UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Pennsylvania Municipal Authorities Association 1000 North Front Street, Suite 401 Wormleysburg, PA 17043; Tennessee Municipal League 226 Capitol Boulevard, Suite 710 Nashville, TN 37219, and The City of Little Rock Sanitary Sewer Committee 211 East Capitol Avenue Little Rock, AR 72201 Plaintiffs, Association of Metropolitan Sewerage Agencies 1816 Jefferson Place, N.W. Washington, DC 20036 Intervenors v. Christine Todd Whitman, Administrator U.S. Environmental Protection Agency Ariel Rios Building, 1101A 1200 Pennsylvania Avenue NW Washington, DC 20460 Donald S. Welsh, Regional Administrator U.S. Environmental Protection Agency, Region III 1650 Arch Street Philadelphia, PA 19103-2029 J.I. Palmer, Jr., Regional Administrator U.S. Environmental Protection Agency, Region IV Atlanta Federal Center 61 Forsyth Street, SW Atlanta, GA 30303-3 104 Gregg Cooke, Regional Administrator U.S. Environmental Protection Agency, Region VI Fountain Place 12th Floor, Suite 1200 1445 Ross Avenue Dallas, TX 75202-2733 Defendants.	CASE NUMBER 1: 02CV01361 JUDGE: Henry H. Kennedy

COMPLAINT OF INTERVENORS THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

I. PRELIMINARY STATEMENT

Plaintiff is a national, non-profit trade association, acting on behalf of its members which own and operate publicly owned treatment works ("POTWs") throughout the United States. AMSA member agencies hold National Pollutant Discharge Elimination System ("NPDES") permits pursuant to Section 402(a), 33 U.S.C. § 1342(a), of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, authorizing the discharge of municipal treated sewage and other treated wastewaters to the waters of the United States.

As authorized by EPA regulations, confirmed by preambles, and evidenced by historical practice and interpretation provided by EPA Headquarters, municipalities are allowed to undertake certain cost effective operational practices known as "blending," "slipstreaming," or "recombination" (hereinafter referred to only as "blending"). Notwithstanding such latitude and the approval of this practice by other EPA Regions and approved NPDES States (*i.e.*, States approved to administer the permitting program pursuant to CWA Section 402(b), 33 U.S.C. § 1342(b)), EPA Regions III, IV, and VI and the Enforcement Office of EPA Headquarters have issued binding guidance and/or directives to approved NPDES States stating that "blending" is illegal and not to be authorized. Such mandates have immediate and adverse affects upon the Plaintiff.

Similarly, EPA regulations, preambles, and historical practice provide for the permitting of emergency outfalls in the municipal collection system. Notwithstanding such latitude, EPA Regions III and IV have issued binding guidance and/or directives to approved NPDES States

directing that the permitting of such outfalls is illegal. Such mandate has immediate and adverse effects upon the Plaintiff.

The third issue pertains to the legal standard that applies to the permitting of Sanitary Sewer Overflows ("SSOs") during non-emergency conditions. Sanitary sewers are municipal sewer systems designed to transport sanitary waste to a municipal treatment plant. Due to waters infiltrating and inflowing into the sewer system during wet weather events (commonly referred to as "infiltration and inflow" ("I/I")), overflows at pump stations or at other points in the sewer system occur. Under the CWA, discharges from POTWs are subject to the "secondary treatment" technology-based standard, *see* 33 U.S.C. § 131 1(b)(1)(B), whereas discharges from other point sources are subject to technology-based standards based upon best available technology economically achievable ("BAT') and best conventional pollutant control technology ("BCT"), *see* 33 U.S.C. §§ 1311(b)(2)(A) and 1311(b)(2)(E). Although EPA Headquarters has never developed or promulgated a regulation defining the appropriate technology-based standard for SSOs, various EPA Regions have issued binding guidance and/or directives to the regulated community and approved NPDES States directing that secondary treatment must be applied to SSO discharges. Such actions have immediate and adverse effects upon the Plaintiff.

The above actions by EPA Regions in issuing binding guidance and/or directives have been undertaken without the promulgation of regulations in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* In addition, such actions by EPA Regions have been undertaken without the requisite authority to establish binding requirements upon the regulated community. Furthermore, such actions have been undertaken in contravention of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 15401 *et seq.* which requires EPA to undertake certain analyses, evaluations of alternatives, or cost assessments before imposing requirements upon Plaintiff.

Plaintiff requests declaratory and injunctive relief. Plaintiff requests relief from this Court declaring that, among other things, (1) blending is not prohibited under the CWA and applicable regulations; (2) EPA lacks authority under the CWA to direct plant design or use of specific processes to achieve effluent limitations; (3) emergency outfalls in the municipal collection system are appropriately permittable under an NPDES permit; and (4) that, as a matter of law, the BAT/BCT standards, not secondary treatment, are applicable to SSO discharges. Furthermore, Plaintiff requests that this Court order Defendants to comply with applicable federal law pertaining to the imposition of requirements upon the regulated community and enjoin Defendants' actions inconsistent with this Court's ruling.

For its Complaint, the Plaintiff alleges as follows:

II. JURISDICTION AND VENUE

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 (Federal Question Statute), by virtue of the federal questions raised in the Complaint, with such federal questions arising under 33 U.S.C. §§ 1251-1375 (Federal Water Pollution Control Act).

2. This Court has jurisdiction of this action by virtue of Defendant, U.S. Environmental Protection Agency "EPA"), and various Regional Offices thereof, imposing binding rules upon Plaintiff without undergoing rulemaking in accordance with 5 U.S.C. §§ 551 *et seq.*

3. This Court has jurisdiction of this action by virtue of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* Final actions of a federal agency are involved for which there is no other adequate remedy in court.

4. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act), by virtue of the relief requested.

5. Section 706(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1), provides that the Court may compel agency action unlawfully withheld or unreasonably delayed.

6. Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), provides relief for the action addressed herein in that Defendant EPA, and Regional Offices thereof, are imposing rules which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

7. Section 706(2)(C) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), provides relief for the action addressed herein in that EPA Regional Offices are imposing rules in excess of statutory jurisdiction or authority provided to Regional Offices.

8. Section 706(2)(D) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(D), provides relief for the action addressed herein in that Defendant EPA, and Regional Offices thereof, are imposing rules without observance of procedures required by law.

