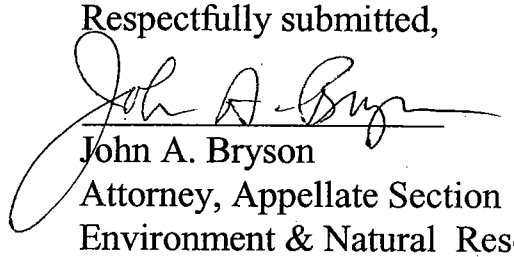
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and amici. Except for the substitution of Stephen L. Johnson, Acting Administrator of the Environmental Protection Agency, for Michael O. Leavitt, all parties appearing before the district court and this Court are listed in appellants' brief.

B. Rulings under review. All references to the matters at issue appear in appellants' brief.

C. Related Cases. The case on review has not previously been before this Court. Appellees are not aware of any related cases within the meaning of Cir. Rule 28(a)(1)(C).

Respectfully submitted,



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GLOSSARY

APA	Administrative Procedure Act
BAT	best available technology economically achievable
BCT	best conventional technology
BPJ	best professional judgment
BPT	best practicable control technology currently available
BOD	biochemical oxygen demand
CSO	combined sewer overflow
CWA	Clean Water Act
EAB	Environmental Appeals Board
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
MS4	municipal separate storm sewer system
NPDES	National Pollutant Discharge Elimination System
POTW	publicly owned treatment works
SSO	sanitary sewer overflows
TSS	total suspended solids

JURISDICTIONAL STATEMENT

A. Jurisdiction of the district court. – The complaint of the plaintiffs Pennsylvania Municipal Authorities Association, the Tennessee Municipal League, and the City of Little Rock Sanitary Sewer Committee, asserted jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 2201, 5 U.S.C. § 551, and 5 U.S.C. § 706(1) (JA ; Compl. 4-6). The complaint of the intervenor Association of Metropolitan Sewerage Agencies asserted jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 2201, 5 U.S.C. § 551, and 5 U.S.C. § 706(1) (JA 4-5). For the reasons set out infra, pp. 26-49, the appellees submit the district court lacked subject matter jurisdiction over plaintiffs' and intervenor's claims.

B. Jurisdiction of the court of appeals. – This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The district court's judgment dismissing the complaint was entered on November 20, 2003 (JA ; Judgment), and plaintiffs filed a timely motion to alter or amend the judgment under Rule 59(e), Fed. R. Civ. P., on December 5, 2003, which was denied by an order entered December 30, 2003 (JA ; Docket Sheet # 67, 12/30/03 Minute Order). The notice of appeal was filed on February 26, 2004, within the time allowed by Rule 4(a)(1)(B) (JA ; Notice of Appeal).

QUESTIONS PRESENTED

1. Whether plaintiffs' and intervenor's challenges to alleged illegal policies and practices of various Regional offices of the Environmental Protection Agency ("EPA") implementing the National Pollutant Discharge Elimination System ("NPDES") permitting provisions of the Clean Water Act ("CWA") identified final agency action subject to review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, et seq.

2. Whether plaintiffs' and intervenor's challenges presented claims that were ripe for review under the APA.

3. Whether the district court had jurisdiction over claims of ultra vires actions under Leedom v. Kyne, 358 U.S. 184 (1958).

4. Whether plaintiffs' and intervenor's complaints stated a cause of action for "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1).

STATEMENT OF THE CASE

A. Nature of the case and proceedings below. – The initial complaint was filed by the Pennsylvania Municipal Authorities Association, an association of municipal sewage treatment agencies in the State of Pennsylvania, the Tennessee Municipal League, an association of municipalities in the State of Tennessee, and

The City of Little Rock Sanitary Sewer Committee, a municipal authority in the State of Arkansas (JA ; Plt. Compl. Compl. 6-9). Each of the associations has members who operate publicly owned treatment works ("POTWs") that collect and treat municipal sewage and other wastewaters and that discharge such treated wastewaters into waters of the United States pursuant to NPDES permits issued under the CWA (JA ; Plt. Compl. Compl. 6-9). The City of Little Rock Sanitary Sewer Committee operates POTWs in Arkansas under NPDES permits (JA ; Plt. Compl. Compl. 9). A national trade association of operators of POTWs, the Association of Metropolitan Sewerage Agencies, intervened and filed a complaint that was virtually identical to that filed by the plaintiffs (JA ; Int. Compl.). Each complaint named as defendants the Administrator of EPA, and three of EPA's Regional Administrators, those for Regions III, IV, and VI (JA ; Plt. Compl. Compl. 1; Int. Compl. 1, 6-7).

The complaints alleged generally that certain of the represented POTWs utilized certain practices in the operation of their systems to address the peak flows associated with wet weather and storm events, and that Regions III, IV, and VI of EPA had adopted policies and taken actions to prohibit the use of such practices by POTWs in those Regions (JA ; Plt. Compl. Compl. 9-47; Int. Compl. 7-24). The complaints alleged that the actions of the Regions amounted to the

promulgation of new regulations that were not within the delegated authority of the Regions to issue, that had not been issued with notice and comment procedures required by the APA, that were substantively inconsistent with the requirements of CWA and existing regulations, and that were arbitrary and capricious (JA ; Plt. Compl. Compl. 49-59; Int. Compl. 26-34). The complaints, invoking 5 U.S.C. § 706(1), also alleged that the headquarters of EPA had unlawfully withheld or unreasonably delayed action to correct the erroneous actions of the Regions (JA ; Plt. Compl. Compl. ; Plt. Compl. Compl. 47-49, 55-56; Int. Compl. 24-26, 31). Finally, the complaints alleged that the Regions had failed to comply with applicable requirements of Unfunded Mandates Reform Act of 1995 (JA ; Plt. Compl. Compl. 58-59; Int. Compl. 32-34).

EPA filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., arguing that the claims challenging the policies of the Regions were within the exclusive jurisdiction of the courts of appeals under Section 509(b) of the CWA, 33 U.S.C. § 1369(b), that these claims had failed to identify final agency action reviewable under the APA, and that these claims were not ripe for review (JA ; Docket # 17). EPA also argued that the claim against the Administrator under 5 U.S.C. § 706(1) would not lie because the plaintiffs and intervenor had failed to identify any mandatory duty under the CWA that EPA had

not performed (ibid.). Upon consideration of the motion, the plaintiffs' and intervenor's opposition, and supplemental briefing, the district court granted the motion and dismissed the action for lack of jurisdiction (JA ; Docket # 65, 66). The district court also denied a motion by the plaintiffs under Rule 59(e), Fed. R. Civ. P., to alter or amend the judgment (JA ; 12/30/03 Minute Order).

B. Statutory and regulatory background. – The Clean Water Act, 33 U.S.C. §§ 1251-1387, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of pollutant discharges into those waters. Section 101(a), 33 U.S.C. § 1251(a). The Act generally prohibits the discharge of pollutants into waters of the United States from "point sources" except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. See CWA section 301(a), 33 U.S.C. § 1311(a); CWA section 402, 33 U.S.C. § 1342. The CWA defines a "point source" as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. § 1362(14).

NPDES permits are issued by EPA unless EPA has authorized the relevant State (or Tribe or Territory) to administer the NPDES program under State (or Tribal or Territorial) law pursuant to CWA section 402(b), 33 U.S.C. § 1342(b).

The core provision of the CWA relating to EPA's issuance of NPDES permits is section 402(a), 33 U.S.C. § 1342(a). This provision provides that the EPA Administrator:

> may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, . . . notwithstanding section 1311(a) of this title [prohibiting discharge except in compliance with law] . . . upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the [EPA] Administrator determines are necessary to carry out the provisions of this chapter.

