SCHEDULED FOR ORAL ARGUMENT ON MAY 19, 2005

Case No. 04-5073

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

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

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

CORRECTED BRIEF OF INTERVENOR ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

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Proof Brief: November 24, 2004

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

Pursuant to D.C. Circuit Local Rule 28(a)(1), the following is a list of all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, Intervenor, or amici in this Court:

Before the District Court:

Plaintiffs:

Pennsylvania Municipal Authorities Association
Tennessee Municipal League
The City of Little Rock Sanitary Sewer Committee

Intervenor-Plaintiff:

Association of Metropolitan Sewerage Agencies

Defendants:

Michael O. Leavitt, *Administrator, U.S. EPA*
Donald S. Welsh, *Regional Administrator, U.S. EPA Region III*
J. I. Palmer, Jr., *Regional Administrator, U.S. EPA Region IV*
Richard E. Greene, *Regional Administrator, U.S. EPA Region IV*

Before the Court of Appeals:

Appellants:

Pennsylvania Municipal Authorities Association
Tennessee Municipal League
The City of Little Rock Sanitary Sewer Committee

Intervenor:

Association of Metropolitan Sewerage Agencies

Appellees:

Michael O. Leavitt, *Administrator, U.S. EPA*
Donald S. Welsh, *Regional Administrator, U.S. EPA Region III*
J. I. Palmer, Jr., *Regional Administrator, U.S. EPA Region IV*
Richard E. Greene, *Regional Administrator, U.S. EPA Region IV*

B. Rulings Under Review.

Ruling of the United States District Court for the District of Columbia, Case No. 1-02-CV-1361, granting Defendant's Motion to Dismiss, Judge Henry H. Kennedy, Jr., dated November 20, 2003. The official citation for this ruling is 292 F. Supp. 2d 95 (D.D.C. 2003).

C. Related Cases.

The case on review has not previously been before this court. The case on review is an appeal from a ruling of the United States District Court for the District of Columbia, Case No. 1-02-CV-1361. Counsel for Intervenor is unaware of any other related cases currently pending in this court or in any other court.

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MISCELLANEOUS

GLOSSARY

CWA	Clean Water Act
EPA	United States Environmental Protection Agency
J.A.	Joint Appendix
POTW	Publicly Owned Treatment Works

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the District Court had subject matter jurisdiction to review whether the actions of Defendant-Appellee U.S. Environmental Protection Agency ("EPA"), as set forth in the Complaint of Plaintiff-Appellants Pennsylvania Municipal Authorities Association, Tennessee Municipal League and the City of Little Rock Sanitary Sewer Committee (collectively, "Appellants") and in the Complaint of Intervenor Association of Metropolitan Sewerage Agencies ("Intervenor"), were *ultra vires*.

STATUTES AND REGULATIONS

CWA § 501(a), 33 U.S.C. § 1361(a):

§ 1361. Administration

> (a) Authority of Administrator to prescribe regulations. The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act [33 USCS §§ 1251 et seq.].
> . . . .

STATEMENT OF THE CASE

Intervenor seeks review of a Memorandum Opinion by the United States District Court for the District of Columbia, dated November 20, 2003, granting EPA's motion to dismiss Appellants' and Intervenor's Complaints for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

STATEMENT OF FACTS

Appellants filed a Complaint with the United States District Court for the District of Columbia on July 8, 2002 ("Appellants' Complaint"), seeking judicial review of, *inter alia*, the actions of several of EPA's Regional Offices for Regions III, IV, and VI (collectively "EPA Regions") in unilaterally adopting policies: (1) prohibiting "blending," or the practice of routing excess flows around the secondary treatment unit of a publicly owned treatment works ("POTW") when peak wet weather flows would exceed the capacity of that secondary treatment unit, and recombining those flows with treated waters prior to discharge into waters of the United States; (2) prohibiting the permitting of emergency outfalls; and (3) functionally dictating how POTWs may design their plants to meet such effluent limitations. *See* Appellants' Complaint Counts I-IV, J.A. ____. In that Complaint, Appellants alleged a number of facts demonstrating that these EPA actions were *ultra vires*. *See* id., J.A. ____

On August 16, 2002, Intervenor filed a Motion to Intervene, which the District Court granted on October 4, 2002. That same day, Intervenor filed a Complaint ("Intervenor's Complaint") in which Intervenor also alleged a number of actions taken by the EPA Regions that were *ultra vires*. *See* Intervenor's Complaint Counts I-IV, J.A. ____.

On October 25, 2002, EPA filed a Motion to Dismiss Appellants' Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. On November 20, 2003, the District Court issued a Memorandum Opinion granting EPA's Motion to Dismiss.