9. Venue in this judicial district is proper under 28 U.S.C. § 1391(e), as this district is where the Defendant resides and where a substantial part of the actions giving rise to the Complaint have occurred.

III. PARTIES

10. The Association of Metropolitan Sewerage Agencies ("AMSA") has represented the interests of the nation's POTWs and municipal wastewater treatment agencies since 1970. AMSA is comprised of over 270 POTW members who collectively serve the majority of this country's sewered population and treat over 18 billion gallons of wastewater each day. AMSA strives to maintain a leadership role in the development and implementation of scientifically-based, technically-sound, and cost-effective environmental programs for protecting public and ecosystem health. AMSA's members operate municipal wastewater treatment plants

under federal and state laws and regulations in cities and towns across the United States, including each of the states located in EPA Regions III, IV and VI.

11. AMSA members include 24 agencies in EPA Region III, 51 agencies in Region IV, and 25 agencies in Region VI.

12. A majority of AMSA's public agency members own and operate POTWs that have NPDES permits issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

13. Many members of AMSA have SSO discharges, employ blending to process wastewater flows, and have locations where emergency discharges may occur.

14. Members of AMSA are adversely impacted and will be adversely impacted by EPA Region III, IV and VI mandates that NPDES permits cannot allow blending, and by EPA Region III and IV mandates that emergency outfalls cannot be permitted and that SSOs are subject to secondary treatment standards.

15. If AMSA members that currently blend are prohibited from blending, the results will include (1) decreased treatment efficiency and possible exceedance of permit limits; (2) washout of biomass and solids from the treatment facility; (3) bypass of raw sewage from the headworks; and/or (4) surcharging in the collection system.

16. In order to avoid sanctions by EPA Region III, IV and VI, members of AMSA will be required to spend more money on facilities and pollution control than is otherwise required by law.

17. Members of AMSA will need to expend significant sums in order to eliminate blending even though the existing treatment facilities (*i.e.,* utilizing blending) achieve applicable effluent limitations.

18. Defendant Christine Todd Whitman is sued here in her official capacity as Administrator of the U. S. Environmental Protection Agency. Pursuant to the Clean Water Act

and its implementing regulations, she is charged with the supervision and management of all EPA decisions and actions, and with the administration of the Clean Water Act.

19. Defendant Donald S. Welsh is sued here in his official capacity as the Regional Administrator of EPA Region III. Pursuant to the Clean Water Act and its implementing regulations, he is charged with the supervision and management of all Region III decisions and actions, and with the administration of the Clean Water Act in Region III. EPA Region III includes the states of Pennsylvania, West Virginia, Virginia, Maryland, Delaware and the District of Columbia.

20. Defendant J.I. Palmer, Jr. is sued here in his official capacity as the Regional Administrator of EPA Region IV. Pursuant to the Clean Water Act and its implementing regulations, he is charged with the supervision and management of all Region IV decisions and actions, and with the administration of the Clean Water Act in Region IV. EPA Region IV includes the states of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee.

21. Defendant Gregg Cooke is sued here in his official capacity as the Regional Administrator of EPA Region VI. Pursuant to the Clean Water Act and its implementing regulations, he is charged with the supervision and management of all Region VI decisions and actions, and with the administration of the Clean Water Act in Region VI. EPA Region VI includes the states of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas.

IV. STATUTORY BACKGROUND

22. The Clean Water Act, 33 U.S.C. § 1252 *et seq.,* regulates the discharges of pollutants into the nation's waters by establishing effluent limitations that must be met by "point sources." *Maier v. United States Environmental Protection Agency,* 114 F.3d 1032 (D.C. Cir. 1997).

23. An "effluent limitation" is any "restriction established by a State or Administrator on the quantities, rates and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters . . . ." 33 U.S.C. § 1362(11).

24. A "point source" is any discernable, confined and discreet conveyance from which pollutants are or may be discharged. 33 U.S.C. § 1362(14).

25. EPA does not have the discretion to refuse to issue NPDES permits to a class of "point sources." "Point sources" are to be permitted in accordance with applicable CWA requirements. *Natural Resources Defense Council, Inc. v. Train,* 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom. Natural Resources Defense Council, Inc. v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977).

26. The federal Clean Water Act, 33 U.S.C. § 1251 *et seq.,* contains a two-pronged approach for regulating facilities that discharge wastewater into the waters of the United States. First, minimum technology-based requirements are imposed upon facilities. *E.I. DuPont deNemours & Co. v. Train,* 430 U.S. 112 (1977). The technology-based requirement is a minimum amount of treatment imposed on facilities regardless of the ambient water quality conditions. If the technology-based minimum requirement is not deemed fully protective of the water body, then imposition of the water quality standards, if applicable, based upon site-specific conditions of the receiving water may result in additional effluent limitations being contained in the NPDES permit. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d).

27. Generally EPA establishes technology-based limits based upon the pollution control technologies that are available to a particular industry or type of source. 33 U.S.C. §§ 1311, 1314. Section 301 of the CWA, 33 U.S.C. § 1311, distinguishes between POTWs and other types of point sources.

28. CWA § 301 requires that effluent limitations for sources other than POTWs be based upon the application of the best practicable control technology currently available ("BPT"), best available technology economically achievable ("BAT"), and best conventional pollutant control technology ("BCT"), 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A) and (E).

29. CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B) applies to POTWs and states that, for POTWs, effluent limitations are to be based upon "secondary treatment" as defined by the Administrator pursuant to 33 U.S.C.S. § 1314(d)(1).

30. A 1975 legal opinion of EPA *(In the Matter of the National Pollutant Discharge Elimination System Permit for Blue Plains Sewage Treatment Plant*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 33 (October 21, 1975) at 12-13) states that "[t]he 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."

31. The technology-based standards that apply to municipal-owned facilities depend upon whether the discharge occurs from the treatment plant or from the collection system prior to reaching the treatment plant.

32. Discharges from the treatment plant are subject to secondary treatment standards. 33 U.S.C. § 1311(b)(1)(B). Federal regulations set forth the secondary treatment standards at 40 C.F.R. Part 133.

33. The secondary treatment regulation at 40 C.F.R. Part 133 sets forth effluent limitations and does not dictate the use of any specific treatment technology. The permittee can utilize biological, physical/chemical treatment, or any other treatment that would meet the applicable effluent limitations.

