IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, et al.,	)	
Plaintiffs,	)	Civil Action No. 1-02-01361 (HHK)
v.	)	
CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, et al.,	)	
Defendants.	)	

EPA'S MOTION FOR A STAY OF PROCEEDINGS, INCLUDING A STAY OF DISCOVERY AND SUMMARY JUDGMENT BRIEFING, PENDING RESOLUTION OF ITS MOTION TO DISMISS

Defendants Christine Todd Whitman, Administrator, United States Environmental Protection Agency, Donald S. Welsh, Regional Administrator, United States Environmental Protection Agency, Region III, J.J. Palmer, Jr., Regional Administrator, United States Environmental Protection Agency, Region IV, and Gregg Cooke, Regional Administrator, United States Environmental Protection Agency, Region VI (collectively "EPA" or the "Agency"), hereby move for an order staying all proceedings, including discovery and summary judgment briefing, pending the Court's disposition of EPA's motion to dismiss, filed on October 25, 2002.

As discussed in the accompanying Memorandum, Courts routinely issue orders deferring discovery or other proceedings pending resolution of a dispositive motion, where, as here, that motion presents purely legal issues that may dispose of the entire case. Such an order is particularly appropriate here because it is so transparent that the courts of appeals, not this Court,

have exclusive jurisdiction over the claims raised challenging alleged EPA rulemaking under the Clean Water Act. A ruling in EPA's favor on this clear-cut issue would end this case. To allow discovery at this time, or require summary judgment briefing while EPA's motion is pending, would be a highly inefficient use of governmental and judicial resources. Plaintiffs will not be unduly prejudiced by the proposed limited stay because the motion to dismiss presents pure issues of law and will be fully briefed in a matter of weeks.

In accordance with Local Rule 7.1(m), counsel for EPA discussed this motion with counsel for Plaintiffs and was informed that Plaintiffs oppose this motion.

WHEREFORE, for these reasons and the reasons set forth in the accompanying Memorandum of Points and Authorities, EPA respectfully requests that the Court stay proceedings in this case, including discovery and summary judgment briefing, pending the Court's disposition of EPA's motion to dismiss the Complaints.

Respectfully submitted,

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DATED: October 29, 2002

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PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, et al.,	)	
Plaintiffs,	)	Civil Action No. 1-02-01361 (HHK)
v.	)	
CHRISTINE TODD WHITMAN, Administrator, United States Environmental Protection Agency, et al.,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EPA'S MOTION FOR A STAY OF PROCEEDINGS, INCLUDING A STAY OF DISCOVERY AND SUMMARY JUDGMENT BRIEFING, PENDING RESOLUTION OF ITS MOTION TO DISMISS

Defendants Christine Todd Whitman, Administrator, United States Environmental Protection Agency, Donald S. Welsh, Regional Administrator, United States Environmental Protection Agency, Region III, J.J. Palmer, Jr., Regional Administrator, United States Environmental Protection Agency, Region IV, and Gregg Cooke, Regional Administrator, United States Environmental Protection Agency, Region VI (collectively "EPA" or the "Agency"), hereby move for an order staying all proceedings, including discovery and summary judgment briefing, pending the Court's disposition of EPA's pending motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

As shown below, courts routinely issue orders deferring discovery or other proceedings pending resolution of a dispositive motion, where, as here, that motion presents purely legal issues that may dispose of the entire case. Such an order is particularly appropriate here because

it is so transparent that the courts of appeals, not this Court, have exclusive jurisdiction over the claims raised challenging alleged EPA rulemaking under the Clean Water Act. A ruling in EPA's favor on this clear-cut jurisdictional issue would end this case. To allow discovery at this time, or require summary judgment briefing while EPA's motion is pending, would be a highly inefficient use of governmental and judicial resources. Plaintiffs will not be unduly prejudiced by the proposed limited stay because the motion to dismiss presents pure issues of law and will be fully briefed in a matter of weeks.

STATEMENT

Plaintiffs Pennsylvania Municipal Authorities Association ("PMAA"), Tennessee Municipal League, the City of Little Rock Sanitary Sewer Committee and intervenor Plaintiff Association of Metropolitan Sewerage Agencies ("AMSA") (collectively "Plaintiffs") represent municipalities who own and/or operate wastewater systems. Plaintiffs' Complaints generally allege that certain EPA regional offices have unlawfully adopted three "rules" under the Clean Water Act, 33 U.S.C. §§ 1251-1387, concerning discharge of untreated or partially treated sewage. Plaintiffs seek broad declaratory and injunctive relief.

On October 25, 2002, EPA moved to dismiss Plaintiffs' Complaints for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. In its dispositive motion, EPA argued that this Court lacks subject matter jurisdiction because the Courts of Appeals have exclusive jurisdiction over any challenges to alleged EPA rulemaking under the Clean Water Act relating to limitations on the discharge of sewage. EPA additionally argued that even if this Court otherwise had jurisdiction, Plaintiffs have failed to identify any final agency actions that are ripe for judicial review.