(emphasis added). Thus, in each instance EPA (or authorized States, Indian Tribes or Territories) have discretion to determine whether to issue a permit for a particular pollutant discharge (including discharge location) or to leave the discharger subject to the default prohibition against unpermitted discharge. See Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977).

1. NPDES Permit Limitations. – NPDES permits typically contain limitations that restrict the amounts (i.e., quantities, rates, and concentrations) of pollutants that may be discharged, or that restrict key pollutants of concern in the

discharge, such as acidity/alkalinity (pH) or biochemical oxygen demand.[1] These "effluent limitations"[2] implement both technology-based and water quality-based CWA requirements. Technology-based limitations represent the degree of pollutant control that can be achieved using various levels of pollution control technology. Sections 301, 304, and 306, 33 U.S.C. §§ 1311, 1314, and 1316; See E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 126-36 (1977); Puerto Rico Aqueduct & Sewer Authority. v. EPA, 35 F.3d 600, 602 (1st Cir. 1994). Water quality-based limitations are additional limitations that are imposed when necessary to protect against the site-specific adverse effects of the discharge on the waters receiving the discharge EPA v. California ex rel. State Resources Control Board, 426 U.S. 200, 205 n.12 (1976). In addition to effluent limitations, NPDES permits generally include "other limitations" as well, such as monitoring and reporting requirements, management practices, and other generally-applicable

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[1] Biochemical oxygen demand (BOD_5) measures the aggregate biological and chemical pollution effect of a substance on the oxygen content of the receiving water after five days.

[2] The CWA defines an "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

standardized permit provisions. Under some circumstances, issuance of an NPDES permit is prohibited. 40 C.F.R. § 122.3.

a. Technology-Based Limitations in NPDES Permits. – The CWA mandates varying standards of technology-based treatment as the minimum requirement for different categories of point sources. 33 U.S.C. §§ 1311, 1314, 1316. For "publicly owned treatment works" ("POTWs"),[3/] such as the wastewater treatment plants represented or operated by Plaintiffs in this case, the CWA mandates that effluent limitations be based upon "secondary treatment." 33 U.S.C. § 1311(b)(1)(B). By contrast, under subsections 301(b)(1)(A) and 301(b)(2)(A), the CWA mandates that effluent limitations for non-POTW point sources be based on either the "best practicable control technology currently available" (the "BPT" standard), "the best available technology economically achievable" (the "BAT" standard), or "the best conventional technology" (the "BCT" standard), depending on the pollutant discharged. 33 U.S.C. § 1311(b)(1)(A); or (b)(2)(A).

Limits within individual NPDES permits that reflect application of the various technology-based standards (as opposed to limits reflecting application of

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[3/] EPA regulations define POTWs to include "any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature," owned by a municipality or State. This definition includes "sewers, pipes, and other conveyances only if they convey wastewater to a POTW Treatment Plant." 40 C.F.R. § 403.3(o).

water-quality based standards) are derived based either (a) on nationally-applicable effluent limitations guidelines and standards that have been promulgated by EPA, or (b) in instances where EPA has not yet promulgated such limitations and standards, on a permit-by-permit basis according to the "best professional judgment" ("BPJ") of the permit writer applying the statutory standards. See Natural Resources Defense Council v. EPA, 859 F.2d 156, 183 (D.C. Cir. 1988); 40 C.F.R. § 125.3(c)

b. "Secondary Treatment" Is the Technology-Based Standard for POTWs. – As noted earlier, discharges from POTWs such as the wastewater treatment plants represented or operated by Plaintiffs in this case must meet limits based on "secondary treatment" technology. 33 U.S.C. § 1314(d)(1). The term "secondary treatment" generally refers to the process of collecting and conveying sewage in and through sewer systems to a municipal treatment plant, wherein physical and biological processes are employed to improve effluent quality. See generally Maier v. EPA, 114 F.3d 1032, 1035, n.2 (10th Cir. 1997). Physical processes to address municipal sewage might include, for example, screening and settling to remove solids. Biological processes to address municipal sewage might include, for example, use of microbes to break down solid wastes.

EPA has promulgated nationally-applicable standards reflecting the capabilities of "secondary treatment" technology. 40 C.F.R. Part 133. These standards are expressed in terms of numerical values for three conventional water quality parameters -- biochemical oxygen measured over five days ("BOD_5"), total suspended solids ("TSS") and pH. See 40 C.F.R. §§ 133.102. The "secondary treatment" standards promulgated by EPA are 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 achieve the limitations.

c. Provisions in NPDES Permits Addressing "Bypass". – NPDES permits typically contain provisions addressing the "bypass" of waste streams from any portion of a wastewater treatment facility. EPA regulations define "bypass" to mean the "intentional diversion of waste streams from any portion of a treatment facility." 40 C.F.R. § 122.41(m)(1).

EPA regulations generally prohibit bypasses. 40 C.F.R. § 122.41(m)(4). EPA regulations also provide that an enforcement action for a bypass may not be brought under certain circumstances. EPA regulations provide that an enforcement action for a bypass may be brought unless: (1) the bypass "was unavoidable to prevent loss of life, personal injury, or severe property damage," (2) "there were no feasible alternatives to the bypass, such as the use of auxiliary

treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime," and (3) the permittee submitted the required notice of the bypass. 40 C.F.R. § 122.41(m)(4). See United States v. City of Toledo, 63 F. Supp. 2d 834 (N.D. Ohio 1999). The regulation allows a bypass, however, where (1) the bypass does not cause effluent limitations to be exceeded and (2) "if it . . . is for essential maintenance to assure efficient operation." 40 C.F.R. § 122.41(m)(2).

The regulations relating to "bypass" described above were promulgated by EPA in 1980. 45 Fed. Reg. 33,448 (May 19, 1980). Upon judicial review, the D.C. Circuit concluded that the bypass provision "directly promotes the goals of the Act" and "is fully consistent with the technology-forcing framework of the Act." Natural Resources Defense Council v. EPA, 822 F.2d 104, 122-126 (D.C. Cir. 1987).

d. Provisions in NPDES Permits Addressing "Upset". – NPDES permits also typically contain provisions addressing the "upset" of treatment processes. EPA regulations define an "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with . . . permit effluent limitations because of factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n)(1). See Natural Resources Defense Council v. EPA, 859 F.2d

156, 206 (D.C. Cir. 1988) (discussing upset regulation). EPA regulations provide that an "upset" can constitute an affirmative defense to an enforcement action brought for noncompliance with permit limitations under certain circumstances. 40 C.F.R. § 122.41(n)(2). However, the regulations specifically provide that an EPA determination concerning whether there has been an "upset" is not final administrative action subject to judicial review when that determination is made "before an action for noncompliance" is commenced. Id.

2. Procedures for Obtaining NPDES Permits and Judicial Review of Permits. – In jurisdictions where EPA is the NPDES permitting agency, a discharger initiates the NPDES permitting process by filing a permit application providing detailed information regarding the facility for which the permit is sought and the facility's planned discharges. 40 C.F.R. §§ 124.3 & 122.21. EPA determines whether a final permit should be issued based on the administrative record compiled during those proceedings. 40 C.F.R. § 124.15. Judicial review of EPA action in the issuance or denial of an NPDES permit lies in the United States Court of Appeals. CWA section 509(b)(1)(F); 33 U.S.C. § 1369(b)(1)(F).[4]

[4] A petition to EPA's Environmental Appeals Board ("EAB") for review is a prerequisite to judicial review. 40 C.F.R. § 124.19.

