ORAL ARGUMENT TOOK PLACE ON MAY 19, 2005

Case No. 04-5073

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

STEPHEN L. JOHNSON, ADMINISTRATOR,
U.S. 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

APPELLANTS' PETITION FOR *EN BANC* REHEARING

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I. Fed. R. App. Proc. 35(b) Statement of Basis for Requesting *En Banc* Rehearing

The June 3, 2005 panel decision ("Panel Op.") issued in this matter conflicts with this Circuit's prior decision in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). *Appalachian Power* establishes that it is the effect and application of agency guidance upon the day-to-day business of the regulated community and state agencies that determines its finality, not the nature of the agency subdivision issuing the guidance. As the panel's decision conflicts with *Appalachian Power*, consideration of the full court is therefore necessary to secure and maintain the uniformity of this Court's decisions regarding the proper analysis for determining the finality of agency action.[1]

In addition, this matter raises questions of exceptional importance as it directly conflicts with the Fourth Circuit's determination that regional EPA policies are final, reviewable agency action when those policies are consistently used to object to draft National Pollutant Discharge Elimination System ("NPDES") permits under the Clean Water Act ("CWA"), 33 U.S.C. §1251 *et seq*. *See West Virginia Coal Assoc. v. Reilly*, 932 F.2d 964 (4th Cir. 1991) (unpublished decision) (attached hereto). Accordingly, this matter warrants *en banc* rehearing in order to resolve the following question:

> Whether the implementation of unpublished, admittedly *ultra vires* regional guidance documents that are repeatedly used as the basis for objecting to NPDES permits and have caused "real, concrete harms" to the regulated community are, as a matter of law, non-final and unreviewable agency action merely because a *regional* agency office issues and implements the guidance.

Finally, the panel decision conflicts with the Supreme Court's opinion in *Leedom v. Kyne*, 358 U.S. 184 (1958), establishing that where an agency admittedly acts in excess of

[1] That the panel's opinion was unpublished does not affect the need for *en banc* rehearing. *See Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1524 (D.C. Cir. 1983) (granting *en banc* rehearing of unpublished panel decision).

delegated authority, courts must act to review such *ultra vires* actions. The Municipal Dischargers argued, and EPA admitted that only the Administrator is authorized to establish new regulatory requirements. However, in denying *Leedom* jurisdiction the panel's decision concludes that the Municipal Dischargers did not identify "any statutory provision that the agency violated" contrary to several circuit court decisions holding that only the Administrator adopts NPDES rules and guidelines. *See* Panel Op. Accordingly, consideration of the full court is, therefore, necessary to secure and maintain the uniformity of this Court's decisions regarding EPA regions' lack of statutory CWA authority to establish regional NPDES prohibitions.

II. Introduction

The panel's decision effectively creates a new "loophole" for agencies to circumvent rulemaking requirements and avoid judicial review of their regulatory initiatives. Under the panel's opinion, agencies can now insulate their actions from judicial review simply by issuing policy and other documents containing new binding regulatory requirements through the agency's subordinate regional offices. Because no "national" guidance document is issued, there is no final agency action, and therefore, no judicial review. *See* Panel Op.; *see also* April 6, 2005 Appellants' Reply Brief ("Reply Br.") at 11-12. Accordingly, this case presents a new and more egregious wrinkle on EPA's oft-tried use of informal "guidance documents" to impose mandatory requirements upon states and the regulated community – a tactic that was specifically admonished in *Appalachian Power*.

It is firmly established that EPA Headquarters has never adopted a rule proscribing the wastewater treatment practices of blending and using emergency outfalls. *See* Panel Op.; Reply Br. at 3; April 6, 2005 Appellants' Brief ("Appellants' Br.") at 6-7. However, EPA Regions III, IV, and VI adopted their own unpublished internal policies prohibiting blending and the

permitting of emergency outfalls within their regions, declaring them both to be violations of the bypass and secondary treatment regulations (40 C.F.R. Part 122.41(m) and Part 133) under the CWA. *See* Appellants' Br. at 4. The District Court found that "…both plaintiffs and defendants agree the EPA Regions do not have authority to establish rules prohibiting the disputed practices" and that such regional prohibitions have caused the Municipal Dischargers "real, concrete harms" in several ways:

> …some states have refused to reissue permits in order to comply with the EPA regional guidance documents banning blending. Other states, also following regional EPA documents, have included the prohibitions on blending in their NPDES permits when such bans did not exist before. Finally, in some instances, EPA regions have intervened directly and objected to state-issued permits that allowed blending.