STATEMENT OF THE SCOPE OF REVIEW

This Court's review of an order dismissing a complaint for lack of subject matter jurisdiction is de novo. *See* General Elec. Co. v. Environmental Protection Agency, *et al.*, 360 F.3d 188, 190-91 (D.C. Cir. 2004); Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003); Sturm, Ruger & Co., Inc. v. Chao, 300 F.3d 867, 871 (D.C. Cir. 2002); Ryan v. Reno, 168 F.3d 520, 521 (D.C. Cir. 1999). In conducting such a review, the Court "must accept the factual allegations in the complaint as true." Sturm, Ruger & Co., 300 F.3d at 871 (citing Sloan v. United States Dep't of Hous. and Urban Dev., 236 F.3d 756, 759 (D.C. Cir. 2001)).

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) should not be granted "unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." Kowal v. MCI Commun. Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Because of the severe impact of dismissing an action at such an early stage of litigation, before the parties have had an opportunity to conduct effective discovery, a complaint must be construed liberally and plaintiffs should receive the benefit of all favorable inferences that

can be drawn from the alleged facts. *See* EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997).

SUMMARY OF ARGUMENT

The District Court erred in granting EPA's motion to dismiss for lack of subject matter jurisdiction because the District Court had jurisdiction to assess the EPA Regions' *ultra vires* actions in adopting and applying binding policy positions prohibiting blending and the permitting of emergency outfalls, which impermissibly usurped the EPA Administrator's rulemaking authority in violation of clear and mandatory statutory provisions.

ARGUMENT

I. The EPA Regions' Actions In Adopting And Invariably Adhering To Policy Positions Prohibiting Blending And The Permitting Of Emergency Outfalls Were *Ultra Vires* Because They Usurp The EPA Administrator's Rulemaking Authority.

The District Court held that it did not have subject matter jurisdiction over the allegations set forth in Appellants' and Intervenor's Complaints because it concluded that: (1) no final agency action existed for POTWs complaining only of prohibitions contained in regional guidance documents, *see* Memorandum Opinion at 16, J.A. ____; (2) the United States Courts of Appeals have exclusive jurisdiction over EPA objections to state-issued permits, *see* Memorandum Opinion at 20-21, J.A. ____; and (3) issues concerning EPA silence on state permitting

decisions are committed to EPA's discretion, *see* Memorandum Opinion at 23-25, J.A. ____.

However, as Appellants point out in their Page Proof Brief, submitted to the Court on November 17, 2004 ("Appellants' Brief"), even where a court finds no other grounds for exercising subject matter jurisdiction, the court nonetheless shall exercise jurisdiction to determine whether an agency's actions are *ultra vires* under the United States Supreme Court's ruling in Leedom v. Kyne, 358 U.S. 184 (1958). Both Appellants and Intervenor have alleged specific facts demonstrating that the EPA Regions' development of policy positions prohibiting blending and the permitting of emergency outfalls constitutes the adoption of rules in clear contravention of the authority granted to the EPA Regions under the Clean Water Act, and consequently are *ultra vires*. *See* Appellants' Complaint Counts I-II, J.A. ____; Intervenor's Complaint Counts I-II, J.A. ____.

Intervenor agrees with the arguments set forth in Appellants' Brief that the Court had jurisdiction to evaluate the EPA Regions' *ultra vires* actions in adopting and applying inflexible policies prohibiting blending and the permitting of emergency outfalls. Without restating those arguments here, Intervenor submits this Corrected Brief to emphasize that, in addition to the reasons set forth in Appellant's Brief, the EPA Regions' actions were *ultra vires* because they demonstrate an attempt by the EPA Regions to usurp the EPA Administrator's

rulemaking authority by adopting the functional equivalent of final rules and by applying existing regulations so as to increase their stringency, applicability, burden of compliance or compliance costs, in clear violation of the CWA.

A. The EPA Regions Impermissibly View Their Permitting Policies As A Binding Equivalent Of A Properly Promulgated Agency Regulation.

This Circuit has stated that "only 'legislative rules' have the force and effect of law." Appalachian Power Co. v. Environmental Protection Agency, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 & n.31 (1979)). A "legislative rule" is "one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act." Id. However, this Court has recognized that an agency's other pronouncements can, as a practical matter, have an equally binding effect if an "agency acts as if a document issued at headquarters 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, [or] 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 . . . ." Id. at 1021 (citations omitted).