In jurisdictions authorized by EPA to administer the NPDES permitting program under State law, EPA has an oversight role in that other agency's permitting program. CWA section 402(d), 33 U.S.C. § 1342(d). EPA may review a permit issued by the authorized agency and object to its issuance as being "outside the guidelines and requirements" of the CWA. Id. If the authorized agency does not revise the permit to meet EPA's objection, then EPA assumes authority to issue the permit. Aggrieved persons may obtain judicial review of the permit issued by EPA as described above. If the authorized agency revises the permit to meet the objection, then judicial review of the authorized agency's permit would be available in State (or Tribal or Territorial) courts. 40 C.F.R. § 123.30. An EPA decision not to object to an authorized agency's permit is not subject to judicial review. District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980). An EPA decision to object to an authorized agency's permit is reviewable as explained above, but only when EPA completes the objection process and takes final action to issue or deny the permit to which it has objected. See 40 C.F.R. § 123.44. See also Champion Int'l Corp. v. EPA, 850 F.2d 182, 186-189 (4th Cir. 1988).

The CWA confers a variety of discretionary enforcement options on EPA in response to NPDES permit violations, including issuing administrative compliance

orders, initiating administrative penalty actions, or bringing civil enforcement actions in federal court seeking penalties and injunctive relief. 33 U.S.C. §§ 1319(a),(b),(g).

3. POTWs: Separate Sanitary Sewers vs. Combined Storm and Sanitary Systems. – As noted above, this case involves the permitting of publicly owned treatment works ("POTWs") under the NPDES permitting program. In the United States, municipal sewage collection systems for POTWs exist in two basic forms: (1) separate sanitary sewer systems and (2) combined storm and sanitary sewer systems. The former is designed to convey only sanitary sewage, including domestic, commercial, and pretreated industrial wastes.[5/] The latter is a publicly owned pipe system that conveys a combination of sanitary sewage and storm water runoff to a POTW treatment plant. EPA has estimated that there are more than 19,000 POTWs nationwide, providing municipal wastewater collection and/or treatment, and that most of these are served by separate sanitary sewer systems. 67 Fed. Reg. 22,077 (May 2, 2002). Approximately 850 publicly owned treatment works are served by combined systems. Id.

[5/] A municipality served by a separate sanitary sewer system is usually also served by a "municipal separate storm sewer system" ("MS4"), which conveys and discharges storm water separately from the sewage collection system. 33 U.S.C. § 1342(p)(3)(B).

a. Combined Sewer Overflows ("CSOs"). – During and after heavy precipitation, a portion of the sewage in a combined system may not be delivered to a treatment plant, but may overflow from the conveyance system into waters of the United States. Such discharges are referred to as "combined sewer overflows" ("CSOs"). CSOs present significant public health risks and can contribute to exceedance of water quality standards. 54 Fed. Reg. at 37,371 (Sept. 8, 1989)

The framework for controlling discharges of CSOs to the Nation's waters through the NPDES permit program is set forth in two national guidance documents: (1) the 1989 "National Combined Sewer Overflow Control Strategy," 54 Fed. Reg. 37,370 (Sept. 8, 1989) (hereinafter "1989 CSO Control Strategy"); and (2) the 1994 "Combined Sewer Overflow (CSO) Control Policy," 59 Fed. Reg. 18,688 (Apr. 19, 1994) (hereinafter "1994 CSO Control Policy"). The 1994 CSO Control Policy elaborates on the 1989 CSO Control Strategy. 59 Fed. Reg. 18,688.

EPA's national policy concerning CSO discharges has essentially been codified by Congress in 2000 amendments to the CWA. Specifically, new section 402(q)(1) of the CWA, 33 U.S.C. § 1342(q)(1), provides that NPDES permits after the enactment of the amendment "for a discharge from a municipal combined storm and sanitary system shall conform to the [1994 CSO Control Policy]."

EPA's 1994 CSO Control Policy recognizes the site-specific nature of CSOs and their impacts, and provides flexibility for controls to be tailored to local situations. 59 Fed. Reg. 18,688.

CSOs are not considered by EPA to be discharges from a publicly owned treatment works subject to "secondary treatment" standards, but rather to be subject to other technology-based standards. See 54 Fed. Reg. at 37,371 (Sept. 8, 1989); Montgomery Environmental Coalition v. Costle, 646 F. 2d 568 (D.C. Cir. 1980).

b. Sanitary Sewer Overflows. – Overflows from separate sanitary sewers which cause raw sewage to be discharged without receiving treatment are commonly referred to as "sanitary sewer overflows" ("SSOs"). Like CSOs, SSOs present significant public health risks, and can contribute to exceedance of water quality standards. 66 Fed. Reg. 61,268, 61,283-84 (Dec. 3, 2001) (discussing the need for an SSO rule). SSOs can release raw sewage to areas where they present high risks of human exposure, such as streets, private property, basements, and receiving waters used for drinking water, fishing, or recreation. Id. The most immediate health risks associated with SSOs are potential exposure to bacteria, viruses, and other pathogens. Id. EPA has estimated that there are at least 40,000

SSO events per year and perhaps as many as 400,000 occurrences of sewage backing up into basements. Id.

Currently, EPA is considering whether to propose a rulemaking that would establish a broad-based regulatory framework for controlling SSOs. See 67 Fed. Reg. 33,859, 33,863 (May 13, 2002) (identifying in EPA's semiannual regulatory agenda that rulemaking related to "NPDES permit requirements for municipal sanitary sewer collection systems" and "sanitary sewer overflows" is among major rulemakings under development).

In the context of the 1989 CSO Control Strategy, EPA stated that "Sanitary sewer systems must adhere to the strict design and operational standards established to protect the integrity of the sanitary system and wastewater treatment facilities. Discharges from separate sanitary sewer systems with less than secondary treatment are prohibited." 54 Fed. Reg. at 37,371.

4. Judicial Review of EPA Rules Under the Clean Water Act. – Claims regarding certain enumerated EPA actions, including most EPA regulations to implement the NPDES permitting program under the CWA, fall within the exclusive, original jurisdiction of the United States Courts of Appeals. 33 U.S.C. § 1369(b). CWA section 509(b)(1)(E) vests judicial review in the courts of appeals for promulgation or approval of any "effluent limitation or other

limitation" under section 301 and other specified sections. 33 U.S.C. § 1369(b)(1)(E). As noted above, judicial review of EPA action in the issuance or denial of an NPDES permit also lies in the U.S. Courts of Appeals. CWA section 509(b)(1)(F); 33 U.S.C. §§ 1369(b)(1)(F).

C. Statement of facts. – In their complaints, plaintiffs alleged that they represented owners or operators of POTWs, or, in the case of the City of Little Rock Sanitary Sewer Committee, that it owned POTWs located in Regions III, IV, and VI that are permitted under the NPDES program (JA ; Plt. Compl. Compl. 6-9; Int. Compl. 5-6). They alleged that those Regions had adopted three policies or "rules" that unlawfully impacted their permits. In particular, plaintiffs allege that EPA Regions III, IV and VI have adopted a rule prohibiting NPDES permits from allowing "blending" (JA ; Plt. Compl. Compl. 13-39; Int. Comp. 11-19). Although the term "blending" is not a term that appears in the CWA or in EPA's NPDES regulations, the complaint defined "blending" for purposes of the claims as "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 an effluent from that unit prior to discharge, and the blended flows meet applicable permit effluent limitations at the final discharge location" (JA : Plt. Compl. Compl. ¶56; Int. Compl. ¶42).

