

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES)	
ASSOCIATION, <u>et al.</u> ,)	
)	
Plaintiffs,)	Civil Action No. 1-02-01361 (HHK)
)	
ASSOCIATION OF METROPOLITAN)	
SEWARAGE AGENCIES,)	
)	
Intervenor)	
v.)	
)	
CHRISTINE TODD WHITMAN, Administrator,)	
United States Environmental Protection Agency,)	
<u>et al.</u> ,)	
)	
Defendants.)	

**EPA’S RESPONSE TO PLAINTIFFS’
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendants Christine Todd Whitman, Administrator, United States Environmental Protection Agency et al. (collectively “EPA”) hereby respond to Plaintiffs’ First Request for Production of Documents.

GENERAL OBJECTIONS

1. EPA objects to each of the discovery requests to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, the pre-decisional/deliberative process privilege, governmental law enforcement privilege, confidential settlement privilege, or any other applicable privilege or exemptions from disclosure. EPA will invoke such privileges where appropriate, and any statement herein indicating a willingness to produce documents is made subject to such claims of privilege and protection. Further, EPA will

provide a privilege log, pursuant to Federal R. Civ. P. 26(b)(5), identifying those documents which it claims are protected from production. EPA objects to Plaintiffs' instruction as to the information to be contained in the privilege log to the extent that the instruction exceeds that required under Rule 26(b)(5).

2. EPA objects to the Requests to the extent that they seek production of documents not relevant to the claim or defense of any party. EPA further objects to each request to the extent it relates only to the merits of claims brought by Plaintiffs under the Administrative Procedure Act, and not to jurisdictional arguments raised by EPA in its motion to dismiss. Claims brought under the Administrative Procedure Act are reviewed based upon an administrative record for a specific agency "action." EPA contends that Plaintiffs have not identified in their Complaint any final agency action that is judicially reviewable. Assuming, solely for the sake of argument, that Plaintiffs following document production could identify a final agency action, then review would be based on the administrative record related to such action.

3. EPA objects to the Requests to the extent that they are unreasonable, oppressive, or unduly burdensome or expensive under the circumstances of this case.

4. EPA objects to the Requests to the extent that they request information that is already in the possession, custody, or control of the Plaintiffs, including, but not limited to, information previously produced to Plaintiffs in response to their numerous Freedom of Information Act requests covering many of the same topics.

5. EPA objects to each of the instructional paragraphs and discovery requests to the extent they seek to impose obligations that exceed the requirements of the Federal Rules of Civil Procedure and the Local Rules of this Court.

6. EPA objects to each of the discovery requests to the extent such requests call for the production of information or documents not within the possession, custody or control of EPA.

7. EPA objects to each request for production of documents, as overbroad and unduly burdensome, to the extent that they seek the production of documents that are already available and accessible to the general public, and thus, are equally, or more readily, available to Plaintiffs.

8. EPA objects to each definition, instruction, and request, to the extent that it seeks the production of documents from EPA offices other than those offices located in EPA Headquarters or Regions that administer or enforce the Clean Water Act. Requests seeking the production of documents from any other EPA office or location are unduly duplicative, burdensome, and are not reasonably designed to lead to the discovery of admissible evidence.

9. EPA objects to the Requests to the extent that they are ambiguous, vague, unclear, or not susceptible to a commonly understood meaning.

10. EPA objects to each request to the extent the it seeks the production of documents that were submitted to EPA, or any other government agency, under a claim of business confidentiality, trade secret, or proprietary restriction. EPA also objects to each request to the extent that it seeks the production of documents, databases, computer files, or software, subject to license agreements, copyright, or other proprietary restrictions.

11. EPA objects to the Requests to the extent that they seek information concerning employees or contractors of the United States which information defendants are required or authorized not to produce pursuant to 5 U.S.C. § 552a, or any other applicable provision of law.

