IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	CASE NUMBER 1: 02CV01361
v.	)	JUDGE: Henry H. Kennedy
CHRISTIE TODD WHITMAN, Administrator, U.S. Environmental Protection Agency, *et al.*,	)	
Defendants	)	

MEMORANDUM OF PLAINTIFF-INTERVENOR THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN OPPOSITION TO EPA'S MOTION FOR A STAY OF PROCEEDINGS, INCLUDING A STAY OF DISCOVERY AND SUMMARY JUDGMENT BRIEFING

Plaintiff-Intervenor The Association of Metropolitan Sewerage Agencies ("AMSA") hereby submits this Memorandum in Opposition to EPA's Motion for a Stay of Proceedings, Including a Stay of Discovery and Summary Judgment Briefing, Pending Resolution of Its Motion to Dismiss. EPA's Motion was filed with the Court on October 9, 2002.

As a general rule, the party seeking to stay discovery has the burden to show some plainly adequate reason for the order. A pending motion to dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery. Twin City Fire Insurance Co. v. Employers Insurance of Wasau, 124 F.R.D. 652 (D. Nev. 1989). Here, Defendant EPA has failed to meet its burden to show that the relief it seeks is either necessary or appropriate.

EPA's motion for a complete stay of all proceedings, including discovery, is based on two false assertions. First, EPA argues that there is a "strong likelihood" that its motion to dismiss will be granted, because it is "transparent" that the Courts of Appeals, not this Court, have jurisdiction over the Plaintiffs' claims. However, as this Court has repeatedly observed, a bald assertion by a defendant that its motion to dismiss will be granted, or that discovery would be burdensome, is generally insufficient to justify the entry of an order staying discovery. See, e.g., Chavous v. Dist. of Columbia Financial Responsibility and Management Assistance Authority, 201 F.R.D. 1, 3 (D.C. Dist. 2001), citing People with AIDS Health Group v. Burroughs Wellcome Co., 1991 U.S. Dist. LEXIS 14389 (D.C. Dist. 1991). In the present case, moreover, EPA's suggestion that it will prevail on its motion to dismiss is vitiated by its oversimplification and mischaracterization of the Plaintiffs' claims. EPA argues that the actions challenged by the Plaintiffs fall within the ambit of § 509(b)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1369(b)(1), which reserves certain categories of actions for review by the Court of Appeals. However, EPA's reductive argument ignores the fact that Plaintiffs have actually asserted ten separate claims for relief that apply to the actions taken by three different EPA Regional offices and EPA headquarters. Many of those claims arise under different sections of the Administrative Procedure Act, as well as the Unfunded Mandates Reform Act. Even if it is assumed that CWA § 509 precluded judicial review of some of the actions complained of, it is not at all clear (let alone "transparent") that all of the Plaintiffs' claims would be so barred. This Court has recognized that a stay of discovery pending determination of a motion to dismiss is rarely appropriate when the pending motion will not dispose of the entire case. Chavous, 201 F.R.D. at 3.

The second false assertion underlying EPA's Motion for Stay is that the Agency's Motion to Dismiss presents "purely legal" issues to which the Plaintiffs can respond without any inquiry into the facts. This assertion is contradicted by the second prong of EPA's jurisdictional argument, which is that the Plaintiffs have failed to identify any final agency actions that are ripe for review. The issues of finality and ripeness present mixed questions of law and fact, on which the discovery sought by Plaintiffs may well serve to establish the answer. The D.C. Circuit has held that it is error to rule on an motion to dismiss without providing an opportunity for discovery on a jurisdictional issue of combined legal and factual nature, such as whether a defendant was doing or not doing business within the District of Columbia. Collins v. New York Central System, 327 F.2d 880, 882-83 (D.C. Cir., 1963). See also Crane v. Carr, 814 F.2d 758, 760 (D.C. Cir. 1987) (district court erred in dismissing the case with no opportunity for discovery on the issue of personal jurisdiction). Even the cases cited by EPA recognize that discovery should precede consideration of dispositive motions when the facts sought to be discovered are relevant to consideration of the particular motion at hand. See, e.g., Coastal States Gas Corp. v. Department of Energy, 84 F.R.D. 278, 282 (D. Del. 1979) (cited in EPA's Memorandum, at 6). Thus, the court in Coastal States denied a DOE motion for stay and allowed discovery to continue pending resolution of DOE's motion to dismiss for lack of ripeness, stating that Coastal "must be given a fair opportunity to discover whether those factors that would rebut DOE's jurisdictional claims are present in this case." Id. at 283. This holding is consistent with the principle that a trial court ordinarily should not stay discovery which is necessary to gather facts in order to defend against a motion to dismiss. Chavous, 201 F.R.D. at 3 (D.C. Dist. 2001).