The plaintiffs' loose definition of the term "blending", especially "flows exceeding the capacity of a treatment unit are *routed around* that unit," implicates EPA's "bypass" regulation, 40 C.F.R. § 122.41(m). As noted above, pp. 10-11, supra, EPA regulations define "bypass" to mean the "intentional diversion of waste streams from any portion of a treatment facility." EPA regulations prohibit bypasses except under specified conditions. Plaintiffs' principal complaint in this case is that the three EPA Regions improperly treat "blending" as constituting an impermissible "bypass" (JA ; Plt. Compl. Compl. 20-24, 29-39; Int. Compl. 17-19).

EPA has not established a national policy regarding whether and under what circumstances "blending" does not constitute a bypass, either through rulemaking or through non-binding guidance to assist in the interpretation of the bypass regulation. 68 Fed. Reg. 63,052 (Nov. 7, 2003). Accordingly, the Regions and other permitting authorities have been interpreting and applying the bypass regulation on case-by-case basis based on the facts and circumstances presented by a particular POTW. Ibid. (JA ; Plt. Compl. Ex. 11, Admission 33, 34). EPA has recently proposed a national policy on this subject, including proposed regulatory interpretations, and is currently considering public comments on the proposal. 68 Fed. Reg. 63,042-63,052 (Nov. 7, 2003).

The second "rule" challenged by plaintiffs was allegedly adopted by Regions III and IV, and would prohibit the permitting of "emergency outfalls" (JA ; Plt. Compl. Compl. 39-44; Int. Compl. 19-23). The term "emergency outfalls" is also not defined in the CWA or NPDES regulations.[9] Nor do plaintiffs themselves define the term "emergency outfalls" as they use this term in the complaints. Plaintiffs appear, however, to use this term to refer generally to emergency overflows from sanitary sewer systems (i.e, "SSOs").

The third "rule" challenged by plaintiffs was allegedly adopted by Regions III, IV, and VI, and would establish "secondary treatment" as the technology-based standard applicable to sanitary sewer overflows ("SSOs") (JA ; Plt. Compl. Compl. 45-47; Int. Compl. 23-24).

To support their claims that the Regions had adopted binding "rules" on these matters, plaintiffs relied on an assortment of statements of subordinate agency officials or representatives gleaned from internal agency memoranda, emails, correspondence, confidential settlement communications, responses to Freedom of Information Act requests, and guidance and policy documents drafted EPA regional offices (JA ; Docket # 17, Exhibits 1 thru 9; Docket # 34, Exhibits 1

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[9] EPA's NPDES regulations do require permit applicants to identify "constructed emergency overflows" in a permit application. 40 C.F.R. § 122.21.

thru 36). None of these documents, however, was an official promulgation of rules or regulations by the Administrator, and some are unsigned and/or undated (JA ; Docket # 17, Exhibits 5, 9; Docket # 34, Exhibits 7, 15, 17, 19, 25).

Plaintiffs also relied on documents evidencing objections by the Regions to particular draft permits presented to the Region involved by the State permitting authority (JA ; Docket # 34, Exhibits 6, 24, 26, 34, 35). Where the State had modified the permits to satisfy the Region's objection, some permittees had sought review in the State court system, and the others apparently had not (JA ; Docket # 34, Exhibit 16).

Contrary to plaintiffs' repeated assertions (Br. 6-7, 17, 18), EPA has never admitted that the actions of the Regions about which plaintiffs complain were ultra vires, or otherwise beyond the authority of the Regions or not in conformance with the requirements of the CWA and EPA's regulations. For example, plaintiffs maintain (Br. 34, 39) that the EPA admitted that its regulations were incorrectly interpreted by the Regions, when the actual admission was that the Administrator had not delegated to the Regional Administrator the authority to issue regulations (JA ; Docket # 65, p. 16, citing Docket #34, Exhibit 11, Admission 72, pp. 38-39). Similarly, plaintiffs's repeated characterizations (Br. 14-16, 31, 34, 36, 38) of "findings" by the district court are misleading because the district court was

merely reciting the allegations of the complaints (JA ; Docket # 65, pp. 6-7, 15-16).

D. Decision below. – The district court first addressed the finality of the documents evidencing the Regions' guidance on permitting issues for POTWs. The court concluded that such documents were not final agency action under the test of Bennett v. Spear, 520 U.S. 154 (1997). Following the decision in American Paper Institute, Inc. v. EPA, 882 F.2d 287 (7th Cir. 1989), the court concluded that such guidance did not mark the consummation of the administrative process, which concludes with the disposition of a permit application actually imposing restrictions and limitations (JA ; Docket #65, pp. 9-16). For the same reason, there would be no legal consequences for permittees until the permit is issued or denied (JA ; Docket #65, pp. 15-16).

The court concluded, however, that objections to State permits by the Regions had sufficient concrete effect to make those actions by the Regions final agency action, concluding that these actions determine the conditions for the permittees (JA ; Docket # 65, pp. 17-19). Although the court found final agency action in those circumstances, the court held that there was no district court jurisdiction over plaintiffs' claims. First, the court ruled that where EPA objected to a state permit, the appropriate court of appeals had exclusive jurisdiction over

that claim under Section 509(b) of the CWA, 33 U.S.C. § 1369(b) (JA ; Docket # 65, pp. 19-23). Second, where EPA had remained silent and not interposed an objection, that decision was "committed to agency discretion by law" under the APA, 5 U.S.C. § 701(a)(2), and therefore unreviewable (JA ; Docket # 65, pp. 23-25).

Finally, the court rejected jurisdiction under 5 U.S.C. § 706(1), for "agency action unlawfully withheld or unreasonably delayed" (JA ; Docket # 65, p. 26). The court ruled that such an action would not lie "in the absence of 'final agency action' as required by Section 704 [of the APA]" (JA ; Docket # 65, p. 26). Accordingly, the district court dismissed the action.

SUMMARY OF ARGUMENT

1. The district court lacked jurisdiction over plaintiffs' challenges to the policies and practices of the three EPA Regions because plaintiffs failed to identify any action that would constitute final agency action reviewable under the APA. The regional guidance concerning the permitting of POTWs are simply statements of policy expressing how those Regions intend to exercise their delegated authority to administer the NPDES permit program. The guidance itself does not determine rights or obligations, or have legal effect of its own force, because it is the permit that has those consequences. For the same reason, the

guidance does not mark the consummation of the permitting process. Accordingly, such guidance is not final agency action. See e.g., American Paper Institute, Inc. v. EPA, 882 F.2d 287 (7th Cir. 1989).

This Court's decisions holding that nationally applicable agency guidance may constitute final agency action are inapplicable because EPA has not issued nationwide guidance on the issues raised by plaintiffs and required the Regions to apply it. Moreover, in this case, the guidance does not have the effect of mandating immediate compliance; only the results of the permitting process will determine the scope and nature of a permittee's obligations. Accordingly, finality will not attach until that process is completed.

For the same reason, the district court incorrectly concluded that any objection to a State permit issued by an EPA Region would be final agency action. The objection does not terminate the permitting process, and either the State or EPA will take further action on the permit, which is subject to review at that time. An objection is not final and does not make any pre-permitting guidance final agency action.

2. Alternatively, plaintiffs' challenges to the Regions' policies and practices are not ripe for review. The claims do not present issues fit for review because judicial intervention will inappropriately interfere with the permitting

process in the Regions. A reviewing court will also clearly benefit from the further factual development that would occur in the context of a permit application that addresses specific factual circumstances.

Nor will permittees suffer any hardship if review is deferred until a specific permit is issued. Until that time, permittees face no obligation to meet changed or new requirements.

