IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	CIVIL ACTION NO. 1-02-01361
v.	)	JUDGE: Henry H. Kennedy
CHRISTIE TODD WHITMAN, Administrator, U.S. Environmental Protection Agency, *et al.*,	)	
Defendants	)	

MEMORANDUM OF THE ASSOCIATION
OF METROPOLITAN SEWERAGE AGENCIES
IN OPPOSITION TO EPA'S MOTION TO DISMISS

Plaintiff-Intervenor The Association of Metropolitan Sewerage Agencies ("AMSA") hereby submits this Memorandum in Opposition to the U.S. Environmental Protection Agency's (EPA's) Motion to Dismiss, filed with the Court on October 25, 2002. By Order dated November 25, 2002, the Court granted an extension of the time to file this response until "10 working days after Defendants produced all documents" responsive to Plaintiffs' pending discovery request. However, due to continuing disputes between the parties over the production of the requested documents, the Plaintiffs elected to file their Memorandum in Opposition on March 14, 2003. For reasons of judicial economy, and in order to accommodate Defendant EPA's desire to file a single Reply brief, Plaintiff-Intervenor AMSA is filing its Memorandum in Opposition at this time although it believes, like the Plaintiffs, that the Defendants have not yet

produced all responsive and non-privileged documents sought by the Plaintiffs' outstanding discovery requests.

ARGUMENT

I. THE DICTATES, MANDATES, AND DECLARATIONS BY EPA REGIONS III, IV AND VI ARE NOT ACTIONS OF THE ADMINISTRATOR FOR WHICH EXCLUSIVE REVIEW IS VESTED IN THE COURTS OF APPEALS

EPA argues that this Court lacks jurisdiction to review the actions complained of in this case because those actions fall within the category of actions by the EPA Administrator for which Clean Water Act (CWA) § 509(b)(1)(E) vests judicial review solely in the Courts of Appeals. However, Counts I through VI of the Plaintiff's Complaint, and Counts I through V of the Plaintiff-Intervenor's Complaint, refer to certain declarations or mandates by EPA Regions III, IV, and VI (prohibiting the practice of blending, the permitting of emergency outfalls, and the discharge of sanitary sewer overflows without biological treatment) which are neither actions of the "Administrator" nor the "approval" or "promulgation" of effluent limitations or other limitations within the meaning of CWA § 509(b)(1)(E). Plaintiffs and Plaintiff-Intervenor AMSA do not question the validity of EPA's "bypass" or secondary treatment regulations. Instead, they challenge a particular interpretation or application of those rules by several EPA Regions. Just like the section of the Clean Air Act at issue in *Utah Power & Light v. EPA*, 553 F.2d 215 (D.C. Cir. 1977), CWA § 501(b)(1) grants exclusive jurisdiction to the Courts of Appeals "to hear challenges to a limited class of actions taken by the Administrator." 533 F.2d at 217, quoting *District of Columbia v. Train*, 533 F.2d 1250, 1252 (D.C. Cir. 1976). As the court observed in *Utah Power*, "only by straining the meaning of the words 'approving' and 'promulgating' could it be said that challenges to interpretations or applications of EPA regulations" are subject to the exclusive jurisdiction of the Courts of Appeals. Instead,

subsequent interpretations or applications of a rule originally promulgated by the Administrator may be sought in District Court under the Administrative Procedure Act (APA), as Plaintiffs and Plaintiff-Intervenors have done in this case. *Id.* at 219 n. 20.

Moreover, as is clear from the face of the Complaints, it is the position of the Plaintiffs and Plaintiff-Intervenors that the new interpretations and applications of the bypass and secondary treatment regulations mandated by Regions III, IV and VI are in fact contrary to the language and intent of those rules when they were promulgated by the Administrator. Indeed, it is the failure to accomplish these Regional reinterpretations or modifications of the original scope and meaning of the regulations through the formal notice-and-comment rulemaking by the Administrator that *would* be reviewable under CWA § 509(b) that provides the basis for the claims asserted in Count V of the Plaintiff's Complaint and Count IV of Plaintiff-Intervenor's Complaint (failure to follow rulemaking procedures set forth in the APA).

