UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

Borough of Naugatuck	)	Docket No. 2-I-97-1017
Respondent	)	

ORDER GRANTING DISCOVERY

This Order addresses the Respondent's motion for the discovery of two documents that the Complainant has withheld as protected by the government's deliberative process privilege. This order finds that the subject documents have significant probative value and are not clearly pre-decisional. Hence they are not covered by the privilege and they are ordered to be disclosed.

The two documents are internal agency memoranda that discuss the EPA's implementation of a new definition for "significant noncompliance" ("SNC") with respect to wastewater permit violations concerning the parameter of total residual chlorine ("TRC" or "chlorine").(1) The Respondent here is charged with a series of such violations at its municipal wastewater treatment plant in Naugatuck, Connecticut. The SNC policy is designed to monitor discharge reports and track or flag them for patterns of violations that are sufficiently significant to generate formal enforcement responses by the Agency. An earlier memorandum that has been disclosed had changed the SNC definition by including violations of permit limits other than monthly average limits, i.e., instantaneous limits.(2) This change had the effect of substantially increasing the number of chlorine violations flagged for SNC, since chlorine limits are generally established and monitored on a daily or instantaneous, rather than monthly average, basis. A subsequent Agency memorandum, also disclosed, determined that the new definition of SNC for chlorine would be fully implemented in accord with the 1995 Herman memorandum, while further experience is gained in addressing chlorine violations.(3)

In defense to the charges, the Respondent contends that the TRC instantaneous limits are legally invalid and technically unsupportable. The Respondent, in a series of requests under the Freedom of Information Act ("FOIA"), sought production of EPA documents relating to the appropriateness of using instantaneous maximum effluent limits to regulate TRC in municipal wastewater discharge permits. The Agency provided a series of documents, but withheld the two documents described

above, claiming they were exempt under the FOIA, 5 U.S.C. §552(b)(5), as intra-agency memoranda which would not be available by law to a party in litigation with the agency. The Respondent filed a motion for their disclosure on January 19, 1998, which was opposed by the Complainant. Pursuant to my order in response to those filings, the Complainant produced the two documents for an *in camera* inspection on February 27, 1998.

Additional discovery beyond the prehearing exchanges is authorized under the EPA Rules of Practice where a party shows that such discovery will not unreasonably delay the proceeding, is not otherwise obtainable, and has significant probative value. 40 CFR §22.19(f)(1). There is no question here that the first two requirements are met. Disclosure of the documents will not cause any delay in this proceeding. The hearing has been stayed pending resolution of the parties' cross-motions for accelerated decision. The documents are only available through disclosure by the Region, which has withheld them thus far.

Upon my *in camera* inspection, I find that the documents may have significant probative value. They expressly discuss the issues of the characteristics and reliability of chlorine discharge violations, at the levels in Respondent's permit. Even if these issues do not directly affect Respondent's liability, they could be relevant to the seriousness of the violations, which must be considered in determining the amount of any penalty that is ultimately imposed in this proceeding.

The Region asserts that the documents should not be disclosed because they are covered by the "deliberative process" privilege. This privilege protects the confidentiality of internal government opinions, recommendations, and deliberations in the formulation of policy. The purposes of the deliberative process privilege are to improve the quality of agency policy decisions by promoting a creative and candid debate; protect the public from confusion arising from premature exposure to policy discussions; and to protect the integrity of the decision-making process itself. Jordan v. United States Department of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978).

In order for a document to be covered by the deliberative process privilege, two prerequisites must be met. The document must be "pre-decisional" or actually precede the adoption of an agency policy. Second, the document must be part of the deliberative process by which an agency policy decision is made. Jordan, supra, at 773. The deliberative process privilege does not encompass documents that comprise the "working law" of an agency, i.e., material that explains or implements policies already adopted. Taxation With Representation v. Internal Revenue Service, 646 F.2d 666, 678 (D.C. Cir. 1981). Claims of deliberative process privilege, and claims made under Exemption 5 under the FOIA should be construed as "narrowly as consistent with efficient government operation." Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) (quoting the Senate report on the FOIA). "To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." Coastal States, supra, at 866.

The documents at issue here tread a fine line at the margin of the deliberative process privilege. They can be viewed from at least two different perspectives. The memoranda are deliberative in the sense that they address whether the definition for chlorine SNC should be changed. They are not clearly predecisional, however. The writers discuss possible changes in the SNC treatment of chlorine discharge exceedances, but the memos did not result in any change in the applicable SNC definition established in the 1995 memo. In that sense, the June 1996 Maas memorandum and the Chow response may be considered postdecisional. The August 1996 Maas memorandum confirmed that there would be no change in the SNC policy on chlorine. On the other hand, that memo could itself be viewed as a decision not to change the pre-existing SNC definition, and to closely monitor the ensuing SNC enforcement response to chlorine discharge violations.

