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,

v.

CASE NUMBER 1:02CV01361
JUDGE: Henry H. Kennedy
DECK TYPE: Administrative Agency Revie
DATE STAMP: 07/08/2002

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 30303-3104

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.

COMPLAINT

I. PRELIMINARY STATEMENT

Plaintiffs are municipalities and associations (acting on behalf of its members who are municipalities or municipal entities). The individual municipal Plaintiff and members of the associational Plaintiffs 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, preamble, and evidenced by historical practice and interpretation provided by EPA Headquarters, municipalities are allowed to undertake certain cost effective operational options known as "blending" or "slip-streaming." Notwithstanding such latitude and the approval of such practice by other EPA Regions and approved NPDES States (*i.e.*, States approved 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 Plaintiffs.

Similarly, EPA regulations, preamble, 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 affects upon the Plaintiffs.

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 and treat 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 publicly owned treatment works ("POTWs") are subject to the "secondary treatment" technology-based standard, *see* 33 U.S.C. § 1311(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). Whereas EPA Headquarters had determined that the BAT/BCT is applicable to SSO discharges, EPA Headquarters has recently reversed its position and various EPA Regions have issued binding guidance and/or directives to the regulated community and approved NPDES States directing that secondary treatment be applied to SSO discharges. Such action has immediate and adverse affects upon the Plaintiffs.

The above actions by EPA Regions in issuing binding guidance and/or directives have been undertaken without the establishment 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 Plaintiffs.

Plaintiffs request declaratory and injunctive relief. Plaintiffs request 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 pending completion of regulations promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* Furthermore, Plaintiffs request that this Court Order EPA 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, Plaintiffs allege 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, and various Regional Offices thereof, imposing binding rules upon Plaintiffs 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.* EPA final agency action is 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, U.S. Environmental Protection Agency, 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 U.S. Environmental Protection Agency 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, U.S. Environmental Protection Agency 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 and the decision-making for ultimate resolution of these issues.

III. PARTIES

A. Pennsylvania Municipal Authorities Association

10. The Pennsylvania Municipal Authorities Association ("PMAA") is an association created under Pennsylvania law. Its members include approximately 625 Pennsylvania authorities formed pursuant to the Municipal Authorities Act of 1945, May 2, 1945, P.L. 382, *as amended*, 53 P.S. § 301, *et seq.* Of these, approximately 418 municipal authorities are in whole or in part sewage authorities and, therefore, have the responsibility to own and/or operate wastewater systems to address municipal sewage. Part of PMAA's mission is to represent its members on statewide NPDES regulatory and compliance issues.

11. A majority of the 418 municipal authorities with sewage responsibility have NPDES permits issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

12. EPA has identified members of PMAA as having SSO discharges, employing blending to process wastewater flows, and having locations where emergency discharges may occur.

13. It is estimated that members of PMAA provide services, including sewer, water, and garbage, to more than 6,000,000 Pennsylvania citizens.

14. SSO discharges by PMAA members will need to be eliminated unless in compliance with applicable NPDES permit requirements.

15. Members of PMAA are adversely impacted and will be adversely impacted by EPA Region's III's mandate that NPDES permits not allow blending and not permit

emergency outfalls, and by EPA's Region III's mandate that SSOs are subject to secondary treatment standards.

16. Members of PMAA must change or adjust their conduct to EPA Region III's mandate or risk costly sanctions. Failure of PMAA members to adjust their conduct to the mandates of EPA Region III will have legal consequences.

17. In order to avoid sanctions by EPA Region III, members of PMAA are required and/or will be required to spend more money on facilities and pollution control than is otherwise required by law.

18. Members of PMAA are adversely impacted by EPA Region III's mandates in that approved NPDES States in Region III, including the Commonwealth of Pennsylvania, must conform their NPDES permitting practices to the dictates set forth by EPA Region III, subject to EPA objecting to or vetoing State-issued NPDES permits.

B. Tennessee Municipal League

19. The Tennessee Municipal League ("TML") is a voluntary, cooperative organization established by the cities of the State of Tennessee for their mutual assistance and improvement.

20. TML represents Tennessee municipalities in negotiations and other relationships with other agencies and instrumentalities, governmental and non-governmental, whose activities may affect TML.

21. Part of TML's purpose and service is to represent its members on statewide NPDES regulatory and compliance issues.

22. Most, if not all, of the TML members have NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342 and T.C.A. 69-3-101 *et seq.*

23. SSO discharges by TML members will need to be eliminated unless in compliance with applicable NPDES permit requirements.

24. If TML members that currently blend are prohibited from blending, either effluent violations or additional SSOs may result pending construction of larger treatment units.

25. Members of TML are adversely impacted and will be adversely impacted by EPA Region's IV's mandate that NPDES permits neither allow blending nor permit emergency outfalls.

26. Members of TML are adversely impacted by EPA Region IV's mandates in that approved NPDES States in Region IV, including the State of Tennessee, must conform their NPDES permitting practices to the dictates set forth by EPA Region IV subject to EPA objecting to or vetoing State-issued NPDES permits.

27. Members of TML are adversely impacted by EPA Region IV's mandates in that TML members are appealing and must continue to appeal their NPDES permits if blending is not allowed by the permits. Such permits are being stayed pending EPA issuance of a policy or regulation addressing this issue.

28. Members of TML are adversely impacted by EPA Region IV's mandates in that TML members are expending significant sums to construct additional facilities to address peak weather flows that would otherwise be adequately addressed by blending. TML members are further adversely impaired by EPA Region IV's declaration that blending is an illegal bypass subject to CWA penalties.

29. Members of TML are adversely impacted by EPA Region IV's mandate that SSO discharges meet secondary treatment standards.

C. City of Little Rock Sanitary Sewer Committee

30. The City of Little Rock Sanitary Sewer Committee ("Little Rock") owns and operates POTWs subject to NPDES permits issued by the State of Arkansas.

