UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, *et al.,*	
Plaintiffs,	
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES,	
Intervenor,	
v.	Civil Action No. 1-02-01361 (HHK/JMF)
CHRISTINE TODD WHITMAN, Administrator, U.S. Environmental Protection Agency, *et al.,*	
Defendants.	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF A MOTION FOR PRELIMINARY INJUNCTIVE RELIEF AND EXPEDITED HEARING

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Plaintiffs Pennsylvania Municipal Authorities Association, *et al*. (hereinafter "Plaintiffs") submit this memorandum in support of its Motion for Preliminary Injunctive Relief and Expedited Hearing in this matter pursuant to Federal Rule of Civil Procedure 65(a) and Local Rule 65.1. As discussed herein, preliminary injunctive relief is required to stem ongoing irreparable harm and to allow communities, such as Little Rock, to comply with deadlines established in judicial consent agreements. An expedited hearing is requested pursuant to Local Rule 65.1(d) and is necessary to address Plaintiffs' harm in a timely manner.

INTRODUCTION

For the past four years Plaintiffs have sought EPA Administrator clarification that the Clean Water Act ("CWA" or "the Act") and its implementing regulations do not restrict the long established, commonly employed, engineering practice of designing facilities to process certain peak wet weather flows via blending. The EPA Regions where the Plaintiffs are located (*i.e.,* Regions III, IV and VI) have, without undertaking any rulemaking, prohibited blending whereas such practice is authorized and encouraged in other Regions. Clarification regarding this issue is critical to the municipal interests represented in this action as the federal government is aggressively enforcing a program to eliminate all untreated overflows that are caused by wet weather events. Where blending is prohibited, the elimination of overflows, in most cases, requires the expansion of treatment facilities to process greater intermittent, peak flow events. As acknowledged repeatedly by EPA, such flow conditions, however, are generally inimical to the proper

operation of biological treatment works, the process most often employed to effectively treat sanitary wastes. Therefore, timely compliance with federal enforcement orders and elimination of untreated overflows requires the ability to employ blending.[1]

As an initial matter, we emphasize the fact that a single national regulatory standard is involved – yet, EPA admits that the Regions are inconsistently prohibiting blending without any regulatory authority. *See, e.g.,* EPA's Reply in Support of its Motion to Dismiss ("Def's Reply to Mot. To Dismiss") at 10 ("EPA acknowledges that many EPA Regions have taken the position in the context of evaluating specific proposed NPDES permits that a proposal to blend constitutes a proposed bypass within the meaning of the bypass regulation."). The single national regulatory standard cannot have completely divergent interpretations in different parts of the country. This is the quintessential case of arbitrary and capricious agency action. *See, e.g., Bracco Diagnostics Inc. v. Shalala*, 963 F. Supp. 20, 27 (D.D.C. 1997) ("Government is at its most arbitrary when it treats similarly situated people differently.").

EPA has admitted that the Agency has never adopted rules that were intended to restrict the ability of municipal entities to employ blending. Despite EPA's, 1) recognition that inconsistent mandates are being imposed by its Regional Offices, and 2) its repeated assurance that blending is allowable and that it would clarify that the various Regional Office policies restricting or prohibiting blending are not proper interpretations of existing NPDES rules, no such clarification has been forthcoming. Most recently,

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[1] As described in the Complaint and prior filings, in general, blending involves designing the primary treatment units to process peak wet weather flow events, while sizing the biological treatment process to accommodate somewhat lesser flows. This allows for stable operations of the biological treatment process while accommodating greater peak flow treatment. The flows are recombined and all flows receive adequate disinfection to ensure that all applicable effluent requirements are met. Blending only occurs when the capacity of the biological process is exceeded.

Plaintiffs met with EPA Office of Water ("OW") on June 5, 2003, and Tracy Mehan, Assistant Administrator, confirmed that the OW supports issuance of the clarification but such action is being blocked by the Office of Enforcement Compliance Assurance ("OECA"). (Hall declaration). Internal EPA correspondence EPA sought to withhold from discovery confirms that OECA purposefully issued statements claiming that EPA had adopted a policy proscribing blending under the bypass rule, knowing those statements to be false. Agency records confirm that OECA continues to block the issuance of the clarification because they imposed the more restrictive bypass rule interpretation in several enforcement actions and that EPA issuance of a clarification would allow those parties to seek judicial redress. OECA's basis for thwarting the clarification request is patently unlawful and constitutes malfeasance by this branch of the Agency.

Regardless of any ongoing "debate" within EPA, this matter is ripe for review as EPA may not, in any event, create new regulatory requirements on blending via policy or guidance documents.[2] Plaintiffs and the environment continue to suffer immediate, ongoing and irreparable harms as a result of EPA's inaction, justifying granting Plaintiffs' request for preliminary injunctive relief. The ability to comply with federal enforcement orders to eliminate sewage overflows is being compromised. Projects to eliminate sewer overflows and ensure appropriate treatment of wet weather flows are stymied throughout the country. Economic harm that is not compensable continues to be

[2] In previous filings with the Court associated with the issues raised in EPA's motion to dismiss, Plaintiffs set forth a number of EPA admissions and documents pertinent to the issuance of preliminary injunctive relief. For a thorough discussion of the jurisdictional issues, *see* Plaintiffs' Response to Defendants' Motion to Dismiss and Memorandum and Points and Authorities in Support Thereof (Pls. Op. to Mo. Dis.) and Plaintiffs' Motion for Leave to File Surreply and Surreply to Defendants' Motion to Dismiss (Pls. Sur. Mo. Dis.)

imposed by the various EPA Regional Offices that proscribe blending, although no rules authorize the imposition of these requirements.

The Regional Offices have been adamant that until the Administrator issues a clarification letter, the more restrictive Regional policies will be implemented. EPA now lacks an Administrator and there is no reason to believe that interim officials will take any action in this matter particularly given OECA's ongoing resistance to proper resolution of the issues. The public interest strongly supports the immediate prohibition on implementation of the unauthorized EPA Regional policies. Issuance of a prohibition would also ensure that the various Regional Offices are applying the same standard, eliminating the inconsistency created by the unauthorized Regional policies. The issuance of preliminary injunctive relief is clearly supported, as follows.

<u>**STANDARD OF REVIEW**</u>

Preliminary injunctive relief may be granted when the plaintiff demonstrates 1) a substantial likelihood of success on the merits, 2) that irreparable injury will result in the absence of the requested relief, 3) that no other parties will be harmed if a preliminary injunction is granted, and 4) that the public interest favors entry of preliminary injunctive relief. *Mova Pharmaceutical Corp. v. Shalala,* 140 F.3d 1060, 1066 (D.C. Cir. 1998), s*ee also, NRDC v. EPA*, 806 F. Supp. 275, 277 (D.D.C. 1992).

There are two types of preliminary injunction: mandatory and prohibitive. A prohibitive injunction merely preserves the *status quo* whereas a mandatory injunction reverses polices already in place. *Leboeuf v. Abraham*, 180 F. Supp. 2d 65, 70-71 (D.D.C. 2001). When a party seeks a mandatory injunction, they must meet a higher

standard than in the ordinary case by showing that they are "clearly" entitled to relief or that "extreme or very serious damage" will result from the denial of the injunction. *Id*. at 71. In this case Plaintiffs seek to maintain EPA's historical position that blending is allowable while prohibiting the further application of unauthorized Regional policies implemented by EPA Regions III, IV, and VI and OECA prohibiting blending. As such, Plaintiffs seek to maintain "*status quo ante*" (EPA's position before the various Regions decided to enforce there own, more restrictive policies).

1. SUCCESS ON THE MERITS

In determining whether to grant the movant relief, the Court must balance the strength of all the factors. *City of Tempe v. FAA*, 239 F. Supp. 2d 55, 59 (D.D.C. 2003). Thus, if the arguments for one or two factors are particularly strong, the injunction may issue even if the arguments in the other areas are weak. *Id*.; *see also, CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) ("an injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury"); *Morgan Stanley DW, Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001) ("a particularly strong showing on one factor may compensate for a weak showing on one or more of the other factors"). However, it is particularly important to demonstrate a likelihood of success on the merits. *City of Tempe*, 239 F. Supp. 2d at 59; *see also*, *Great Prince Michael v. U.S.*, 2003 U.S. Dist. LEXUS 4790 at 5 (D.D.C. 2003) ("absent a 'substantial indication' of likely success on the merits, 'there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review'").

2. IRREPARABLE INJURY

To show irreparable injury, the moving party must show that harm is "certain to occur in the near future, and that this harm could be prevented by the injunction." *LeBoeuf*, 190 F. Supp. 2d at 71-72. Usually, a loss that could be recovered by compensatory or other corrective relief is not irreparable harm (*Morgan Stanley DW Inc.*, 150 F. Supp. 2d at 77); however, an economic loss which is unrecoverable may be irreparable injury.[3] *See The Sunday School Board v. U.S. Postal Service*, 1999 U.S. App. LEXIS 11061 at 2 (D.C. Cir. 1999); *see also, Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("As this Court has noted: 'the key word in this consideration is *irreparable'*…").

