

CENTER FOR REGULATORY REASONABLENESS

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January 19, 2016

VIA FOIA ONLINE

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: Freedom of Information Act Request
EPA Records Authorizing Numeric Flow Controls in NPDES Permits

Dear National Freedom of Information Officer:

The undersigned, Center for Regulatory Reasonableness (“Center”), herewith files a request for Environmental Protection Agency (“EPA” or “Agency”) records, under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*¹ Please note that the U.S. Department of Justice instructs, and such instruction is used here, that: “Since 1996 the FOIA has defined the term “record” as including “any information that would be an agency record subject to the requirements of [the FOIA] when maintained by an agency in any format, including an electronic format.” *Department of Justice, Office of Information Policy (OIP) Guidance*, at 1.² The sole focus of the Center’s request is *only* for the EPA record(s) which authorize the imposition of flow controls in National Pollutant Discharge Elimination System (“NPDES”) permits issued by EPA Region I, and supported by EPA Headquarters.

Center’s Request is Unambiguous

Region I is the issuing authority for NPDES permits in the States of Massachusetts and New Hampshire, so its FOIA response will focus on its permit writing activities there. Presently, Region I has issued *numeric flow limitation requirements* for several NPDES permits. These can

¹ The FOIA is implemented by EPA at 40 C.F.R. Part 2.

² <http://www.justice.gov/oip/blog/foia-post-2008-summaries-new-decisions-july-2008>.

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see seen in such issued permits for the *Brockton Advanced Water Reclamation Facility (NPDES Permit No. MA0101010)* (refusal to reflect increased capacity of upgraded facility); *City of Taunton Wastewater Treatment Plant (NPDES Permit No. MA0100897)* (imposition of mass total nitrogen limit in discharge); and, *Marion Water Pollution Control Facility (NPDES Permit No. MA0100030)* (limiting sewage effluent flow), although other NPDES permits may well be subject to numeric flow limitations and requirements.

The single request by the Center is for Agency “records” which serve to authorize, or to tell the EPA Permit Writer that it is proper to include, provision for, numeric flow controls or restrictions in Region I NPDES permits. The Center is uninterested, *and does not request*, copies of existing EPA regulations, or published policy of any kind. What the Center seeks – and EPA is obligated to provide – is a statement of Agency authority that it can impose such flow restrictions as effluent limitation requirements (*i.e.*, any Federal Register or other public regulatory notices specifying this is a proper NPDES program requirement or legal opinion formulated to support such action by the Office of Water) . Of course, a “statement of Agency authority” can take the form of written instruction from a program official, including from EPA Headquarters, to Region 1 permit drafting specialists, for example, that directs or authorizes them to place flow-based controls in Agency-issued permits. The point to this request is to locate the source of Region 1 (or EPA-wide) authority to impose flow-based requirements; nothing more is sought at this time.

Center’s Request is Timely

The Center’s request makes little demand on EPA resources. The subject matter decision-making is fresh, and does not require the sort of costly time commitment that EPA often claims as a threshold to fully respond to FOIA requests. For example, the *Brockton* NPDES permit comment period extended to May 4, 2015; the *Taunton* final permit was issued April 10, 2015; and the *Marion* comment period was extended until about February 6, 2015. While the Center requests a waiver of any fees, except copying charges, as more fully discussed herein, it wishes to avoid the protracted *identity* battles which have increasingly captured public attention.³

EPA need not do much research to see what authorized the flow-based restrictions in this permit. In fact, EPA clearly understood that it was taking new steps in creating such restrictions, as it explained in the Fact Sheet to the *Brockton* NPDES permit, “The Brockton AWRF has not had a numeric flow limit in its current or previous permits[.]” Fact Sheet, at 6. Again, the Center wishes to understand under what authority EPA now believes that the numeric flow provisions were justified.