31. Little Rock has been threatened with criminal sanctions by the federal government due to its use of blending.

32. Little Rock has received notices of violation ("NOVs") from EPA Region VI due to Little Rock's use of blending.

33. EPA Region VI has told Little Rock that blending is illegal.

34. Little Rock 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.

IV. STATUTORY BACKGROUND

35. 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 for discharge that must be met by "point sources." *Maier, et al., v. United States Environmental Protection Agency,* 114 F.3d 1032 (D.C. Cir. 1997).

36. 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).

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

38. 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), *affirmed sub nom Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

39. 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 State. First, minimum technology-based requirements are imposed upon facilities. *E.I. DuPont deNemours & Co. v. Train,* 430 U.S. 112, 97 S.Ct. 965, 51 L.Ed.2d 204 (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); *accord,* 40 C.F.R. § 122.44(d).

40. 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 point sources, which are POTWs, and those that are not.

41. CWA Section 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).

42. CWA Section 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 section 33 USCS § 1314(d)(1).

43. 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."

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

45. 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.

46. 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.

47. A sewage overflow point is not 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).

48. Discharges or overflows from a municipal owned sewer system which 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.

49. Technology-based standards are set 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 which 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.

50. EPA has determined that the technology underlying the development of the secondary treatment regulation (*i.e.,* typically biological treatment) is impracticable or infeasible for treating intermittent, weak wastewater flows associated with SSOs.

51. When EPA promulgated the secondary treatment standards in 1973, EPA never evaluated the degree of pollution control that could be achieved by POTWs treating peak wet weather flows. *April 5, 2002FOIA Response from EPA Office of Wastewater Management.*

52. 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.

53. 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).

54. The bypass regulation precludes a permittee from turning off a treatment unit and "coast" simply because the discharger is momentarily not in danger of violating effluent limitations. *NRDC v. EPA,* 822 F.2d 104, 123 (D.C. Cir. 1987).

55. "The bypass regulation does not, in fact, 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

56. "Blending, "slip-streaming" or "recombination" (hereinafter referred to as "blending") generally 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.

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

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

59. Generally, if flow significantly above the hydraulic capacity of a POTW treatment unit is all 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.

60. Generally, if flow 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.

61. 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.

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

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

64. No final EPA rule or Headquarters policy requires that in order for a POTW to legally blend, blending must be specifically referenced in the permit.

65. No final EPA rule 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.

66. On or about March 2001, EPA had an NPDES Branch Chiefs' Meeting that addressed, *inter alia,* blending.

67. EPA Headquarters provided a handout at the NPDES Branch Chiefs' Meeting entitled "Recombination/Blending of Peak Wet Weather Flows at POTWs" (hereinafter "EPA HQ Handout").

68. With respect to blending, the "EPA HQ Handout" states:

- NPDES authorities have addressed this scheme inconsistently.

- Rerouting design sometimes approved under Construction Grants program.

- 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.

69. NPDES permits have been issued which authorize blending.

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

71. An NPDES permittee is required to properly operate its treatment plant. 40 C.F.R. § 122.41(e).

72. Generally, it would be improper for a permittee to operate its treatment plant in a manner that results in effluent limitation violations when the permittee could have operated the plant in a manner that would comply with effluent limitations.

A. EPA Headquarters – Regulatory History of Blending

(i) Blending is Deemed an Appropriate Engineering Practice and Approved in EPA Grants

73. 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.

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

75. An EPA 1974 publication entitled "Technical Bulletin – Design Criteria for Mechanical, Electric, and Fluid System and Component Reliability," @ Paragraph 211.5, Pages 17-18, states that:

> The design of the wastewater treatment system shall include provisions for bypassing around each operation. The bypassing system . . . shall be designed to provide

> control of the diverted flow such that only that portion of the flow in excess of the hydraulic capacity of the units in service need be bypassed . . . .

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

77. By letter dated April 5, 2002, EPA's Office of Wastewater Management responded to a Freedom of Information Act, 5 U.S.C. § 551, request (hereinafter "EPA April 5, 2002 FOIA response") stating:

> EPA has a number of documents indicating that 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.

78. Information obtained by EPA from the Association of Metropolitan Sewerage Agencies ("AMSA") indicates that numerous POTWs across the country are designed to blend peak wet weather flows.

79. EPA's 1975 program guidance entitled "Program Guidance Memorandum PG-61" (Dec. 16, 1975) pertaining to construction grants emphasized secondary treatment of dry weather flows. EPA discourages funding redundant components or storage systems to treat wet weather flows.

80. EPA's 1977 publication entitled "Value Engineering, Case Studies and Formats for Proposals and Reports, A Supplement to the Value Engineering Workbook for Construction Grant Projects," (June 1977) indicates that plant designs and construction grants approved by EPA incorporate blending to process peak wet weather flows.

81. 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.

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

83. By letter dated April 8, 2002, EPA's Office of Wastewater Management responded to a Freedom of Information Act, 5 U.S.C. § 551, request (hereinafter "EPA April 8, 2002 FOIA response") stating:

> EPA has information from Water Environment Manuals of Practice that provide that:
>
> - [W]here peak flows approach or exceed the design capacity of a treatment plant they can seriously reduce treatment efficiency. [Footnote omitted.]
>
> - Activated sludge systems are particularly vulnerable to high volume peak flows. Peak flows that approach or exceed design capacity of an activated sludge unit shift aeration basin solids inventory to the clarifiers and can lead to excessive solids losses (*i.e.*, wash out the biological mass necessary for treatment). [Footnote omitted.]
>
> - [I]f the clarifier experiences excesses loss of solids, treatment efficiencies can be lowered for weeks or months until the biological mass in the aeration basin is reestablished . . . .

84. EPA's April 8, 2002 FOIA response stated:

> EPA has information from Water Environment Manuals of Practice that provide that:

- There are a number of design and operational options routinely employed by POTWs to handle peak wet weather flows without an excessive loss of solids from the clarifiers. [Footnote omitted.] These include utilizing the full capacity of the biological treatment unit and providing primary treatment for additional flows where primary treatment capacity exceeds the capacity of the biological unit. Excess flows receiving primary treatment are typically either discharged directly to receiving waters, with or without disinfection, or recombined with the effluent from the biological unit, disinfected and discharged.