Environmental harm is typically considered irreparable injury. *Citizen's Alert Regarding the Environment v. DOJ*, 1995 U.S. Dist. LEXIS 18619, 28-29 (D.D.C. 1995) ("injuries in environmental cases are often effectively irreparable, for environmental disruption and damage can rarely be undone through monetary remedies."); *see also*, *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").

3. PUBLIC INTEREST

In determining the public interest courts will look, *inter alia*, at what impact the issuance or denial the requested injunctive relief will have on the environment,

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[3] In this case, municipalities inappropriately precluded from blending are forced into unnecessary construction or permit appeals. Generally, municipal entities cannot recover compensation from EPA for such costs.

Kentuckians for the Commonwealth Inc. v. Rivenburgh, 206 F. Supp. 2d 782, 806 (S.D.W.V. 2002) ("The purpose of the Clean Water Act is to protect and improve the Nation's waters. Upholding that purpose is of the highest public interest"), the public fisc, *Doe v. SEPTA*, 72 F.3d 1133, 1142 (3rd Cir. 1995) ("Keeping fares and taxes low, and preserving the public fisc are genuine, recognizable public interests"), and officials whose job it is to see the law carried out, *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1329 (N.D.Ga. 1996) ("the public has an interest in preventing Defendants from acting in a manner inconsistent with the applicable law."). Within this context, the adverse impact upon others may also be considered.

I. PLAINTIFFS DEMONSTRATE CLEAR LIKELIHOOD OF SUCCESS ON THE MERITS

1. FACTS RELEVANT TO SUCCESS ON THE MERITS

EPA has released dozens of documents confirming that the Regions have repeatedly denied permits and imposed the more restrictive requirements based upon rule interpretation contained in their "policy" statements. Plaintiffs' Ex. 1, 6, 16, 24, 26, 29, 31, 33, 34, 35, 36; Defendants' Ex. 1, 3, 4, 6, 7. Enforcement actions continue to force communities to adhere to these positions. Plaintiffs' Ex. 5, 17. Most importantly, without NPDES permits which allow blending, Plaintiffs will either face sanctions for violating the bypass rule or be forced to build unnecessary facilities costing millions of dollars, delaying plans to eliminate SSOs. Admissions 33, 35, 36, 37, 38.[4]

EPA has acknowledged the following critical facts with regard to the legality of these Regional policies:

[4] Exposure to fines is precisely what EPA threatens in its Regional policies. *See, e.g.,* Defendants' Ex. 1, 3, 4, 6, 7, and 9; Plaintiffs' Ex. 1 and 17.

- Blending is allowable, been grant funded by EPA and has been an acceptable wastewater design practice for over 30 years. Plaintiffs' Ex. 11 Defendants' Response to Plaintiffs' First Request for Admissions, Admissions 12, 16 (hereinafter "Admission #"); Plaintiffs' Ex. 23.

- EPA's Administrator has never declared blending prohibited by rule or otherwise. Admissions 12, 30.

- Neither of the two federal regulations cited as the basis for the blending prohibition by the Regional Offices (secondary treatment and bypass rule) were intended to proscribe blending. Admission 30; Plaintiffs' Ex. 22, 23.

- The EPA Regions don't have authority to amend or set more stringent rules. Admission 72; Plaintiffs' Ex. 10.

- The Regional policies have been used to impose millions of dollars in plant modifications. Defendants' Ex. 7, Plaintiffs' Ex. 17.

- EPA has no authority to proscribe plant design practices, such as blending. Def's Mot to Dismiss at 6; Plaintiffs' Ex. 4, Plaintiffs' Ex. 23.

Given this information, success on the merits is clearly supported. Plaintiffs have made exhaustive efforts over the past four years to have EPA Headquarters clarify that the imposition of more restrictive Regional requirements is not authorized and is a misplaced interpretation of the existing rules. Despite repeated promises of prompt action and confirmation that the issue is of national significance, no formal Administrator action has occurred. *See infra* p. 30 n.30. EPA records confirm the cause of this inaction – EPA's enforcement office has repeatedly blocked attempts to eliminate the more restrictive Regional policies in order to protect enforcement cases that relied upon those policies. Plaintiffs' Ex. 39 at 10; Plaintiffs' Ex. 52. This cause for inaction (protecting inappropriately obtained enforcement settlements) is a patently illegal basis for delaying agency action that supports immediate correction by this Court and prevention of further irreparable harm to Plaintiffs.

2. **STATUTORY BACKGROUND**

A restriction on the use of blending constitutes a restriction on allowable plant design. Whether or not these Regional policies imposing such restrictions are allowable under the Act is a central issue raised by Plaintiffs. As discussed below the CWA, 33 USC 1251 *et seq.,* does not authorize EPA to regulate plant design.

a. **EPA Lacks Authority To Dictate Plant Design**

EPA's lack of statutory authority to dictate how a treatment plant is designed has been a well established EPA interpretation of the Act for more than a quarter of a century. EPA published the Administrator's decisions and the Office of General Counsel ("OGC") opinions in the 1970s to guide the Agency in its implementation of the CWA. In response to a Regional Office request to dictate a particular plant design, the publication sets forth a 1976 OGC opinion concluding:

> The Congressional history demonstrates that EPA is not to prescribe any technologies…[and that] *it is not within authority of the Regional Administrator to define particular treatment methods.* (emphasis added).

Plaintiffs' Ex. 2 at 12-13.

Similarly, a published 1980 OGC opinion states:

> [T]he effluent limitations in the regulations may be met by the permittee through any lawful means . . . .
>
> * * * *
>
> [The discharger] argues that under the Clean Water Act the choice of an appropriate control technology to meet effluent limitations must be left to the regulated industry. I agree . . . . *EPA is precluded from imposing any particular technology on a discharger*. (emphasis added).

In re Borden, Inc., Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. §125.36(m), No. 78 (Feb. 19, 1980). Plaintiffs' Ex. 40.

As such, EPA stated in the preamble to the 1980 NPDES regulations that:

> Permittees may meet their permit limits by selecting any appropriate treatment equipment or methods . . .

45 Fed. Reg. 33535 (May 19, 1980).

Similarly, courts have agreed that EPA does not have authority under the Act to dictate the type of technology or plant design that may be used to achieve effluent limitations. *See generally AISI v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997) ("Congress clearly intended permittees to choose [their] own control strategy.") *Rybachek v. United States EPA*, 904 F.2d 1276, 1298 (9th Cir. 1990) ("The [plaintiff] correctly notes that Congress sought to avoid requiring specific technologies and instead to encourage experimentation."); *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA cannot "transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities themselves. To do so would unjustifiably expand the Agency's authority beyond its power perimeters.")[5]

Thus, it is clear that EPA lacks authority under the CWA to dictate plant design and that design practices, such as blending are acceptable so long as the applicable effluent limitations will be achieved.

3. <u>REGULATORY BACKGROUND</u>

Statutory limitations aside, whether blending is prohibited, as espoused by EPA Regions III, IV and VI, depends upon whether one of two potential regulations establish such prohibition – the secondary treatment regulation (40 C.F.R. Part 133) or the bypass regulation (40 C.F.R. § 122.41(m)). As described below, EPA has repeatedly stated that

[5] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169-171 (2001), Army Corps of Engineers' acknowledgement of the limits of CWA authority made immediately after adoption of the CWA was considered dispositive, given that the statute contained no clear language to the contrary.

these rules do not, in any way, limit plant design options for processing wastewater flows, such as blending. Such a position is consistent with EPA's longstanding position that EPA may not dictate how a facility chooses to comply with CWA requirements.

a. Secondary Treatment Rule

This rule, 40 C.F.R. Part 133, is the only categorical effluent limitation applicable to municipal entities. *See generally* 33 U.S.C. § 1311(b)(1)(B). It sets numeric pollutant limits for three parameters (BOD, TSS, and pH) that must be achieved in the discharge effluent, 40 CFR § 133. The rule sets no restrictions on the type of process or design that may be used to achieve the adopted effluent limits. *Accord,* Admission 6. The rule does not require that all wastewater flows receive biological treatment (*i.e.,* the effect of the blending prohibition for any plant with biological treatment).[6] Thus, a municipality could choose to use a non-biological treatment process, as long as it meets it permit limits. Or the municipality may choose to use a biological treatment process. Or the municipality may choose to use a biological treatment process for part of its flow, a non-biological treatment process for other parts of its flow, and "blend" the biologically treated wastewater with the non-biologically treated wastewater prior to discharge, so long as applicable effluent limits are met. The rule was not intended to restrict blending,

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[6] The March 2, 2001 EPA letter to Congressman Gekas states:

> ... the secondary treatment regulations do not specify the type of treatment process that must be used to meet secondary treatment requirements nor do they preclude the use of non-biological facilities.

Plaintiffs' Ex. 22. In addition, EPA admissions state:

> EPA admits that after having made reasonable inquiry, it has not located to date any documents in the record for the secondary treatment rule that show that 100 percent of all flows must be processed through biological treatment limitations.