Finally, even if the mandates or declarations by the EPA Regions at issue in this case did constitute the "approval" or "promulgation" of effluent limitations or other limitations, these mandates and declarations were not actions of the "Administrator" of EPA. As the Plaintiffs and Plaintiff-Intervenors have alleged in their Complaints, and as EPA has admitted in its Response to Plaintiffs' Request for Admission No. 72 (Exhibit 11 to Plaintiffs' Memorandum in Opposition), the Regions do not have the statutory or administrative authority to promulgate such regulations.

Central to this case is the clear fact that at *no* time has a Region been delegated authority to promulgate or modify an effluent limitation or other limitation under CWA § 301 or to prohibit the processing of permits otherwise allowed under 40 C.F.R. Part 122. When EPA established the NPDES regulations in 1973, select CWA authorities were delegated from the

Administrator to the Regional Administrators. 40 C.F.R. § 125.5, 38 Fed. Reg. 13,530-31 (1973). The Regional Administrators were authorized to re-delegate the authority within the Region to the Directors, Enforcement Division. 40 C.F.R. § 125.5(c); 38 Fed. Reg. 13,531 (1973). It is clear from these delegations that not all of the Administrator's authorities under the CWA are delegated to the Regional Administrators. Clearly important for the case at hand, is the fact that the Administrator did not delegate any authority to the Regions associated with his/her authority to prescribe regulations pursuant to CWA § 501(a). Subsequent regulations authorized the Regional Administrators to re-delegate authorities to the Regional Division Director level. *Id.* at § 122.60(h). The regulatory delegations establish a clear chain-of-authority for determining whether a Regional action was taken pursuant to the CWA or, as in this case, was *ultra vires.*

Today, delegation of authority from the Administrator to the Regions is no longer undertaken in the federal regulations, but is instead set forth in the *EPA Delegations Manual. See* EPA's Motion to Stay Reply at 4, n. 1. Section 1-21 of the *EPA Delegations Manual* is the only section that addresses the potential authority of the Regional Administrator to publish regulations under Section 301. This section delegates to the Regional Administrators, as well as other designated EPA officials, the Administrator's authority to undertake the following promulgations:

> 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*.

EPA Delegations Manual, § 1-21 (emphasis added) (Plaintiffs' Memorandum in Opposition, Exhibit 10).

As shown in the Complaints, the challenged Regional actions make substantive changes to EPA's promulgated rules, affecting their stringency, burden of compliance, and costs.

Nowhere in the *EPA Delegations Manual* is the authority set forth for the Regional Offices to undertake any of the challenged actions on behalf of the Administrator. Thus, EPA's contention that all Regional actions are imputed to be actions of the Administrator, and therefore are subject to review exclusively by the Courts of Appeals, is simply false.

II. THE DICTATES, MANDATES AND DECLARATIONS BY EPA REGIONS III, IV AND VI ARE "FINAL AGENCY ACTIONS" SUBJECT TO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

Although the actions by the EPA Regional Offices at issue in this case are not actions of the "Administrator" within the meaning of CWA § 509(b), they are "final agency actions" within the meaning of APA § 704. As this court has noted in prior cases, it is well established that interpretive guidance issued without formal notice and comment rulemaking can qualify as final agency action. *State of Arizona v. Shalala*, 121 F. Supp. 2d 40, 48 (D.D.C. 2002) *rev'd on other grounds,* 281 F.3d 248 (D.C. Cir. 2002) (citing *Appalachian Power Co. v. EPA*, 341 U.S. App. D.C. 46, 208 F.3d 1015, 1021 (D.C. Cir. 2000); *McLouth Steel Prods. Corp. v. Thomas*, 267 U.S. App. D.C. 367, 838 F.2d 1317, 1321 (D.C. Cir. 1988); *Ciba-Geigy Corp. v. EPA*, 255 U.S. App. D.C. 216, 801 F.2d 430, 435-38 (D.C. Cir. 1986)). A two-prong test has been articulated by the United States Supreme Court to determine whether an agency action is final. The action must first mark the "consummation" of the decisionmaking process, and second must determine "rights or obligations" or cause "legal consequences." *Arizona v. Shalala*, 121 F. Supp. 2d at 48 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