3. Nor did the district court have jurisdiction under Leedom v. Kyne, 358 U.S. 184 (1958). Such jurisdiction is available in the extremely narrow situation where an agency has clearly violated an express statutory mandate and the plaintiff has no alternative for review. Here, a permittee has the right to challenge the terms and conditions of a permit in either State or Federal court. Moreover, plaintiffs have not identified any clear statutory mandate that prevents the EPA Regions from issuing non-binding guidance about how they would administer aspects of the delegated authority to administer the NPDES permit program.

4. Finally, plaintiffs' complaint failed to state a claim for "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). As the Supreme Court has recently confirmed, this remedy is only available where an agency has a mandatory statutory duty to take final agency action. Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004). Plaintiffs have failed

to identify any statutory duty under the CWA for EPA to set nationwide effluent or other limitations relating to permitting issues plaintiffs seek to have reviewed.

STANDARD OF REVIEW

Where, as here, the disposition of a rule 12(b)(1) motion was based in part on materials outside the pleadings, the district court and this Court will consider the allegations of the complaint as supplemented by those materials. Artis v. Greenspan, 158 F.3d 1301, 1305-1306 (D.C. Cir. 1998); Herbert v. National Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992). Where the facts established by those materials are undisputed, this Court applies a de novo standard of review to the district court's application of law to undisputed fact. Artis v. Greenspan, 158 F.3d at 1305-1306; Herbert v. National Academy of Sciences, 974 F.2d at 197. In evaluating the motion to dismiss, the district court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiffs. Walker v. Jones, 733 F.2d 933, 925-926 (D.C. Cir. 1984). See Artis v. Greenspan, 158 F.3d at 1306. While the complaint is to be construed liberally, the court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the court accept the plaintiffs' legal conclusions. National Treasury Employees Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996); Kowal

v. MCI Communication Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing jurisdiction. See Gibbs v. Buck, 307 U.S. 66, 71-72 (1939); McNutt v. General Motors Acceptance Corporation, 298 U.S. 178, 184 (1936).

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THE CHALLENGED ACTIONS DO NOT CONSTITUTE FINAL AGENCY ACTIONS

Judicial review, whether it is under the judicial review provision of the CWA, 33 U.S.C. § 1369(b), or the APA, is limited to final agency action. American Telephone & Telegraph Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001) (addressing APA); Westvaco Corporation v. EPA, 899 F.2d 1383, 1386 (4th Cir. 1990) (addressing CWA). If a challenged agency action is not final, then the reviewing court lacks subject matter jurisdiction.

The Supreme Court has established that two conditions must be satisfied for agency action to be final. Bennett v. Spear, 520 U.S. 154, 178 (1997). First, the action "must be one from which 'rights or obligations have been determined,' or from which 'legal obligations will flow.'" Id. (citations omitted). Second, the action "must mark the 'consummation' of the agency's decisionmaking process,"

and not be "of a merely tentative or interlocutory nature." 520 U.S. at 177-78. Where neither condition is met, there is no final agency action that is subject to judicial review. See General Motors v. EPA, 363 F.3d 442, 449-452 (D.C. Cir. 2004) (letter regarding Resource Conservation and Recovery Act compliance not a "rule" and not "final"); Independent Equip Dealers Ass'n v. EPA, 372 F.3d 420, 426-429 (D.C. Cir. 2004) (letter regarding Clean Air Act compliance not "final");

On appeal, plaintiffs primarily challenge the district court's conclusion that the regional guidance documents were not final agency action, arguing that this conclusion is inconsistent with the court's conclusion that objections by the Regions to specific permits were final action reviewable under the APA (Br. 20-30). The Region VI "Strategy" and Region III "Interim Guidance" documents, however, are policy statements expressing how these EPA offices intend to exercise their discretionary authority to issue NPDES permits or oversee state issuance of permits for certain types of discharges. These regional guidance documents have no independent legal force or binding legal effect and do not mark the consummation of EPA's decisionmaking process.

Moreover, contrary to the view of the district court and the plaintiffs, an objection by a Region to a permit proposed by a State is not final agency action either. An EPA objection standing alone does not consummate the permitting

process. The State may choose to modify the permit to meet the objections or not; if not, then EPA assumes authority to resolve the permit application and engages in additional proceedings. The final permit decision of either the State or EPA is subject to judicial review in State court or a Federal court of appeals, as appropriate. Consequently, an objection by a Region to a State permit is not final agency action itself and does not make any prior permitting guidance issued by a Region final agency action.

A. Neither the Regional guidance documents on permitting issues nor Regional objections to specific permits are final agency action. – A regional policy statement, in and of itself, does not have legal force and does not reflect a final agency position on any particular matter. See City of San Diego v. Whitman, 242 F.3d 1097 (9th Cir. 2001) (letter issued by EPA Region IX indicating regional interpretation of statutory provision applicable to a POTW permit not final agency action); American Paper Institute v. EPA, 882 F.2d 287 (7th Cir. 1989) ("American Paper I") (holding that guidance document concerning discharge limitations issued by EPA Region V was not final agency action subject to judicial review unless adopted by Administrator in particular permitting decision); American Paper Institute v. EPA, 726 F. Supp. 1256 (S.D. Ala. 1989) ("American

Paper II") (holding guidance document concerning discharge limitations issued by EPA Region IV was not final agency action).

In American Paper I, EPA Region V issued a guidance document addressing discharge standards under the CWA for pulp and paper mills. The Seventh Circuit held that the document had no legal effect and was not subject to judicial review. The Court stressed that "the [EPA] Administrator may overrule Region V" in determining whether the region's guidance should be followed in a particular permitting decision. 882 F.2d at 289. The Seventh Circuit further noted that in the event the Administrator "adopts Region V's position, and a permit is turned down, modified, or rescinded, review will be available in state or federal court. That review, on a full record, will disclose EPA's final position, as applied to the plant in question." Id. The Court noted that although "Region V told the states how it thought it might react to particular proposals," "telegraphing your punches is not the same as delivering them." 882 F.2d at 289.

In American Paper II, the Alabama district court followed the Seventh Circuit decision and likewise held that an EPA Region IV policy statement concerning NPDES discharges did not constitute final agency action. The district court explained that regional guidance documents do not have binding legal effect because states authorized to administer NPDES permitting programs "may or may

not choose to implement the Region IV suggestions in whole or in part" and that "at the time the issue reaches the EPA for review, EPA could . . . change its position." The court explained that "[b]ecause EPA does not have the power to force compliance at this point, the plaintiffs are not being required . . . to make any changes." 726 F. Supp. at 1260.

In City of San Diego, the Ninth Circuit dismissed a challenge by a POTW to an EPA Region IX letter in which EPA Region IX indicated that it interpreted the Ocean Pollution Reduction Act to apply to the POTW's NPDES permit renewal application. The City sought judicial review of EPA's letter. The Ninth Circuit agreed that the City had not met either prong of the Bennett v. Spear test. The Ninth Circuit found that EPA's decisionmaking process would conclude after Region IX's action on the permit application and after appeal to EPA's Environmental Appeals Board. Id. at 1101. The Ninth Circuit further found that the interpretations contained in EPA's letter did not impose an obligation, deny a right or fix any legal relationship. Id. at 1102.

The Regional guidance challenged here is indistinguishable from that found not to be final agency action in these cases. The Regions, in the exercise of their delegated authority over NPDES permits, have done no more than to advise how they intend to resolve issues that could arise in the consideration of specific

permits. The guidance itself does not create rights or obligations, or have legal consequences, and accordingly cannot be final agency action under Bennett v. Spear.