(ii) Permittee Has Option of Choosing Technology – Biological Treatment Not Required

85. EPA does not have the authority under CWA to dictate how a plant may be designed to achieve applicable effluent limitations.

86. 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."

87. At 48 *Fed. Reg.* 52259 (Nov. 16, 1983), EPA stated that "[w]ith the exception of the SS 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."

88. In a response to a Congressional inquiry, EPA's letter dated March 2, 2001 from Diane Regas, Acting Assistant Administrator for Water, to Congressman Gekas stated:

> **Do the secondary treatment regulations preclude the use of non-biological facilities that otherwise meet secondary treatment objectives?**
>
> No. The secondary treatment regulations define minimum levels of effluent quality for publicly owned treatment works (POTWs). These requirements are in the form of 7-day and 30-day average effluent concentrations and a 30-

> day average percent removal requirement. With the exception of alternative requirements for facilities eligible for treatment equivalent to secondary treatment, 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.

(iii) Secondary Treatment Regulation Did Not Prohibit Blending

89. In 1973 when EPA promulgated the federal secondary treatment standards at 40 C.F.R. Part 133, EPA 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.

90. When EPA subsequently amended the federal secondary treatment standards at 40 C.F.R. Part 133, EPA did not consider the costs associated with biologically treating one hundred percent of peak wet weather flows.

91. EPA's April 5, 2002 FOIA response stated:

> EPA did not estimate costs associated with ensuring that the biological treatment operation was sized to process all peak wet weather flows under all conditions.

92. 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 as discussed in EPA' s 1982 Concept Paper entitled "Preliminary Concept Paper, Analysis of the 1981 Clean Water Act Amendments and Required Regulatory Changes: Secondary Treatment Information Regulation," (40 CFR Part 133) (July 23, 1982).

93. The federal secondary treatment regulations were based upon a criterion of "proper design and operation" 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.

94. The federal secondary treatment regulations do not intend that municipalities be required to construct advanced wastewater treatment plants such as a plant designed to nitrify.

95. If secondary treatment units must be designed to process one hundred percent of all peak wet weather flows, such design would cause the facility to nitrify under dry weather conditions for many communities.

96. EPA's April 5, 2002 FOIA response stated:

> There is no information on the record to the secondary treatment regulation that indicates that EPA considered restricting the practice of blending primary treated peak flows with other flows receiving biological treatment as a wet weather flow management option for achieving compliance with secondary treatment limitations.

(iv) Bypass Regulation Did Not Prohibit Blending

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

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

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

100. 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.

101. Preamble to the 1978 proposed NPDES rules at 43 *Fed. Reg.* 37080 (August 21, 1978) states that the intent of the bypass rule is to provide "fair treatment . . . while ensuring proper pollution control through adequate design operation and maintenance of treatment facilities."

102. In 1984 when EPA revised the NPDES regulations, EPA declared at 49 *Fed. Reg.* 38036 (September 26, 1984) that the intent of the bypass rule is to excuse certain justifiable effluent limitation violations and for "permittees to operate control equipment at all times, thus obtaining maximum pollutant reductions consistent with technology-based requirements."

103. In 1984 when EPA revised the NPDES regulations, EPA 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."

104. In 1984 when EPA revised the NPDES regulations, EPA 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."

105. A legal challenge to, *inter alia,* NPDES "bypass" regulation resulted in a 1987 decision by the U.S. Court of Appeals in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987). The Court of Appeals for the D.C. Circuit upheld EPA's bypass regulation, stating that "[t]he regulation thus ensures that treatment systems chosen by the permittee are operated as anticipated by the permit writer, that is, as they are designed to be

operated and in accordance with the conditions set forth in the permit." *NRDC v. EPA,* 822 F.2d at 122.

106. Upon information and belief, the brief submitted by the U.S. Environmental Protection Agency on the issue of "bypass" in *NRDC v. EPA* states EPA's position that:

> The 'specific' technology 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 insure '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 additional burdens on the 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. Likewise, if routine maintenance procedures allow for repairs during non-process operation, the bypass regulation does not require the treatment facility to run during the non-process time.

107. EPA stated in preamble to the bypass regulation at 53 *Fed. Reg.* 40609 (Oct. 17, 1988) that "the bypass provision merely 'piggybacks' existing requirements, it does not itself impose costs that have not already been taken into account in development of categorical standards."

108. EPA's April 5, 2002 FOIA response stated:

> 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.

109. 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.

110. EPA Headquarters' December 21, 2001, draft memorandum titled "NPDES Requirements fro 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.

111. EPA stated in preamble to the bypass regulation at 53 *Fed. Reg.* 40609 (Oct. 17, 1988) that the intent is for the permittee to "operate the treatment system in a manner consistent with appropriate engineering practice."

112. EPA has no documents from the promulgation of the bypass rule that indicate that the bypass rule was intended to preclude the use of blending as an acceptable engineering practice for wet weather flow management.

113. EPA's April 8, 2002 FOIA response stated:

> EPA has no documents form 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.

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

(v) Longstanding EPA Rule Interpretation Establishes that Blending Can Be Approved in NPDES Permits

115. On January 19, 1993, EPA published notice 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).

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

117. 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. [Hereinafter referred to as "CSO blending language"]

118. 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).

119. EPA's January 2, 2002 Freedom of Information Act, 5 U.S.C. 551, response stated that "[t]here 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 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."

120. A March 12, 1997 from James Pendergast, EPA Headquarters Office of Water, Permits Division, to Lial Tischler, stated 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.

121. On or about May 3, 1999, EPA Region V wrote to EPA Headquarters' Office of Waste Management regarding a question that the Indiana Department of Environmental Management ("IDEM") had about blending. The 1999 Region V correspondence stated that "IDEM has asked whether NPDES permits can be issued authorizing such peak flow routing and recombination without such rerouting and recombination being considered a 'bypass' under federal NPDES regulations at 40 CFR 122.41(m)."