³ See, e.g., *E&E Legal On The Capture Of EPA*, by JV DeLong, which is available here: <http://www.forbes.com/sites/jvdelong/2015/09/18/ee-legal-on-the-capture-of-epa/>

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What the Center Does Not Request

The Center’s present FOIA request does not include copies of emails or correspondence to the public or delegated state programs. Please do not search for, or include, such items in response to this request.

Having said this, the Center does request that EPA provide whatever “record” was directed, or is available, to the EPA Permit Writer, or other person authorized to draft NPDES permits, which shows, or directs, that the flow-based controls discussed above, and other such flow-based NPDES permit conditions, are authorized. The EPA Permit Writer, after all, is directed by the Agency that its primary responsibility is in assuring technical accuracy in drafting NPDES permits.⁴

Center Fee Waiver Request

The Center anticipates that EPA’s reply will be relatively modest in length. Certainly we agree that copy charges will be fully paid, although we ask to be notified, *in advance*, if they are anticipated to exceed \$250.00. If so, and not in derogation of any other action, the Center requests that such fees, and any associated search and other source of cost basis, be waived, pursuant to EPA rule, at 40 C.F.R. §2.107(k).

The Center, and the nature of its request, fully meet the basis for fee waiver, under Section 2.107(k)(1), and the FOI Officer should find, “that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” This conclusion is further supported by the further analysis of the fee waiver provisions of the FOIA in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108 (D.C. Cir. 2015) (“*Cause of Action*”).

- *Subject of the FOIA Request* (Sec. 2.107(k)(2)(i)): The Center’s request deals strictly with “the operations or activities of the government.” The Center seeks only to learn the basis of authority for the EPA Region I imposition of NPDES permit conditions and restrictions on flow. EPA, by law, drafts and ultimately approves the permits and its conditions.
- *Informative Value of the Information to be Disclosed* (Sec. 2.107(k)(2)(ii)): The information sought in this request is certainly “likely to contribute” to an understanding of government operations or activities.” *Id.* Permittees are entitled to understand on what basis the

⁴ Even in a NPDES permit adjudication, the Permit Writer is directed, as follows: “A permit writer should not attempt to support technically indefensible conditions. Contested permit conditions that are not technically defensible and are not based on any legal requirement should be brought to counsel’s attention, with advice that EPA or the state withdraw those conditions.” *U.S. Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit Writers’ Manual*, Ch. 11.4.1.2, at 11-17 (2010).

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federal government is placing restrictions on the flows from its treatment facilities, and other conditions and requirements on controlling flows into the plant and related to the receiving waters of the discharge, as well. The EPA response will be instructive to the public in explaining by what authority it can limit, for example, plant expansion, economic growth, and the like. Without this information, permittees will be in the dark regarding these important permit conditions.

- *Disclosure Contributes to Public Understanding of the Subject* (Sec. 2.107(k)(2)(iii)): The Center's Executive Director, and General Counsel, have decades of environmental law experience, both in private and governmental capacities; they can quickly and effectively disseminate anything of value received from EPA to the Center's client base and others that might read the Center's *Newsletter*. See, e.g., *Newsletter*, of February 2015, found here: http://static1.squarespace.com/static/52eb2b55e4b00030838c3c03/t/55afed05e4b082155fd35993/1437592837628/CRR_Newsletter_02_2015.pdf. Looked at a different way, without full EPA disclosure, the public will be entirely in the dark regarding what empowers EPA to add permit conditions that directly impact areas of traditionally local concern, such as infrastructure development, growth decisions, and the like.

- *Significance of Contribution to Public Understanding* (Sec. 2.107(k)(2)(iv)): This query has largely been asked and answered above. No one in the public knows the basis by which important EPA NPDES permit conditions restricting flow are made. If disclosure of this information is refused by EPA, the public will continue not to know the "how and why" of their own permit conditions. As to this, and the immediately preceding, points, *Cause of Action* has emphasized that a more nuanced agency approach to FOIA compliance is required regarding the size of the public audience to be reached, and the significance of the information imparted. Essentially, that court agreed with bill sponsor statements that "[p]ublic understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter." 799 F.3d at 1116, n. 6. Here, the Center represents members of the group of permittees in Massachusetts and New Hampshire – a "subset" of the most interested public -- who are adversely affected by the growth conditions mentioned.