The dictates, mandates, and declarations by Regions III, IV and VI at issue in this case easily satisfy both criteria. With regard to the first prong, as this Circuit recently noted in *Public Citizen v. Department of State*, 276 F.3d 634, 642 (D.C. Cir. 2002), where the agency has stated that the action in question governs and will continue to govern its decisions, such action is

reviewable. This is precisely the situation with regard to the Regional dictates to their respective state agencies on blending and permitting of emergency outfalls. The documents produced by the Defendants to date are replete with statements that the Regional prohibitions against these practices are invariable, and that all present and future permits issued in those Regions must conform to these policies. The Regional positions are, therefore, more than "merely tentative or interlocutory" in nature, but instead represent "definitive pronouncements" by those Regions. *See* Exhibits 1, 6, 16, 24, 26, 29, 31, 33, 34, 35 and 36 to Plaintiffs' Memorandum in Opposition. To quote but a single example, Exhibit 24 to Plaintiffs' Memorandum in Opposition contains an e-mail from Scott Gordon at U.S. EPA Region 4 to Qualis Saya at the Tennessee environmental agency stating that:

> There is still no national policy on this (see the attached blending letter accompanying the April Monthly Update). In March, we [*i.e.*, Region 4] objected to two Alabama drafted permits that proposed to allow blending. . . . We are also preparing to object to a draft permit from South Carolina that allows blending. *We have not changed our position on this and 4-5 other Regions that have an interest in this decision are with us.*

As this Court astutely observed in *American Trucking Ass'n, Inc. v. Reich,* 955 F. Supp. 4, 8 (D.D.C. 1997) (quoting another decision of this District in *Washington Legal Foundation v. Kessler*, 880 F. Supp. 26, 34 (D.D.C. 1995)):

> Whether [an agency] has officially adopted a final policy . . . is not determinative. In the context of a ripeness inquiry, it is the effect of the agency's conduct which is most important in determining whether an agency has adopted a final policy. And this case illustrates why this must be so: If an agency's own characterization of the finality of its policy were determinative, that agency could effectively regulate industry without ever exposing itself to judicial review. A powerful agency . . . could achieve this result through the simple expedient of 1) never formally declaring the policy to be "final," and 2) threatening (but never actually initiating) enforcement procedures against companies which failed to comply with the agency's *de facto* policy.

With regard to the second prong of the finality test, the Regional mandates clearly have an "immediate impact" on the affected entities that have applied for NPDES permits or permit renewals or have been subject to actual or threatened enforcement actions implementing those mandates. In the words of this Circuit in *Ciba-Geigy*, the Supreme Court has dictated a "flexible" and "pragmatic" approach to the finality requirement, in which the court looks to whether the agency's position has a "direct and immediate . . . effect on the day-to-day business" of the parties challenging the action. 801 F.2d at 435, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-50 (1967). If so, it is an action that has determined "rights and obligations" and caused "legal consequences" as required by the second prong of the *Bennett v. Spear* test.

It is instructive that the cases primarily relied upon by the Defendants in this section of their brief are from other Circuits. *See* EPA Memorandum in Support at 31-32, citing cases from the Southern District of Alabama and from the Seventh Circuit. The courts in this Circuit have a long and intimate familiarity with agency decisionmaking processes, and they have consistently viewed agency arguments against finality and ripeness with skepticism. Consequently, the Defendants must try to distinguish away the leading authorities from this Circuit, *Appalachian Power* and *Ciba-Geigy*, with the half-hearted argument that, unlike those decisions, this case does not involve a situation where EPA Headquarters has adopted guidance that is nationwide in scope and directed all Regions to use it.