Admission 26.

and therefore did not evaluate any costs associated with such a restriction in achieving secondary effluent limits. Admission 30; Plaintiffs' Ex. 22.[7]

Furthermore, EPA, in its filings with the Court in this proceeding, has readily acknowledged the sacrosanct right of the permittee to choose its technology for meeting permit limitations – *i.e.,* that the applicable regulations, the secondary treatment regulations, allow the permittee the flexibility of choosing its treatment process:

> The 'secondary treatment' standards promulgated by EPA are thus 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 attain the limitations*. (emphasis added).

Def. Mot. to Dismiss at 6.

If a municipality can choose its preferred technology to meet permit limits and biological treatment is not required, then, in developing the secondary treatment regulations EPA would not have considered restricting blending, which combines biological and non-biological treatment. Therefore, it is not surprising that EPA admits this.[8] Thus, under the secondary treatment regulations, (*i.e.,* the only Section 301 effluent

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[7] Inasmuch as biological treatment is not required for all flows, EPA admits that, in developing the secondary treatment process, it never evaluated the costs associated with sizing biological treatment to process all peak wet weather flows:

> EPA admits that after having made reasonable inquiry, it has not as of this date located any documents in the record for the secondary treatment rule that provide an estimate of costs associated with ensuring that biological treatment is sized to process all peak wet weather flows under all conditions.

Admission 29.

[8] EPA admissions state:

> EPA admits that after reasonable inquiry, it has not as of this date located any information within the record to the secondary treatment regulation that EPA specifically considered restricting the practice of blending primary treated peak flows with other flows receiving

guideline regulating municipalities), blending (combining biological and non-biological treatment processes) can be designed and operated to meet effluent limitations.

b. Bypass Regulation

The bypass rule (40 CFR § 122.41(m)) was adopted by EPA to achieve two basic purposes: (1) ensure continued operation of equipment installed by a permittee and (2) to provide a defense to permit violations caused by events beyond the reasonable control of the permittee. 49 Fed. Reg. 38036 (Sept. 26, 1984). This regulation, like the secondary treatment rule, imposes no restrictions on the technology or plant design that may be employed to achieve applicable effluent limitations.[9] Plaintiffs' Ex. 23 at 2. Moreover, under the bypass rule EPA specifically determined that the permittee can design and operate the plant to dispense with some unit processes operations under certain conditions:

> Any variation in effluent limits accounted for and recognized in the permit which allows a facility to dispense with some unit processes under certain conditions is not considered bypassing.

49 Fed. Reg. 38036-37 (September 26, 1984).

As stated by EPA, "the bypass provision merely 'piggybacks' existing requirements, it does not itself impose costs that have not already been taken into account

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> biological treatment as a wet weather flow management option for achieving compliance with secondary treatment limitations.

Admission 30.

[9] EPA preamble states:

> The bypass provision does not dictate how users must comply because it does not dictate what [ ]treatment technology the user must install.

53 Fed. Reg. 40609 (Oct. 17, 1988).

in development of categorical standards." 53 Fed. Reg. 40609 (Oct. 17, 1988). EPA acknowledges that the huge costs associated with a blending prohibition were not considered under the bypass or secondary rule. EPA's April 5, 2002 FOIA response states:

> EPA has no documents indicating the cost impacts of prohibiting the use of blending at POTWs to manage peak wet weather flows that were used in the development of the secondary treatment regulations or the bypass regulations.

Plaintiffs' Ex. 22 at 3. EPA Admissions state:

> EPA admits that after reasonable inquiry that it has not as of this date located any documents from the administrative record related to the secondary treatment regulations and the bypass regulations in which EPA formally analyzed the national cost of prohibiting the use of blending . . . .

Admission 25.

Inasmuch as the secondary treatment regulation does not prohibit blending nor did it intend to impose costs of a blending prohibition, then it is apparent that the prohibition/restrictions mandated by EPA Regions III, IV and VI are not imposed under the bypass regulation since that rule does not impose new costs. In fact, EPA admits that the bypass regulation was never intended to restrict blending:

> EPA has no documents from the promulgation of the bypass provisions that indicate that the bypass rule was intended to preclude the use of blending as a wet weather flow management option.

Plaintiffs' Ex. 23. Furthermore, EPA admits that EPA Headquarters has never issued a public notice specifically stating that blending is prohibited at publicly owned treatment works ("POTWs"). Admission 14. The Regional policies imposing the blending prohibition have no basis in existing regulation.

i. EPA Brief To D.C. Circuit Regarding Purpose And Scope Of The Bypass Rule

The brief submitted by EPA in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987) (*i.e.,* responding to a challenge to the bypass regulation) provides an historic insight into EPA's interpretation of the scope of the bypass prohibition. EPA emphasized to the court that the intent of the bypass regulation is for the plant to be operated as designed and specifically eschewed any attempt to dictate technology selection or plant design. The brief also acknowledges (like the rule preamble) that units may be designed to only run at certain times (*e.g.,* during peak flow events).

> The specific 'technology' that the Agency is accused of dictating is 'full operation of the treatment system.' However the regulation imposes *no limits on the permittee's choice of treatment technology and therefore does not 'dictate technology'* . . . . [T]he regulation requires only that, except for 'essential maintenance,' the equipment *that the permittee has selected* will be operated . . . .
>
> . . . . [W]hat the Agency originally intended, and still intends, is to ensure 'proper pollution control through adequate design operation and maintenance of treatment facilities.' *'Design' operation and maintenance are those requirements developed by the designer of whatever treatment facility a permittee uses.* The bypass regulation only ensures that facilities follow those requirements. *It imposes no specific design and no additional burdens on a permittee.* If the facility is required to use scrubbers two times a day, the bypass regulation does not require the facility to run scrubbers twenty-four hours per day. (underlining in original) (emphasis added in italics).

Plaintiffs' Ex. 3 at 189-190.

Likewise, EPA's brief informed the court that the bypass regulation never imposes additional costs upon the regulated community beyond those considered by EPA in the categorical guideline development (*i.e.,* secondary treatment rule):

> [I]n promulgating an effluent guideline limitation or establishing a BPJ limit, *the Agency considers fully the costs of operating treatment systems to the extent assumed by the bypass regulation. Thus, the bypass regulation itself imposes no costs.* (emphasis added).

Plaintiffs' Ex. 3 at 194-95. The U.S. Court of Appeals upheld EPA's bypass regulation interpretation presented in its brief, indicating that it only requires operation of the treatment system as designed:

> The bypass regulation does not, in fact, dictate that a specific treatment technology be employed; instead, the regulation requires that a system be *operated as designed.* (emphasis added).

NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987). The regulation thus does not require a municipality to select a particular plant design but instead, merely prohibits the shutting off of a treatment process and "coasting" when the facility is in compliance. *Id.*

In summary, the bypass regulation was never intended to restrict blending as a design practice to process peak wet weather flows. It merely requires the permittee to operate its plant as designed and fully utilize its treatment process rather than turning off the unit and coasting. As the bypass rule admittedly imposes "no additional burdens," beyond categorical requirements, it is clearly improper to interpret the rule to restrict blending, as no such restriction is contained in the secondary treatment rule.

c. Contemporaneous O&M Rule Confirms EPA Intent To Provide Operator Flexibility

The fact that blending is not prohibited by the NPDES regulations is also apparent from a review of a corollary subsection accompanying the bypass regulation – the duty to properly operate and maintain ("O&M") facilities. 40 C.F.R. § 122.41(e).[10] Given

[10] This regulation provides:

that blending is designed into a plant to achieve effluent limitation compliance when, without blending, noncompliance would otherwise occur, the duty to properly operate a facility requires the POTW operator to utilize the blending system, particularly "when the operation is necessary to achieve compliance with the conditions of the permit."

When the bypass regulation was first promulgated in 1979,[11] the O&M regulation, promulgated in the same regulatory section, specifically stated that proper operation is based upon the design of the facility. 40 C.F.R. § 122.14(g) (44 Fed. Reg. 32905, 1979).[12]

EPA's 1980 preamble to the O&M regulation emphasized that the primary objective of plant operation is to meet permit effluent limitations.[13] In the same 1982

> *Proper operation and maintenance.* The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. . . . . This provisions *requires the operation of back-up or auxiliary facilities or similar systems* which are installed by a permittee only *when the operation is necessary to achieve compliance with the conditions of the permit*. (emphasis added).

40 C.F.R. § 122.41(e).

[11] 40 C.F.R. § 122.14(k) (44 Fed. Reg. 32905-06).

[12] The 1979 O&M regulation provides:

> The permittee shall at all times maintain in good working order and operate as efficiently as possible all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee for water pollution control and abatement to achieve compliance with the terms and conditions of the permit. Proper operation and maintenance includes but is not limited to *effective performance based on designed facility removals*…(emphasis added).

[13] In 1980, EPA removed the "designed facility removals" language from the regulation, explaining:

> One commenter argued that if *a permittee can meet its permit requirements* by operating its treatment or control systems at less that [sic] optimum efficiency, rather than at 'designed facility removals,' it should be allowed to do so. EPA agrees and has deleted that example from the second sentence. (emphasis added).

rulemaking repromulgating the bypass regulation, EPA emphasized its intent to provide the permittee with greater flexibility in operation of the plant:

> EPA proposes to amend this section to eliminate most of these examples of proper operation and maintenance. This does not imply that these examples are not elements of proper operation and maintenance. Rather, the proposed change would provide facilities and sources with *greater flexibility in establishing internal plant management procedures* to assure that proper operation . . . is achieved. (emphasis added).