- *Commercial Interest Issues* (Sec. 2.107(k)(3)(i)): The Center does not stand to benefit alone from the information sought. Instead, the Center seeks the missing information to advise the public, and other permittees, of the basis for EPA decision-making. Moreover, the affected public has a critical economic stake in what EPA demands in its permit actions. Flow-related restrictions operate effectively like a sewer connection ban, growth moratorium, or land use controls, to a local government. Even if the Center received the primary benefit, however, EPA could not find a "commercial" interest bar to providing the requested information: "But since the 1986 amendments, it no longer matters whether the information will also (or even primarily) benefit the requester. Nor does it matter whether the requester made the request for

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the *purpose* of benefitting itself. The statutory criterion focuses only on the likely *effect* of the information disclosure.” (Emphasis in original.) *Id.*, 799 F.3d at 1118.⁵

- *Primary Interest in Disclosure* (Sec. 2.107(k)(3)(ii): EPA regulation states that “A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure.” *Id.* While the Center fully meets the EPA announced test, the Agency’s standard itself must be construed consistently with *Cause of Action*. Recall that the Court there recognized that it did not matter whether the primary benefit of the information goes to the requester (or even if that was intended), rather, “The statutory criterion focuses only on the *effect* of the information disclosure.” (Emphasis in original.) *Id.*, 799 F.3d at 1118. Here, the *effect* of the information requested, once received, will directly benefit both adversely affected NPDES permittees, as well as those that must yet deal with EPA and who anticipate, or have been advised, that they will receive similar flow control results from the Agency.

The Center’s request for EPA records is limited, unambiguously stated, and contemporaneous with recently completed Agency permit drafting activities. No request is made for EPA to create or draft any new record, or to do other than what the FOIA was drafted for: to assist the public to learn about federal agency decision-making.

One final note, the Center reserves the right to amend or modify its request as other information becomes known to it.

Please advise the undersigned with your schedule in this matter, or if there are any questions.

Thank you.

Respectfully submitted,



Christopher L. Risetto, General Counsel

⁵ Nor did the *Cause of Action* Court have any difficulty avoiding recognizing the “commercial” tag for Action, even though it directly benefitted from the results of its FOIA request – which was to obtain information about the FTC award of fee waivers, which would assist Action’s own fee waiver request: “But Action’s interest in information regarding the FTC’s treatment of fee-waiver applications (including Action’s own) is not rendered “commercial” merely because the information could help it obtain a fee waiver.” 799 F.3d at 1118. Here, the Center’s interest is in advising the public as to EPA’s authority to do what the Agency has already done: impose various flow restrictions in its issued permits.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 26, 2016

OFFICE OF
WATER

Christopher L. Risetto, General Counsel
Center for Regulatory Reasonableness
1620 I St., NW – Suite 701
Washington, DC 20006

RE: Freedom of Information Act Request EPA-HQ-2016-002924

Dear Mr. Risetto:

This letter responds to your January 19, 2016, request under the Freedom of Information Act (FOIA) for *“record(s) which authorize the imposition of flow controls in National Pollutant Discharge Elimination System (“NPDES”) permits issued by EPA Region I, and supported by EPA Headquarters.”* Your letter also notes that it *“...does not request, copies of existing EPA regulations, or published policy of any kind.”*

Please be advised that a search has been conducted in EPA Headquarters and no records responsive to your request have been located. This response should not be understood as a statement by EPA that it lacks authority to include permit limits of the kind described in your FOIA request. Please note that EPA is not required to answer questions, respond to interrogatories, or rebut substantive assertions posed as FOIA requests.

You may appeal this no records response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked “Freedom of Information Act Appeal.”

Sincerely,

A handwritten signature in blue ink, appearing to read "Deborah Nagle".

Deborah G. Nagle, Director
Water Permits Division