Pennsylvania Mun. Authorities Ass'n v. Horinko, 292 F.Supp.2d 95, 104 (D.D.C. 2003) ("*PMAA*"); *id*. at 100. These prohibitions were imposed contrary to 33 U.S.C. §1361(a) (authorizing only the Administrator to establish rules) and without public notice - contrary to the Administrative Procedures Act ("APA"), 5 U.S.C. §551 *et seq.* *See* 33 U.S.C. §1251(e) (mandating public participation in CWA programs); *see also* Appellants' Br. at 4, 30-31, 36-37.

The District Court, therefore, found that EPA's regions had repeatedly made "ultimate decisions concerning whether to object to and/or deny particular permits" based on their regional prohibitions. *See* Panel Op.; *cf. PMAA*, 292 F.Supp.2d at 102 ("…EPA Regional Administrators object[] to state-issued permits"). Moreover, the Municipal Dischargers' briefs were replete with specific examples of how the EPA regions have made numerous "ultimate decisions" based upon their regional policies to object to NPDES permits incorporating blending and emergency outfalls. *Cf.* Panel Op. These examples included: Region IV objection letters to proposed South Carolina and Alabama permits (*see* J.A. 327 and J.A. 506); Region IV correspondence referencing that the Region had "objected to two Alabama drafted permits that proposed to allow

blending…[and] [w]e are also preparing to object to a draft permit in South Carolina that allows blending (*see* J.A. 441); a Region VI objection letter to a proposed Arkansas NPDES permit (s*ee* J.A. 447); and Region III objection letters to proposed Pennsylvania NPDES permits regarding separate sewer system overflows (*see* J.A. 492-95, 500-01, and 504-05). *See* Appellants' Br. at 7; *see also id*. at 4, 26-29; Reply Br. at 6-7, 9. These objection letters confirm that the EPA regions are not merely "telegraphing their punches" when they repeatedly object to NPDES permits with the flat explanation that "[o]ur answer has always been the same…" – blending is prohibited. *Compare* Appellants' Br. at 7 (citing J.A 192) *with PMAA*, at 103 (citing *American Paper Institute, Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir.1989)); *see also* Reply Br. at 7. Despite the clear record and District Court finding of repeated regional objection to state permits based on the regional prohibitions, the panel held that the Municipal Dischargers could not claim final agency action "…until something more happens to them (e.g. permit denials or a national EPA guidance document…)…" *See* Panel Op. (quoting *PMAA*, at 105).

Contrary to *Appalachian Power*, this decision effectively shields the EPA regions' admittedly *ultra vires* conduct from review based upon the empty formality that no national EPA guidance document has been issued. Consequently, the panel's decision directly conflicts with the central holding of *Appalachian Power* that it is the binding effect and application of agency guidance upon the day-to-day business of the regulated community and states agencies that determines its finality, not the nature of the agency subdivision issuing the guidance. *See Appalachian Power*, 208 F.3d at 1021. This decision furthermore conflicts with *West Virginia Coal*'s holding that EPA regional policies specifically can be final reviewable action when they are used as the basis for repeatedly objecting to proposed NPDES permits, as demonstrated here. *See West Virginia Coal*, 932 F.3d 964 at *3.