122. The draft EPA Region V response stated that:

> U.S. EPA believes that the answer to IDEM's question is "yes," provided the permit application explicitly describes the circumstances during which the rerouting/ recombination would occur and the permit contains provisions explicitly recognizing those circumstances. U.S. EPA's position is based upon the fact that "bypass" is defined as "the intentional diversion of wastes streams from any portion of the treatment facility," 40 CFR 122.41(m)(1)(i). The question of what constitutes a permittee's "treatment

> facility" is one that can be answered by the permittee in its permit application. See 40 CFR 122.21(f)(7). A permittee can describe in its permit application that the "treatment facility" is designed and constructed for the purpose of providing treatment necessary to comply with NPDES permit effluent limitations is one designed to provide differential treatment of wastestreams during peak flow conditions (*i.e.*, it is designed to provide only primary treatment to certain flows during peak flow conditions). If the permit writer includes in the permit an explicit recognition of this differential treatment, 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 form the 'treatment facility,' and so would not constitute a 'bypass.'

123. EPA Headquarters' Office of Wastewater Management concurred with the EPA Region V draft response set forth above in item 122, above.

124. The EPA HQ Handout (as referenced in paragraph 68, above) stated the position of EPA Headquarters as follows:

> • Under the existing NPDES regulatory framework, an NPDES permit can define the term "treatment facility" as it applies to the bypass provision. The approach encourages the maximum use of the treatment facility during peak wet weather events.

125. The EPA HQ Handout set forth criteria wherein "[a]lternative flow routing schemes would not constitute a bypass."

126. 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 ....

(vi) Significant Costs Would Be Associated with an EPA Prohibition Against Blending

127. The March 7, 2001 letter from Diane Regas, EPA Acting Assistant Administrator for Water, to Senator Frist and the EPA's April 5, 2002 FOIA response confirm 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.

128. Due to the lack of cost information pertaining to "blending," on or about the year 2001, EPA hired a contractor to assess costs.

129. A document dated February 3, 2002 entitled "Draft National Cost Impact Analyses" (hereinafter "EPA LimnoTech Report") was prepared by LimnoTech, an EPA contractor, to assess the costs associated with an EPA prohibition on blending. The EPA LimnoTech Report indicates 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).

130. The EPA LimnoTech Report indicates 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).

131. Upon information and belief, a prohibition on blending would be the single most expensive requirement imposed for conventional pollutant removal (dollars per pound of pollutant removed) under any technology-based regulation ever promulgated by EPA under the Clean Water Act.

132. Upon information and belief, a prohibition on blending would have an impact exceeding $100 million on POTWs in Pennsylvania.

133. Upon information and belief, a prohibition on blending would have an impact exceeding $100 million on POTWs in Tennessee.

134. Upon information and belief, a prohibition on blending would have an impact exceeding $17 million for Little Rock.

B. EPA Regions Authorize Blending

135. Upon information and belief, 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 permit.

136. Approved NPDES States have authorized blending in NPDES permit wherein such authorization did not result in an EPA Region objection to or veto of the NPDES permit.

137. In a December 20, 2001 letter from Walter Andrews, EPA, Region II, to John Hall, Region II indicated that blending can be approved in NPDES permits. The December 20, 2001 EPA Region II letter stated:

> 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 ....

138. Upon information and belief, EPA Region V told the State of Indiana (an approved NPDES State) that blending can be authorized in NPDES permits.

139. By letter dated June 1, 2001, EPA Region V told the State of Wisconsin (an approved NPDES State) that blending can be authorized in NPDES permits.

140. An August 20, 2001 letter from EPA Region IX to the State of California regarding the City of Vacaville's NPDES permit stated that EPA Region IX had adopted the approach set forth in Headquarters' March 7, 2001 letters and that blending can be approved in an NPDES permit.

141. 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.

C. EPA Region III Dictates Ban Blending

142. EPA Region III has declared to dischargers and to approved NPDES States that blending is illegal.

143. EPA Region III has objected to State draft or proposed NPDES permits that allowed blending.

144. EPA Region III has taken the position in enforcement actions against municipalities that blending is illegal.

145. EPA Region III's interpretation that blending cannot be authorized in an NPDES permit is binding upon approved NPDES States in Region III. Approval of blending in an NPDES permit by an EPA Region III approved NPDES State could subject that permit to objection and/or veto by EPA Region III.

146. When EPA objects to a State draft or proposed NPDES permit in the Commonwealth of Pennsylvania, by law the Commonwealth cannot issue or modify the permit except in accordance with the EPA comment. 25 Pa. Code 92.73(4).

147. By letter dated April 29, 1999 from Steven R. McGraw, P.E., Stiffler, McGraw & Associates, Inc. to Rob Sanchez, EPA Region III Office of Compliance & Enforcement, Water Division, a representative for a municipal NPDES discharger (*i.e.*, the Borough of Indiana, Pennsylvania) seeking to incorporate blending into its operation requested EPA Region III's response as to whether blending can be approved.

148. The April 29, 1999 letter from Steven R. McGraw stated that the Pennsylvania Department of Environmental Protection ("DEP") indicated that "[t]hey had some concerns that this methodology for treatment would not be approved by EPA" and, therefore, the Borough of Indiana was requesting an EPA ruling on such matter.

149. A June 22, 1999 response to the April 29, 1999 letter to EPA Region III was written by Lisa Cherup, Department of Justice. The June 22, 1999 response stated that "[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."

150. The June 22, 1999 response on behalf of EPA Region III further stated that "slipstreaming would be prohibited bypassing under the Borough's NPDES permit" and that "[s]uch bypassing could subject the Borough to additional federal enforcement."

151. A July 20, 1999 letter from Brian Mass, Director, EPA Water Enforcement Division, to David McGuigan, Chief, EPA Region III NPDES Branch, pertaining to the Borough of Indiana stated "slipstreaming of treatment units, whether those units are for

primary or secondary treatment, would constitute bypassing and would not be acceptable long-term injunctive relief."

152. A September 13, 1999 letter from Steven R. McGraw, Stiffler, McGraw & Associates to Lisa Cherup, Department of Justice, asked for the Region to "re-think" its position asserting that "blending" is allowed under the regulations and that blending would allow the Borough to meet its effluent limitations "without expenditures for facilities that are not required."