Nor is this case governed by this Court's decisions that have deemed nationally applicable agency guidance documents to be judicially reviewable. See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (nationally applicable guidance document on monitoring requirements to measure compliance with emission standard under Clean Air Act); Ciba-Geigy v. EPA, 801 F.2d 430 (D.C. Cir. 1986) (letter of EPA program head stating agency's position on labeling requirements of Federal Insecticide, Fungicide, and Rodenticide Act necessary to avoid unlawful misbranding). Unlike in Appalachian Power or Ciba-Geigy, this case does not involve a situation where EPA Headquarters has adopted guidance that is nationwide in scope and has directed all Regions to apply it. Rather, Plaintiffs contend that EPA regional offices have failed to adopt uniform policies. Plaintiffs express a preference for policies allegedly adopted by some regions over policies allegedly adopted by others. To the extent that EPA regions have not adopted a uniform policy, this reflects that EPA has not issued a nationwide position that could be judicially reviewable. Indeed, the fact that EPA has proposed a nationwide policy for blending for the first time, and has announced its

consideration of proposed rulemaking to specifically address the regulatory framework for SSOs, underscores the lack of finality. Cf. Ciba-Geigy, 801 F.2d at 437 (noting that "[W]e have no reason to believe that the . . . statement of the agency's position [at issue in case] was 'only the ruling of a subordinate official' that could be appealed to a higher level of EPA [authority].'"); Appalachian Power Co. v. EPA, 208 F.3d at 1021 (addressing legal effect of "document issued at headquarters" that was nationwide in scope).

Moreover, the cases relied on by plaintiffs addressing nationwide guidance documents are distinguishable on the ground that rights and obligations related to a particular POTW's proposed discharges of sewage are determined in a particular permit adjudication, when EPA or an authorized State either denies an NPDES permit, or issues the permit with any appropriate conditions. See General Motors v. EPA, 363 F.3d at 452 (finding lack of hardship because affected party had opportunity to challenge agency's interpretations administratively, and distinguishing Appalachian Power on that ground). Statements by EPA regional offices may signal how they presently intend to interpret EPA's existing regulations in future adjudications, but such statements do not determine rights or obligations, or mandate anything. Unless and until EPA completes the objection process and takes final action to issue or deny a permit to which it has objected, no

final agency action has been taken. See 40 C.F.R. § 123.44; City of Ames v. Reilly, 986 F.2d 253, 256 (8th Cir. 1993) (judicial challenge to EPA objection to permit "premature because it vitiates the administrative process"); American Paper Institute v. EPA, 890 F.2d 869, 872-875 (7th Cir. 1989). Until issuance of an NPDES permit setting a fixed effective date for compliance and imposing specific conditions on discharge, a POTW need not modify plant designs or upgrade treatment controls to meet those conditions. Thus, the district court erred in concluding that the Regional objections to specific permits were final agency action.

This case is further distinguishable from Appalachian Power and Ciba-Geigy because, as plaintiffs concede, the regulatory interpretations they seek to challenge in this case are not embodied in published guidance documents, but are allegedly set forth in "secret" and "unpublished internal policies." Plaintiffs thus challenge vague alleged regional "policies," not any particular guidance documents. Indeed, many of the internal agency documents Plaintiffs do identify are undated and/or unsigned, and in some cases, do not even identify any EPA official as an author. The fact that persons outside of EPA may have obtained copies of internal deliberative communications through Freedom of Information Act requests or otherwise does not convert these communications into agency

"actions." See Appalachian Energy Group v. EPA, 33 F.3d 319, 322 (4th Cir. 1994) (holding that internal memorandum transmitted to public advising that NPDES permit was required for storm water discharges was not a "final action" subject to judicial review even though it signaled position that EPA might eventually take).

Finally, in addition to the alleged prohibition on "blending," plaintiffs challenge two other alleged EPA regional policies relating to overflows of sewage from sanitary sewer systems ("sanitary sewer overflows" or "SSOs"). First, Plaintiffs allege that EPA Regions III and IV have adopted an unlawful "regional policy" that prohibits POTWs from receiving NPDES permits that allow POTWs to discharge untreated sewage from "emergency outfalls" (i.e. "SSOs") within sanitary sewer systems (Br. 3-7) (JA ; Plt. Compl. Compl. 39-44; Int. Compl. 19-23). Second, Plaintiffs allege that EPA Regions III, IV, and VI have unlawfully adopted a "regional policy" that establishes "secondary treatment" as the technology-based standard applicable to discharges of sewage from SSOs (Br. 3-7) (JA ; Plt. Compl. Compl. 45-47; Int. Compl. 23-24). Neither of the alleged

regional interpretations relating to SSOs determines rights or obligations for all the reasons set out above.[7]

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[7]Assuming, solely for the sake of argument, that the actions of the Regions described in the complaints constitute final agency actions that are judicially reviewable, the grant of exclusive jurisdiction to the courts of appeals found in Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), would preclude the district court from reviewing these actions. To the extent that an objection by a Region to a specific State draft permit would be held to be final action having the effect of denying a permit, a conclusion that we have shown above is incorrect, a challenge to such an objection would plainly come within the exclusive jurisdiction of the court of appeals to review of the ". . . Administrator's action in issuing or denying any permit under" 33 U.S.C. § 1342. See 33 U.S.C. § 1369(b)(1)(F). See Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (actions of EPA having the "precise effect" of denying a permit reviewable under Section 509). Similarly, if, contrary to our submission, the plaintiffs are correct that the Regions have adopted binding "rules" dictating certain conditions and limits for POTW permits, those "rules" would be restrictions and limitations on discharges such as to constitute "effluent limitation[s] or other limitation[s]" within the meaning of Section 509(b)(1)(E). See Natural Resources Defense Council v. EPA, 656 F.2d 768, 775 (D.C. Cir. 1981) ("NRDC I") (regulations governing applications for variances from the limitations imposed on municipal sewage plants "effluent limitations . . . under section 1311"); Natural Resources Defense Council v. EPA, 673 F.2d 400, 407 (D.C. Cir. 1982) ("NRDC II") (consolidated permit regulations mandating procedures for issuing or denying NPDES permits were "effluent limitation[s] or other limitation[s]"); Natural Resources Defense Council v. EPA, 822 F.2d 104, 111 (D.C. Cir. 1987) ("NRDC III") (NPDES regulations prescribing statutory definitions and conditions to be incorporated into NPDES permits, including the "bypass" rule, were reviewable under Section 509(b)(1)(E)). The appropriate court of appeals, however, would not have had jurisdiction over plaintiffs' claims here because they did not seek review within the 120-day window allowed by Section 509(b)(1), 33 U.S.C. § 1369(b)(1).

II. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW

Even if the challenged actions were final agency action, plaintiffs' claims are not ripe for review. The ripeness doctrine is rooted in both the Article III requirement of "cases or controversy" and in prudential considerations favoring the orderly conduct of administrative and judicial processes. See Blanchette v. Connecticut General Ins. Co., 419 U.S. 102, 138 (1974). The doctrine was developed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). Application of the ripeness doctrine requires consideration of two basic factors: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." Id. at 149.

A. The Issues Raised By Plaintiffs Are Not Fit For Judicial Decision. – Whether the issues raised in a challenge to agency action are fit for review depends on two factors: (1) "whether judicial intervention would inappropriately interfere with further administrative action," and (2) "whether the courts would benefit from further factual development of the issues presented." Ohio Forestry

Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). Here, consideration of both these factors compels the conclusion that Plaintiffs' claims are not ripe for review.