47 Fed. Reg. 52078 (1982). *See also,* 49 Fed. Reg. 38039 (1984).[14] It is telling that, in the very same Federal Register rulemakings wherein EPA indicated its intent to provide plant operators greater flexibility, EPA also addressed the bypass subsection of the same regulation but, nowhere expressed the intent to preclude blending or any other plant operations designed to achieve compliance with end-of-pipe effluent limitations.[15]

Thus it is clear that the regulations intend for the plant to be operated in a manner that assures compliance with the end-of-pipe effluent limitations. In fact, the regulations "require *operation* of back-up equipment which is installed by the permittee, where operation of such equipment is necessary to achieve compliance with the conditions of

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45 Fed. Reg. 33303 (1980).

[14] Preamble to the final rule similarly states:

> The proposed deletion of the examples was not intended to remove any obligation of the permittee to properly operate and maintain its treatment equipment but rather to *provide greater flexibility* to ensure that this is done. The backup provision would still require *available* backup systems to be properly operated. . . . (emphasis added in first sentence).

49 Fed. Reg. 38039 (1984). Blending, as a designed *available* back-up system to deal with peak wet weather flows would be required to be utilized to achieve compliance under this standard.

[15] *See* proposed 122.60(g), 47 Fed. Reg. 52088 (1982) and final rule codified at § 122.41(m), 49 Fed. Reg. 38049 (1984).

the permit." (emphasis added). 47 Fed. Reg. 52078 (1982). Permittees are required to operate their blending system where it would achieve compliance that would not otherwise occur. Any other interpretation, *i.e.,* to preclude operation of a perfectly capable plant so as to induce effluent limitation exceedances, would be contrary to the stated intent of the NPDES regulations.

d. EPA Historical Interpretations Allow Blending

As a generally accepted engineering practice for processing peak flow events,[16] blending is a common plant design[17] that has historically been grant funded by EPA to achieve the goals of the CWA.[18] Although the NPDES permit regulations do not require blending to be specifically authorized in the permit, NPDES permits have been issued

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[16] *See, e.g.,* Admission 16:

> EPA further admits that it has received letters from municipal groups in several States (*e.g.,* State-specific trade associations for POTWs) that contend that blending is a somewhat common practice for handling wet weather flows. EPA additionally admits that it has possession of a technical manual prepared by an industry trade group, the Water Environment Federation, captioned *Design of Municipal Wastewater Treatment Plants*, WEF Manual of Practice #8 (4th edition, 1998 at 3-21, 22), and that such manual indicates that blending is a somewhat common practice for handling wet weather flows.

[17] In its recent briefing of the Deputy Administrator, EPA states:

> - Many municipalities blend now.
>   - Half of 122 respondents to an AMSA Member Survey blend.
>   - Letters from municipal groups in 9 States say blending is common.

Plaintiffs' Exhibit 39 at 3, slide 6.

[18] EPA's April 5, 2001, FOIA response states:

> EPA allowed the use of federal funds under the Construction Grants Program to build facilities that were designed to blend effluent from primary treatment processes with effluent from biological treatment processes during peak wet weather events . . . .

Plaintiffs' Ex. 22 at 3.

that specifically authorize blending.[19] Moreover, EPA has historically stated that the bypass regulation does not preclude blending. This conclusion is expressly set forth in a myriad of agency documents.

For example, in 1992, EPA specifically addressed the issue of whether blending is subject to the bypass regulation. In the draft 1992 CSO policy, which was public noticed in the Federal Register (and signed by both the EPA Assistant Administrators for the OW and the Enforcement Office, now OECA), EPA specifically stated:

> Under EPA regulations, the intentional diversion of waste streams from any portion of a treatment facility, including secondary treatment, is a bypass. *For a POTW a bypass does not refer to flow or portions of flows that are diverted from portions of the treatment system but that meet all effluent limits for the treatment plant upon recombining with non-diverted flows prior to discharge.* (emphasis added).

Plaintiffs' Ex. 14 at 24.[20]

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[19] An EPA handout at a meeting of NPDES Branch Chiefs, summarizes:

> - Some NPDES authorities have allowed this design and operation. In some cases, permit compliance is based on flows after blending. Of these, some have addressed issue in permits and some have not.

Plaintiffs' Ex. 37. A letter from EPA Region II states:

> Regarding the topic of blending effluent, the State of New York has authorized by permit some public-owned treatment works to blend peak wet weather flows with treated effluent before discharge. The State of New York is the authorized permitting authority . . . .

December 20, 2001 letter from Walter Andrews, EPA Region II, to John Hall. Plaintiffs' Ex. 41.

[20] Although such language was removed from the final CSO policy, the final CSO document stated no substantive changes to the draft policy were made. 59 Fed Reg 18688. Thus, the deletion of the language was not an attempt to revise EPA's understanding of the scope of the bypass rule. Instead, the final CSO policy just did not address the issue. An EPA FOIA response confirms that the language was not removed because of concerns that the statement was inaccurate. Plaintiffs' Ex. 42. An EPA FOIA response states that EPA has no records indicating why the language was removed stating:

> There are no documents in EPA files that: 1. [d]iscussed the need or the basis for including the [CSO blending language] in the 1992 proposed

EPA Region I, for example, implements the final CSO policy by allowing blending without subjecting it to the bypass regulation:

> Specifically, the question was asked whether a generic bypass would be needed if primary and secondary treated effluent were combined and met the numeric permit limits. EPA has determined that in those cases where permit limits are met a generic bypass would not be required.

Plaintiffs' Ex. 43 at 1-2; *see also*, *Region I NPDES Permit Policy, Model Fact Sheet* Plaintiffs' Ex. 44 at 12 (bypass approval required only if use of excess primary treatment for treatment of wet weather flows will result in violations of the effluent limitations, *i.e.,* blending does not require bypass approval).

When the issue came up again in 1997, EPA's Office of Wastewater Management ("OWM") stated in a response letter that:

> [T]he National Pollutant Discharge Elimination System (NPDES) regulations provide sufficient flexibility for permit writers to account for the *designed-in intentional diversion of wastewater around a treatment unit without triggering bypass* in special or unique situations when writing permits. (emphasis added).

Plaintiffs' Ex. 45.[21] Then a few years later, EPA OWM received another inquiry, this time from EPA Region V, asking for Headquarters' agreement with a draft response Region V planned to send to the State of Indiana agreeing that blending was not subject to the bypass prohibition. The Region V letter with which OWM concurred states:

> CSO control policy, 2. [d]iscussed any objections to including [the CSO blending language] in the 1992 proposed CSO control policy, 3. [d]iscussed the basis for the removal of the [CSO blending language] from the final CSO control policy that EPA published in the *Federal Register* in April 1994.

January 2, 2002 Freedom of Information Act response from EPA to Hall & Associates. Plaintiffs' Ex. 42.

[21] March 12, 1997 letter from James Pendergast, EPA Headquarters Office of Water, Permits Division, to Lial Tischler. Plaintiffs' Ex. 45.

> If the permit writer includes in the permit an explicit recognition of this differential treatment [i.e., blending], and if the treatment facility is operated in accordance with the treatment facility's design for providing treatment during peak flow conditions, any rerouting/recombination that occurs during such conditions would not constitute a diversion from the "treatment facility," and so would not constitute a "bypass."

Plaintiffs' Ex. 21. Before concurring with the Region V response, OWM sought the legal position of the EPA OGC and was provided a legal analysis of why blending is not subject to the bypass regulation. The OGC analysis states:

> If, however, the permit application identifies the different operating conditions (associated with 'normal' and with 'peak flows') and if the permit accounts for the differential conditions in the permit, then Approach 2 [*i.e.,* blending is not a bypass] represents a better reading of the bypass regulation as interpreted through case law. A permit application describing differential operation of a 'treatment facility' during peak flow conditions should characterize the effluent under both 'normal' and 'peak flow' routing conditions. *Authorization of such discharges, however, need not apply evaluation criteria for approved anticipated bypass at 40 CFR 122.41(m)(4)(ii).* (emphasis supplied).

Plaintiffs' Ex. 7.[22]

Based upon the OGC opinion, in May 1999, OWM confirmed to EPA Region V that blending was allowable and not subject to the bypass rule. Plaintiffs' Ex. 21. The position that blending can be approved in an NPDES permit without being subject to the bypass regulation was again confirmed by EPA Headquarters in the March 7, 2001, letter from Diane Regas, EPA Acting Assistant Administrator for OW to Senator Frist**.** Plaintiffs' Ex. 20. Thus, despite Regional dictates to the contrary, the official position of EPA Headquarters has always been the same: blending is an allowable practice and its

[22] *Controls for Peak Flows at POTW Plants*, From Stephen Sweeney (OGC) to Addressees in ORC, OW and OECA, undated, at 4.

use to enhance processing of peak wet weather flows is not subject to the bypass rule restrictions.