153. An October 20, 1999 letter from Lisa Cherup to a representative of the Borough of Indiana rejected the Borough's request for blending to be approved and required that the Borough of Indiana "propose another solution, or set of solutions ... that will avoid bypassing any treatment unit at the Sewage Treatment Plant" and stated that "the Clean Water Act requires the Borough, among other things, to eliminate all sanitary sewer overflows ("SSOs") from its collection system."

154. If blending is prohibited, NPDES permittee(s) and member(s) of PMAA, would be required to spend millions of dollars for additional plant upgrades.

155. Upon information and belief, various NPDES permits have not been reissued pending resolution of the blending issue, which has been raised with the Commonwealth of Pennsylvania and Region III of the Environmental Protection Agency.

156. Upon 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.

157. As of the date of the filing of this Complaint, pursuant to the direction of EPA Region III, the Commonwealth of Pennsylvania will not authorize blending in an NPDES permit.

158. As of the date of the filing of this Complaint, EPA Region III will not allow its approved NPDES States to authorize blending in a municipal NPDES permit.

D. EPA Region IV Dictates Ban Blending

159. EPA Region IV has declared to dischargers and to approved NPDES States that blending is illegal.

160. EPA Region IV has objected to State draft or proposed NPDES permits that allowed blending.

161. The State of Tennessee has an approved NPDES program pursuant to CWA Section 402(b), 33 U.S.C. § 1342(b).

162. Tennessee's NPDES program was implemented by the Tennessee Department of Health and Environment ("DHE"), which subsequently became the Tennessee Department of Environment and Conservation ("DEC").

163. An April 8, 1991, policy memorandum by the DHE stated that Tennessee allows POTWs to blend and, as such, one hundred percent biological treatment of all flows is not required:

> This Division recently abandoned its policy requiring biological treatment for all flows. This policy prohibited new construction of swirl concentrators or flow schemes that split off peak flows and routed them through primaries only. Under the old policy, the existing systems like this were considered "temporary" only and were required to report flow through those peak flow portion of the plant as "bypasses."

164. Prior to receiving objections from EPA Region IV on or about 1998, the State of Tennessee issued NPDES permits to POTWs that authorized blending. EPA Region IV did not object to or veto such permits.

165. Beginning in 1999, Tennessee POTWs were informed by DHE that the State would no longer authorize blending in NPDES permits because Region IV had told the State that blending was prohibited and that all flow must undergo one hundred percent biological treatment.

166. Members of the Tennessee Municipal League have appealed their NPDES permits because blending is no longer being allowed. The TML members that have appealed their NPDES permits include the communities of Maryville, Cookeville, Dayton, Hohenwald, Pulaski, Lewisburg, and Shelbyville.

167. The NPDES permit appeals by the Tennessee municipalities are stayed pending EPA clarification of the issue. Tennessee DEC has stated that it will not act upon the stayed permits until the blending issue is resolved between EPA Region IV and EPA Headquarters.

168. Upon information and belief, Region IV still refuses to allow Tennessee to issue NPDES permits authorizing blending until EPA Headquarters again addresses the issue in rulemaking or in final guidance.

169. By letter dated June 12, 2000, Tennessee DEC indicated that "[r]evising the language to accommodate Cookeville's [blending] request would result in EPA objection to the permit."

170. A letter dated August 29, 2000 from Milton Hamilton, Tennessee DEC to Suzette Denslow, Executive Director, TML, stated:

> Your letter is correct in stating that TDEC has historically allowed a flexible approach to managing wet weather flows. I believe that a flexible approach is still appropriate. However, at this point, that flexibility will be seen in enforcement discretion. EPA has given us very direct instruction on implementation of 40 CFR § 122.41(m). This prohibits bypass of any portion of a treatment facility other than for essential maintenance.

171. DEC's August 29, 2000 response acknowledged that the Region IV ban on blending would have a "potential financial impact" on TML members.

172. If blending is not allowed by NPDES permits, Tennessee municipalities will need to expend hundreds of millions of dollars to achieve the same level of effluent limitation compliance currently being achieved with blending.

173. The TML had an engineering firm estimate the costs associated with a prohibition on blending for seven Tennessee municipalities. The costs estimate, prepared by J.R. Wauford & Company and entitled "Summary of Analysis of Cost and Ability of WWTPs to meet EPA Region IV Prohibition against Flow Blending" indicated that the cost for the seven municipalities range from $1.55 million for Cookeville to $18.3 million for Maryville.

174. A memorandum dated June 27, 2000 from Douglas Mundrick, EPA Region IV Permits Chief, to Charles Sutfin, EPA Headquarters, responded to EPA Headquarters' request for information pertaining to Regional approval of blending.

The June 27th EPA Region IV Memorandum stated:

> This issue has recently been brought to this Region's attention in the State of Tennessee which has the authority to implement the National Pollutant Discharge Elimination System (NPDES) program. The Region had been requesting that the State bring their standard or 'boilerplate' language of their NPDES permits which are issued to publicly owned treatment works (POTWs) in line with the

> federal requirements of secondary treatment, including language about bypasses and overflows. The State had language in their NPDES permits for POTWs that allowed bypasses during wet weather peak flow conditions and blending with other treated wastewaters. The Region learned from State personnel that some of their previous built POTWs actually allowed in-plant bypassing, some of which were SWIRL devices. Late 1999, the State changed their permit language to attempt to reflect the federal regulations. This language would now consider bypasses to be permit violations. As a result of this, the State is being questioned by the POTWs and various organizations that support the municipalities, whether EPA's interpretation of the secondary treatment is correct as this Region has interpreted it ....

