressed in a similar or different manner." Pls. Ex. 13; Complaint ¶ 222 at 45; *see also* Pls. Ex. 33 at 2 n. 1.

facility can meet secondary treatment standards" (emphasis added). Admission 67. EPA further admitted that EPA Regions III and IV led private parties and NPDES States to believe that SSO permits must be based upon secondary treatment. Admissions 69 and 70. Furthermore, they admit that these Regions "*mandate* that if SSOs are permitted, such outfalls are to meet secondary treatment" (emphasis added). Admission 71. As discussed above, EPA admits that these Regional positions are "mandates" that must be followed in order to be permitted. As such, we are not dealing with "merely tentative" positions or "abstract disagreements" – we are dealing with EPA Regional mandates that demand compliance. These are the actions of an agency from which legal consequences flow and are final agency actions within the meaning of 5 U.S.C. § 704. *General Electric,* 2002 U.S. Dist. LEXIS at 14; *Appalachian Power,* 208 F.3d at 1023; *NRDC,* 22 F.3d at 1132-1133; *Ciba Geigy Corp.,* 801 F.2d at 435-436; and *Barrick,* 215 F.3d at 50.

EPA Region III has informed NPDES states and SSO dischargers that SSO discharges are subject to secondary treatment standards. Several letters from Region III to the Pennsylvania DEP have shown this policy to be final and binding. Pls. Ex. 34. Over the past six years Region III has consistently held that SSO discharges must meet secondary treatment standards. This position is not being revised by the Region and has a huge impact on construction costs for SSO dischargers, particularly where it is not cost-effective to transport all plant wet weather flows to a downstream POTW.

EPA Regions III and IV have adopted secondary treatment as the standard for SSOs. As noted, EPA previously concluded that BAT/BCT, not secondary treatment, applied to permittees' intermittently discharging SSO facilities. Defendants seek to impose the secondary standard without notice and comment rulemaking. Under D.C. Circuit law this violates the procedures set

forth in the Administrative Procedure Act. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (holding that a long-standing interpretation of an FAA regulation could not be reinterpreted without notice and comment rulemaking.); *see also* 5 U.S.C. 551(5); *Paralyzed Veterans of Am. V. D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C. Cir. 1993) (fundamental changes in rule interpretation must undergo notice and comment). It is hard to imagine a more fundamental change in regulatory interpretation than one that would impose nearly $300 billion in nationwide costs beyond those considered in the original rule adoption. For the purposes of the APA, this represents final agency action and is subject to district court review.

III. DEFENDANT EPA'S ACTIONS ARE RIPE FOR JUDICIAL REVIEW

EPA has also argued that the court should not review the allegations in the Complaint because the matter is not "ripe." EPA has sought to convince the court that no one yet has actually been affected by these Regional policies. EPA Mot. to Dismiss at 35-36, *citing Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1013, (9th Cir. 1987): "[I]f and when . . . the guidance has been applied specifically to them" the matter is ripe. That claim is specious and has been admitted by EPA to be false. The matter is plainly ripe for review.

The tests employed by the Supreme Court and this Circuit to determine ripeness are (1) are the issues fit for judicial review; (2) are the issues purely legal; (3) would consideration of issues benefit from a more concrete setting; is agency action sufficiently final; and (5) will the plaintiff suffer hardship if review is postponed. *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998). When the case raises purely legal questions, the threshold for judicial determination is assumed. *State of Arizona,* 121 F.Supp. 2d at 41. The issues raised in the Complaint meet all of these tests.

A. PERMITTING POLICY PRESENTS ISSUE RIPE FOR REVIEW

Where a "draft" permitting policy is used to deny permit applications, the issue is ripe for review. *Safari Club Int'l v. Babbit*, 1994 U.S. LEXIS 18183, 25 (D.D.C. 1994) ("[B]ecause the court finds that the use of the guidelines to deny permits is subject to judicial review, even though the Guidelines have not yet been formally adopted, ripe issues are presented.") As the Regions are admitted to be applying their own Regional policies to permit decisions, the review of those Regional policies is clearly ripe under *Safari Club*.