4. NEW REGULATORY COSTS IMPOSED IF BLENDING IS A BYPASS

As admitted by EPA "blending is a somewhat common practice for handling wet weather flows." *See supra* p. 19 n.16. EPA's own estimates reflect that regulating blending as a bypass would result in *hundreds of billions of dollars* in new costs to municipalities. A 2002 cost estimate by an EPA contractor estimates a prohibition on blending would range for municipality facilities with combined sewer overflows ("CSOs") from $9.1 billion (if POTWs increased wet weather storage) to $79.2 billion (if POTWs were to double secondary treatment capacity) and for municipalities with separate sanitary sewer overflows ("SSOs") range from $13.4 billion (if POTWs increased wet weather storage) to $52.8 billion (if POTWs were to double secondary treatment capacity). Plaintiffs' Ex. 46.[23] EPA's OW subsequently estimated the national costs of declaring "blending" to be a "bypass" to be approximately three hundred billion dollars ($300,000,000,000). Plaintiffs' Ex. 19.[24] In a review of four enforcement cases wherein the EPA enforcement office precluded blending and instead required construction of larger biological facilities, it was estimated that a municipality on the average spent an additional $69 million due to the imposition of a blending prohibition. Plaintiffs' Ex. 17.[25]

[23] *Draft National Cost Impact Analyses*, prepared by LimnoTech (EPA contractor), Feb. 3, 2002. The estimate, however, fails to address those municipal facilities that currently are in full compliance without any overflows due to blending but will have overflows if blending is prohibited.

[24] *See also* Plaintiffs' Exhibit 39 at 3, EPA's recent briefing of the Deputy Administrator stating that "No blending alternative could cost billions nationwide."

[25] The OECA cost estimates indicate for four municipalities a total cost of $275 million. Plaintiffs' Ex. 17.

Whether the facts ultimately confirm the EPA estimated costs of $69 million per municipality or nationwide costs at three hundred billion dollars is not the issue. These are new costs which were not imposed as part of EPA's past rulemaking.[26] The fact that these costs are so astronomical, however, makes the Regional actions and Headquarters failure to act that much more egregious.

ARGUMENT

A. EPA REGIONS DO NOT HAVE THE AUTHORITY TO PROMULGATE RULES

It is clear that the EPA Regions do not have the authority to promulgate rules under the CWA. EPA Admissions provide, in part:

> EPA admits that EPA Regional Administrators have not been delegated the authority by the EPA Administrator to establish rules of national applicability under the Clean Water Act.

Admission 72. Furthermore, the section of the delegations manual (*i.e.,* Section 1-21.2a(1) that EPA failed to provide to the Court) unequivocally withholds the authority to establish rules imposing additional, or more costly requirements from the EPA Regions. It only authorizes the Regions to issue:

> 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*. (emphasis added).

Plaintiffs' Ex. 10.

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[26] These values vastly exceed Unfunded Mandates Reform Act triggers ($100 million) though no congressional notification of the new rule interpretation has occurred. 2 USCS § 1532(a).

By fiat, several EPA Regions have *de facto* amended the regulations without authorization, claiming blending is prohibited and forcing municipalities to construct alternative facilities. *See supra* p. 7. As summarized by EPA in its recent briefing of the Deputy Assistant Administrator:

> States/EPA Regions *interpret regulations differently*. *Some prohibit blending* that meets permit limits, some approve it as anticipated bypass, some authorize it in permits.

Plaintiffs' Ex. 39 at 5. The record is clear that EPA Regions III, IV and VI prohibit blending[27] whereas other Regions allow blending, and this Regional prohibition imposes

[27] For example, Region III correspondence states: "[i]t is U.S. EPA's policy that 'slipstreaming' or 'internal bypassing' of treatment units (whether those units are for primary or secondary treatment), constitutes illegal bypassing, and *is not allowed*." (emphasis added). Defendants' Ex. 1. EPA Region IV policy memorandum states: "[T]he blending of a secondary effluent and a primary effluent is *not permittable*, since this would constitute a bypass of the required secondary treatment units…Sanitary Sewer Overflows (SSOs), including discharges from pump stations, manholes and other sewer appurtenances, *are violations of the Act and cannot be permitted* . . . ." (emphasis added). Defendants' Ex. 4. EPA Region VI December 1998 policy on blending established mandatory design requirements for processing peak flows. ("Any diversion of wastewater from any portion of a treatment facility *is defined as a 'bypass'* . . . biological treatment system *must have* ability to treat at least 97% of flow . . . peak flow treatment *must be* a credible 'secondary type treatment system'."). (emphasis added). Defendants' Ex. 5. *See also,* Plaintiffs' Ex. 11, Admission 36.

Counsel for EPA has acknowledged that Regions III, IV, and VI prohibit blending. *See* Plaintiffs' Ex. 25 at 4.

> (Sweeney indicated that *these Regions have taken the position the* [sic] *blending is a prohibited bypass* . . .) (emphasis added).

Furthermore, EPA's clarification in response to the discovery requests indicates that, notwithstanding the fact that we are dealing with a single national standard, the three Regions impose different Region-specific criteria in implementing their own self-styled versions of a blending prohibition. Plaintiffs' Ex. 27 at 9-10. The letter from EPA's counsel to Plaintiffs' counsel indicates the further idiosyncratic standards imposed by the three Regions:

> EPA Region III additionally has considered the criteria set forth in the March 7, 2001, correspondence to Senator Frist referenced in response to request for admission No. 9.
>
> EPA Region VI additionally has considered factors identified in the "Strategy" document attached as Exhibit 5 to EPA's motion to dismiss and identified in the Complaint at Paragraph 183. These factors identified in this strategy document include: whether peak blended flows receive treatment functionally equivalent to secondary treatment (*e.g.,* advanced physical-chemical treatment); whether the POTW has

considerable additional costs of compliance. In light of the fact that the Agency has never adopted rules proscribing the ability to select blending as the means for processing peak flows, and the Regional Administrators may not amend rules to impose additional burdens of compliance or costs, it is undeniable that Regions III, IV and VI, as a matter of law, are acting without authority and in violation of the Administrative Procedures Act. *NLRB Union v. FLRB,* 834 F.2d 191, 193 (D.C. Cir. 1987); *Safari Club International v. Babbitt,* 1994 U.S. Dist. LEXIS 18183 (D.D.C. 1994).

B. THE REGIONAL ACTIONS DICTATING PLANT DESIGN ARE *ULTRA VIRES*

EPA acknowledges that blending is a long standing engineering design practice used by municipalities to efficiently process wet weathers flows. *Supra* p. 19. As reflected in numerous EPA materials, including OGC opinions, regulatory preamble, briefs, admissions and correspondence, it is clear that the Agency readily acknowledges that it does not have the authority to dictate to a municipality how it should design its plant to meet applicable effluent limitations – the choice of technology and plant design is up to the discharger. Controlling D.C. Circuit law also holds accordingly. *See supra* p. 10. As stated by EPA in this proceeding "The 'secondary treatment' standards

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> proper maintenance and controls on its collection system; and whether the principal secondary treatment portion would have the ability to treat 97% of the daily flows reaching the headworks of the plant (*e.g.,* that the peak flow blending scenario would need to be used only 3% or less of daily flows reaching the headworks over the course of the year).
>
> EPA Region IV has taken the position that the factors under 40 C.F.R. §122.41(m)(4)(i) & (ii) need not be considered if the permittee instead elects to measure for compliance at an "internal outfall."

Plaintiffs' Ex. 27 at 9-10. A cursory review of the secondary treatment and bypass regulations (40 C.F.R. Part 133 and § 122.41(m), respectively) would readily reveal that these Regional requirements are not set forth in the regulations but, rather, are made up and imposed upon the states and regulated community due to the mere whims of the Regions.

promulgated by EPA are thus 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 attain the limitations." *See* Def. Mot. to Dismiss at 6. Nor may the bypass rule be used to dictate choice of technology or plant design. *See supra* pp. 9-10, 16.

Thus it is clear that EPA Regions III, IV and VI do not possess the authority to preclude or restrict blending as a cost-effective plant design and treatment strategy as long as applicable effluent limitations are met. Blending is, as reflected by EPA's historical practices, the background to the secondary treatment and bypass regulations, and EPA's interpretations of its statutory authority, an allowable plant design and operational practice. As such, EPA Region III, IV and VI's positions restricting or precluding blending are *ultra vires* because these Regions are dictating the type of technology that a municipality must use to meet its effluent limitations (*i.e.,* one hundred percent biological treatment). *Dixon v. United States,* 381 US 68, 75 (1965) ("The power of an administrative officer…to administer a federal statute and to proscribe rules and regulations is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed in the statute…A regulation which does not do this…is a mere nullity.") (citations omitted). Such *ultra vires* actions constitute a violation of federal law and justify issuance of injunctive relief. *King v. Smith,* 392 U.S. 309, 326-27 (1968) (eligibility requirements prohibited by the statute cannot be imposed). *See also, Mova Pharmaceutical Corp. v. Shalala,* 140 F.3d 1060, 1074-1076 (D.C. Cir. 1998). Plaintiffs have a right not be injured by *ultra vires* action and the Court may direct Defendants not to use the unpromulated, unpublished rules in question. *Safari Club International v. Babbitt,* 1994 U.S. Dist. LEXIS 18183 (D.D.C. 1994); *see NLRB v.*

FLRA, 834, F.2d 191, 199 (D.C. 1987) ("if Congress' intent is clearly at odds with the regulations then they must be struck down…").