34. A sewage overflow point is not designed for "storage, treatment, recycling, or reclamation," but, rather for uninhibited discharge, and, therefore, is not considered part of the "treatment works." *Montgomery Environmental Coalition v. Costle,* 646 F.2d 568, 590 (D.C. Cir. 1980).

35. Discharges or overflows from a municipally owned sewer system that is designed to receive both sewage and storm water (hereinafter "combined sewer") are not part of the publicly owned treatment works and therefore, their limits are based upon standards applying to "point sources other than publicly owned treatment works." 33 U.S.C. § 1311(b)(1)(A); *Montgomery Environmental Coalition,* 646 F.2d 568 at 592.

36. Technology-based standards are predicated upon a detailed technical study of pollution control in the industry. Based upon the technical data, economic studies, anticipated pollutant loading rates, and other information, EPA promulgates standards reflecting its determination of the degree of pollution control that could be achieved by various levels of technology. *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112 (1977); 33 U.S.C. § 1314.

37. The technology underlying the development of the secondary treatment regulation (typically, biological treatment) is impracticable or infeasible for treating intermittent, weak wastewater flows associated with SSOs.

38. On information and belief, when EPA promulgated the secondary treatment standards in 1973, it did not evaluate the degree of pollution control that could be achieved by POTWs treating peak wet weather flows.

39. On information and belief, the evaluation of technology by EPA in developing the federal secondary treatment standard at 40 C.F.R. Part 133 did not assess the use and costs of storage basins or expanded biological facilities to process peak wet weather flows.

40. EPA has established a bypass regulation to ensure that permittees operate their facilities consistent with the adopted technology-based regulatory standards. 40 C.F.R. § 122.41(m).

41. The bypass regulation does not dictate that a specific treatment technology be employed. Instead, the bypass regulation requires applicable treatment technology to be operated as designed. *Id.*

V. GENERAL ALLEGATIONS REGARDING BLENDING

42. As used in this complaint, the term "blending" refers to the practice where peak wet weather flows exceeding the capacity of a treatment unit (*e.g.* biological unit) are routed around that unit, blended together with the effluent from that unit prior to discharge, and the blended flows meet applicable permit effluent limitations at the final discharge location.

43. Blending involves full use of a treatment unit. Blending entails routing excess flows beyond the capacity of a treatment unit.

44. Blending does not involve the shutting down of a unit at any time. To the contrary, the unit is utilized to its maximum capacity.

45. If flow that is significantly above the hydraulic capacity of a POTW treatment unit is passed through that unit, the treatment efficiency of the unit can reasonably be expected to decrease in comparison to the treatment of the unit operated within its hydraulic capacity.

46. If flow that is significantly above the hydraulic capacity of a biological unit is passed through that unit, the system can be "washed out" and the ability of that unit to effectively treat wastewater compromised for an extended period of time.

47. Use of blending for peak wet weather events may result in a treatment plant achieving applicable NPDES effluent limitations whereas sending one hundred percent of the flow through every unit could result in noncompliance with the NPDES effluent limitations.

48. The NPDES regulations allow blending to be authorized in an NPDES permit.

49. The NPDES regulations do not specifically prescribe standards for approving or disapproving blending.

50. No formally promulgated EPA regulation or Headquarters policy requires that in order for a POTW to legally blend, blending must be specifically referenced in the permit.

51. No formally promulgated EPA regulation or Headquarters policy precludes an approved NPDES State from authorizing blending by State approval of a POTW operation and maintenance manual that provides for blending.

52. NPDES permits have been issued which authorize blending.

53. Blending is a cost-effective and expeditious means for some POTWs to eliminate SSOs.

A. Blending Has Been Approved in EPA Grants and Is Authorized by the NPDES Permit and Secondary Treatment Regulations

54. Designing a treatment plant to blend under peak wet weather flow conditions has been a common design and operational mode since at least the early 1970's.

55. Blending is an appropriate engineering practice to handle POTW peak wet weather flows if compliance with effluent limitations is achieved.

56. EPA has approved numerous federal construction grants for POTWs designed to blend under peak wet weather flow conditions.

57. By letter dated January 10, 2002 from AMSA Executive Director Ken Kirk to Kevin Weiss at U.S. EPA, AMSA provided statistical information, based upon a recent survey of its member agencies, documenting that a large number of POTWs across the country were designed, constructed (often with state and/or federal funding), and in many cases formally permitted to blend peak wet weather flows.

58. The Water Environment Federation ("WEF") and the American Society of Civil Engineers ("ASCE") have published Manuals of Practice setting forth standards of design practice which state that accepted facility design practices to address peak wet weather flows include blending.

59. Sizing a treatment plant so that one hundred percent of all wastewater, including peak wet weather flows, passes through every unit can have an adverse effect on treatment plant efficiency during non-peak wet weather flow events.

60. The CWA requires POTWs to meet "effluent limitations" based upon secondary treatment, but does not give EPA the authority to dictate how a plant must be designed to achieve those limitations. 33 U.S.C. § 1311(b)(1)(B).

61. At 45 *Fed. Reg.* 33535 (May 19, 1980), EPA stated that "[p]ermittees may meet their permit limits by selecting any appropriate treatment equipment or methods."

62. At 48 *Fed. Reg.* 52259 (Nov. 16, 1983), EPA stated that "[w]ith the exception of the SS [suspended solids] adjustment for WSPs [waste stabilization ponds], the current secondary treatment regulation itself does not address the type of technology used to achieve secondary treatment requirements."

63. On information and belief, when EPA promulgated the federal secondary treatment standards at 40 C.F.R. Part 133 in 1973, it did not consider the costs associated with biologically treating one hundred percent of peak wet weather flows nor the costs of constructing storage basins to ensure one hundred percent of all flows pass through biological treatment.

64. On information and belief, when EPA subsequently amended the federal secondary treatment standards at 40 C.F.R. Part 133, it did not consider the costs associated with biologically treating one hundred percent of peak wet weather flows.

65. The federal secondary treatment regulations were based upon municipal treatment plants being designed to conform to generally accepted principles of engineering practice in place at that time.