Defendants also argue that these policies are not yet ripe for judicial review because the Administrator is signaling that she will be revisiting these issues in the coming months and has not yet settled on a final answer to the questions before this court. Mot. to Dismiss at 34. Promises of future EPA action do not render an issue non-ripe. *Appalachian Power Co.*, 208 F.3d at 1022 ("[A]ll laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment"). At issue is the ripeness of Regional Office activities, *not* EPA Headquarters' promises of activity.[46]

Like plaintiffs in *State of Arizona v. Shalala*, *Bowen*, and *Safari Club Int'l.*, Plaintiffs here are not seeking review of specific permitting decisions but review of these unpublished, internal policies adopted by Regions III, IV, and VI used to deny or condition permits. Review of the procedural and substantive validity of such secret law is appropriate under the APA.

[46] EPA has said it would adopt an SSO rule. First of All, EPA has been promising to adopt an SSO rule since 1995. Second, EPA by its silence would have the court conclude that the SSO rule would address these issues. EPA has never said that it would specifically address the points raised in this action.

B. EPA ADMITS THE CASE IS RIPE FOR REVIEW

Defendants have stated:

> If EPA does elect to issue, deny, or object to any NPDES permits consistent with or shaped by the alleged regional policies, adversely affected parties will have an opportunity to contest the policy's application in a concrete setting . . . . In short, judicial review will be enhanced by waiting until the effects of the alleged policies have been crystallized in a concrete fact situation involving an actual, present impact on a particular affected party . . . . The impact of these alleged policies is speculative in that they are actually applied in a particular permitting decision or enforcement action.

EPA Mot. to Dismiss p. 35-36.

EPA tried to mislead the court into thinking that Plaintiffs' claims were hypothetical, and then admitted that the very actions alleged in Plaintiffs' Complaint had occurred. In their responses to Plaintiffs' Request for Admissions, EPA agreed that: (1) Regions III, IV, and VI have objected to permits that incorporate blending (Admissions 33, 35); (2) EPA initiated enforcement actions against facilities that blend; and (3) informed the regulated community that blending was a prohibited by the secondary treatment and bypass rules (Admission 36, 37, and 38). In short, EPA has done everything it claimed in its Mot. to Dismiss was necessary in order for Plaintiffs' claims to be ripe for judicial review. Thus, EPA has provided the response to its own call for a "concrete fact situation" which confirms that the issues are ripe for judicial review.

C. THESE ISSUES ARE FIT FOR REVIEW

These issues are plainly fit for judicial review. First, as discussed above, consideration of theses issues would not benefit from a more concrete setting. The Regional "policies" are well

defined and already implemented as delineated in the Complaint and discovery documents. Plaintiffs have had draft permits denied due to the secret policies and are in the process of appealing those permitting decisions. Little Rock recently received notice dated March 8, 2003 that EPA objected to its blending design for processing peak wet weather flows. Pls. Ex. 26.

The usual case goes somewhat like this: the permittee submits its permit application to an NPDES delegated state agency. The state agency develops a draft or proposed and transmits it to the EPA region. The Region then tells the state or the permittee that blending or the permitting of emergency outfalls is illegal, cannot be permitted and secondary treatment rules apply to SSOs. *See, e.g.,* Defs. Ex. 4, 6, 7; Pls. Ex. 1, 6, 16, 26, 29, 31, 34, 35, and 36. The state then changes the permit to conform to EPA's directives. This cycle has been repeated ad nauseum. It is perfectly clear how these actions occurred and will continue to occur. It would be hard to imagine a more concrete setting. The matter is fit for review.

D. ENFORCEMENT "POLICY" IS NOT AT ISSUE

EPA also argues that the matter is not fit for review because judicial intervention would interfere with administrative action (Mot. to Dismiss at 34). EPA attempts to characterize the dispute raised by Plaintiffs as one involving "enforcement policy." That too is absurd. The issue is *not* enforcement policy but whether or not the Regional Offices have adopted permitting policies inconsistent with the adopted regulations and Clean Water Act. While EPA may have, at times, chosen an enforcement context to deliver the contents of the permitting policy, it does not change this matter into a dispute over "enforcement policy."

E. PURELY LEGAL ISSUES ARE RIPE

Some of these issues are purely legal (Does any Region have the authority to impose an across-the-Region ban on blending or to prohibit all emergency outflows? Does the bypass rule restrict blending? Does the CWA allow EPA to direct treatment plant design? Can Regional Offices change the standard for permitting SSOs from BAT/BCT to secondary treatment without notice and comment rulemaking?). Once the court determines that these actions are final, the only question becomes whether they are allowable under the Clean Water Act and the APA, a purely legal question.