C. ACTIONS OF EPA REGIONS III, IV AND VI VIOLATE THE RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

EPA admits that the Agency has never issued a Federal Register notice indicating that blending is prohibited in any way. Admission 14. Assuming, *arguendo,* the three EPA Regions had authority to establish their own more-restrictive Regional requirements it is incumbent to do such through the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.,* rulemaking, *i.e.,* by formally amending the bypass regulation, not by Regional fiat. As stated by the D.C. Circuit in *Appalachian Power v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000):

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and another and so on . . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations . . . . The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

Because the guidance document added substantive requirements to an existing rule and APA prerequisites were not met, EPA's use of the "guidance" as binding requirements was prohibited.[28] *Id.* at 1028. As succinctly stated by the D.C. Court of

[28] *See, e.g.,* Letter from the Tennessee DEC to the Tennessee Municipal League regarding Region IV's position that blending is prohibited: "EPA [Region IV] has given us very direct explicit instruction on implementation of 40 C.F.R. § 122.41(m)." Plaintiffs' Ex. 16.

Appeals, EPA cannot, under the guise of regulatory interpretation, establish new requirements upon the regulated community:

> Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to '*repeals*' or '*amendments*.' *See* 5 U.S.C. § 551(5). To allow an agency to make fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation 'adopts a new position inconsistent with . . . existing regulations." *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 115 S. Ct. 1232, 1239, 131 L.Ed. 2d 106 (1995); *see also National Family Planning & Reproductive Health Ass'n v. Sullivan*, 298 U.S. App. D.C. 288, 979 F.2d 227, 240-41 (D.C. Cir. 1992). (emphasis in original).

Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579, 586 (D.C. Cir. 1997). *See Appalachian Power,* 208 F.3d at 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.").

It is a travesty that EPA has been fully aware of these inconsistencies since at least 1999[29] and has allowed Regions III, IV and VI to continue to the detriment of the public and the environment. This issue should have been resolved by EPA years ago. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 487 (1986) ("[T]he Secretary had the capability and the duty to prevent the illegal policy found to exist by the District Court"); *see also, Fox v. Brown*, 656 F. Supp. 1236, 1248 (D. Conn. 1986) ("[T]he Secretary cannot permit his intermediaries to use blanket rules not supported or authorized by any

[29] *See, e.g.,* May 3, 1999, letter from Michael Cook (EPA Headquarters) to EPA Region V ("I concur with your draft letter [that blending is not subject to the bypass rule]. I also want to point out that other Regions have different points of view."). Plaintiffs' Ex. 21.

applicable law or regulation to deny what otherwise might be meritorious claims"). It is clear that these Regional actions constitute illegal rulemaking, in contravention with well established APA notice and comment requirements.

D. <u>UNREASONABLE DELAY – OECA INTERFERENCE</u>

EPA has been acknowledging the importance of resolving the blending inconsistencies since at least December 2000, indicating guidance would be issued in a "few months."[30] The EPA Administrator, in December 2001, stated that it is "very important for the EPA to respond in as timely a manner as possible." Plaintiffs' Ex. 51. With such high importance associated with this issue why has EPA failed to act? The answer is that there has been a concerted effort by the EPA OECA to thwart the efforts of OW to rein in the Regional Offices unauthorized mandates.

OECA intentional interference in this matter is now well documented. OECA had been copied on the April 1999, OGC opinion and OWM concurrence with the Region V letter that blending was <u>not</u> an illegal bypass. Plaintiffs' Ex. 21. Incredibly, a few months later OECA, simply disregarded the OGC opinion and the EPA OW concurrence letter, and unilaterally decided to send out its own letter to EPA Region III declaring

[30] *See, e.g.,* December 20, 2000 letter from J. Charles Fox, OW Assistant Administrator to The Honorable John Tanner ("We realize that municipalities in Tennessee and other States are very concerned about this issue. We will strive to finalize our analysis and discussions in the next few months."); December 20, 2000 letter from J. Charles Fox, OW Assistant Administrator to The Honorable Bud Shuster ("We realize that PMAA and similar organizations in other States are very concerned about this issue. We will strive to finalize our analysis and discussions in the next few months."), Plaintiffs' Ex. 47 and 48. *See also,* December 14, 2001 letter from G. Tracy Mehan, III, OW Assistant Administrator to Mr. William G. Washnock ("We are preparing guidance because we recognize that this is an important issue that will impact your joint sewage authority and other entities that own and operate publicly-owned treatment works across the country."); March 7, 2001 letter from Diane C. Regas, Acting OW Assistant Administrator to The Honorable Bill Frist ("The Agency remains committed to providing guidance on this issue as expeditiously as possible."); March 7, 2001 letter from Diane C. Regas, Acting OW Assistant Administrator to The Honorable Frank Mascara ("The Agency remains committed to providing guidance on this issue as expeditiously as possible."). Plaintiffs' Ex. 49, 20, 50, respectively.

blending to be illegal and not permittable. Defendants' Ex. 2.[31] OECA further told EPA Region III that "[a]ny proposed expansion of the Borough of Indiana (PA) POTW should not incorporate operational plans to slipstream [*i.e.,* blend] any of the waste streams from portions of the treatment facility." Defendants' Ex. 2 at 2. As such, OECA was dictating how the municipality could/could not design its plant, and purposefully requiring this municipality to expend millions of dollars beyond what would otherwise be required to achieve compliance under the CWA, contrary to EPA's express position that no such authority exists under the Act. On June 22, 1999, DOJ responding to a letter on behalf of EPA Region III, asserted that it was "U.S. EPA's policy that 'slipstreaming' or 'internal bypassing' [blending] constitutes illegal bypassing and is not allowed." Defendants' Ex. 1. This was a complete and blatant fabrication as no such EPA "policy" existed. To the contrary, OECA was aware that blending was allowed and simply lied about the federal requirements to the unfortunate municipality.

Subsequently, an EPA Region V attorney contacted OECA to point out the fallacy of the OECA position – providing OECA, among other things, a copy of the statements EPA made to the Court of Appeals in the *NRDC* case and citing the OGC opinions that EPA has no authority to dictate technology. Plaintiffs' Ex. 4. OECA ignored the law and continued its policy, thwarting any attempts by OW to address the issue to protect its enforcement posture. The purpose of delaying EPA clarification of the proper bypass rule implementation is set forth in an April 16, 2001, EPA e-mail:

> I talked to Alan Morrissey [OECA] today about OECA's review of our draft transmittal memo . . .. for the signed Congressional (*e.g*., Mascara) on blending of POTW effluent. He indicated that OECA does not intend to concur. . . . He also indicated that OECA is hoping to

[31] EPA regulations grant OW authority on water program rules (40 CFR § 1.49), not OECA.

> complete a settlement agreement with Toledo soon that would support their interpretation that the only way for blending to be allowed would be through a demonstration that their were 'no feasible alternatives.' [*i.e.*, subject to the bypass criteria in 40 C.F.R. § 122.41(m).]

Plaintiffs' Ex. 52.

Thus, knowing that their interpretation was a complete fabrication, directly contradicted by the OGC/OW rule interpretation and beyond statutory authority, OECA sought to impose their own interpretation in a judicial settlement. As a practical matter, the only effect the settlement could have on the EPA clarification from OECA's perspective is that they would then be able to complain that a contrary interpretation could potentially allow Toledo to reopen the settlement. In other words, OECA knowingly intended to continue to perpetrate bad law by knowingly imposing bad law. That is a gross abuse of prosecutorial authority and a fraudulent litigation practice. *See Derzack v. County of Allegheny,* 173 F.R.D. 400, 412 (W.D. Pa. 1996) (Fabrication of evidence or foisting an article on the court as legitimate constitutes fraud on the court). *See also, Aoude v. Mobil Oil Corp.,* 892 F.2d 115 (1st Cir. 1989); *Alexander v. Robertson,* 882 F.2d 421, 424 (9th Cir. 1989). An April 7, 2003, briefing document confirms OECA's improper motivation for blocking OW clarification that blending is allowable:

> There will be numerous legal challenges to [OECA's] decisions to accept or deny municipal requests to reopen consent decrees to allow blending. . . .

Plaintiffs' Ex. 39, Slide No. 19. In essence, OECA seeks to cover-up its malfeasance by asking the Deputy Administrator, without rulemaking, to declare blending to be an illegal

bypass.[32] Such actions are highly inappropriate. *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994, 1010 (7th Cir. 1980) (Agency impropriety involved where EPA enforcement attorneys delayed action to improve position in on-going enforcement case). Such intentional acts misrepresenting applicable federal requirements constitute Agency malfeasance clearly justifying judicial intervention. *Halaco Engineering v. Costle,* 843 Fed. 2d 376, 379 (9th Cir. 1988) (Discussing appropriate district court sanction for EPA's intentionally false statements, but ultimately ruling those statements benign as they had no meaningful impact on the case under review). EPA has a duty to act when it discovers illegal policies are being implemented. *Bowen,* 476 US at 487 (1986). This history clearly supports a finding that the Administrator's failure to clarify that blending is not and has never been restricted under the secondary treatment or bypass rule constitutes agency action unlawfully withheld or unreasonably delayed. *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 80 (D.C. Cir. 1984).