The foregoing General Objections are incorporated into each of the individual responses below. If EPA refers to a specific General Objection in the course of responding to a particular

Request for Production, it is solely for emphasis.

REQUESTS FOR PRODUCTION OF DOCUMENTS

Request for Production Number 1

1. All documents from 1990 to the present that address the issue of whether blending can be utilized by a municipality in response to an EPA enforcement action under the Clean Water Act to minimize or eliminate sanitary or combined sewer overflows. This includes, but is not limited to, all documents discussing blending associated with the Clean Water Act enforcement action against the City of Toledo, Ohio; Borough of Indiana, Pennsylvania, Allegheny County Sanitary Authority, Pennsylvania; the City of Cambridge Ohio; the City of Baton Rouge, Louisiana, Miami-Dade Water and Sewer Department, Florida; and enforcement actions against any other municipality or municipal entity. This request includes draft documents, options papers, e-mails and other documents of EPA enforcement offices (e.g., Office of Enforcement and Compliance Assurance and Department of Justice) or personnel, including but not limited to the sign-off sheets indicating who signed off on the memorandum (e.g., the sign-off sheet indicating who drafted and concurred with the July 20, 1999, memorandum from Brian J. Maas, Director, EPA, Water Enforcement Division, to David McGuigan, Chief, NPDES Branch, EPA Region III, regarding the Borough of Indiana, Pennsylvania).

Response to Request No. 1

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit, and the requests are not reasonably calculated to lead to the discovery of admissible evidence. EPA has brought hundreds of administrative and judicial enforcement actions under the Clean Water Act against municipalities, each of which typically spans several years, and the files relating to such actions are voluminous. Moreover, Plaintiffs allege that various EPA Regions have engaged in rulemaking since 1995, but the document request seeks documents dating back to 1990 (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

EPA further objects to this request to the extent it seeks production of confidential settlement communications between EPA and municipal entities who are not parties to this litigation.

Without waiving and subject to the foregoing specific and general objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents responsive to this request for production related to the enforcement cases specifically identified in Plaintiffs' Requests and will further produce non-privileged documents associated with any other enforcement actions initiated since 1995. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 2

All documents from 1996 to the present that set forth the position of States, EPA Headquarters, and Regional Offices, including subdivisions and personnel thereof (*e.g.* Office of Enforcement and Compliance Assurance, Office of Water, Office of Wastewater Management, Office of General Counsel) on whether and how blending can be approved in an NPDES permit. This request includes, but is not limited, to the following documents and any related communications (including any comments from the Office of Enforcement and Compliance Assurance and/or Regional Offices) on (a) the "Note" entitled "Controls for Peak Flows at POTW Plants" from Stephen Sweeney, OGC/WLO to Gary Prichard, ORC/Region V, Ross Brennan, OW/OWM, Alan Morrissey, OECA/ORE and Kevin Weiss, OW/OWM; (b) emails and other documents from Gary Prichard commenting on EPA Headquarters' approach to blending; (c) E-mails and other documents from Gary Prichard regarding the use of blending by the City of Toledo to mitigate overflows, (c) E-mails and other documents from Gary Prichard regarding the use of blending by the City of Toledo to mitigate overflows; (d) position paper by Eric Schaeffer and/or Alan Morrissey pertaining to blending; (e) EPA's December 21, 2001, draft guidance entitled "NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions," and (f) the March 20, 2002, briefing of Diane Regas and Ben Grumbles on options to address blending, emergency discharges, and peak excess flow facilities.

Response to Request No. 2

Without waiving and subject to the foregoing general objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 3

All documents relating to EPA Region IV communications to various States (including North and South Carolina) that non-biological treatment could not be used by municipalities under the NPDES program in conjunction with biological treatment to treat peak wet weather discharges or that such non-biological facilities must separately demonstrate compliance with secondary treatment requirements. This request includes, but is not limited to, to any permit objection letter involving this issue and EPA's decision whether to allow the Miami-Dade Water and Sewer Department to use ballasted flocculation, notes and other documents pertaining to Miami-Dade's meeting with Diane Regas, Deputy Assistant Administrator for Water (held in approximately April, 2002) , and to all related documents generated or received by EPA Region(s) and EPA Headquarters.