The District Court concluded that "[t]he D.C. Circuit has not directly addressed" the issues raised by the Municipal Dischargers. *See PMAA*, at 103; *see also* Appellants' Br. at 21. The panel apparently disagreed with this finding. *See* June 3, 2005 Judgment (citing D.C. Cir. Rule 36(b) for unpublished dispositions). If, as the District Court concluded, this is indeed a matter of first impression, *en banc* rehearing is warranted to establish this Circuit's position on critical issues regarding judicial review of agency action and to fully develop a supporting rationale. If not, the panel's decision summarily affirms the applicability of *Appalachian Power's* finality analysis to reviewing regional agency guidance documents, but then reaches a result entirely in conflict with its holding by elevating the title of the agency subdivision issuing guidance above the impact of that guidance upon the states and regulated community. *See* Panel Op. ("until something more happens to them (e.g. permit denials or a national EPA guidance document…), these municipalities can not claim final agency action..."). The panel's conclusion therefore directly conflicts with *Appalachian Power* and *West Virginia Coal*, as well as the uncontested facts that the EPA Regions have made numerous "ultimate decisions" (*i.e.*, permit objections) based upon the EPA regional policies. As the regional office actions were admittedly in excess of delegated authority and violated clear statutory provisions, at a minimum, review per *Leedom* should have been granted. Thus, *en banc* rehearing is warranted.

III. Argument

A. The Panel's Decision Conflicts With *Appalachian Power's* Central Holding that the Binding Effects of An Agency Action Dictate Finality

Contrary to *Appalachian Power*, the panel's decision ignored the practical effect of EPA's regional prohibitions, and instead focused on the distinction that because EPA's regional policies had not been adopted by EPA's national headquarters, there could be no final reviewable agency action. *See* Panel Op. This Circuit adheres to the Supreme Court's instruction that

finality is to be analyzed "in a 'flexible' and 'pragmatic' way.'" *See NRDC v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-50 (1967)). Following this directive, *Appalachian Power* established that the fundamental factors used in determining the finality of an agency action are the manner of its implementation and binding effect upon the regulated community, not the document's form:

> if an agency acts as if a document issued...is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or state permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding'.

Appalachian Power Co. v. EPA, 208 F.3d at 1020-21. Every one of *Appalachian Power's* indicia of finality was demonstrated for EPA's regional prohibitions to the panel. *See* Appellants' Br. at 4-5, 7, 26-29; *see also* Reply Br. at 5-11.

A long line of precedent reinforces *Appalachian Power*'s holding, both from the D.C. Circuit and other courts. *See* Appellants' Br. at 20-29; Reply Br. at 5-11. As discussed at length by the Municipal Dischargers, these cases confirm that:

- Analyzing the binding effect of an agency's conduct is "ordinarily controlling…." *See* Appellants' Br. at 24 (citing *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986)).

- A key inquiry in determining whether an agency's conduct indeed has a binding effect is "whether the agency's position is 'definitive' and whether it has a 'direct and immediate…effect on the day-to-day business' of the parties challenging the action." *See* Appellants' Br. at 26 (citing *Ciba-Geigy Corp.*, 801 F.2d at 435-36).

- "it is the *effect* of the agency's conduct which is most important in determining whether an agency has adopted a final policy." *See* Appellants' Br. at 23 (citing *American Trucking Assoc.'s v. Reich*, 955 F.Supp. 4, 7 (D.D.C. 1997) (emphasis in original).

- "[m]ore critically than [the agency's] language…its later conduct in applying it confirms its binding character." *See* Reply Br. at 8 (citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1998)).

- "an agency pronouncement will be considered binding in a practical matter if it either appears on its face to be binding…or is applied by the agency in a way that indicates it is binding." *See* Reply Br. at 8 (citing *General Electric Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)).