175. The June 27, 2000 EPA Region IV Memorandum attached a Region IV "paper on the subject" of secondary treatment, bypass and blending. The Region IV "paper" attached to the June 27th Memorandum contained a discussion on "blending" which stated:

> Blending is the combination of two or more effluent streams, where the combined flow is discharged through a single permitted outfall and the combined discharge is monitored. Blending can be permitted when all effluent streams have individually received secondary treatment. Blending may be used when a higher efficiency secondary process is used to offset a lower efficiency secondary process (*e.g.*, activated sludge effluent blended with trickling filter effluent). Or blending can be permitted when a portion of a secondary effluent is filtered and the remainder is not, if such a situation is provided for in the NPDES permit. The blending of a secondary effluent and a primary effluent is not permittable, since this would constitute a bypass of the required secondary treatment units ....

176. Through its interpretation of the secondary treatment and bypass regulations, EPA Region IV is dictating how a treatment plant must be designed and operated.

177. The Region IV "paper" attached to the June 27, 2000 EPA Region IV Memorandum set forth EPA Region IV's position that "secondary treatment" means that one hundred percent of all flows must go through biological treatment.

178. The Region IV "paper" attached to the June 27th Memorandum concluded:

> The blending of a secondary waste stream with a waste stream from primary clarifiers, swirl concentrators, or less than secondary processes can not be permitted for either dry weather or wet weather conditions ....

179. A February 4, 2002 letter from Tennessee DEC to EPA Headquarters states that the personnel in EPA Region IV who overview Tennessee's NPDES permits are "insistent" that blending is prohibited under the bypass regulation.

180. The February 4, 2002 letter from Tennessee DEC to EPA Headquarters stated "if the contents of the [EPA December 21, 2000] draft memorandum become official EPA Headquarters policy, this Division will concur and write NDPES permits which will allow the use of 'bypassing and blending,' within the conditions that are included in the memorandum."

181. As of the date of the filing of this Complaint, 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.

E. EPA Region VI Dictates Ban Blending

182. EPA Region VI has declared to dischargers and approved NPDES States that blending is illegal.

183. EPA Region VI issued a "Strategy for Permitting Discharges of Wet Weather-Related Peak Flows" dated December 16, 1998, upon which EPA Region VI

bases its position regarding blending. The Region VI "Strategy for Permitting Discharges of Wet Weather-Related Peak Flows stated:

> Many municipalities in Region 6 have experienced wet weather-related peak flows beyond the treatment capacity of their wastewater treatment plants. Such peak flows may not always be the result of inadequate efforts by municipal permittees to abate infiltration and inflow (I&I) to their wastewater collection system. In addition, peak flows related to wet weather events may not always be biologically treatable, even where existing treatment capacity at the publicly owned treatment works meets appropriate design standards. Besides causing the hydraulic capacity of the treatment units to be exceeded, wet weather-related peak flows may be too low in biochemical oxygen demand to be efficiently treated using biological processes. In such cases, permittees have protected their treatment systems against hydraulic washout by diverting untreated/partially-treated sewage around biological treatment units. Any diversion of wastewater from any portion of a treatment facility is defined as a 'bypass' (40 CFR 122.41(m)).

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

185. Little Rock's POTW was grant funded by U.S. Environmental Protection Agency. The design of the Little Rock POTW includes a process for blending peak wet weather flows.

186. A May 21, 1997 letter from Jack Ferguson, Chief, NPDES Permits Branch, EPA Region VI, to William V. Larrain, Director of Public Utilities, City of Port Arthur, Texas, stated that blending is a prohibited bypass unless it meets the criteria under the bypass regulation for allowable bypasses.

187. A November 23, 1999 e-mail from Jack Ferguson, Chief, NPDES Permit Branch, EPA Region VI, regarding "December 2nd Meeting on Municipal Treatment Recombination – Reply" stated:

> This question of the diversion of waste streams around portions of a waste treatment system has come up on numerous occasions in our Region 6 permit program over the past decade or so.
>
> This is usually presented as some type of 'blend-and-treat' approach, whereby waste only receiving primary treatment is mixed with fully treated waste and discharged with an associated claim that it 'meets the Permit limits' (usually they don't talk about the % removal requirement).
>
> Our answer has always been the same – these types of diversions, either from a municipal or industrial facility, constitute a bypass under 122.41 (*i.e.*, the diversion of waste streams from any portion of a treatment facility.)

188. The November 23, 1999 Region VI e-mail further stated that Region VI had "told municipalities that have 'designed' their treatment system with such a system, that any such diversion must be reported as a bypass and is generally prohibited under the standard permit (regulatory) language."

189. The November 23, 1999 Region VI e-email readily acknowledged the significant financial implications associated with a prohibition on blending. The e-mail stated that a "number of folks have spent, and are spending, fairly significant sums to correct and eliminate these conditions in our region."

190. The discharge of blended effluent by the Little Rock POTW for at least the past five years has been in full compliance with applicable effluent limitations.

191. Nevertheless, in the year 2000 Little Rock was informed that it was being subject to a federal criminal investigation and potential criminal indictment because it blended its effluent and failed to report the "blending" activities as an illegal bypass.

192. Little Rock has spent significant time and resources in meeting with the U.S. Attorney's office to convince the government that "blending" is allowed under the NPDES program.

193. Little Rock has subsequently been informed by the U.S. Attorney's office that the federal government will not bring a criminal action against Little Rock for its blending activities.

194. Nevertheless, Little Rock continues to be told by EPA Region VI that blending is an illegal bypass.

195. As of the date of the filing of this Complaint, 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.

196. Little Rock has proposed to the State of Arkansas to spend approximately $171 million to upgrade the Little Rock treatment facilities and collection system, which would continue to include blending of peak wet weather flows. Region VI's blending policy would prohibit this project, to the detriment of Little Rock.

VI. GENERAL ALLEGATIONS REGARDING PERMITTING OF EMERGENCY OUTFALLS

197. In general, the Clean Water Act prohibits non-emergency SSO discharges to waters of the United States, unless specifically or implicitly authorized by a National Pollutant Discharge Elimination System (NPDES) permit.

198. 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.

199. 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.

200. 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.

201. 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).

202. 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.

203. It is EPA's position that if an outfall is permitted, the NPDES regulations at 40 C.F.R. §§ 122.41(m) and (n) allow for the upset and bypass defenses to be available for the discharge from that outfall.

204. 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).