Plaintiffs Pennsylvania Municipal Authorities Association, Tennessee Municipal League, and the City of Little Rock Sanitary Sewer Committee (collectively "PMAA"), filed a First Request for Production of Documents on October 18, 2002. See Plaintiffs' Pennsylvania Municipal Authority Association et al. First Request for Production of Documents. These document requests are numerous and extremely broad in scope. PMAA essentially seeks every piece of paper ever generated by EPA regarding alleged limitations on the kinds of discharges of sewage identified in Plaintiffs' Complaints. See, e.g., PMAA Requests ## 14-16. PMAA has further informed EPA that it intends to serve additional document requests beyond the First Request for Production, and intends to serve interrogatories and to depose various EPA officials as well.

PMAA has additionally informed EPA that it intends to file a motion for summary judgment on the same date that it files an opposition to EPA's motion to dismiss (November 27). This would force EPA to prepare a response to a summary judgment motion while the motion to dismiss was still being briefed.

I. TEMPORARILY STAYING PROCEEDINGS, INCLUDING DISCOVERY AND SUMMARY JUDGMENT BRIEFING, IS APPROPRIATE AND NECESSARY BECAUSE EPA'S PENDING DISPOSITIVE MOTION RAISES PURELY LEGAL ISSUES AND, IF GRANTED, WOULD DISPOSE OF THE ENTIRE CASE.

The Supreme Court has expressly directed lower courts to make a threshold determination in each case as to whether it possesses subject matter jurisdiction over an action. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) ("jurisdiction [must] be established as a threshold matter"); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (court has duty to ensure that it has jurisdiction); KVOS, Inc. v. Associated Press, 299

U.S. 269, 278 (1936) (a motion challenging the jurisdiction of the court "require[s] the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction."); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). If a court does not have jurisdiction over an action, the action must be dismissed; the jurisdictional limitations imposed on the federal courts by the Constitution or statute can neither be "disregarded nor evaded." Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

Federal trial courts possess broad discretionary authority to manage the conduct of discovery and other pre-trial proceedings. United Presbyterian Church v. Reagan, 738 F.2d 1375, 1382-83 (D.C. Cir. 1984) ("Trial courts enjoy wide discretion in handling pretrial discovery matters.") (citation omitted); Chavous v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 2 (D.D.C. 2001) (same). The United States Court of Appeals for the District of Columbia Circuit has emphasized the importance of controlling discovery, repeating the Supreme Court's admonition that "district courts should not neglect their power to restrict discovery where 'justice requires (protection for) a party or person from annoyance, embarrassment, oppression or undue burden or expense." Chagnon v. Bell, 642 F.2d 1248, 1266 (D.C. Cir. 1980) (quoting Herbert v. Lando, 441 U.S. 153, 177 (1979) (quoting Fed. R. Civ. P. 26(c)).

Consistent with these principles, this Court and other federal district courts have repeatedly issued orders, which have been upheld on appeal, deferring discovery pending resolution of threshold jurisdictional issues, like the ones presented in this case. See, e.g., United Presbyterian Church, 738 F.2d at 1382-83 (upholding stay of all discovery where motion to

dismiss for lack of jurisdiction on standing grounds was filed); Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1304 n.13 (5th Cir. 1983) (stay of discovery appropriate where case might be resolved by motion); Tamari v. Bache Halsey Stuart Inc., 619 F.2d 1196, 1203 (7th Cir. 1980) (discovery properly disallowed where claim could be resolved as a matter of law); see also Chavous, 201 F.R.D. at 2-5 (discovery stayed pending resolution of dispositive motions, including two motions to dismiss for lack of subject matter jurisdiction); see Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."). Staying discovery in the face of such jurisdictional motions is entirely appropriate "for the obvious reason that the court might not have the authority to order or direct any further proceedings" in the case. Cannon v. United Ins. Co., 352 F. Supp. 1212, 1215 (D.S.C. 1973).

Similarly, this Court and other federal district courts have repeatedly issued orders deferring summary judgment briefing pending resolution of threshold jurisdictional issues. See e.g., Version v. United States, 5 F.Supp. 2d 963, 965-66 (Ct. Int'l Trade Mar. 23 1998) (deferring briefing on merits pending decision on motion to dismiss); Honeywell Info. Sys. v. Hodges, 85 F.R.D. 339, 341-42 (D.D.C. 1980) (action on plaintiffs' motion for summary judgment withheld pending ruling on defendants' motion to dismiss raising standing issue) aff'd sub nom. Control Data Corp. v. Baldrige, 655 F.2d 283 (D.C. Cir. 1981); Cult Awareness Network, Inc. v. Martino, Nos. 97 C 8097C416 & 95B22133, 1997 WL 327123 at *1 (N.D. Ill. May 27, 1997) (granting motion to stay briefing on merits to allow consideration of threshold issues raised in motion to dismiss), aff'd, 151 F.3d 605 (7th Cir. 1998).