The EPA Regions' policy positions may not have been issued at EPA Headquarters by the Administrator or promulgated through the appropriate

rulemaking channels, but the EPA Regions are acting as though their policy positions are binding on states and the regulated community. The EPA Regions are treating their policy positions in the same manner that they treat properly promulgated legislative rules and have repeatedly and affirmatively told the states that they will invariably declare permits invalid unless the states comply with those policy positions. *See* Memorandum Opinion at 8 n.5, J.A. ____. Therefore, the EPA Regions are implementing their "policies" prohibiting blending and permitting of emergency outfalls in a manner functionally equivalent to properly promulgated regulations or, at the very least, in such a manner as to increase the stringency, applicability and burden of compliance of properly promulgated regulations, both of which exceed the EPA Regions' delegated authority as described below.

B. In Addition To Violating The Clear And Mandatory Language Of the CWA, The EPA Regions' Actions Impermissibly Usurp The EPA Administrator's Rulemaking Authority Based On EPA's Own Delegation Authorities.

As pointed out in Appellants' Brief, the EPA Regions' adoption and adherence to their policy positions governing blending and the permitting of emergency outfalls constitute facial violations of the "clear and mandatory" language of CWA § 501(a), 33 U.S.C. § 1361(a). In addition to the CWA's clear language, EPA's own regulations and other materials governing delegated powers reveal that the EPA Regions do not have authority to act as though they are creating

binding regulations or to apply existing regulations in such a manner as to increase their stringency, applicability, burden of compliance or compliance costs.

When EPA established regulations under the National Pollutant Discharge Elimination System in 1973, select CWA responsibilities were delegated from the Administrator to the Regional Administrators. *See* 40 C.F.R. § 125.5 (1973), J.A. ____; 38 Fed. Reg. 13530-31 (1973), J.A. ____. The Regional Administrators were authorized to re-delegate authority to their Regional Enforcement Division Directors. *See* 40 C.F.R. § 125.5(c) (1973), J.A. ____; 38 Fed. Reg. at 13531, J.A. ____. It is clear from these delegations that not all of the Administrator's authorities under the CWA are delegated to the Regional Administrators. Importantly, the Administrator did not delegate any authority to the Regions associated with his or her authority to prescribe regulations pursuant to CWA § 501(a), 33 U.S.C. § 1361(a), reflecting the clear and mandatory language of that statute.

Today, delegation of authority from the Administrator to the Regions is no longer governed by the federal regulations but is instead dictated in the *EPA Delegations Manual.* 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. That 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, J.A. ____ (emphasis added).

As set forth in Intervenor's Complaint, the practice of blending and the permitting of emergency outfalls are clearly authorized under current EPA regulations and under the CWA generally. *See* Intervenor's Complaint ¶¶ 42-127, J.A. ____. Additionally, Appellants' and Intervenor's Complaints demonstrate that the challenged actions of the EPA Regions make binding, substantive changes to EPA's promulgated regulations, affecting the stringency of, and the cost and burden of complying with, those regulations. *See* Intervenor's Complaint Counts I-II, J.A. ____. However, the *EPA Delegations Manual* reflects EPA's own belief that the EPA Regions do not have the delegated authority to act in such a manner. Because the EPA Regions have usurped the EPA Administrator's authority by implementing their policy positions in a manner functionally equivalent to final rules or rule amendments, thereby affecting the stringency, applicability, burden of compliance or compliance costs of existing regulations, they have proceeded far

beyond what the CWA and their own policies and regulations allow them to do. Therefore, the EPA Regions' actions were *ultra vires* under the CWA.

CONCLUSION

For the reasons set forth herein, as well as those set forth in Appellants' Brief, the EPA Regions do not have the statutory authority to make informal, binding policy pronouncements that are more stringent than existing regulations and then to inflexibly apply those pronouncements in a manner identical to enforceable rules. Appellants and Intervenor have made numerous allegations in their Complaints demonstrating that the EPA Regions have elected to proceed in such fashion rather than procuring a properly issued regulation from the EPA Administrator. Construing these allegations liberally, with all favorable inferences that can be drawn from the alleged facts, *see* EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997), it is clear that the EPA Regions' actions were *ultra vires* attempts to usurp the statutory authority of the EPA Administrator in clear violation of the CWA, granting the District Court subject matter jurisdiction under Leedom v. Kyne. Therefore, Intervenor respectfully requests that this Court find that the District Court had subject matter jurisdiction to examine the EPA Regions' *ultra vires* actions and remand this matter to the District Court for further proceedings consistent with that finding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(A)(3)(B) AND
D.C. CIRCUIT RULE 32(a)(3)(B)

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_____
One of the Attorneys for Intervenor
Association of Metropolitan Sewerage Agencies

Dated: _____

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing *Corrected Brief of Intervenor Association of Metropolitan Sewerage Agencies* were served via first class mail this 23rd day of November, 2004, upon the following:

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