Response to Request No. 3

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit, and the request is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs allege that Region IV promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 4

All documents from Regional Offices to delegated States agencies informing such agencies that blending and emergency discharge permitting is prohibited, restricted under the federal bypass rule, and/or unlawful unless the requirements of the bypass rule are met (*e.g.*, no feasible alternatives). This includes, but is not limited to, comments on NPDES program implementation as well as specific permit objections.

Response to Request No. 4

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit, and the request is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs allege that various EPA Region have promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 5

All documents relating to EPA Region IV communications to various States (including South Carolina and Alabama) that peak flow facilities utilizing blending are either (a) to be reported as bypasses or upsets or (b) subject to secondary treatment concentration and removal requirements before being blended with the effluent from the biological units. This includes, but is not limited to, any records pertaining to EPA Headquarters' input into the Regional NPDES program interpretation as well as all related requirements generated or received by EPA Region(s) and EPA Headquarters.

Response to Request No. 5

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit, and the request is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs allege that Region 4 promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 6

All documents associated with the April 5, 2002, and April 8, 2002, Freedom of Information Act (“FOIA”), 5 U.S.C. § 551, responses of EPA (signed by Mr. Kevin Weiss) to John Hall regarding the basis and background of the secondary treatment and bypass regulations. This includes, but is not limited, to all notes, e-mails, communications, and other documents authored or received by EPA after April 5, 2002, pertaining to such FOIA responses and any document not identified by EPA in those FOIA responses that EPA asserts are inconsistent with the FOIA response.

Response to Request No. 6

EPA objects to this request as not relevant to the claim or defense of any party. EPA further objects to the request for “documents not identified by EPA in those FOIA responses that EPA asserts are inconsistent with the FOIA response” as ambiguous, vague, and unclear. EPA further objects to this request to the extent that it calls for EPA to make legal determinations.

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged notes, e-mails, communications, and other documents authored or received by EPA after April 5, 2002, pertaining to EPA’s FOIA response. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 7

All documents associated with options evaluated or otherwise considered by EPA in the development of the December 21, 2001, draft policy entitled “NPDES Requirements for Municipal Wastewater Treatment During Wet Weather Conditions.” This includes all option papers, whether authored by EPA Office of Wastewater Management personnel or other(s).

Response to Request No. 7

Without waiving and subject to the foregoing general objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 8

All documents associated with the September 12, 2002, response letter written by G. Tracy Mehan to the Honorable Doug Ose including, but not limited, to all drafts, comments, and the sign-off page(s) pertaining to such documents.

Response to Request No. 8

Without waiving and subject to the foregoing general objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 9

All documents associated with cost estimates undertaken by or for EPA (*e.g.*, by an EPA contractor) or submitted to EPA pertaining to the costs municipalities would incur if there is a prohibition on blending or if blending must meet bypass rule restrictions to be approved (*e.g.*, no feasible alternatives test). This includes, but is not limited, to all, drafts and comments, work orders, scopes of work, and related documents describing the need for such analysis.

Response to Request No. 9

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit. Plaintiffs allege that various EPA Regions promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 10

All documents associated with cost estimates undertaken by or for EPA (*e.g.*, by an EPA contractor) or submitted to EPA identifying or estimating the number of POTWs that (a) blend wastewater, (b) are specifically authorized by an NPDES permit to blend, (c) have received a Clean Water Act grant to fund the construction of a treatment plant that blends; or (d) have requested approval to blend.

Response to Request No. 10

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit. Plaintiffs allege that various EPA Regions promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will

be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 11

All documents identified in the enclosure entitled “List of Withheld Documents” to EPA Region III’s May 14, 1999 response to FOIA Request 03-RIN-011333-99 signed by W. Michael McCabe in response to a FOIA request by Hall & Associates dated March 26, 1999.