66. The federal secondary treatment regulations were based upon design principles which recognized that facilities were not designed to provide biological treatment to all peak wet weather flows. Due to process upset concerns, proper secondary treatment design does not include sizing biological units to process one hundred percent of peak wet weather flows.

67. The current NPDES regulations do not prohibit blending during peak wet weather events as an allowable operational practice.

68. The current NPDES regulations do not require blending, if approved, to be identified in the NPDES permit.

69. The current NPDES regulations do not require that the NPDES permit identify how the permittee will operate the treatment plant.

70. When EPA promulgated the bypass regulation (40 C.F.R. § 122.41(m)), EPA never indicated a specific intent to prohibit blending under the bypass rule.

71. In 1984 when EPA revised the NPDES regulations, it declared at 49 *Fed. Reg.* 38037 (September 26, 1984) that "[a]ny 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 a bypass."

72. In 1984 when EPA revised the NPDES regulations, it declared at 49 *Fed. Reg.* 38037 (September 26, 1984) that the bypass regulation would not preclude a permittee from "shut[ting] down a specific pollution control process during certain periods of the year."

73. By letter dated March 7, 2001, Diane Regas, EPA Acting Assistant Administrator for Water, responded to a letter from Senator Frist regarding blending. The March 7, 2001 EPA letter stated:

> **Has EPA ever completed any regulatory analysis regarding the cost impact and environmental benefits of a blending prohibition?**
>
> EPA believes that NPDES permitting authorities have considerable flexibility through the NPDES permitting process to account for different peak flow scenarios that are consistent with generally accepted good engineering practices and criteria for long-term design. As such, NPDES permitting can account for blending. As described above, blending may be approved. EPA did not conduct a formal analysis of the national costs or environmental impacts of alternative regulatory frameworks for addressing peak wet weather flows at POTWs when conducting the regulatory analyses that were applicable at the time when EPA promulgated the bypass regulation.

74. EPA Headquarters' December 21, 2001, draft memorandum titled "NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions" confirms that blending can be authorized in an NPDES permit and is not subject to the bypass regulation.

75. When promulgating the bypass regulation, EPA never intended to prohibit POTWs from blending as a wet weather flow management option.

76. On January 19, 1993, EPA published at 58 *Fed Reg.* 4994 a Notice of Availability of EPA's draft guidance document entitled "Combined Sewer Overflow Policy" (dated December 18, 1992), signed by LaJuana Wilcher (Assistant Administrator for Water) and Herbert H. Tate, Jr. (Assistant Administrator for Enforcement).

77. The December 18, 1992 draft "Combined Sewer Overflow Policy" contained EPA's contemporaneous interpretation that blending is allowable and not a prohibited bypass.

78. The December 1992 draft "Combined Sewer Overflow Policy" stated at page 24 that:

> 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.

79. The public notice for the April 1994 final CSO policy stated that there are no significant changes from the draft 1992 policy. 59 *Fed. Reg.* 18688 (April 19, 1994).

80. By letter dated March 7, 2001 from Diane C. Regas, EPA Acting Assistant Administrator for Water, to Congressman Mascara, EPA responded to a Congressional inquiry regarding the availability of blending to be approved in NPDES permits. EPA's March 7, 2001 response to Congressman Mascara stated:

> We believe that NPDES authorities have considerable flexibility through the permitting process to account for different peak flow scenarios that are consistent with generally accepted good engineering practices and criteria for long-term design. We believe that peak wet weather discharges from POTWs that are comprised of effluent routed around biological treatment units together with the effluent from the biological units prior to discharge could be approved in an NPDES permit.

81. The March 7, 2001 letter from Diane Regas, EPA Acting Assistant Administrator for Water, to Senator Frist confirms that when EPA promulgated the secondary treatment regulation (40 C.F.R. Part 133) and the bypass regulation (40. C.F.R. § 122.41(m)), EPA never evaluated the costs associated with a prohibition on blending.

82. On information and belief, contractors retained by EPA have estimated that the total capital CSO-related costs associated with a prohibition on blending would range from $9.1 billion (if POTWs increased wet weather storage) to $79.2 billion (if POTWs were to double secondary treatment capacity).

83. On information and belief, EPA contractors have also estimated that the total SSO-related capital costs associated with a prohibition on blending would range from $13.4 billion (if POTWs increased wet weather storage) to $52.8 billion (if POTWs were to double secondary treatment capacity).

84. On information and belief, a prohibition on blending would have an impact exceeding $100 million for a single one of the larger POTWs owned and operated by members of AMSA.

B. Some EPA Regions Authorize Blending

85. On information and belief, several EPA Regions, including but not limited to Regions II, V, VII and IX, have authorized blending in NPDES permits or have allowed their approved NPDES States to authorize blending in NPDES permits.

86. On information and belief, authorized NPDES States have approved blending in NPDES permits where such approval did not result in objection to or veto of the NPDES permit by EPA Regional administrators.

87. On information and belief, after consultation with EPA headquarters EPA Region V has told the State of Indiana (an approved NPDES State) that blending can be authorized in NPDES permits.

88. On information and belief, EPA Region IX has told the State of California that EPA Region IX has adopted the interpretation set forth in EPA Headquarters' March 7, 2001 letters and that blending can be approved in an NPDES permit.

C. EPA Regions III, IV and VI Have Dictated a Ban on Blending

89. Although blending can be authorized in NPDES permits, certain EPA Regions do not authorize or allow their approved NPDES States to authorize blending in NPDES permits.

90. On information and belief, EPA Region III has declared to dischargers and to approved NPDES States that blending is illegal.

91. On information and belief, EPA Region III has objected to State draft or proposed NPDES permits that allowed blending.

92. On information and belief EPA Region III has taken the position in enforcement actions against municipalities that blending is illegal.

93. On information and belief, various expired NPDES permits in Region III have not been reissued pending resolution of the blending issue.

94. On information and belief, some POTWs in EPA Region III have spent or are spending significant sums to design their plants to avoid blending peak wet weather flows based upon EPA's Region III's mandate that blending is prohibited.

95. On information and belief, EPA Region IV has declared to dischargers and to approved NPDES States that blending is illegal.

96. On information and belief, EPA Region IV has objected to State draft or proposed NPDES permits that allowed blending.

97.. On information and belief, Region IV refuses to allow NPDES authorized states within its region to issue NPDES permits authorizing blending until EPA Headquarters addresses the issue in rulemaking or in final guidance.