Whether the headquarters of an agency "…has officially adopted a final policy…is not determinative [of finality]." *See* Reply Br. at 7 (citing *American Trucking Assoc.'s v. Reich*, 955 F.Supp. at 7), 11-12; Appellants' Br. at 17, 23-25. It makes little practical difference to the regulated community and delegated state programs whether an NPDES document originates from an agency's headquarters rather than a regional office if they are nonetheless ordered to comply with its terms.[2]

The Municipal Dischargers also relied on a Fourth Circuit decision, directly on point that confirmed the applicability of *Appalachian Power*'s finality test to regional permitting guidance. *See* Appellants' Br. at 24-25; Reply Br. at 8. In *West Virginia Coal*, an EPA Region III CWA permitting policy was found to be "final agency action and, hence, reviewable," despite there being no "national EPA guidance document." *West Virginia Coal*, 932 F.2d 964, *2; *cf.* Panel

[2] Even where subordinate agency officials are involved in setting requirements, this Circuit did not waiver in its fidelity to the established finality analysis. *See NRDC v. Thomas*, 845 F.2d 1088 (D.C. Cir. 1988). As explained:

> [i]n this case where the subordinate is the director of the relevant component unit of the administration, where no further action by the administrator is directly implicated, and where no further proceedings are noticed, it would appear that subordinate employees of the agency and, more importantly, cooperating state components of the compliance effort would be justified in construing the [guidance] to be their marching orders. Therefore, in a flexible and pragmatic interpretation, we must find this [guidance] of the Director to be a final agency action.

NRDC v. Thomas, 845 F.2d at 1094. There is no persuasive policy reason for finding the actions of subordinate agency officials final and reviewable if they exhibit "binding effects," while denying review for regional agency prohibitions with identical impacts.

Op. The key fact behind this conclusion was that "…since the in-stream policies promulgated by the EPA [*i.e.*, the EPA Region III Policy for In-stream Treatment of Mining Wastewaters] were used as a basis for blocking draft NPDES permits…[, t]he impact of the administrative action was direct and immediate upon those applying for permits…" *Id.* (citing *Abbott Laboratories*, 387 U.S. at 149-50). The panel and District Court's holding that regional guidance *per se* cannot be final agency action plainly contradicts *West Virginia Coal*.

EPA's regional prohibitions in this case are being implemented in exactly the same manner as those found to be final reviewable action in *West Virginia Coal*, and the District Court here found that this caused the Municipal Dischargers "real, concrete harms." *PMAA*, 292 F.Supp.2d at 100. Just as in *Appalachian Power* and *West Virginia Coal*, the elements of EPA's regional guidance challenged here:

> …consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply.

Appalachian Power, 208 F.3d at 1022; *see also PMAA*, 292. F.Supp.2d at 100 (describing the ways in which the Municipal Dischargers had suffered "real, concrete harms" as a result of imposition of EPA's regional guidance).

Nevertheless, the panel's decision turned on the formalistic distinction that because "a national EPA guidance document" had not been issued (*i.e.*, EPA Headquarters had not ratified the illegal regional policies), the real, concrete harms caused by EPA's regional policies could not be reviewed. *See* Panel Op. Accordingly, the panel's conclusion directly conflicts with *Appalachian Power* and *West Virginia Coal* by elevating form over substance in derogation of the Supreme Court's instruction in *Abbott Laboratories*. Thus, *en banc* rehearing is warranted.

B. Permit Issuance or Denials Is Not A Prerequisite for Review

The panel's determination that illegal regional policies may only be reviewed in specific permit challenges is contrary to both *Appalachian Power* and *West Virginia Coal*. In both cases, the petitioners were "not challenging any specific permit objections or denials." *See* Panel Op.; *cf. Appalachian Power*, 208 F.3d 1015, *West Virginia Coal*, 932 F.2d 964. The *Appalachian Power* petitioners simply claimed that during permit negotiations, "…State authorities, with EPA's Guidance in hand, are insisting…" on compliance with its requirements. *Appalachian Power*, 208 F.3d at 1023. Evidence of EPA Region III's 41 objections in *West Virginia Coal* was used, as it is in this matter, to illustrate the active implementation and binding effect EPA's regional policies have upon the states and regulated community. Moreover, in *Appalachian Power*, the court flatly dismissed EPA's claim that the permitting guidance was "not ripe for review because the court's review would be more focused in the context of a challenge to a particular permit." *Appalachian Power*, 208 F.3d at 1023 n.18. The court's blunt response was: "there is nothing to this." *Appalachian Power*, 208 F.3d at 1023 n.18. The court explained that whether EPA's guidance is reviewable "*...**will not turn on the specifics of any particular permit***." *Appalachian Power*, 208 F.3d at 1023 n.18 (emphasis supplied).[3]