The actions of Regions III, IV and VI are sharply contrasted with the national standard otherwise applicable to the regulated community. In the case of the blending issue, EPA admits that in developing the secondary treatment standard, it never evaluated a restriction on blending or otherwise requiring one hundred percent of all flow to go through biological treatment. Admissions 25-26, 29-30. In sharp contrast to these admissions, as well as the allegations set forth in the Complaint that blending is not prohibited by the bypass regulation (*see, e.g.,* Complaint at ¶¶ 97-100 at 20), EPA now admits that Regions III, IV, and VI prohibit blending. Admission 33; Pls. Ex. 25 at 4. EPA's subsequent clarification indicates that, notwithstanding the fact that we are dealing with a national standard, the three Regions impose different Region-specific criteria in implementing their own self-styled versions of a blending prohibition. Pls. Ex. 27 at 9-10.[47]

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[47] The letter from EPA's counsel to Plaintiffs' counsel indicates the further idiosyncratic standards imposed by the three Regions:

> EPA Region III additionally has considered the criteria set forth in the March 7, 2001, correspondence to Senator Frist referenced in response to request for admission No. 9.
>
> EPA region VI additionally has considered factors identified in the "Strategy" document attached as Exhibit 5 to EPA's motion to dismiss and identified in the

EPA's admissions also address the issue of discharge from emergency outfalls – with EPA admitting that Regions III and IV base enforcement actions on the unpermitted discharges from emergency outfalls. Admission 59. EPA further admits that the emergency outfalls "may be authorized or approved in an NPDES permit." Admission 58. The position that such outfalls may be authorized, is in sharp contrast to the positions of EPA Regions III and IV that such outfalls *will not* be permitted. *See* Complaint ¶¶ 209-220 at 42-44; Defs. Ex. 4 and 9. Thus, in light of EPA's admissions, a number of the central regulatory issues presented are reduced to purely legal issues that are fit for review.

F. PLAINTIFFS WILL SUFFER SUBSTANTIAL HARDSHIP IF JUDICIAL REVIEW IS DENIED

If interests of court or agency favor postponing review then the party must show hardship would occur from postponing such that the case should be reviewed immediately. *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1297-1298 (D.C. Cir. 2000); *see also*, *Florida Power and Light Company* 145 F3d 1414, 1421 ("when a challenged decision is not 'fit' for review, the petitioner

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> Complaint at Paragraph 183. These factors identified in this strategy document include: whether peak blended flows receive treatment functionally equivalent to secondary treatment (*e.g.,* advanced physical-chemical treatment); whether the POTW has proper maintenance and controls on its collection system; and whether the principal secondary treatment portion would have the ability to treat 97% of the daily flows reaching the headworks of the plant (*e.g.,* that the peak flow blending scenario would need to be used only 3% or less of daily flows reaching the headworks over the course of the year).
>
> EPA Region IV has taken the position that the factors under 40 C.F.R. §122.41(m)(4)(i) & (ii) need not be considered if the permittee instead elects to measure for compliance at an "internal outfall."

Pls. Ex. 27 at 9-10. A review of the secondary treatment and bypass regulations (40 C.F.R. Part 122 and § 122.41(m), respectively) would readily reveal that these Regional requirements are not set forth in the regulations but, rather, are made up and imposed upon the states and regulated community due to the mere whims of the Regions.

must show 'hardship' in order overcome a claim of lack of ripeness"). The hardship prong is also satisfied in this case as well.

EPA's entire argument regarding hardship (Mot. to Dismiss at 36) is premised on the fiction that the Regional policies haven't affected anyone. Defendants own admissions prove the arguments to be false. Moreover, the Complaint alleges the additional harm due to EPA's failure to act and address the actions of the renegade Regions. Complaint ¶ 241 at 48-49. *See also*, Complaint ¶¶ 256-57, 267 at 50-51.

The interpretations adopted by the various EPA Regions have a significant effect on Plaintiffs' day-to-day business. Complaint ¶¶ 211-234, 257, 260, 290 at 42-47, at 50, 51,54. Most importantly, without NPDES permits which allow blending, Plaintiffs will either face sanctions for violating the bypass rule or forced to build unnecessary facilities costing millions of dollars, delaying plans to eliminate SSOs. Admissions 33, 35, 36, 37, 38.[48] This is the "classic definition of hardship," forcing a permittee to "choose between disadvantageous compliance and risking serious penalties." *Safari Club Int'l*, 1994 U.S. Dist. LEXIS 18183 at 24-25. Further, permit appeals currently stayed in Tennessee pending the outcome of this litigation will be put on hold indefinitely, as that litigation awaits the outcome of the issues to be decided before this court. Admission 40. Thus, the issues are ripe for review as every aspect for demonstrating ripeness is met.

