

ORAL ARGUMENT OCCURRED ON OCTOBER 15, 2004

No. 96-1062 and Consolidated Cases

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

EDISON ELECTRIC INSTITUTE, et al.,

Petitioners,

v.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY, et al.,**

Respondents.

**ON PETITION FOR A PANEL REHEARING
PERTAINING TO REVIEW OF A RULE OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**MOTION OF LEAGUE OF KANSAS MUNICIAPLITIES
AND IOWA WATER POLLUTION ASSOCIATION
TO FILE
AMICI CURIAE BRIEF
IN SUPPORT OF PETITIONER AND REVERSAL OF
COURT'S DECISION**

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to F.R.A.P. 29 and Cir. R. 29, the League of Kansas Municipalities (“LKM”) and Iowa Water Pollution Association (“IWPA”) request leave to file the accompanying brief as *amici curiae* in support of Petitioners WESTCAS and [insert] petition for rehearing. In support of its Motion, LKM and IWPA state:

1. LKM, established in 1910, is a voluntary, nonpartisan federation of over 500 Kansas cities. The mission of LKM is to unify, strengthen, and advocate for the interests of Kansas municipalities to advance the general welfare and promote the quality of life of the people who live within our cities. LKM operates as a public agency and is defined by state law as an instrumentality of its member cities

2. IWPA, established in 1927, is an Iowa nonprofit corporation with more than 650 members who work for and with public agencies that provide wastewater collection, treatment, disposal, and water recycling service in Iowa. The objectives of the IWPA include: the advancement of fundamental and practical knowledge concerning the nature, collection, treatment, reclamation, and disposal of domestic and industrial wastewaters; the advancement of knowledge in the design, construction, operation, and management of facilities for the collection and treatment or reclamation of wastewaters; the study, promotion, and encouragement of waterways quality control, the promotion of public understanding and the encouragement of sound regional policy in matters relating to the water quality control field; the improvement of the professional status of all personnel engaged in any aspect of water control, including, but not limited to the design, management, and operation of water quality control systems; and the stimulation of public awareness of the relationship of water resources to the general public welfare and need for preservation and reuse of water resources.

3. LKM has member municipalities and IWPA has members who work for and with municipalities that are subject to National Pollutant Discharge Elimination System (“NPDES”) permitting, including the imposition of whole effluent toxicity (“WET”) effluent limitations.

4. Kansas and Iowa have many low flow streams. As such, WET effluent limitations imposed upon LKM and IWPA members have been and are expected to regulate low amounts of toxicity in the 1 –3 TU_c range.

5. KLM and IWPA are concerned regarding the degree of variability associated with the chronic sublethal methods (NOEL and IC₂₅ endpoints), as such variability is capable of placing municipal facilities in violation of permit limits and trigger expensive follow-up toxic reduction evaluation activities to try and identify and reduce toxicity.

6. LKM and IWPA have reviewed the Court’s decision in *Edison Electric Institute, Et. Al., v. Environmental Protection Agency*, Cas No. 96-1062, Opinion dated December 10, 2004 (hereinafter “Opinion”). A review of the Opinion by our members, however, has revealed that, based upon their professional expertise, the Opinion appears to be based upon a number of mathematical and scientific errors. Due to the fact that this matter involves the appropriate use of statistics associated with environmental issues, LKM and IWPA sought an analysis of the underlying mathematical statistical and environmental engineering principles by independent experts in statistical modeling and environmental engineering. As such, LKM and IWPA have obtained the advice of Drs. Baumann and David, who confirm that the Court has indeed made fundamental mathematical errors in its opinion. The affidavits of Drs. Baumann and David are attached hereto.

7. The mathematical errors lie at the “heart” of the matter as described on page 7 of the Opinion. The coefficient of variation (“CV”) of the only low toxicity set evaluated by EPA

is incorrectly concluded by the Court in footnote 7 of the Opinion to be 0.43. The appropriate CV is 1.7 reflecting an extreme variability in the testing methodology.

8. LKM's and IWPA's interest in assuring that the Court's opinion is based upon sound mathematical principles is to assure that its members (1) are not subject to NPDES permit liability due to the over-reporting of TU_c 's and (2) are not subject to the significant expenditure associated with undertaking toxic reduction investigations when the result is an artifact of the testing methodology variability, not the result of actual toxicity.

9. To the extent Cir. R. 29 would have required *amici* to have sought leave to participate as *amici curiae* within sixty-days of the docketing of the original petition with this court, good cause exists for extending the date. The original petition, an appeal of EPA WET testing regulations, was an appeal of right for petitioners under section 509(b)(1) of the Clean Water Act, 33 U.S.C. section 1369(b)(1). This Court has exclusive jurisdiction of such appeals, *id.*, and, as such, review would definitely be occurring – not subject to the discretion of the Court.

The Petition for Rehearing, however, involves the situation wherein review of the Court is not a certainty. Moreover, it is based upon new concerns – mistakes that had not existed at the time of petitioners' original filing. This new concern is the mathematical errors upon which the Court bases its Opinion. These mathematical errors, as described on page 7 of the Opinion, go to the very "heart" of petitioners' case. The Court created errors, unless corrected, will essentially preclude state authorities from considering the full extent of the test "error-band" and variability associated with the WET test when testing at low levels of toxicity ultimately leading to the imposition of NPDES permit liability and associated toxic reduction obligations upon *amici*

curiae's members due to the test itself, not the quality of the discharged effluent. As such, good cause for filing now exists.

WHEREFORE, *amici curiae* respectfully request that this Court:

Grant its Motion to file the accompanying brief as *amici curiae* on Petitioners' petition for rehearing.

Respectfully submitted,

[INSERT]

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