98. On information and belief, through its interpretation of the secondary treatment and bypass regulations, EPA Region IV is dictating how a treatment plant must be designed and operated.

99. On information and belief, EPA Region IV will not authorize blending in an NPDES permit nor allow its approved NPDES States to authorize blending in a municipal NPDES permit.

100. On information and belief, EPA Region VI has declared to dischargers and approved NPDES States that blending is illegal.

101. On information and belief, EPA Region VI has objected to State draft or proposed NPDES permits that allowed blending.

102. On information and belief, EPA Region VI will not authorize blending in an NPDES permit nor allow its approved NPDES States to authorize blending in a municipal NPDES permit.

103. The dictates issued by Regions III, IV and VI, that blending cannot be authorized in an NPDES permit, are binding upon approved NPDES States in those Regions. Approval of blending in an NPDES permit by an approved NPDES State in those Regions would subject that permit to objection and/or veto by the Regional Administrator.

104. If blending is prohibited, POTWs in Region III, IV and VI, including members of AMSA, will be required to spend hundreds of millions of dollars for additional plant upgrades to achieve the same level of effluent limitation compliance currently being achieved with blending.

VI. GENERAL ALLEGATIONS REGARDING PERMITTING OF EMERGENCY OUTFALLS

105. In general, the Clean Water Act prohibits any discharge to waters of the United States, unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit.

106. A July 7, 1995 Memorandum entitled "Enforcement Efforts Addressing Sanitary Sewer Overflows" from Steven A. Herman (EPA OECA) and Robert Perciasepe (EPA OW) to Water Management Division Directors stated that SSO discharges to waters of the United States are prohibited unless authorized by an NPDES permit.

107. By memorandum dated March 7, 1996 from Steven A. Herman to the Water Management Division Directors, the NPDES State Enforcement Directors and the Regional Counsels of Regions I-X added a new "Chapter X" to its Enforcement Management System Guide, entitled "Setting Priorities for Addressing Discharges from Separate Sanitary Sewers." The Chapter stated that:

> Some permits have specific requirements for these discharges, others have specific prohibitions under most circumstances, and still other permits are silent on the status of these discharges.
>
> The legal status of any of these discharges is specifically related to the permit language and the circumstances under which the discharge occurs. Many permits authorize these discharges when there are no feasible alternatives . . . . Other permits allow these discharges when specific requirements are met . . . .

108. SSO outfalls (*e.g.*, point source discharges from a pump station) can be authorized in an NPDES permit. The NPDES permit can include minimum technology-based requirements and any more stringent water quality-based effluent limitations for that outfall.

109. The preamble to EPA's August 4, 1999 NPDES regulations at 64 *Fed Reg.* 42442, stated:

> The legal status of these discharges [SSO] is specifically related to the permit language and the circumstances under which the discharges occurs. The Agency notes that NPDES permit regulations do provide limited relief under the bypass and upset provisions of 40 CFR 122.41(m) and (n), respectively, for such discharges. The Agency is currently developing guidance that would clarify the applicability of the bypass and upset provision to such discharges.

110. In permitting an SSO outfall in an NPDES permit, the NPDES permit can include a "no discharge" requirement, except in emergency situations as allowed by the upset and bypass regulations. 40 C.F.R. § 122.41(m) and (n).

111. It is EPA's position that if an outfall is not permitted, the upset and bypass defense as set forth in 40 C.F.R. §§ 122.41(m) and (n) are not available for discharges from that outfall.

112. It is EPA's position that if an outfall is permitted, the NPDES regulations at 40 C.F.R. §§ 122.4 1(m) and (n) allow for the upset and bypass defenses to be available for the discharge from that outfall.

113. Refusal to permit an SSO outfall will subject a POTW to liability for an illegal discharge even if that discharge would otherwise qualify for the upset or bypass defense under 40 C.F.R. §§ 122.41(m) and (n).

114. Historically, EPA and authorized NPDES States have issued NPDES permits for emergency discharge locations such as pump stations and specifically constructed SSO overflow devices.

A. EPA Headquarters

115. By letter dated December 21, 2001, EPA Headquarters sent a draft memorandum entitled "NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions" (hereinafter "EPA Wet Weather Guidance") to the Water Division Directors, EPA Regions I-X and to Authorized NPDES State Program Directors. The EPA Wet Weather Guidance stated that:

> When submitting an application for an NPDES permit to discharge from a POTW, the applicant must identify all outfalls that discharge to waters of the United States, including "constructed emergency overflow" outfalls located on the sanitary sewer collection system that discharge to waters of the United States (see 40 CFR 122.21 (j)(1)(viii)(A)). Emergency overflow outfall structures are recognized in some State and local design standards.

116. The EPA Wet Weather Guidance further stated that:

> If an anticipated discharge from an emergency outfall is identified and fully disclosed to the NPDES permit authority, and considered during the permitting process as documented in the public record consistent with the applicable NPDES regulations, EPA's policy is that the permit should address any discharges *(e.g.,* incorporate effluent limits or prohibit discharges) from such an outfall. For a more complete explanation, see the memorandum entitled 'Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits,' April 11, 1995.
>
> * * *
>
> A discharge from an emergency outfall identified in a permit is also subject to the bypass provision of the permit.

117. EPA has never published any final policy or regulation that prohibits the NPDES permitting of emergency outfalls from the collection system.

B. EPA Regions III and IV Have Prohibited the Permitting of SSO Outfalls

118. On information and belief, EPA Region III has declared to dischargers and

approved NPDES States that SSO discharges must be eliminated. EPA Region III has further declared to dischargers and approved NPDES States that SSO emergency outfalls cannot be permitted.

119. On information and belief, EPA Region III has objected to State draft or proposed NPDES permits that include an SSO outfall as a permitted outfall.

120. A December 6, 1996 letter from Bill Colley and Lynnette Elser, EPA Region III, to Kevin Weiss, EPA Headquarters regarding "Review of Sanitary Sewer Collection System and SSO Unified Paper (November 20, 1996 Version)" stated that: "[t]his Region believes that SSOs are illegal," that "[t]his region requires that SSOs are eliminated," and that "[t]he SSO structures in a sewer system are usually not permitted, at least in Region 3."