First, whether an action constitutes "final agency action" should be considered in determining whether judicial intervention would inappropriately interfere with further administrative action. See Abbott Laboratories, 387 U.S. at 149. For the reasons stated above, the challenged agency statements do not constitute final agency actions, and do not terminate the ongoing permitting process. Judicial intervention now would pretermit that process. See Utility Air Regulatory Group v. EPA, 320 F.3d 272, 279 (D.C., Cir. 2003) (challenge to various Clean Air Act policy statements not ripe where rulemaking in progress).

Second, additional factual development would significantly advance a reviewing court's ability to deal with the types of issues presented by Plaintiffs, and assist in their resolution on a case-by-case basis. See General Motors v. EPA, 363 F.3d at 452 (finding issue not ripe because resolution depended on facts at individual facilities). For example, judicial consideration of whether routing wastewater flows around a treatment unit and "blending" these flows with wastewater flows going through the treatment unit is consistent with EPA's "bypass" regulation at 40 C.F.R. § 122.41 will stand "on a much surer footing" in the context of a case-specific permitting or enforcement decision than in the

instant "generalized challenge" to the EPA Regions' alleged interpretations of the bypass rule. Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967). Municipal Dischargers' own definition of "blending" would appear to require a fact-specific application. They define "blending" as "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 an effluent from that unit prior to discharge, and the blended flows meet applicable permit effluent limitations at the final discharge location" (JA ; Plt. Compl. Compl. ¶56; Int. Compl. ¶42). Factual questions presented might include whether the wet weather flows are "peak" or should be expected as routine for a "separate" system, or whether the blended effluent would meet permit limits. Likewise, whether and how a particular "sanitary sewer overflow" ("SSO") may be permitted consistent with the CWA and applicable regulations will stand on a surer footing in the context of a case-specific permitting or enforcement decision than it would in the instant generalized challenge.

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. See Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987) (holding that

persons can challenge determinations embodied in agency guidance only if and when guidance has been applied specifically to them).

In short, judicial review would be enhanced by waiting until the effects of the alleged policies have been crystalized in a concrete fact situation involving an actual, present impact on a particular affected party. Judicial review in the absence of a concrete fact situation would entangle the Court in precisely the sort of "abstract disagreements over administrative policies" that the ripeness doctrine seeks to avoid. Ohio Forestry Ass'n, 523 U.S. at 732-33.

B. Plaintiffs Will Not Suffer Hardship If Review is Deferred. – Withholding court consideration until discharge limitations are actually applied at specific sites will not cause Plaintiffs any hardship. As discussed above, the alleged regional policies Plaintiffs cite do not create any actual legal rights or obligations. They do not "command anyone to do anything or to refrain from doing anything," Ohio Forestry Ass'n v. Sierra Club, 523 U.S. at 733; nor do they "grant, withhold, or modify any formal legal license, power or authority." Id. The impact of these alleged policies on municipalities is speculative until they are actually applied in a particular permitting decision or enforcement action.

III. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER THE ULTRA VIRES CLAIMS UNDER LEEDOM V. KYNE

Plaintiffs also argue (Br. 31-39) that even if their claims do not meet the tests for finality and ripeness, the district court had jurisdiction under Leedom v. Kyne, 358 U.S. 184 (1958), because the Regions were acting ultra vires. Plaintiffs ignore controlling precedent of the Supreme Court and this Court applicable to the circumstances in this case. The D.C. Circuit has emphasized the "extraordinary" nature of Leedom v. Kyne jurisdiction, and characterized the limitations on such jurisdiction as "nearly insurmountable." United States Dep't of Justice v. Fed. Labor Relations Authority., 981 F.2d 1339, 1342-1343 (D.C. Cir. 1993) (rejecting argument that defendant acted in excess of statutory authority in upholding labor arbitration award under Federal Service Labor Management Relations Statute); Association of Civilian Technicians, Inc. v. Federal Labor Relations Authority, 283 F.3d 339, 344 (D.C. Cir. 2002) (finding that statute placing exclusive jurisdiction for review of agency action in Court of Appeals, except for bargaining unit determinations, precluded district court jurisdictions over all agency actions, including review of bargaining unit determinations). Leedom v. Kyne jurisdiction is available only in the "very limited circumstance" (emphasis in original) where an agency has both (a) clearly violated an express mandate of the statute and (b)

the plaintiff has no alternative means of review. Telecommunications Research & Action Ctr v. FCC ("TRAC"), 750 F.2d 70, 78 (D.C. Cir. 1984). Neither of these factors is present here.

A. Plaintiffs Have An Alternative Means of Review. – Plaintiffs' claims relate to alleged EPA restrictions and limitations on NPDES permits, but under the statutory scheme, plaintiffs have a means of obtaining judicial review of the permits and any basis for their restrictions and limitations. If the permit has been issued by EPA, then the challenge must be filed in the United States Courts of Appeals. 33 U.S.C. § 1369(b)(1)(F).[8/] If the permit has been issued by a State agency, then the challenge is to State action and must be filed in the appropriate State court. See District of Columbia v. Schramm, 631 F.2d 854, 863 (D.C. Cir. 1980) ("State courts are the proper forums for resolving questions about state NPDES permits, which are, after all, questions of state law."). See 40 C.F.R. § 123.30. Plaintiffs have an alternate means to obtain review of allegedly ultra vires

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[8/] In addition, under EPA's administrative appeals process, actions by Regional Administrators in issuing or denying NPDES permits are appealable to EPA's Environmental Appeals Board – a permanent entity of EPA officials appointed by the Administrator to review actions of EPA Regions in, among other things, issuing NPDES permits. 40 C.F.R. §§ 1.25(e)(1); 124.19. Thus, Plaintiffs have an administrative remedy for challenging regional permitting decisions believed to be inconsistent with any applicable EPA national standard. EPA regulations require exhaustion of this remedy prior to seeking judicial review of EPA's permit decisions. 40 C.F.R. § 124.19(c).

actions other than through district court jurisdiction under Leedom v. Kyne. Therefore, Leedom v. Kyne jurisdiction is inapplicable.

The Supreme Court's decision in Federal Communications Comm'n v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984), which was subsequent to Leedom v. Kyne, speaks directly to the jurisdictional circumstances here. In ITT, a telecommunications company brought an action in district court to enjoin action of the Federal Communications Commission ("FCC") as ultra vires (i.e., in excess of statutory authority). The company sought to enforce the same restrictions on agency conduct as they had sought in an administrative petition for rulemaking that was denied by the FCC. The Supreme Court found that exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents's rulemaking petition, rested in the Court of Appeals. The Supreme Court concluded that the "[l]itigants may not evade [jurisdictional] provisions" by bringing an ultra vires claim in district court. 466 U.S. at 468. Instead, "[t]he appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by statute." Id. Likewise here, the appropriate procedure for obtaining judicial review of challenged agency actions is through appeal to the Courts of Appeals, as provided

by the applicable judicial review provision of the Clean Water Act, 33 U.S.C. § 1369(b)(1).

This Court in TRAC has also rejected the application of Leedom v. Kyne jurisdiction to circumstances analogous to the circumstances in this case. 750 F.2d at 74-79. In TRAC, non-profit corporations and public interest groups sought to compel the Federal Communications Commission to decide certain unresolved matters pending before the agency. The Court found that where exclusive jurisdiction over review of final FCC orders is vested in the Courts of Appeals, the Courts of Appeals had exclusive jurisdiction over claims of unreasonable delay, explaining that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." Id. at 78-79 (emphasis added). This Court further noted that Leedom v. Kyne jurisdiction could be available only "in the very limited circumstance" where a defendant has (1) clearly violated an express mandate of the statute and (2) the plaintiff has no alternative means of review. Id. at 78.