Consequently, the panel's reliance on that "[h]ere, appellants state that they are not challenging any specific permit objections or denials" is irrelevant. Just as in *Appalachian Power*, the EPA regions' prohibition of blending and the permitting of emergency outfalls

> reads like a ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their 'marching orders' and EPA expects the States to fall in line…

[3] *See also American Paper Instit. V. EPA*, 726 F.Supp. 1256, 1260 (S.D. Ala. 1989) (Once EPA objects to NPDES permits, "the policy becomes final….").

Appalachian Power, 208 F.3d at 1023 (explaining that "obligations on the part of the State regulators and those they regulate" are certainly created by EPA's Operating Permitting Guidance). By making review of the regional prohibitions "turn on the specifics of" particular permits, the panel's decision adds a hurdle to the finality analysis that was not contemplated in *Appalachian Power* and directly conflicts with its pragmatic analysis. *Appalachian Power*, 208 F.3d at 1023 n.18. Accordingly, the panel's conclusion that EPA's regional policies could only be reviewed if "something more happens to [the Municipal Dischargers]…" contradicts *Appalachian Power*, as well as the clear facts that something more has indeed happened to them.

C. Regional Failure to Act on Objected Permits Leaves Permittees Without Any Meaningful Review

The Fourth Circuit's approach provides meaningful review where such review is otherwise unavailable. The *PMAA* case, like the *West Virginia Coal Ass'n* case, addresses circumstances wherein a regional policy is used to impose new requirements upon the regulated community, with failure of a state to include such regional requirements resulting in EPA objections to many state NPDES permits. However, this case is even more egregious because, as the District Court found, permittees are left to languish without any final permitting action.[4] Whereas EPA's objection letter effectively precludes a state from issuing an NPDES permit,[5] EPA's subsequent failure to process the permit is worse than a permit denial. If the EPA region

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[4] The District Court found that:

> In affidavits and exhibits uncontroverted by defendants, plaintiffs identify *POTWs that have had permits expire without renewal*, states refusing to issue permits based on the regional guidance documents, and *EPA Regional Administrators objecting to state-issued permits.*

DC Op. at 12. (Emphasis added.) *See also* Appellants' Br. at 8, 18, 39, 43 n.24; Complaint at ¶ 155.

[5] *See* Appelants' Br. at 11 citing 40 C.F.R. § 122.4(c) and 25 Pa. Code § 92.73(4).

were, as Congress intended by amending the CWA in 1977 by adding 33 U.S.C. § 1342(d)(4),[6] to either deny the NPDES permit or issue the permit (even with inappropriate conditions), then an appeal under CWA §1369(b)(1)(F) could ensue. Nonetheless, the permit objection does not give rise to such judicial review,[7] instead it leaves the permittee to languish and EPA's inaction potentially is used as leverage to force the municipality to acquiesce regional demands.[8]

This impasse between the permittees, the states, and the EPA is not a product of state action – nor is it subject to appeal in state court. Furthermore, it is not an EPA issuance or denial of a permit subject to exclusive Court of Appeals jurisdiction under CWA § 509(b)(1). *See supra* note 6. This is an impasse, created by the regions to superimpose *ultra vires* regional mandates upon the regulated community, for which there is no other avenue of relief. Accordingly, judicial review of these clearly *ultra vires* actions must be allowed.