E. ISSUANCE OF A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

1. Compliance With Established Laws

There is a strong public interest in meticulous compliance with the law by public officials. *The Fund For Animals Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1992). Indeed, "the Constitution itself declares a prime public interest that the President and, by necessary inference, his appointees in the Executive Branch 'take Care that the Laws be faithfully executed.'" *Id, quoting* Const. Art. II § 3. Such compliance "is especially

[32] The attorneys on this litigation had a "duty of candor" to allow Plaintiffs' access to such information and instead have made extensive efforts to prevent its discovery. *See U.S. v. Shaffer Equipment Co.,* 11 F.3d 450, 459 (4th Cir. 1993).

appropriate in light of the strong public policy expressed in the nation's environmental laws." *Citizen's Alert Regarding the Environment*, 1995 U.S. Dist. LEXIS 18619 at 32.

Regions III, IV, and VI have repeatedly refused to allow state permits to be issued that allow blending. Affidavits of Reggie A. Corbitt, John H. Graham, Jr., John Brosious and Raymond A. Dami. Furthermore, these Regions in the context of enforcement actions, have prevented municipalities with overflows from utilizing blending, often a cost-effective and expeditious means to minimize, if not, totally eliminate overflows. Plaintiffs' Ex. 17; Defendants' Ex. 1, 2, 3. As discussed herein, these actions are contrary to the law as written and historically implemented by EPA. The strong public interest in "meticulous" compliance with the law is being dealt a serious blow by the idiosyncratic actions of Regions III, IV, and VI as well as by OECA. Notwithstanding the EPA Administrator's acknowledgement of the importance to expeditiously resolve this crucial issue (Plaintiffs' Ex. 51), EPA's inaction indicates that only an injunction will make the EPA Regions and OECA comply with its own rules and regulations.

2. **An Injunction Would Prevent Harm To The Environment**

An injunction would also prevent harm to the environment. The public has an enormous interest in seeing that the environment is protected. *See Public Interest Research Group v. Top Notch Metal Finishing Co., Inc.*, 1987 U.S. Dist. LEXIS 15163 at 15 (D.N.J. 1987) ("Clearly, the public at large has a very substantial interest in maintaining the integrity of the Hackensack River."); *see also*, *Public Interest Research Group of New Jersey v. Yates Industries, Inc*., 1992 U.S. Dist. LEXIS 13625 at 12 (D.N.J. 1992) ("The public interest in clean waters is extremely strong, and Congress,

through its enactment of the Federal Water Pollution Prevention and Control Act, has shown the high value it places on this interest.”).

As acknowledged by EPA, if authorities and municipalities are forced to comply with the mandates espoused by EPA Regions III, IV and VI (*i.e.,* force all flows through all units) the environment would suffer, severe property damage would result, and risk of personal injury would ensue. At a minimum, the blending prohibition would adversely impact the ability of the municipal plant to remove pollutants, and could cause a plant to lose biomass (commonly referred to as "wash out") during periods of high flow, [33] resulting in permit violations, or worse, causing the release of untreated raw sewage[34] into the environment from the collection system. Affidavit of Reggie A. Corbitt, Raymond A. Dami and John H. Graham, Jr. and Gordon L. Bloom.

Where a loss of biomass does occur, severe property damage and adverse environmental impacts would result,[35] and also presents a risk of personal injury.[36] Such

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[33] EPA states that "where peak flows approach or exceed the design capacity of a treatment plant they can *seriously reduce treatment efficiency*." (emphasis added). Plaintiffs Ex. 23. An EPA Branch Chief's meeting handout similarly states, "biological treatment units lose efficiency and may become unstable as flow rates increase and loadings vary. High flows can wash out biomass." Plaintiffs' Ex. 37. Accordingly, a survey by the Association of Municipal Sewerage Authorities found that if blending were prohibited among its members, 41% would experience a washout of biomass and 46% would experience decreased treatment efficiency and possible exceedance of permit limits. *See* Plaintiffs' Ex. 53.

[34] *See also,* Plaintiffs' Ex. 54 at 1 Tetra Tech Report. (An EPA contractor concluded that a prohibition on blending would have the effect of transforming treated effluent that would meet permit limits into untreated overflows: "[D]iversions around biological units provides for treatment of flows that would otherwise receive no treatment and simply overflow at locations upstream of the POTW.")

[35] As explained by EPA:

> Loss of biomass is considered by EPA to be severe property damage under the definition of bypass, since it would render the plant inoperable. Permit limit(s) violations would result and an inability to comply while the biomass was being reestablished.

Fact Sheet to Bangor, ME, permit. Plaintiffs' Ex. 55. An EPA enforcement action against an industry discharging into a POTW identifies additional environmental concerns associated with the loss of a municipal plant's biomass:

detrimental impacts to the treatment plant is not simply a short-term effect limited to the day on which the peak flow occurs, but can result in higher discharges of pollutants for weeks or months-on-end.[37] This is why it is against the public interest to preclude blending as an engineering design.

3. **Economic Waste Is Associated With A Blending Prohibition**

Unnecessary economic hardship is imposed by a blending prohibition. Municipalities that are already strapped for cash, and citizens on fixed incomes already subject to significantly increased rates, would be asked to needlessly expend additional resources for a facility that could otherwise meet all applicable effluent limitations when

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> Without these microorganisms, the POTW cannot operate efficiently and consequently discharges into [the receiving water] which are not in compliance with their NPDES permit may result. Discharges of pollutants could lead to fish and plant kills and have an aesthetic impact. This is serious because the river is designated as "fully body contact," which means that it is used for recreational purposes such as swimming, fishing and boating. Such activities would be prohibited if the river became septic from the wastewater. (footnote and transcript references omitted).

In the Matter of Jehovah-Jireh Corporation, EPA Docket No. CWA 5-99-016, 2001 EPA ALJ Lexis 42, 51. (July 25, 2001) Plaintiffs' Exhibit 56.

[36] In discussing the efficacy of a blending proposal, EPA concludes:

> The City has proposed to construct treatment plant modifications which would allow for primary treatment and disinfection of flows exceeding a flow rate of 30 MGD up to a flow rate of 43 MGD. The cost of these modifications is estimated at $135,000. The hydraulic capacity of the secondary plant would remain at 30 MGD. Attempting to process flow rates in excess of 30 MGD through the secondary plant would result in the surcharging of structures, *causing severe property damage, and a risk of personal injury.* (emphasis added).

Plaintiffs' Ex. 55.

[37] EPA states that if blending were not allowed, "efficiencies can be lowered for weeks or months until the biological mass in the aeration basin is reestablished." Plaintiffs' Ex. 23 at 4.

blending. Affidavits of Reggie A. Corbitt, John Brosious, Raymond A. Dami, John H. Graham, Jr., and Richard Tokarski.

It is against public policy, the CWA, and EPA regulations to require municipalities to needlessly expend limited local resources. *Doe v. SEPTA,* 72 F.3d. at 1142; 33 U.S.C. § 1298**;** 40 C.F.R. Part 35, Subpt. E, Appendix A. (Federal guidelines require the selection of the most cost-effective project to meet federal requirements).

4. Public Policy Provides For Public Participation When Amending Regulatory Requirements

CWA Section 101(e), 33 U.S.C. § 1251(e), declares it to be the public policy for public participation in the revision and enforcement of any regulation to be "provided for, encouraged, and assisted" by the EPA Administrator.[38] EPA regulations sets forth policy objectives for participation by the public in various actions taken pursuant to the CWA. 40 C.F.R. Part 25.[39] EPA Regions III, IV, and VI have implemented their own policies regarding the practice of blending without the input of the public or explanation to the public in violation of these policies. EPA Headquarters has also failed to abide by these directives: they have failed to rein in Regions III, IV, and VI or OECA although these edicts clearly amend applicable regulatory requirements. This is not only a violation of 40 C.F.R. 25.3(a) and 25.10(a) but also 40 C.F.R. 25.12(c) which provides,

[38] Section 101(e) provides:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter *shall be provided* for, encouraged, and assisted by the Administrator and the States. (emphasis added).

[39] For example, 40 C.F.R. 25.3(a) states that one objective of the EPA in carrying out rulemaking and issuing permits is to, "assure that the public has the opportunity to understand official programs and proposed actions, and that the government fully considers the public's concerns." 40 C.F.R. 25.10(a) goes one step further and provides that in addition to maintaining and making available a public record during rulemakings, "EPA *shall* invite and consider written comments on proposed and interim regulations from any interested or affected persons and organizations." (emphasis added).

"[a]ssuring compliance with these public participation requirements…is the responsibility of the Administrator of the EPA….The Administrator will assure that instances of alleged non-compliance are properly investigated and that corrective action is taken where necessary." This is a fundamental duty that agencies are bound to and may not refuse to undertake. *See Bowen*, 476 U.S. at 487 (1986).