Because review of the relevant EPA actions in this case (NPDES permitting decisions) is available in the Courts of Appeals, and because consideration of ultra vires claims in district court in this case would affect the Circuit Court's exclusive

jurisdiction over EPA permitting decisions, TRAC dictates that Plaintiffs cannot bring ultra vires claims in this Court. Denial of review in this Court will not "truly foreclose all judicial review," as required for Leedom v. Kyne jurisdiction. Id. at 78.

Plaintiff incorrectly rely on the Fourth Circuit's decision in Champion Int'l Corp. v. EPA, 850 F.2d 182 (4th Cir. 1988). There, the court affirmed a district court's jurisdiction over an ultra vires claim against an assumption by EPA of NPDES permitting authority after objecting to a State permit. 850 F.2d at 185-186. To the extent the Fourth Circuit's decision in Champion holds district courts may exercise jurisdiction over an ultra vires claim, it is inconsistent with the governing law in this Court as set forth in TRAC.

B. Plaintiffs Have Not Identified An Express Violation of A Clear Statutory Mandate. – Alternatively, plaintiffs' ultra vires claims must be dismissed under the Leedom v. Kyne standard because plaintiffs have not identified any express violation of a clear statutory mandate. See Griffith v. Federal Labor Relations Authority, 842 F.2d 487, 493 (D.C. Cir. 1988) (Leedom v. Kyne has "extremely limited scope" and "[g]arden-variety errors of law or fact are not enough"); TRAC, 750 F.2d at 78. Plaintiffs have not identified any clear statutory mandate preventing EPA Regions from issuing non-binding guidance documents

concerning how they may or intend to exercise their delegated authorities related to administration of the NPDES permitting program.

It is undisputed that EPA has authority to review and object to NPDES permits in states with EPA-authorized permitting programs, and to oversee authorized state permitting programs (including associated review of and objection to state permits). 33 U.S.C. § 1342. It is also uncontested that the EPA Administrator has delegated authority to EPA Regional Administrators to administer the National Pollutant Discharge Elimination System ("NPDES") permit program within their respective regions. See JA ; EPA Delegations Manual 2-20, 2-21 (EPA Opp. to Motion for Costs, Ex. 1). Among other things, EPA Regions have been delegated authority: (1) to issue and condition NPDES permits or to deny applications for permits; and (2) to review permit applications submitted to State agencies authorized to administer the NPDES program and object to and veto proposed State-issued NPDES permits. It is equally plain that EPA regions exercising their delegated authority to administer the NPDES permitting program have the authority and responsibility to interpret the CWA and EPA's regulations as they apply to specific proposed instances of blending by POTWs, and nothing in plaintiffs' arguments suggest otherwise. Here, the actions of the Regions challenged by plaintiffs clearly fall within that delegated authority,

and accordingly, plaintiffs have failed to state an ultra vires claim that comes within the jurisdiction of the district court.

Indeed, the same Fourth Circuit cases that Plaintiffs cite to as supporting jurisdiction under Leedom v. Kyne also support the proposition that ultra vires claims such as those brought here fail to state a claim upon which relief may be granted. In the Champion case, for example, the Fourth Circuit found that EPA had acted within its delegated powers in objecting to a proposed NPDES permit and assuming permitting authority. See 850 F.2d at 187. The Fourth Circuit explained that "Even if EPA may ultimately be shown to be incorrect in its objections to North Carolina's proposed permit (and we do not intimate they are), its acts are not so clearly outside its authority to subject them to immediate judicial review in [this] court." Id. Similarly, the Fourth Circuit in an unpublished decision cited by Plaintiffs, West Virginia Coal Ass'n v. Reilly, No. Civ. A. 2:87-0834, 1991 WL 75217 (4th Cir. May 13, 1991), concluded that EPA had acted within its statutory authority in issuing a regional policy and objecting to NPDES permits consistent with that policy. The court explained:

> Under *Champion*, the EPA clearly had authority to object to NPDES permits which it found to be in conflict with the CWA. 33 U.S.C. § 1342(d)(1). The promulgation of the Region III policy is simply an interpretation of the Act. The fact that it serves as the basis for the EPA's

> objecting to NPDES permits does not constitute "brazen defiance" of the EPA's statutory authority.

1991 WL at 75217, *3.

Plaintiffs erroneously contend that EPA seeks to shield its actions from judicial review. At issue is the proper action, timing and forum of judicial review, not its availability. EPA does not dispute that plaintiffs can challenge agency permitting actions that actually govern their discharge of sewage, when those actions occur. EPA simply disagrees that an Administrative Procedure Act ("APA) action in the district court, challenging Regional policies, is permissible.

IV. PLAINTIFFS CANNOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PREMISED ON THE THEORY THAT AGENCY ACTION HAS BEEN UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED

Plaintiffs additionally fail to state a claim upon which relief may be granted under section 706(1) of the APA under the theory that agency action has been unlawfully withheld or unreasonably delayed. As the Supreme Court has recently confirmed, in order to establish that agency action has unlawfully been withheld or unreasonably delayed, Plaintiffs would have to prove that EPA has some mandatory duty or obligation which EPA has not performed. In Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004) ("SUWA"), the Supreme Court held "a claim under §706(1) can proceed only where a plaintiff

asserts that an agency failed to take a discrete agency action that it is required to take." 124 S.Ct. at 2379 (emphasis in original). The "agency action" alleged to be required must fit into one of the five categories of actions found in the definition of "agency action," 5 U.S.C. § 551(13), or be the equivalent or denial thereof. The "agency action" must also be final. 124 S.Ct at 2378-2379; 5 U.S.C. § 704. See Madison-Hughes v. Shalala, 80 F.3d 1121, 1124-25 (6th Cir. 1996) ("Agency action is 'unlawfully withheld' only when 'the agency has violated its statutory mandate by failing to act.'. . . [J]urisdiction depends upon the alleged existence of a mandatory legal requirement . . . ." (quoting Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981)); San Francisco Baykeeper v. Whitman, 297 F.3d 877, 885 (9th Cir. 2002) ("for a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place"). Under these principles, 5 U.S.C. § 706(1) is not available to plaintiff-appellant. Plaintiffs have not identified, and cannot identify, any statutory duty for EPA to set nationwide effluent or other limitations relating to the subject areas plaintiffs have identified (i.e., "blending," "emergency outfalls," "SSOs").

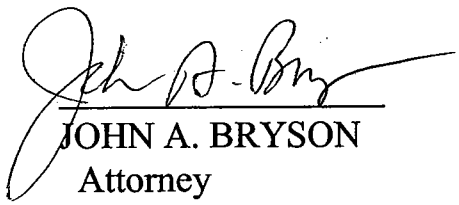
Plaintiffs' mistakenly rely (Br. 41-42) on Bowen v. City of New York, 476 U.S. 467, 487 (1986). That case concerned the scope of class certification and of relief for an action challenging undisclosed policies governing eligibility for

disability benefits, and the decision does not address the scope of EPA's duties under the CWA. Similarly, the general obligation of all administrative agencies under 5 U.S.C. § 555(b) to conclude matters pending before them "within a reasonable time" does not establish a specific mandatory duty under the CWA for EPA to take action.[9/]

[9/] To the extent Municipal Petitioners argue that they have sought informal redress from EPA Headquarters and that EPA Headquarters has unlawfully withheld or unreasonably delayed agency action, they have not provided documentary evidence, much less a formal rulemaking petition initiating compilation of an agency record.

CERTIFICATE OF COMPLIANCE

I certify that pursuant Rule 32(a)(7)(C), Fed. R. App. P., the attached Initial Brief for the Appellees is proportionately spaced, has a typeface of 14 points or more, was prepared using Corel WordPerfect Version 9.0, and contains 11, 135 words.



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