D. The Panel's Decision Allows Admittedly *Ultra Vires* Acts to Continue

The panel's opinion allows EPA's regional offices to continue to impose their regional prohibitions despite EPA's acknowledgement and the District Court's finding that such action was beyond the regional "delegated authority" and no such requirements had ever been adopted by EPA's Administrator – the only entity authorized by Congress under Sections 1361(a) and 1314(i) to adopt NPDES rules. *See PMAA*, 292 F. Supp.2d at 104. ("[B]oth plaintiffs and defendants agree that the EPA Regions do not have authority to establish rules prohibiting the

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[6] *See* Appellants' Br. at 10-12 identifying the legislative intent of the 1977 amendments to the CWA that EPA is to expeditiously exercise its authority and issue an NPDES permit after it has objected to a State NPDES permit.

[7] *See* Appellants' Br. at 12-13, 43-44, setting forth case law holding that only an EPA decision granting or denying a permit – not an EPA objection -- is subject to §1369(b)(1) review. EPA is in agreement on this point. See Initial Brief for the Appellees filed February 4, 2005 at 13.

[8] *See* Reply Br. at 9 explaining that Regional inaction on the NPDES permit denies Plaintiffs the opportunity to address on-going municipal needs, a critical function recognized by EPA.

disputed practices….a regional guidance only becomes 'final agency action' if the Administrator adopts it.") Agency conduct that is admitted to be *ultra vires* and is contrary to the basic statutory framework is exactly the type of situation the Supreme Court and this Court envisioned *Leedom* review would promptly remedy; thus, the panel's decision should be reversed.

In *Leedom,* the Supreme Court exercised subject matter jurisdiction to review a non-final order where the National Labor Relations Board "did not contest the trial court's conclusion that the Board …had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees.'" *See Leedom v. Kyne*, 358 U.S. 184, 187 (1958). Given these circumstances, the Court stated:

> Does the law 'apart from the review provisions of the *** Act' afford a remedy? We think surely the answer must be yes. This suit… is one to strike down an order of the Board made in excess of delegated powers and contrary to a specific prohibition in the Act. … [C]onduct which would thwart the declared purpose of the legislation cannot be disregarded….

Leedom at 188,189. The panel's rationale for denying *Leedom* review was that "appellants only argue that EPA regions are acting in excess of authority delegated *to them by the Administrator*." *See* Panel Op. (emphasis supplied). This rationale misapplies *Leedom* and is contrary to applicable D.C. Circuit precedent. Requiring that parties identify a specific mandatory statutory provision that is violated when the offending party already *agrees* that the actions are *ultra vires* is an unnecessary burden that would shield behavior plainly contrary to Congressional intent from immediate review.[9]

Municipal Dischargers identified specific statutory provisions only granting the Administrator authority to issue and amend rules. *See* Appellants' Br. at 5-7, 9-10, 31-32, 36-39. The Municipal Dischargers relied, in part, upon the explicit language of EPA's Delegations

[9] None of the D.C. Circuit cased cited as controlling by the panel involved circumstances where the agency admitted acting beyond delegated authority.

Manual for proving that the regions clearly exceeded their delegated authority. However, the explicit restrictions of Administrator's Delegations Manual simply follow the CWA's statutory mandate that only the Administrator is authorized to undertake rulemaking. *See* 33 U.S.C. §1361(a) and 1314(i).[10] This Court has repeatedly found that Congress wanted the Administrator to adopt uniform requirements under the Act without regional adoption of alternative standards:

> The drafters' intent that the Administrator promulgate such standards is made clear by [§]509…which specifically provides for review of the Administrator's action 'in approving or promulgating any effluent limitation or other limitation under section 301 . . . .' …33 U.S.C. [§]1369(b)(1)(E)....

American Frozen Food Institute v. Train, 539 F.2d 107, 128-29 (D.C. Cir. 1976).[11] The panel's decision is contrary to the precedent of this Circuit as it failed to recognize that the Act itself mandates that the Administrator, and only the Administrator, adopts NPDES rules. *Id.*

Moreover, Congress does not write statutes that describe every prohibited activity – Congress grants authority to act in a certain manner and actions not identified may be analyzed, per *Leedom,* to determine if such acts are clearly contrary to the Congressional delegation of authority. This Court stated in *Dart v. United States* (discussing and granting *Leedom* review):

> … the Veterans' Administrator cannot issue oil drilling permits – nor can the Secretary of Labor rescind television licenses – and expect to escape judicial review by ***hiding behind a finality clause***. Were such unauthorized actions to go unchecked, chaos would plainly result. When an executive acts *ultra vires,* courts are normally available to reestablish the limits on his authority. Rarely, if ever, has Congress withdrawn court's jurisdiction to correct such lawless behavior….