121. Additional comments contained in the Dec. 6, 1996 email from Bill Colley at Region II to Kevin Weiss at EPA Headquarters sets forth Region III's position that "SSOs are unpermitted discharges for which affirmative defenses are not available."

122. On information and belief, EPA Region III will not permit SSO outfalls in an NPDES permit nor allow its approved NPDES States to permit SSO outfalls in a municipal NPDES permit unless a biological treatment plant meeting secondary treatment standards is constructed.

123. On information and belief, EPA Region IV has declared to dischargers and approved NPDES States that SSO discharges must be eliminated. EPA Region IV has further declared to dischargers and approved NPDES States that SSO emergency outfalls cannot be permitted.

124. On information and belief, EPA Region IV has objected to State draft or proposed NPDES permits because it includes an SSO outfall as a permitted outfall.

125. The document prepared by Mary Kay Lynch, Chief, Water Enforcement Branch of Region IV, for distribution at the December 16, 1996 meeting of the SSO Federal Advisory Subcommittee, entitled "Region 4 Comments," states that "Region 4 has already taken a position ... opposing the application of the Upset/Bypass language to SSOs. All such discharges to Waters of the United States should be subject to appropriate enforcement action."

126. On information and belief, EPA Region IV will not permit SSO outfalls in an NPDES permit nor allow its approved NPDES States to permit SSO outfalls in a municipal NPDES permit unless a biological treatment plant meeting secondary treatment standards is constructed.

127. Refusal to permit SSO outfalls precludes a POTW from raising the upset and bypass defenses even if the POTW would otherwise meet the requirements under 40 C.F.R. §§ 122.4 1(m) and (n).

VII. GENERAL ALLEGATIONS REGARDING SSO PERMITTING STANDARD

128. On information and belief, EPA and approved NPDES States have issued NPDES permits authorizing discharge from SSO locations wherein secondary treatment effluent limitations have not been imposed.

129. EPA Headquarters briefing material from the "Sanitary Sewer Overflow (SSO) Policy Dialogue" (on or about March 9-10, 1995), contained a document entitled "SSO Questions and Answers." Item #7 on "SSO Questions and Answers" stated:

> **What technology-based requirements apply to permits for SSOs?**
>
> The CWA does not clearly specify whether the technology-based standard for permits for SSOs would be secondary treatment or best available technology economically achievable (BAT) for toxic pollutants and pollutants which are neither toxic nor conventional pollutants and best conventional pollutant control technology (BCT) for conventional pollutants. The secondary treatment

> standard applies to publicly owned treatment works (POTWs). EPA has defined POTW to include 'pipes, sewers, or other conveyances only if they convey wastewater to a POTW providing treatment.' 40 CFR 122.2. In the CSO context, EPA has interpreted this definition to provide that secondary treatment requirements are only applicable to discharges from the POTW, not discharges from CSO outfalls that occur prior to reaching the headworks of the treatment works. This interpretation was upheld in 1980. *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 592 (D.C. Cir. 1980). EPA has not clarified whether SSOs should be addressed in a similar or different manner.

130. In the absence of any EPA rulemaking to the contrary, BAT/BCT is the appropriate technology-based standard to be applied to SSO discharges.

B. EPA Regions III and IV Impose Secondary Treatment on SSOs

131. On information and belief, EPA Region III has declared to dischargers that SSO discharges, to be permittable, are subject to secondary treatment standards.

132. On information and belief, EPA Region III has declared to approved NPDES States that SSO discharges, to be permittable, are subject to secondary treatment standards.

133. On information and belief, EPA Region III will only permit SSO outfalls in an NPDES if the permittee installs, at a minimum, technology to meet secondary treatment standards.

134. On information and belief, EPA Region IV has declared to dischargers that SSO discharges, to be permittable, are subject to secondary treatment standards.

135. On information and belief, EPA Region IV has declared to approved NPDES States that SSO discharges, to be permittable, are subject to secondary treatment standards.

136. On information and belief, EPA Region IV will only permit SSO outfalls in an NPDES if the permit, at a minimum, imposes secondary treatment standards.

VIII. ATTEMPTS BY PLAINTIFF TO HAVE EPA HEADQUARTERS RESOLVE THESE ISSUES UNSUCCESSFUL

137. Representatives of AMSA member agencies served on the SSO Subcommittee of EPA's Wet Weather Federal Advisory Committee ("FACA") from its inception in 1995, and

participated in the effort to forge a consistent national policy or regulation concerning SSO discharges.

138. AMSA representatives were present at the December 16, 1996 meeting of the FACA subcommittee when the differences between EPA Headquarters and several of the EPA Regions regarding the permitting of SSOs and the application of the Bypass defense first became prominent. AMSA representatives urged EPA at that time to develop a single agency position on these issues.

139. In letters dated March 5, 1997 and March 26, 1997, AMSA urged EPA to complete the process of forging a single, national policy on these issues.

140. By letter dated September 19, 2000 AMSA sought assistance from the EPA Assistant Administrator for Water to resolve the growing dispute over the practice of blending that had arisen between several EPA Regions and EPA Headquarters divisions.

141. By letter dated January 10, 2002, AMSA submitted written comments on the blending issue to EPA Headquarters in connection with the draft EPA policy entitled "Wet Weather Treatment Scenarios at POTWs."

142. AMSA representatives have met with EPA Headquarters on several occasions over the past several years to discuss the need for EPA Headquarters to resolve issues relating to the practice of blending and the permitting of emergency outfalls.

143. Whereas EPA Headquarters' Office of Water has consistently agreed that blending is allowed under the NPDES regulations, the Office of Water has failed to preclude EPA Region III, IV or VI from pursuing a contrary view.

144. Whereas EPA Headquarters' Office of Water has consistently agreed that the permitting of emergency outfalls is allowed under the NPDES regulations, the Office of Water has failed to preclude EPA Region III or IV from pursuing a contrary view.

145. Due to EPA Headquarters' failure to act, confusion by EPA Regions III, IV and VI still exist as to whether they may prohibit blending or the permitting of emergency outfalls, and what is the proper legal standard to be applied to SSOs.

146. EPA's failure to act to clarify the above issues has, among other things, delayed implementation of SSO corrective measures, forced communities to file appeals, exacerbated potential periods of noncompliance, unduly extended moratoriums imposed upon new connections to municipal plants, forced State agencies to delay reissuance of NPDES permits, and increased project costs associated with wet weather flow management.