205. 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

206. By letter dated December 21, 2001, EPA Headquarters sent a draft memorandum entitled "NPDES Requirements fro 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 ....

207. 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.

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

B. EPA Region III Dictates Regarding the Permitting of SSO Outfalls

209. 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.

210. EPA Region III has objected to State draft or proposed NPDES permits that include an SSO outfall as a permitted outfall.

211. 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:

> This Region prefers to treat SSOs as illegal and not permit them for any reason. Once we start permitting SSOs it will be much harder to enforce other SSOs and to enforce effluent limitations due to equity issues.

212. EPA Region III's March 12, 1997 guidance entitled "Region III Interim Guidance for Sanitary Sewer Overflow and NPDDES Permits" sets forth the standard

EPA Region III applies to its approved NPDES States and NPDES municipal dischargers:

> **EPA REGION III INTERIM POSITION ON SSO**
>
> In order to address the SSO issue and establish consistency among our states, Region III will follow the following interim SSO guidance.
>
> SSO discharges shall not be permitted in NPDES permits, but corrected thru an enforcement action, *e.g.*, Administrative Order.
>
> SSOs shall not be included in NPDES permits in order not to weaken enforcement actions for their correction.

213. The EPA Region III March 12, 1997 guidance further indicates that municipalities are not currently to be provided any defense to excusable SSO events until EPA Headquarters promulgates future regulations. The EPA Region III March 12, 1997 guidance stated:

> The existing standard bypass/upset provisions do not apply to the collection system SSOs. EPA HQ's is drafting specific SSO bypass/upset language with a limited defense to apply to SSOs. Region III will wait for this HQ SSO bypass permit condition language.

214. As of the date of the filing of this Complaint, 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.

C. EPA Region IV Dictates Regarding the Permitting of SSO Outfalls

215. 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.

216. Upon 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.

217. The Region IV "paper" attached to the June 27, 2000 EPA Region IV Memorandum contains a discussion on "sanitary sewer overflows" and provided:

> Sanitary Sewer Overflows (SSOs), include discharges from pump stations, manholes and other sewer appurtenances, are violations of the Act and cannot be permitted, since they do not provide a minimum of secondary treatment ....

218. The Region IV "paper" attached to the June 27th EPA Region IV Memorandum concluded that "[p]ermits cannot be written for separate sanitary sewer overflows."

219. As of the date of the filing of this Complaint, 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 if a biological treatment plant meeting secondary treatment standards is constructed.

220. 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. §§ 122.41(m) and (n).

VII. GENERAL ALLEGATIONS REGARDING SSO PERMITTING STANDARD

A. EPA Headquarters Shifting Position

221. 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.

222. 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.

223. By letter dated March 23, 1995 from Michael B. Cook, Director, EPA Office of Wastewater Management, to Myron Knudson, Director, EPA Region VI Water Management, EPA Headquarters responded to Region VI regarding the appropriate

standard to be used in permitting SSO discharges from Houston, Texas. The March 23rd EPA Headquarters letter stated that the SSO discharges should be based upon BAT/BCT.

224. The March 23, 1995 letter stated that "[t]he legal basis for the BAT/BCT analysis (*e.g.*, application of Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 592 (D.C. Cir. 1980)) to sanitary sewer collection systems) should be clearly stated."

225. Pending the completion of EPA rulemaking to the contrary, BAT/BCT is the appropriate technology-based to be applied to SSO discharges.

226. An October 17, 2000 letter from Michael B. Cook, Director, EPA Headquarters Office of Wastewater Management, stated:

> Your first question is whether the secondary treatment regulations apply to facilities that are designed solely to treat wet weather flows from sanitary sewer systems. In response, EPA interprets the Clean Water Act to require that a permit issued for discharges from a treatment facility that is located in a sanitary collection system needs to include effluent limitations based on the secondary treatment regulations (40 CFR Part 133) and any more stringent limitations necessary to meet water quality standards.

B. EPA Region III Imposes Secondary Treatment on SSOs

227. EPA Region III has declared to dischargers that SSO discharges, to be permittable, are subject to secondary treatment standards.

228. EPA Region III has declared to approved NPDES States that SSO discharges, to be permittable, are subject to secondary treatment standards.

229. A November 7, 1996 NPDES permit objection letter from Alvin Morris, EPA Region III Water Management Division Director, to Steven Beckman, Pennsylvania DEP, regarding the City of Sharon, Pennsylvania, stated that:

> There is at least one location in the sewer system where there are separate sewer system overflows (SSOs). Section 301 of the Clean Water Act prohibits such discharges of untreated sewage without meeting the pollution control requirements listed in Section 301. These treatment requirements may be met by installing holding tanks to contain the untreated sewage from the SSOs or by installing secondary treatment facilities to treat the sewage before it is discharged to the Shenango River.

230. As of the date of the filing of this Complaint, EPA Region III will only permit SSO outfalls in an NPDES if the permittee installs, at a minimum, technology to meet secondary treatment standards.

C. EPA Region IV Imposes Secondary Treatment on SSOs

231. EPA Region IV has declared to dischargers that SSO discharges, to be permittable, are subject to secondary treatment standards.

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

233. The Region IV "paper" attached to the June 27, 2000 EPA Region IV Memorandum contains a discussion on "sanitary sewer overflows" and provided that unless SSOs are provided a minimum of secondary treatment, SSOs cannot be permitted.

234. As of the date of the filing of this Complaint, EPA Region IV will only permit SSO outfalls in an NPDES if the permit, at a minimum, imposes secondary treatment standards.

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

235. Congressional representatives for the Commonwealth of Pennsylvania and the State of Tennessee contacted EPA on several occasions during the past three years to

have the inconsistent EPA Regional dictates regarding blending, emergency outfall, and/or permitting of SSOs resolved.

236. EPA Headquarters received several requests under the Freedom of Information Act, 5 U.S.C. § 551, pertaining to the rulemaking record associated with the issues of blending, emergency outfall, and/or permitting of SSO wherein EPA was unable to identify any records supporting the more restrictive positions of EPA Regions III, IV, or VI, as applicable.