If Plaintiffs' case is dismissed and Regions III, IV, and VI are allowed to continue to prohibit blending and refuse to permit emergency outfalls, Plaintiffs will incur substantial expense as evidenced by EPA's own cost estimates associated with blending prohibitions (Pls.

[48] Exposure to fines is precisely what EPA threatens in its Regional policies. *See, e.g.,* Defs. Ex. 1, 3, 4, 6, 7, and 9; Pls. Ex. 1 and 17.

Ex. 17 and 19). These are enormous sums of money and will constitute a substantial hardship if Plaintiffs are denied judicial review of these Regional actions.

IV. EPA ACTION IS UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED AND IS SUBJECT TO DISTRICT COURT REVIEW

Under Section 706(1) of the Administrative Procedure Act, 5 U.S.C. § 706(l), a court may "compel agency action unlawfully withheld or unreasonably delayed." Plaintiffs contend that EPA has unlawfully withheld action under the CWA and the UMRA by failing to rein in the illegal Regional policies or providing a report to Congress regarding the new costs being imposed. As a result of this failure, Regions III, IV, and VI impose different standards for compliance with the secondary treatment and bypass regulations than are imposed by other Regional Offices. This is the quintessential case of arbitrary and capricious agency action. *See Bracco Diagnostics*, 963 F.Supp. at 28. Such inconsistent application of national standards is arbitrary and capricious per se. *See e.g., Bracco Diagnostics Inc*., 963 F. Supp. at 27 ("Government is at its most arbitrary when it treats similarly situated people differently").

EPA has repeatedly stated that the Clean Water Act does not provide it authority to dictate plant design (*see, e.g.,* Pls. Ex. 2 and 3). Courts have repeatedly affirmed this position. *See generally, AISI*, 115 F.3d at 996; *NRDC III*, 822 F2d at 123. EPA has known that through enforcement and permitting actions that the Regions have been dictating plant design, contrary to the Administrator's determination that the Act grants no such authority. Admissions 33, 35, 38, 43; Pls. Ex. 21, 25, 27. The costs imposed under these illegal Regional policies far exceed the cost trigger identified in UMRA for submission of a report to Congress. Complaint ¶¶ 317, 320-322 at 58-59.

Contrary to EPA's argument (Mot. to Dismiss at 37), one does not need a mandatory provision of the CWA to find that an agency action is unlawfully withheld or unreasonably delayed. *See Environmental Defense Fund v. Costle*, 657 F.2d 275, 283-284 (D.C. Cir. 1981) ("Courts which have construed this standard have found it to consist of either of two issues: (1) whether the agency has violated its statutory mandate by failing to act (citations omitted) or (2) whether the agency's delay in acting has been unreasonable.") EPA Headquarters' now longstanding knowledge that the Regions are implementing *ultra vires* activities and repeated failure to rein in such actions with enormous monetary impact is unconscionable. Complaint ¶ 2, 5, 238-240 at 4-5 and 48; Pls. Ex. 21. The repeated and ongoing imposition of more restrictive requirements through permitting and enforcement actions, contrary to the adopted rules, is obvious. Failure to take action under these circumstances is precisely the type of activity that APA was intended to address.

CONCLUSION

It is apparent that the issues raised by plaintiff do not trigger Clean Water Act Section 509(b)(1) jurisdiction as (1) this action does not challenge any regulation adopted by the Administrator and (2) with respect to the Regional adoption of more restrictive Regional mandates, there has been no action of the "Administrator" (particularly in light of the fact that the EPA Delegations Manual specifically identifies that the challenged Regional actions are not delegated). In addition, there has been no "promulgation" of an effluent limitation pursuant to Section 301 or any of the other CWA sub-sections identified in Section 509(b)(1)(E). As such, this suit is appropriately addressed in district court.

Furthermore, the issues presented are final agency actions, ripe for review. The Complaint, EPA's Admissions, and EPA records document the fact that the Regions have been

imposing Regional-specific mandates upon approved NPDES States and the regulated community. Such mandates have adversely impacted the Plaintiffs, resulting in permit appeals and enforcement actions, and in the regulated community being coerced into undertaking non-cost effective approaches to addressing peak wet weather flows.

Accordingly, Plaintiffs respectfully request that this court deny Defendants' Motion to Dismiss for want of subject matter jurisdiction and ripeness and that Plaintiffs be awarded attorneys fees.

Respectfully submitted,

/S/

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