

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES)	
ASSOCIATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No. 1-02-01361 (HHK/JMF)
)	
ASSOCIATION OF METROPOLITAN)	
SEWERAGE AGENCIES,)	
)	
Intervenor,)	
)	
v.)	
)	
MICHAEL O. LEAVITT, ^{1/} Administrator,)	
United States Environmental Protection Agency,)	
<u>et al.</u> ,)	
)	
Defendants.)	

**MOTION FOR LEAVE TO SUPPLEMENT EPA’S MEMORANDA IN SUPPORT
OF ITS MOTION TO DISMISS AND PROPOSED SUPPLEMENTAL MEMORANDUM**

Defendants Michael O. Leavitt, Administrator, United States Environmental Protection Agency, *et al.* (collectively hereinafter “EPA”) hereby notify the Court that EPA published in the Federal Register on Friday, November 7, 2003, a notice of a proposed policy focusing on the practice of peak wet weather flow blending at publicly owned treatment works, which is at issue in this case. *See* 68 Fed. Reg. 63042 (Attachment 1). EPA requests that the Court allow it to supplement its Memoranda in Support of its Motion to Dismiss to incorporate consideration of the proposed policy. As discussed further below, publication of the proposed policy supports dismissal of Plaintiffs’ claims on finality and ripeness grounds.

^{1/} Administrator Michael O. Leavitt, sworn in to office on November 6, 2003, is automatically substituted for his predecessor in office pursuant to Fed. R. Civ. P. 25(d)(1).

I. LITIGATION BACKGROUND

This case relates to EPA's administration of the Clean Water Act's framework for regulating the discharge of pollutants into the Nation's waters from municipal wastewater treatment systems, also referred to under the Clean Water Act as "publicly owned treatment works." Plaintiffs include a municipality and associations representing municipalities that own and operate municipal wastewater treatment plants and collection systems, and that seek to discharge (under some circumstances) untreated or partially treated sewage into the Nation's waters.

At the core of Plaintiffs' Complaint is the allegation that certain EPA regional offices have unlawfully adopted "rules" concerning conditions and limitations on the discharge of sewage into waters. EPA has filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). EPA contends that its motion to dismiss should be granted because (1) Plaintiffs have failed to identify any final agency actions, (2) Plaintiffs' claims are not ripe for review, and (3) challenges to any final agency "rules" relating to limitations in National Pollutant Discharge Elimination System permits must be brought in the Courts of Appeals.

Plaintiffs' principal issue in this case relates to "blending."² "Blending" is not a term used in the Clean Water Act or its implementing regulations. Plaintiffs use the term "blending" to refer to the practice of diverting untreated or partially treated sewage flows during periods of high rainfall or snowmelt around biological treatment facilities, and then recombining, hence

² Plaintiffs filed on August 14, 2003, a motion for preliminary injunctive relief that focuses exclusively on the "blending" issue raised in its Complaint. EPA filed an opposition to this motion, which remains pending.

“blending,” those flows with flows with flows that have been treated by the biological treatment. The practice of blending implicates EPA’s “bypass” regulation because “blending” contemplates that some portion of incoming flows (diluted by excess precipitation) will be routed around one or more treatment units. 40 C.F.R. § 122.41(m). EPA’s regulations define “bypass” to mean the “intentional diversion of waste streams from any portion of a treatment facility.” *Id.*

II. EPA’S PROPOSED BLENDING POLICY

EPA has not established any national policy regarding whether and under what circumstances “blending” does not constitute a “bypass” as defined at 40 C.F.R. § 122.41(m)(1)(i), either through rulemaking or through non-binding guidance to assist in the interpretation of the bypass regulation. Instead, EPA or State permitting agencies have interpreted and applied the bypass regulation on a case-by-case basis according to the facts and circumstances presented by a particular municipal treatment system.

EPA proposed a blending policy, comprised of a proposed rule interpretation and draft guidance to implement that interpretation, by publication in the Federal Register last Friday, November 7, 2003 (*See* 68 Fed. Reg. 63042 (Attachment 1)). The proposed policy is intended to provide nationally consistent guidance in the interpretation of EPA regulations as they relate to the practice of blending, and to ensure that blending is used by municipal sewage treatment facilities in a way that is fully protective of human health and the environment. EPA has invited public comments on its proposed policy, and may revise the proposed policy after consideration of public comments.

III. PUBLICATION OF THE PROPOSED POLICY PROVIDES FURTHER SUPPORT FOR EPA'S MOTION TO DISMISS

Publication of EPA's proposed national policy related to blending provides additional support for EPA's position that Plaintiffs' challenges to alleged unlawful EPA regional blending policies should be dismissed. The proposed policy provides further evidence that Plaintiffs have not identified any final agency actions, much less actions that are ripe for judicial review.

The issues of regulatory interpretation raised by Plaintiffs in this case related to blending are the subject of an ongoing administrative process and are not fit for decision in this case. EPA has now proposed a nationwide policy concerning issues of regulatory interpretation related to blending and invited public comments on its proposed policy. EPA may revise the proposed policy after consideration of public comments. To the extent Plaintiffs have concerns with the contents of the non-final proposed policy, they can and should participate in the administrative process and submit comments during the public comment period. No provision of law entitles Plaintiffs to an advisory opinion directing EPA regarding the contents of the Agency's non-final proposed policy on blending. As set forth in prior briefs (*See, e.g.*, EPA Reply Brief in Support of Motion to Dismiss at 1-4), Plaintiffs are free to challenge any final EPA or State action that actually governs their discharge of sewage, when such actions occur. Plaintiffs' Complaint does not identify any final agency action that is ripe for judicial review.

In short, EPA's publication of a proposed nationwide policy on blending provides additional support for dismissal of this case.

WHEREFORE, EPA respectfully requests that this Court allow it to supplement its Memorandum in Support of its Motion to Dismiss to incorporate consideration of the recently proposed policy, and requests that the Court grant EPA's Motion to Dismiss for the reasons