237. Plaintiffs have met with EPA Headquarters on several occasions over the past three years to discuss the need for EPA Headquarters to resolve the blending, emergency outfall, and/or permitting of SSO issue(s).

238. Whereas EPA Headquarters' Office of Water has consistently agreed with Plaintiffs 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.

239. Whereas EPA Headquarters' Office of Water has consistently agreed with Plaintiffs 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.

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

241. 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*)

242. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 241 of this Complaint and reallege them as if fully set forth herein.

243. EPA Region III has declared blending to be prohibited.

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

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

246. EPA Region IV has declared blending to be prohibited.

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

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

249. EPA Region VI has declared blending to be prohibited.

250. Neither the Regional Administrator nor any other member of EPA Region VI has the authority to promulgate a rule.

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

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

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

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

255. 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.

256. Plaintiffs have suffered harm as a result of EPA Region III, IV, and VI's action. Plaintiffs 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.

257. Plaintiffs have suffered harm as a result of EPA Region III, IV, and VI's actions in that the resultant stayed permit appeals and the informally stayed 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*)

258. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 257 of this Complaint and reallege them as if fully set forth herein.

259. EPA Headquarters had declared that the regulations provide for the permitting of emergency outfalls.

260. Nevertheless, EPA Region III has 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.

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

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

263. EPA Region IV has 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.

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

265. EPA Region 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.

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

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

COUNT III

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

268. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 267 of this Complaint and reallege them as if fully set forth herein.

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

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

271. 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.

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

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

274. Plaintiffs have suffered harm as a result of EPA Region III, IV, and VI's actions. Plaintiffs 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 Have Acted Beyond Statutory Authority)

275. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 274 of this Complaint and reallege them as if fully set forth herein.

276. EPA Regions III, IV, and VI have declared that blending is prohibited.

277. EPA Region IV has declared that biological treatment of all wastewater flows is mandated. Upon information and belief, EPA Region III has also declared biological treatment of all wastewater flows is mandated.

278. These various Regional dictates restrict treatment plant design forcing the use of storage basins or expanded biological systems to process peak wet weather flows.

279. The Clean Water Act does not provide the authority for EPA to dictate to a POTW how the treatment plant is to be designed or operated.

280. EPA Regions III and IV have declared that the permitting of emergency outfalls is prohibited.

281. The Clean Water Act does not provide authority for EPA to prohibit permitting of point sources.

282. These actions of EPA Regions III, IV, and VI and beyond the authority set forth by the Clean Water Act and therefore violate the Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.*

COUNT V

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

283. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 282 of this Complaint and reallege them as if fully set forth herein.

284. 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, IV, and VI have declared that the permitting of SSOs is subject to the secondary treatment standard.

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

286. 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.*

287. 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 VI

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

288. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 287 of this Complaint and reallege them as if fully set forth herein.

289. 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, IV, and VI have declared that the permitting of SSOs is subject to the secondary treatment standard.

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

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

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

293. The various Regional policies impair the ability of Plaintiffs to timely address and remedy untreated overflows and are inconsistent with the proper interpretation and application of the secondary treatment and bypass regulations.

294. The various Regional policies impair the ability of Plaintiffs to blend and will, accordingly, result in an increase in the number of untreated overflows pending other long-term solutions.

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

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

COUNT VII

(Agency Action Unlawfully Withheld and Unreasonably Delayed)

297. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 296 of this Complaint and reallege them as if fully set forth herein.

298. For the past three years, Plaintiffs have sought EPA Headquarters clarification that the various Regional policies improperly implement CWA requirements pertaining to municipal wet weather flow management.

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

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

301. 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.

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

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

COUNT VIII
(EPA Actions are Arbitrary and Capricious
and Will Cause More Harm Than Good)

304. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 303 of this Complaint and reallege them as if fully set forth herein.

305. EPA Regions III, IV, and VI have declared that blending is prohibited wherein the result of such decision will have more harm to the environment than benefit. The EPA Region IV dictate that all municipal treatment plants must provide biological treatment will have adverse environmental impacts.

306. 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.

307. 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.

308. 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.

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

COUNT IX

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

310. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 309 of this Complaint and reallege them as if fully set forth herein.

311. 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.

312. 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.

313. 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.

314. 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.

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

COUNT X

(EPA Action Violates the Unfunded Mandates Reform Act)

316. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 315 of this Complaint and reallege them as if fully set forth herein.

317. 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.

318. 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.

319. 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.

320. 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.

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

322. The dictates of EPA Region III, IV, and VI 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.

323. 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.

324. 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.

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

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand Judgment in their favor against the Defendants and ask 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 under the Clean Water Act, 33 U.S.C. §1251 *et seq.*, EPA may not dictate plant design (e.g., how wet weather flows must be processed, use of storage basins or that biological process must be used to process all flows).
4. 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.
5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 allows blending of peak wet weather flows.

11. 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.

12. 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.

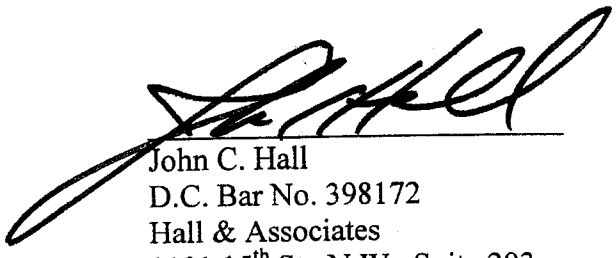
13. Enjoin Defendants from applying the secondary treatment regulations to peak excess flow treatment facilities and instead apply the BAT/BCT analysis unless and until the secondary treatment rule is amended to address processing of peak wet weather flows.

14. Order EPA Regions III, IV, and VI, to issue letters to the regulated community and approved NPDES States correcting past statements regarding blending prohibition, emergency discharge prohibition and application of secondary treatment to SSO facilities.

15. Award Plaintiffs reasonable attorney fees and costs for this Action.

16. Provide Plaintiffs such other relief as the Court may deem just and equitable under the circumstances.

RESPECTFULLY SUBMITTED



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