IX. CLAIMS FOR RELIEF

COUNT I
(Regional Rules Regarding Blending Are *Ultra Vires*)

147. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 146 of this Complaint and reallege them as if fully set forth herein.

148. EPA Regions III, IV and VI have declared blending to be prohibited.

149. Neither the Regional Administrator nor any other member of EPA Regions III, IV or VI has the authority to promulgate a rule.

150. EPA Region III, IV and VI never promulgated a rule in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, prohibiting blending.

151. The adoption of rules by EPA Regions III, III and VI prohibiting blending is *ultra vires.*

152. EPA Headquarters' Office of Water has declared blending to be a practice that can be authorized under an NPDES permit.

153. EPA Regions III, IV, and VI are without authority to prohibit blending.

154. EPA Regions III, IV, and VI are without authority to adopt an interpretation of national CWA federal regulations different than that provided by EPA Headquarters' Office of Water.

155. Plaintiff has suffered harm as a result of EPA Region III, IV, and VI's actions. Plaintiff's members must construct and operate unnecessary and costly pollution control facilities to meet the more stringent Regional interpretation of the national federal regulation or else be subject to an enforcement action.

156. Plaintiff's members have suffered harm as a result of EPA Region III, IV, and VI's actions in that delays in the permit reissuance process has resulted in the delay of approvals associated with further implementation of pollution abatement programs.

COUNT II

(Regional Rules Prohibiting the Permitting of Emergency Outfalls Are *Ultra Vires*)

157. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 156 of this Complaint and reallege them as if fully set forth herein.

158. EPA Headquarters has declared that the regulations provide for the permitting of emergency outfalls.

159. Nevertheless, EPA Regions III and IV have declared that it and its approved NPDES States will not permit emergency outfalls, but instead will keep such outfalls in a state of noncompliance and subject the POTW to an enforcement action.

160. Neither the Regional Administrator nor any other member of EPA Region III or IV has the authority to promulgate a rule.

161. EPA Regions III and IV never promulgated a rule in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, prohibiting the permitting of emergency outfalls.

162. The refusal of EPA Regions III and IV to permit emergency outfalls is *ultra vires.*

163. Plaintiff has suffered harm as a result of EPA Region III and IV's actions. Plaintiff's members must construct and operate costly pollution control facilities to eliminate SSOs that would otherwise be subject to the bypass defense associated with a permitted outfalls.

COUNT III

(EPA Regions Are Without Authority to Impose Secondary Treatment Standards on SSOs)

164. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 163 of this Complaint and reallege them as if fully set forth herein.

165. EPA Regions III, IV, and VI have declared that the NPDES permitting of SSOs is subject to the secondary treatment standard.

166. Neither the Regional Administrator nor any other member of EPA Region III, IV, or VI has the authority to promulgate a rule.

167. EPA Regions III, IV and VI have never promulgated a rule in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, establishing secondary treatment as the standard applicable to SSOs.

168. The adoption of a rule by EPA Regions III, IV, and VI establishing secondary treatment as the standard applicable to SSOs is ultra vires.

169. EPA Regions III, IV, and VI are without authority to impose secondary treatment standards upon SSOs absent rulemaking.

170. Plaintiff has suffered harm as a result of EPA Region III, IV, and VI's actions. Plaintiff's members must construct and operate unnecessary and costly pollution control facilities to meet the Regional standard imposing secondary treatment requirements or else be subject to an enforcement action.

COUNT IV

(EPA Region III, IV, and VI Dictates Violate Administrative Procedure Act)

171. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 170 of this Complaint and reallege them as if fully set forth herein.

172. EPA Regions III, IV, and VI have declared that blending is prohibited. EPA Region III and IV have declared that the permitting of emergency outfalls is prohibited. EPA Regions III, and IV have declared that discharges from SSOs are subject to the secondary treatment standard.

173. These various mandates have been issued by EPA Regions III, IV, and VI without notice and comment rulemaking.

174. The establishment of such regulatory mandates requires EPA to follow rulemaking procedures as set forth in the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

175. EPA Region III, IV, and VI's actions have been taken in contravention of the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

COUNT V

(EPA Regional Policies Are Arbitrary and Capricious or Otherwise Not in Accordance with Applicable Regulations)

176. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 175 of this Complaint and reallege them as if fully set forth herein.

177. EPA Regions III, IV, and VI have declared that blending is prohibited. EPA Regions III and IV have declared that the permitting of emergency outfalls is prohibited. EPA Regions III and IV have declared that the permitting of SSOs is subject to the secondary treatment standard.

178. EPA Regions III, IV, and VI have sought to enforce and impose liability upon POTWs based upon these Regional declarations.

179. The various Regional policies dictate specific plant designs without considering the CWA factors applicable to such NPDES decisions.

180. Designing a treatment plant so that one hundred percent of the influent goes through each treatment unit will reasonably be expected to result in operational problems under high and low flow conditions resulting in a lower quality effluent during such events.

181. A prohibition on blending for those POTWs which currently blend peak wet weather flows will reasonably be expected to require POTWs to build additional treatment units to meet applicable effluent limitations during peak wet weather events.

182. Additional treatment units will require resources to operate and maintain. Additional treatment units will utilize non-renewal resources and divert limited municipal resources from other environmentally beneficial projects.

183. EPA dictates that cause more environmental harm than good constitute arbitrary and capricious behavior.

184. The various Regional mandates impose non-cost effective solutions to municipal wet weather flow management contrary to applicable rules and the CWA.

185. The various Regional mandates impair the ability of Plaintiff's members to timely address and remedy untreated overflows and are inconsistent with the proper interpretation and application of the secondary treatment and bypass regulations.

186. The various Regional mandates impair the ability of Plaintiff's members to blend and will, accordingly, result in an increase in the number of untreated overflows pending other long-term solutions.

187. The various Regional mandates place additional restrictions on the application of the bypass and upset rule defenses effectively negating such defenses.

188. Consequently, imposition of the various Regional mandates is arbitrary and capricious and an abuse of discretion as they are not in accordance with the applicable regulations.

COUNT VI

(Agency Action Unlawfully Withheld and Unreasonably Delayed)

189. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 188 of this Complaint and reallege them as if fully set forth herein.