The specific issue presented in this case, whether or not the statements and conduct complained of by the Plaintiffs constitute "final agency action" within the meaning of the Administrative Procedure Act, involves a factual inquiry that is not susceptible to resolution without appropriate discovery. As this Court stated in American Trucking Associations, Inc. v. Reich, 955 F. Supp. 4 (D.D.C. 1997), quoting Washington Legal Foundation v. Kessler, 880 F. Supp. 26, 34 (D.D.C. 1995),

> Whether [an agency] has officially adopted a final policy . . . is not determinative. In the context of a ripeness inquiry, it is the effect of the agency's conduct which is most important in determining whether an agency has adopted a final policy. And this case illustrates why this must be so: If an agency's own characterization of the finality of its policy were determinative, that agency could effectively regulate industry without ever exposing itself to judicial review. A powerful agency . . . could achieve this result through the simple expedient of 1) never formally declaring the policy to be "final," and 2) threatening (but never actually initiating) enforcement procedures against companies which failed to comply with the agency's de facto policy.

Thus, the issuance of a guideline or policy statement (such as those which the Plaintiffs' pending discovery requests are currently seeking to obtain) may constitute final agency action. See Barrick Goldstrike Mines, Inc. v. Browner, 215 F.3d 45, 49 (D.C. Cir. 2000). Similarly, as the D.C. Circuit recently observed, where "'the agency has stated that the action in question governs and will continue to govern its decisions, such action'" is reviewable. Public Citizen v. Department of State, 276 F.3d 634, 642 (D.C. Cir. 2002), quoting Better Government Ass'n v. Department of State, 780 F.2d 86, 93 (D.C. Cir. 1986). See also Sallie Mae v. Riley, 907 F. Supp. 464, 472 (D.D.C. 1995) (finding that the text of letters from the of Department of Education's General Counsel Office were replete with the indications of final agency action, and were not the mere advisory opinions of subordinate officials).

Finally, AMSA must also take issue with EPA's argument that the pending document requests from Plaintiffs Pennsylvania Municipal Authorities Association (PMAA) are merely a

"fishing expedition" that seeks "every piece of paper ever generated by EPA" regarding the issues in the Complaint over the 25 years that EPA has administered the CWA. To the contrary, even a cursory review of Plaintiff PMAA's First Request for Production of Documents reveals that it is carefully targeted both in terms of chronology and subject matter. See, e.g., PMAA Request # 1 (all documents from 1990 to the present that address the issue whether blending can be utilized to minimize or reduce sanitary or combined sewer overflows); PMAA Request # 2 (all documents from 1996 to the present that address the issue whether blending can be approved in an NPDES permit); PMAA Request # 6 (all pertinent documents withheld by EPA from its April 5, 2002 and April 8, 2002 responses to PMAA's FOIA requests, or subsequently authored or received by EPA); and PMAA Request # 12 (all documents associated with the March 2001 EPA handout on "Recombination/Blending of Peak Wet Weather Flows at POTWs"). Many of the PMAA requests are even more narrowly focused on specific actions or statements by EPA Regions III, IV and VI, some of them in connection with permitting or enforcement actions involving specific individual dischargers. Even if some of these documents are privileged or confidential, as EPA suggests it may argue in the future, PMAA's outstanding requests can hardly be described as the type of "uncontrolled" discovery that constitutes "harassment" of public officials. EPA Memorandum at 7.

For each of the foregoing reasons, Plaintiff-Intervenor AMSA respectfully requests that EPA's Motion for Stay be denied.

Dated: November 12, 2002

Respectfully submitted,

/s/

Alexandra Dapolito Dunn
(DC Bar # 428526)
General Counsel
Association of Metropolitan
Sewerage Agencies
1816 Jefferson Place, N.W.
Washington, D.C. 20036-2505
(202) 533-1803
Email: adunn@amsa-cleanwater.org

/s/

David W. Burchmore (Ohio Bar # 0034490)
(*pro hac vice pending*)
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8779
Email: dburchmore@ssd.com

Attorneys for Plaintiff-Intervenor AMSA