[10] *See NRDC v. EPA*, 859 F.2d 156, 200 (D.C. Cir. 1988) ("[S]ections 301 and 304 … do indeed require adoption and implementation of nationally uniform effluent limitations guidelines….") These are the same guidelines that originated the bypass rule whose modification by the Regional Offices is the central issue of this case.

[11] *See also National Independent Meat Packers Ass'n v. EPA,* 566 F. 2d 41, 43 (8th Cir. 1977) "Uniform regulation of water pollution on a nationwide basis was a major purpose of the [CWA]"… citing *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 ((1977).

Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988) (emphasis supplied). The panel's prerequisite for review – a mandatory provision precluding regional rulemaking, is directly at odds with this court's decision in *Dart,* wherein an analysis of statutory language and Congressional intent may be used to determine if the agency actions were plainly contrary to the Congressional delegation of authority. *Dart,* 848 F.2d 228-231.

EPA itself has admitted that its regions are acting *ultra vires* and the Act, as interpreted by both the Supreme Court and this Circuit, unquestionably does not authorize anyone else but the Administrator to establish the blanket prohibitions at issue. *Leedom* is intended to provide relief from such unlawful action. Consequently, the panel's opinion regarding the application of *Leedom* review should be reversed.

IV. Conclusion

Both *Appalachian Power* and *West Virginia Coal* recognize that whether an agency official resides in a regional office or at headquarters makes little difference to the practical effect of that official's "marching orders." Regarding CWA permitting, "marching orders" to the delegated states and regulated community come from EPA's regional offices -- not EPA Headquarters. *See* Appellants' Br. at 14; Reply Br. at 11-12. The panel's decision simply fails to recognize that "[t]he short of the matter is that the [regional] Guidance…is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies…who must obtain…permits in order to continue operating." *Appalachian Power*, 208 F.3d at 1023. The panel's decision allows agencies to dictate totally arbitrary requirements upon states and the regulated community via unauthorized policy directives, yet remain insulated from judicial review simply by issuing them

through regional offices. Such a decision ignores *Abbott Laboratories*' instruction and eviscerates the very purpose of *Appalachian Power*.

The panel's decision also conflicts with clear precedent of the D.C. Circuit and the Supreme Court that admitted *ultra vires* actions should be enjoined regardless of finality considerations. *En banc* rehearing is therefore warranted to prevent further imposition of the admittedly illegal regional office prohibitions.

WHEREFORE, Appellants, the Municipal Dischargers, respectfully request this Court:

1) Grant this Petition for *En Banc* Rehearing and vacate the June 3, 2005 Memorandum Opinion and Judgment of this Court;

2) Grant the relief sought in Appellants' April 6, 2005 Briefs; and

3) Any and all other relief as this Court deems just and appropriate.

Dated: **July 14, 2005**

Respectfully submitted,

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D.C. CIRCUIT RULE 35(c) ADDENDUM TO APPELLANTS' PETITION FOR *EN BANC* REHEARING

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, counsel for the Appellants, who join in this Petition, certify this 14th day of July 2005, as follows:

A. Parties and Amici. The parties, intervenors, and amici before this Court, all of whom were parties in the District Court proceeding, are the following:

Appellants: Pennsylvania Municipal Authorities Association ("PMAA"); Tennessee Municipal League ("TML"); and The City of Little Rock Sanitary Sewer Committee ("Little Rock").