Response to Request No. 11

EPA objects to this request as unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, because documents contained on the list of withheld documents have previously been determined by EPA to be privileged for the reasons stated in EPA’s May 14, 1999 response letter and EPA’s July 5, 2001, decision granting in part, and denying in part, Plaintiff’s appeal pursuant to the Freedom of Information Act. See EPA Region III’s May 14, 1999, response to Plaintiffs’ Freedom of Information Act Request, and July 5, 2001, Letter of Robert A. Friedrich, Deputy Associate General Counsel, to John Hall (containing EPA’s Final determination on appeal of May 14, 1999 decision to withhold documents).

Without waiving and subject to the foregoing specific and general objections, EPA will include responsive privileged documents on a privilege log and will produce any reasonably segregable non-privileged factual information from documents that were not the subject of Plaintiffs’ FOIA appeal.

Request for Production No. 12

All documents associated with EPA Headquarters’ document entitled “Recombination/Blending of Peak Wet Weather Flows at POTWs” provided as a handout on or about March 2001, by the Office of Wastewater Management at a meeting of EPA Headquarters and Regional Branch Chiefs. This request includes, but is not limited to, all drafts and comments on the draft, as well as any comments received on the document at or after the Branch Chiefs’ meeting.

Response to Request No. 12

Without waiving and subject to the foregoing general objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 13

All documents associated with the issue of whether satellite treatment facilities (*e.g.*, peak excess flow treatment facilities) constructed to treat only peak weather flows can be issued an NPDES permit and the requirements such facilities must meet. This includes, but is not limited, to documents generated by EPA Regions.

Response to Request No. 13

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit. Plaintiffs allege that various EPA Regions promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 14

All documents associated with the issue of whether secondary treatment, as provided by 40 C.F.R. Part 133 mandates the use of biological treatment or allows other type of treatment (*e.g.* physical/chemical treatment). This includes, but is not limited, to documents generated by

EPA Regions.

Response to Request No. 14

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit. Plaintiffs allege that various EPA Regions promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 15

All documents associated with the issue of whether emergency discharge outfalls located within a sanitary sewer system can be issued an NPDES permit. This request includes, but is not limited, to Regional policies, comments, or other communications whether to other personnel with the EPA Region, EPA Headquarters, States, permittees or to others pertaining to such issue.

Response to Request No. 15

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit. Plaintiffs allege that various EPA Regions promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will

be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 16

All documents associated with the issue of whether sanitary sewer overflows (SSOs) are subject to permitting standards based upon secondary treatment, BAT, BCT, or some other standard. This includes, but is not limited, to EPA Regional policies, comments, or other communications whether to other personnel with the EPA Region, EPA Headquarters, States, permittees or to others pertaining to such issue.

Response to Request No. 16

EPA objects to this request for production because the burden and expense of the proposed production outweighs its likely benefit. Plaintiffs allege that various EPA Regions promulgated rules after 1995, but this request does not contain a date restriction (APA challenges to rulemaking prior to 1995 would be barred by the applicable statute of limitations).

Without waiving and subject to the foregoing general and specific objections, EPA will produce for inspection and copying, as soon as reasonably practicable, non-privileged documents from 1996 to the present responsive to this request for production. Responsive documents will be made available for review either at the offices of the United States Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, or at some other mutually agreeable location or locations.

Request for Production No. 17

All documents in the possession of EPA Region VI, the U.S. Attorney's Office, and EPA Headquarters regarding (a) the previously threatened criminal prosecution of the Little Rock Wastewater Utility based upon the alleged failure to report blending events as unlawful bypasses and (b) the subsequent decision of the U.S. Attorney's Office to drop prosecution of that claim after further discussion with EPA Headquarters.

Of Counsel

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