Contrary to EPA's argument, this case involves the use of informal policies in a manner that closely parallels those at issue in *Appalachian Power*. Although they are not "national," these policies are being uniformly applied to all the states within the jurisdiction of the three EPA Regions that are defendants in this case. As in *Appalachian Power*, these Regional office mandates have "given the States their 'marching orders' and EPA expects the States to fall in

line, as all have done." 408 F.3d at 1023. Just as it has in this case, EPA attempted to argue in *Appalachian Power* that its guidance was not subject to judicial review because it was not "final," and that it was not final because it was not "binding." The court easily rejected both arguments on the basis that the agency acted as if the guidance at issue was controlling in the field, that it based its enforcement actions upon it, and that it lead private parties and State permitting authorities to believe that it would declare permits invalid unless they comply. *Id.*

The fact that the policies in this case have been dictated by certain Regional offices rather than by EPA Headquarters makes them no less "final" or "binding" on the regulated entities within those Regions. Moreover, EPA "Headquarters" must not be allowed to shield Regional policies from judicial review simply by virtue of the fact that it has abdicated its own responsibility to ensure that the CWA is administered in a fair and consistent manner throughout the country.

III. THE ISSUES RAISED IN THIS CASE ARE RIPE FOR REVIEW

EPA suggests in its brief that the issues in this case are not ripe because judicial intervention would inappropriately interfere with further administrative action. In support of this contention, EPA cites the fact the "EPA headquarters has formally announced its intention to conduct a rulemaking related to issues Plaintiffs identify in their Complaint." EPA Brief at 34. However, the intended rulemaking to which EPA refers has been "in the works" for nearly *eight years*, while the parties represented by the Plaintiffs and the Plaintiff-Intervenors have suffered and continue to suffer *immediate* hardship by virtue of the supposedly "tentative," "interim" and "non-final" actions of the Regional offices.

EPA headquarters first announced its intention to conduct a rulemaking on the appropriate regulation of sanitary sewer discharges and related wet-weather issues (such as the

construction of separate "peak excess flow" facilities that discharge wet-weather flows without full secondary treatment) in 1995, when it convened an SSO advisory group under the Federal Advisory Committee Act (FACA). 60 Fed. Reg. 21,189 (May 1, 1995). Representatives of the Plaintiff-Intervenor's member agencies participated actively in all of the FACA meetings, and what was supposed to be the "final" meeting before the promised rule was released was held nearly *four years ago*, on July 28-29, 1999. 64 Fed. Reg. 27,543 (May 20, 1999). A draft notice of proposed rulemaking was signed by EPA Administrator Browner on January 4, 2001, but, in accordance with the January 20, 2001 memorandum from the Assistant to the President and Chief of Staff, entitled "Regulatory Review Plan," published in the Federal Register on January 24, 2001, 66 Fed. Reg. 7701, EPA withdrew this document from the Office of Federal Register to give the incoming Administration the opportunity to review it.

As of this writing, EPA still has failed to issue even a *proposed* regulation in the Federal Register. For EPA to suggest that the Regional dictates, mandates, and declarations which are inflicting documented ongoing hardship on the Plaintiffs and Plaintiff-Intervenors are not ripe for review because the agency is still deliberating its "final" position is absurd. As this Circuit wisely observed in *Appalachian Power*,

> . . . all 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.

208 F.3d at 1022 (citing *McLouth Steel Products Corp. v. EPA*, 838 F.2d at 1320). The court in *Appalachian Power* also rejected EPA's contention that a challenged guidance document was not ripe for review because the court's review would be "more focused" in the context of a challenge to a particular permit. *Id*. at 1023, n. 18. Just as was true of the EPA guidance involved in that case, resolution of the legal questions whether the Regional dictates prohibiting the practice of

blending or the permitting of emergency outfalls comply with the Clean Water Act or its implementing regulations "will not turn on the specifics of any particular permit." The claims raised by the Plaintiffs and the Plaintiff-Intervenors present pure issues of statutory and regulatory interpretation that are ripe for review by this Court.

CONCLUSION

For each of the foregoing reasons, Plaintiff-Intervenor AMSA respectfully requests that EPA's Motion to Dismiss be denied.

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Respectfully submitted,

/s/

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