Intervenor:	Association of Metropolitan Sewerage Agencies ("AMSA")[1]
Appellees:	Stephen L. Johnson, Administrator U.S. Environmental Protection Agency ("EPA");[2] Donald S. Welsh, Regional Administrator, U.S. EPA Region III; J. I. Palmer, Regional Administrator, U.S. EPA Region IV; Richard E. Greene, Regional Administrator, U.S. EPA Region VI.[3]

All Appellants and Intervenors that are parties in this matter have previously made the disclosure required by Circuit Rule 26.1. Nevertheless, pursuant to Federal Rule of Appellate Procedure 26.1(b), the Appellants joining in this Petition for Panel Rehearing disclose the following:

Rule 26.1 Corporate Disclosure Statement of PMAA

PMAA is an association created under Pennsylvania law. Its members include approximately 650 Pennsylvania authorities formed pursuant to the Municipal Authorities Act of 1945, May 2, 1945, P.L. 382 *as amended*, 53 P.S. §301, *et seq.* Of these, approximately 448 municipal authorities are in whole or in part sewage authorities, and therefore, have the responsibility to own and/or operate wastewater systems to address municipal sewage. A majority of the 418 municipal authorities with sewage responsibility operate under NPDES permits issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. §1251 *et seq.* Part of PMAA's mission is to represent its members on statewide NPDES regulatory and compliance issues. PMAA has no parent companies, and there are no other publicly-held companies that have a 10% or greater ownership interest in PMAA. PMAA has no outstanding shares or debt securities in the hands of the public.

[1] AMSA has recently changed its name to the National Association of Clean Water Agencies ("NACWA").

[2] Pursuant to Fed. R. Civ. P. 25(d)(1), Stephen L. Johnson was automatically substituted as a party in the underlying proceeding for his predecessor Michael O. Leavitt.

[3] Pursuant to Fed. R. Civ. P. 25(d)(1), Richard E. Greene is automatically substituted as a party in this proceeding for his predecessor Gregg Cooke.

Rule 26.1 Corporate Disclosure Statement of TML

TML is a voluntary, cooperative organization established by the cities of the State of Tennessee for their mutual assistance and improvement. TML represents Tennessee municipalities before agencies and other instrumentalities, both government and non-governmental, whose activities may affect TML, including those pertaining to statewide NPDES regulatory and compliance issues. Most, if not all, of TML members operate under NPDES permits issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. §1251 *et seq.* and T.C.A. 69-3-101 *et seq.* TML has no parent companies, and there are no other publicly-held companies that have a 10% or greater ownership interest in TML. TML has no outstanding shares or debt securities in the hands of the public.

Rule 26.1 Corporate Disclosure Statement of Little Rock

Little Rock owns and operates publicly-owned treatment works ("POTWs") subject to NPDES permits issued by the State of Arkansas. Little Rock has no parent companies, and there are no other publicly-held companies that have a 10% or greater ownership interest in Little Rock. Little Rock has no outstanding shares or debt securities in the hands of the public.

B. Rulings Under Review

The ruling presented for *en banc* review is this Court's June 3, 2005 Judgment and Memorandum Opinion affirming the dismissal of the underlying matter by District Court Judge Henry H. Kennedy for lack of subject matter jurisdiction on November 20, 2003 (*Pennsylvania Mun. Authorities Ass'n v. Horinko*, 292 F.Supp.2d 95 (D.D.C. 2003)) and the subsequent denial by minute order of a motion to reconsider such dismissal pursuant to Fed. R. Civ. P. Rule 59(e) on December 30, 2003 (no official citation available).

C. Related Cases

This appeal arises as of right from proceedings in the U.S. District Court for the District of Columbia, *PMAA, et al. v. Whitman, et al.*, Case No. 1-02-CV-01361. The case under review has not previously been before this Court. No related cases are currently pending in this Court or any other court of which counsel is aware.

PANEL OPINION: Pursuant to D.C. Cir. Rule 35(c), a copy of this Court's June 3, 2005 Judgment and Memorandum Opinion in this matter is attached.

Respectfully submitted,

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Dated: July 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellants' Petition For *En Banc* Rehearing was served this 14th day of July 2005 by first class mail, postage prepaid, on the following:

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