190. Plaintiff has sought EPA Headquarters clarification that the various Regional mandates improperly implement CWA requirements pertaining to municipal wet weather flow management.

191. EPA Headquarters has acknowledged that there is no legal or technical basis for the Regional imposition of these various mandates.

192. EPA Headquarters has acknowledged that neither the secondary treatment regulation nor the bypass regulation prohibits blending or the NPDES permitting of emergency discharges.

193. EPA Headquarters has acknowledged that blending and NPDES permits authorizing emergency discharges have been frequently authorized by EPA and approved NPDES States in accordance with applicable law.

194. Despite these admissions, EPA Headquarters has unreasonably delayed and has failed to address the misapplication of CWA requirements by its Regional offices.

195. EPA's failure to remedy the inappropriate Regional mandates in a timely manner, in light of its admissions, has and continues to harm Plaintiff and constitutes agency action unlawfully withheld or unreasonably delayed.

COUNT VII

(EPA Has Failed to Consider Secondary Treatment or BAT/BCT Factors, As Applicable, In Establishing Standards)

196. Plaintiff incorporates by reference the allegations of Paragraphs I through 195 of this Complaint and reallege them as if fully set forth herein.

197. Section 304(d) of the CWA, 33 U.S.C. § 1314(d), requires the Administrator, after consultation with, *inter alia*, interested persons, from time to time to issue information on the degree of effluent reduction attainable through the application of secondary treatment.

198. Sections 304(b)(2)(B) and 304(b)(3)(B) of the CWA, 33 U.S.C. §§ 1314(b)(2)(B) and 1314(b)(3)(B), require the Administrator to consider, among other things, the engineering aspects of the application of various types of control techniques and the costs of achieving effluent reduction in establishing BAT and BCT standards. EPA Regions III, IV, and VI have failed to consider these factors in establishing limitations and in mandating the use of storage basins or expanded biological facilities to process peak wet weather flows.

199. EPA Region III, IV, and VI have failed to identify the degree of effluent reduction attainable through the application of secondary treatment if one hundred percent of peak wet weather flows must be routed through each and every unit.

200. EPA Region III, IV, and VI have failed to identify the degree of effluent reduction attainable through the application of secondary treatment if such standard is applied to dilute wastewater associated with intermittently discharging SSOs.

201. Such failure violates the guidelines and procedural requirements established under the CWA for the development of secondary treatment standards or other effluent guidelines.

COUNT VIII

(EPA Action Violates the Unfunded Mandates Reform Act)

202. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 201 of this Complaint and reallege them as if fully set forth herein.

203. Title II of the Unfunded Mandates Reform Act of 1995 ("UMRA"), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for

proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

204. Before promulgating an EPA rule for which a written statement is needed, Section 205 of the UMRA generally requires EPA, with limited exceptions, to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule.

205. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

206. The dictates of EPA Regions III, IV, and VI pertaining to blending will result in expenditures by local governments of $100 million or more in any one year.

207. Upon information and belief, the dictates of EPA Regions III and IV pertaining to the permitting of emergency outfalls can be expected to result in expenditures by local government of $100 million or more in any one year.

208. The dictates of EPA Region III and IV pertaining to the imposition of secondary treatment standard upon SSO discharges will result in expenditures by local governments of $100 million or more in any one year.

209. EPA Region's III, IV, and VI have not considered and adopted the least costly, most cost-effective, or least burdensome alternatives in accordance with the Unfunded Mandates Reform Act.

210. EPA Regions III, IV, and VI have failed to develop and implement a small government agency plan in accordance with the Unfunded Mandates Reform Act.

211. The actions of EPA Region III, IV, and VI are in contravention of the Unfunded Mandates Reform Act.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands Judgment in its favor against the Defendants and asks that the Court:

1. Declare that EPA Regions III, IV and VI do not have the authority to promulgate rules under the Clean Water Act or any other statute and therefore their more restrictive requirements regarding blending, emergency bypass, and the application of secondary treatment to SSOs are *ultra vires.*
2. Declare that the various EPA Region III, IV, and VI requirements regarding blending, emergency outfall permitting and application of secondary treatment rule limitations to SSOs are arbitrary and capricious, an abuse of discretion and not otherwise in accordance with law.
3. Declare that neither the federal bypass nor federal secondary treatment rule restrict the ability of municipal entities to design and operate facilities that utilize blending to process peak wet weather flows.
4. Declare that where blending has been designed as part of the plant operations, it is authorized and shall continue to be authorized under the Clean Water Act, 33

U.S.C. § 1251 *et seq.*, and its implementing regulations regardless of whether or not the NPDES permit specifically references blending as an operational practice.

5. Declare that SSOs may receive NPDES permits covering emergency outfall locations subject to the upset and bypass rule provisions and that EPA Regions III and IV may not prohibit the NPDES permitting of emergency outfall locations.

6. Declare that BAT/BCT standard, not secondary treatment, is applicable to municipal facilities located in the collection system *(i.e.*, above the POTW headworks) that are designed to treat only intermittent peak wet weather flows.

7. Declare that EPA must comply with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, rulemaking requirements if it is to restrict blending, restrict permitting of emergency outfalls, or impose secondary treatment upon SSOs.

8. Declare that EPA must comply with the Unfunded Mandates Reform Act and publish the written statement, including the cost impacts information, if it is to restrict blending, restrict the permitting of emergency outfalls, or impose secondary treatment upon SSOs.

9. Enjoin EPA Regions III, IV and VI from any further implementation of mandates that prohibit blending and from objection or veto of any NPDES permits which implicitly or explicitly allow blending of peak wet weather flows.

10. Enjoin Defendants from taking any enforcement action based upon the allegation that blending is illegal or a prohibited bypass unless specifically authorized in the NPDES permit.

11. Enjoin EPA Regions III and IV from any further implementation of requirements that prohibit permitting of emergency outfalls and from objection or veto of any NPDES permits that authorize discharge from emergency SSO outfalls.

12. Enjoin Defendants from applying the secondary treatment regulations to peak excess flow treatment facilities and instead apply the BAT/BCT analysis.

13. Award Plaintiff reasonable attorney fees and costs for this Action.

14. Provide Plaintiff such other relief as the Court may deem just and equitable under the circumstances.

Respectfully Submitted:

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