Entering an order staying discovery and summary judgment briefing in this case would

not only be "an appropriate exercise of the Court's discretion," Chavous, 201 F.R.D. at 2, but "'an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.'" Id. (quoting Coastal States Gas Corp. v. Department of Energy, 84 F.R.D. 278, 282 (D. Del. 1990).

II. A TEMPORARY STAY OF PROCEEDINGS WILL NOT UNDULY PREJUDICE PLAINTIFFS AND WILL BENEFIT ALL INVOLVED GIVEN THE STRONG LIKELIHOOD THAT EPA's MOTION WILL BE GRANTED AND THE CASE RESOLVED.

In considering motions to stay discovery pending resolution of dispositive motions, courts "'inevitably must balance the harm produced by a delay in discovery against the possibility that [a dispositive] motion will be granted and entirely eliminate the need for discovery.'" Chavous, 201 F.R.D. at 3 (citation omitted). Here, the balance weighs decisively in favor of a stay.

EPA's Motion to Dismiss raises purely legal questions that go to the threshold issue of whether this Court has jurisdiction to hear Plaintiffs' claims. EPA's motion, if granted, "would be thoroughly dispositive of the claims in the Complaint." Chavous, 201 F.R.D. at 2.

It would be an undue burden to force the Government to spend substantial time and other resources now responding to PMAA's discovery requests and responding to a motion for summary judgment when the case can, and should be, resolved as a matter of law. PMAA's First Requests for Production of Documents are numerous and extremely broad in scope. PMAA essentially seeks every piece of paper ever generated by EPA regarding the Clean Water Act issues raised in its Complaint. See, e.g., PMAA's Requests ## 14-16. Considering that EPA has administered that Act for over 25 years, it is unquestionable that searching for, reviewing, compiling and producing the information responsive to PMAA's request would require a

substantial expenditure of time and other scarce resources by EPA Headquarters, several EPA Regional offices, and the Department of Justice. The Government should not be forced to undertake the massive effort to respond to PMAA's request until such time as the Court has ruled on EPA's pending Motion to Dismiss. As the D.C. Circuit observed in Chagnon, uncontrolled discovery "can be a form of harassment that imposes an 'undue burden' on the time and resources of public officials and their agencies." 642 F.2d at 1266. Moreover, because PMAA's discovery request includes a substantial amount of confidential enforcement-related and other sensitive internal communications, it is likely that there will be significant disputes between EPA and the PMAA over the allowable scope of discovery, and the privileged nature of the information sought, resulting in further costs in Agency and, possibly, judicial resources. See, e.g., PMAA Request # 17 (requesting production of documents related to decision of U.S. Attorney's office to drop prosecution of criminal claim).

Staying discovery until the fundamental question of this Court's jurisdiction is resolved will not prejudice Plaintiffs because discovery is not necessary to resolve the legal issues raised in EPA's motion to dismiss. See United Presbyterian Church, 738 F.2d at 1382-83; Chavous, 201 F.R.D. at 3-5. The principal argument advanced in EPA's motion is that the courts of appeals, not this Court, have exclusive jurisdiction over any challenges to EPA rulemaking relating to NPDES permit limitations. Plaintiffs do not need any discovery to address this purely legal issue. EPA additionally argues in its motion to dismiss that the kinds of agency statements (e.g., enforcement settlement communications, internal agency deliberative memoranda; regional policy statements) cited by Plaintiffs in their Complaints do not constitute final agency actions that are ripe for judicial review. Plaintiffs do not need any discovery to respond to EPA's finality

and ripeness arguments because the issues EPA has raised in its motion are purely legal issues.

As the Eleventh Circuit has recognized, "[a]llowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system." Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1368 (11th Cir. 1997).

The extensive discovery PMAA seeks here amounts to "a 'fishing expedition' of the most obvious kind, . . . undertake[n] . . . in the hope that some cause of action might be uncovered." United Presbyterian Church, 738 F.2d at 1383 (citation and internal quotation omitted). The D.C. Circuit has previously rejected similar attempts by plaintiffs to engage in discovery where jurisdiction is lacking as a matter of law. Id. (upholding stay of discovery where plaintiff had moved to dismiss on standing grounds).

III. ALTERNATIVE REQUEST FOR RELIEF

In the event that this Court denies this Motion, EPA respectfully requests that the Court allow it thirty (30) days from the date of such order to review PMAA's First Requests for Production of Documents, discuss them with PMAA, and attempt to negotiate the scope of the requests and a schedule for EPA's response. If EPA is unable to reach an agreement with PMAA on either the scheduling issue or the scope of the requests, EPA would file a Motion for Protective Order no later than ten (10) business days after the close of the thirty-day negotiation period. EPA requests this alternative relief because of the breadth and complexity of PMAA's discovery requests, which, without modification, would require months for a full response.

WHEREFORE, EPA respectfully requests that the Court stay proceedings in this case, including discovery and summary judgment briefing, pending the Court's disposition of EPA's motion to dismiss the Complaints.

Respectfully submitted,

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