5. <u>Defendant Is Not Harmed By Issuance Of Injunctive Relief</u>

An injunction would prevent the EPA Regions III, IV, and VI, and OECA from imposing these secret laws upon NPDES states and municipalities, *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 153 (1975). Plaintiffs' assert there are no public interests in favor of maintaining these '*ad hoc*' inconsistent Regional blending prohibitions. *Bracco Diagnostics,* 963 F. Supp. at 27. If EPA Regions III, IV and VI are allowed to continue imposing their Regional requirement that all flows pass through every unit of the plant, regardless of environmental need, the detrimental effect and the inconsistency with the intended plant design, severe property damage and harm to the environment would result. At best, reduced treatment efficiency would result. At worst, either weeks of noncompliance would result or there would be overflows of untreated sewage from the collection system. The costs associated with this misguided mandate are astronomical, *see supra* p. 23, and completely wasteful. Preventing the Regions from enforcing this policy will greatly reduce the possibility of releasing untreated effluent into the environment or washing out the biomass during wet weather thus protecting a vital public interest while allowing communities to implement more cost-effective alternatives, conserving the public fisc. The public interest demands that these gross violations of the APA and CWA public participation requirements be corrected.

F. IRREPARABLE HARM WILL OCCUR IF REGIONS III, IV & VI CONTINUE THEIR PROHIBITIONS

Under the unauthorized Regional blending prohibitions, Plaintiffs must change their conduct or risk costly sanctions and states must conform their permitting practices to these Regional dictates subject to EPA vetoing or objecting to state permits. Plaintiffs will suffer irreparable harm if EPA continues to allow various Regional Offices to impose more restrictive policies prohibiting or restricting blending. Irreparable harm will occur if this injunction is not issued because the environment will be subject to excessive and unnecessary pollutant discharges. This includes (1) communities that are unable to expeditiously abate raw sewage overflows in the collection system; (2) communities currently, in full compliance with applicable effluent limitations, being told to stop blending and employ detrimental plant designs; and (3) communities prevented from proceeding with long-term environmental planning. Moreover, communities will be forced to expend resources that cannot be recovered on unnecessary plant design or challenging arbitrary permit denials.

1. Efforts By Communities Seeking To Abate Overflows In The Collection System Are Being Thwarted

A number of communities across the country, including PMAA and TML members, are aggressively seeking to undertake activities to abate the overflows from their collection system, whether a CSO or SSO community. In a number of instances, the community has entered into binding judicial orders to design and implement activities subject to an expeditious compliance schedule. These municipalities are either forced a) into violation of the applicable Order because the state, based upon EPA Regional dictates, cannot approve the most cost effective option which includes blending or b) to

construct unnecessary and inappropriate facilities. Affidavits of Reggie A. Corbitt and Richard Tokarski**.** In the later case, not only would the non-blending option waste the public fisc (with no possible opportunity to recoup the excess expenditure from EPA) but the over-sized plant designs, as described above in EPA's documents, would result in decreased plant efficiency and other operational difficulties. Affidavit of John H. Graham, Jr., and Raymond A. Dami.

Other municipalities, such as Plaintiff Little Rock and Rahway, NJ (a member of Intervenor AMSA) cannot appropriately proceed with their plant upgrade. Affidavit of Reggie A. Corbitt and Richard Tokarski. Design decisions cannot proceed due to the uncertainty associated with the divergent Regional approaches and EPA Headquarters' declarations that it would soon be clarifying the issue. This allows wet weather overflows to continue despite Plaintiffs attempts to the contrary.

Whether subject to a judicial order or not, the delays in EPA clarification of the legality of blending are delaying necessary improvements in wastewater operations and allowing untreated or inadequately treated sewage (*i.e,* the discharge of raw sewage or wastewater which fails to meet applicable effluent limitations) to continue to enter the environment when blending would remedy such overflows promptly. Affidavit of John Brosious, John H. Graham, Jr. and Gordon L. Bloom. Whereas as little as a four-month delay can impact final compliance dates,[40] EPA's refusal to rectify its Regional inconsistencies for over four years exposes more and more PMAA, TML, and other municipalities to delay in necessary treatment plant improvements. The harm caused by this delay is irreparable.

[40] 44 Fed. Reg. 32870 (1979) ("EPA further believes that a slippage of more than 120 days in an interim compliance date would, in most cases, interfere with the attainment of a final compliance date.")

2. Blending Prohibition Will Put Complying Municipalities Into Noncompliance

As discussed above, EPA has historically allowed blending – it was not subject to the bypass regulation. As such, Pennsylvania and Tennessee municipalities, as well as the City of Little Rock, have historically designed and operated their treatment plants to blend and meet permit effluent limitations when receiving wet weather flows. Now suddenly, these municipal facilities, in compliance with effluent limitations, are being told that they must change their practice and operate their plants without utilizing blending. If the flows are not routed around the biological unit, municipalities are left with a choice between Scylla and Charybdis:[41] (a) do not let the flows reach the treatment plant (*i.e.,* cause raw sewage overflows in the collection system) or (b) force all flows through the biological unit, causing loss of biomass and resulting in, as explained above, effluent limitations noncompliance, severe property damage and risk of personal injury. Affidavits of Reggie A. Corbitt, John H. Graham, Jr., Raymond A. Dami, and Gordon L. Bloom. EPA Regions III, IV and VI should not be allowed to impose such harm pending a decision on this suit.

3. Communities Prevented From Proceeding With Long-Term Environmental Planning With Stayed NPDES Permits

Whereas NPDES permits are intended to be issued for a period not to exceed five years, 33 U.S.C. § 1342(b)(1)(B), EPA's delay in addressing the blending issue is resulting in TML and other municipalities remaining subject to old expired continued NPDES permits for many years[42] due to an EPA Region III, IV or VI State waiting for

[41] This is another type of harm Plaintiffs experience – "choos[ing] between disadvantageous compliance and risking serious penalties." *Safari Club Int'l,* 1994 U.S. Dist. LEXIS 18183 at 24.

[42] *See, e.g.,* 40 C.F.R. § 122.6 (continuation of expired NPDES permits).

resolution of the blending issue before reissuing the NPDES permit. Affidavit of Reggie A. Corbitt, and Raymond A. Dami. In other situations, NPDES permits are being reissued by the Region III, IV or VI State, appealed and then stayed. Affidavit of John H. Graham, Jr. Admission 40. In either case – long term plant upgrades, contingent upon resolution of the blending issue, cannot appropriately be undertaken – much to the detriment of the environment.

4. Plaintiffs' Incur Irreparable Monetary Losses

Plaintiffs have suffered and will continue to suffer monetary loss and exposure to criminal prosecution on a daily basis because the Regions involved refuse to implement the applicable regulations and EPA Headquarters refuses to rein in those Regions. Communities are forced into permit appeals, facility redesign and unnecessary construction. These costs are not recoverable. Affidavits of John W. Brosious, Reggie A. Corbitt, John H. Graham, Jr., Raymond A. Dami and Richard Tokarski.

The Regions have specifically stated that they will continue denying permits under this regulatory interpretation. Plaintiffs' Ex. 6 and 26; *see also,* Plaintiffs' Ex. 24 (Region IV objecting to two state blending permits and prepared to object to a third since, "[w]e have not changed our position [on blending]"). Every day that passes and the Regional policies are implemented costs Plaintiffs money and adversely impacts the operation and planning for municipal wastewater treatment. *Id.* Only Court intervention, at this point, will stop these illegal Regional actions and the irreparable harm they are causing.

In summary, Plaintiffs have clearly demonstrated that the requested injunctive relief should be issued. Success on the merits is clearly demonstrated, ongoing and

anticipated harm is irreparable and the public interest strongly supports EPA's adherence to its adopted rules.

RELIEF REQUESTED

Plaintiffs' request that the Court issue a preliminary injunction establishing the *"status quo ante"* by prohibiting further implementation of the EPA Regions III, IV and VI policies which restrict or prohibit blending (*i.e.,* the Regional Offices shall not classify blending as subject to the bypass regulation or require biological treatment for all municipal wastewater flows pending resolution of this case).

REQUEST FOR EXPEDITED HEARING

Pursuant to Local Rule 65.1(d), Plaintiffs request that an expedited hearing be held on this request for preliminary injunction. Expedition is essential because various Plaintiffs are required, pursuant to judicial consent order, to commit to design and construction of specific treatment plant improvements to process wet weather flows in the near future. Affidavits of Reggie A. Corbitt and Richard Tokarski. Other parties are still expending scant municipal resources on permit appeals because of EPA's failure to clarify that blending is not restricted by either the secondary treatment or bypass regulations. Affidavit of John H. Graham, Jr. Others are being prevented from planning for further treatment plant improvements due to EPA's failure to prohibit application of the unauthorized Regional policies. Affidavits of John Brosious and Raymond A. Dami. Based upon these ongoing and irreparable harms, scheduling of an expedited hearing to decide Plaintiffs' preliminary injunction request is appropriate.

As such, Plaintiffs respectively request that the Court schedule an expedited hearing on the matter and thereafter, issue the requested preliminary injunction.

Respectfully submitted,

__________/s/_____________
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