In these circumstances, where the claim of privilege is uncertain, doubt should be resolved in favor of disclosure. Disclosure of the memoranda at issue would not in

any way stifle honest and frank communication within the Agency. Although the memos express the authors' opinions, they consist mainly of factual support for the existing policy, rather than personal observations. These documents form the basis for the current policy expressed in the August 1995 Maas memorandum, and could thus be considered part of the working law of the agency. They essentially provide the factual background for the decision to continue to apply the SNC definition, with special scrutiny of chlorine SNC violations.

In those cases cited by the parties, and in administrative proceedings before the EPA, in which the deliberative process privilege has been upheld, the protected material was far more *sensitive* or **case-specific** than the documents at issue here.[(4)] *The* memos here give the reasons behind a nationwide policy to consider violations of non-monthly average discharge limits for chlorine as significant noncompliance, while monitoring the effects on the enforcement program. There is nothing personal or case-specific in these memoranda. Although the Maas memo seeks input from the Regions, and the Chow response provides it, the overall tone is general and factual, rather than personal. It is difficult to conceive of any injurious effect on agency deliberations arising from the disclosure of these memos.

In closing, it is worthwhile to cite the guidance provided by the EPA's first Administrator, William D. Ruckelshaus. In a memorandum dated October 3, 1984 (page 3), Administrator Ruckelshaus provided the following counsel on when to assert the deliberative process privilege:

"Although the law allows the Agency to assert this privilege in a wide variety of situations, it does not require the Agency to exercise that right. Indeed, it is EPA's policy that the Agency will not assert the privilege in every case where it applies. The Agency has a responsibility to the public to provide the relevant facts which underlie a particular policy. This responsibility suggests that we disclose data and the reasons supporting a policy on occasions which might otherwise fall within the scope of the privilege." (emphasis in original).

The memo continues by stating that the Agency should release documents otherwise subject to the deliberative process privilege, unless their release may cause harm to the public interest. Release of the memoranda at issue here would serve the public interest by providing the relevant facts that underlie the current Agency policy toward significant noncompliance violations of chlorine discharge limits. Hence, the Complainant will be ordered to disclose those documents.

Order

Complainant is directed to send the June 1996 Maas memo and the Chow response (with attachments) to Respondent immediately upon receipt of this Order.

_Andrew S. Pearlstein
Administrative Law Judge

Dated: March 25, 1998
Washington, D.C.

1. The first document is a June 24, 1996 draft memorandum from Brian Maas, Director of the Water Enforcement Division, on chlorine significant noncompliance violations below the quantification level, directed to the Regional water enforcement branch chiefs (the "June 1996 Maas memorandum"). The second is a response to the Maas memorandum dated July 8, 1996, by Clara Chow, Chief of the Water Enforcement Unit in Region 1, with attached memoranda by Eric Hall and Michael Fedak (the "Chow response").

2. Memorandum dated September 21, 1995 from Steven Herman, Assistant Administrator, to Water Management Division Directors and Regions, on revision of NPDES

significant noncompliance criteria to address violations of non-monthly average limits ("1995 Herman memorandum").

3. August 20, 1996 memorandum from Brian Maas to the Regional Water Enforcement Branch Chiefs on Significant Noncompliance for Chlorine ("August 1996 Maas memorandum").

4. See Chautauqua Hardware Corp., 3 E.A.D. 616, EPCRA Appeal No. 91-1 (EAB, June 24, 1991) (predecisional documents discussing the purpose and legal basis for the EPCRA Penalty Policy); Safety-Kleen Corp., Docket No. V-W-003-93, 1994 RCRA LEXIS 60 (ALJ, July 1, 1994) (predecisional internal memos specifically discussing the respondent's violations and enforcement options); and Hawaiian Independent Refinery, Inc., Docket No. RCRA-09-91-0007, 1992 RCRA LEXIS 302 (ALJ, July 14, 1992) (staff recommendations concerning the prosecution of this case). See also CWM Chemical Services, Inc., 6 E.A.D. 1 at 4, TSCA Appeal No. 93-1 (EAB, May 15, 1995), in which a series of internal memos discussing options for measuring PCB concentrations were discussed.