

HALL & ASSOCIATES

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November 25, 2014

VIA U.S. FIRST CLASS MAIL & E-MAIL

Ms. Susan Murphy
U.S. Environmental Protection Agency – Region I
5 Post Office Square, Suite 100 (OEP06-1)
Boston, MA 02109-3912

RE: Supplemental Comments Regarding Draft Permit #MA0100897, City of Taunton

Dear Ms. Murphy:

On September 10, 2014, EPA held a meeting with the City of Taunton to discuss key concerns that the City had raised with respect to the draft permit published by EPA Region I in 2013. During this meeting EPA claimed that the new information obtained by the Region and analyses created by the Region, since the draft permit was issued, demonstrated that the nitrogen reduction requirements specified in the draft permit were well founded. On September 16, 2014, the City of Taunton, through its attorneys Hall & Associates, submitted a Freedom of Information Act (FOIA) request to obtain the “new information and analyses” that EPA Region I indicated it had developed to support its permit action. (*See*, attached FOIA No. EPA-R1-2015-000252) The FOIA asked for the following documents and analyses, which have never been previously disclosed to the public:

1. The analysis showing that the money spent by municipal entities on various wastewater improvement projects in the Taunton estuary system and waters influenced by that system (*i.e.*, Mount Hope Bay and Rhode Island nitrogen reductions) did not change oxygen demanding pollutant loading to the system, only bacteria levels.
2. The analysis showing that the Brayton Point temperature reductions occurring since 2004/05 and recently proposed discharge elimination did not/will not improve system DO.
3. The documentation showing that EPA’s published guidance and technical methods for nutrient criteria development and estuary DO assessments specify that a “sentinel approach” is a valid method for setting applicable nutrient criteria and nutrient reduction targets in estuarine systems.

4. Documentation confirming that EPA has previously peer-reviewed the “sentinel approach” as proposed for use in this system.
5. The data sonde information, and any analysis thereof, that EPA referred to as demonstrating Taunton nutrients are still causing problems and that little water quality improvement has occurred since 2004.
6. Any confirmation received from EPA HQ stating that the Regional office’s “sentinel approach” was scientifically defensible.
7. Any information confirming EPA’s claim that other entities may sue the agency if a 3 mg/l TN permit is not imposed and the data supplied by these entities in support of their position that a 3 mg/l TN limitation is necessary for this system.

Subsequently, the Region refused to provide any documents whatsoever, indicating that the submission failed to reasonably describe the documents sought. (*See*, attached, EPA FOIA denial letter dated November 3, 2014). Given the Region’s actions, which have prevented the City from reviewing and commenting on the “new information and analyses”, it would be improper for the Region to include such information as part of the basis for issuing the permit. The Region’s approach violates the City’s due process rights by creating one basis for permit issuance and substituting another, without opportunity for public comments. Absent publication of the above-referenced new information for public review and comment, the Region should not (and legally cannot) move forward with finalizing the City’s permit if such action is based on this undisclosed and, to date, non-publically available administrative record.

Thank you for your consideration of these comments. We look forward to the Region’s response.

Sincerely,



.....
John C. Hall

Attachments

cc: Mayor Thomas C. Hoye, Jr.
Joseph Federico, BETA
Dan Arsenault, EPA

Attachment 1

FOIA No. EPA-R1-2015-000252

**Request for Records Added to the Permit Administrative Record for NPDES
Draft Permit #MA0100897 by EPA Region I since March 20, 2013
(Submitted October 7, 2014)**

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October 7, 2014

Via FOIA Online

Regional Freedom of Information Officer
U.S. EPA, Region 1 (OARM01-6)
5 Post Office Square, Suite 100
Boston, MA 02109-3912
Facsimile: (617) 918-1102
Email: r1.foia@epa.gov

**Re: Freedom of Information Act Request for Records Added to the Permit
Administrative Record for NPDES Draft Permit #MA0100897 by EPA
Region I since March 20, 2013**

To Whom This May Concern:

This is a request for a public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2. For purposes of this request, the definition of "records" includes, but is not limited to, documents, letters, memoranda, notes, reports, e-mail messages, policy statements, data, technical evaluations or analysis, and studies.

Background

On March 20, 2013, EPA Region 1 (EPA R1) published NPDES Draft Permit #MA0100897 (Draft Permit) for the City of Taunton (City) and an accompanying Fact Sheet for public comment. The public comment period on the Draft Permit was initially March 20, 2013, to April 18, 2013; EPA R1 extended the comment period to June 17, 2013. On September 10, 2014, EPA R1 met with the City to discuss the Draft Permit. At that meeting, EPA R1 indicated that, since the development of the Fact Sheet for the Draft Permit, it had received new information, and had conducted additional analyses in preparation for issuing the Final Permit. Neither information nor analyses were included as part of the Fact Sheet which accompanied the public comment notification for the Draft Permit, and have not been published for public comment and/or review.

Request

This request seeks any and all records added to the permit administrative record by EPA Region I since the March 20, 2013 publication of the Fact Sheet specifically addressing the following issues:

1. Any analysis showing that the money spent by municipal entities on various wastewater improvement projects in the Taunton estuary system and waters influenced by that system since 2004/2005 (*i.e.*, Mount Hope Bay and Rhode Island nitrogen reductions) did not change oxygen demanding pollutant loading to the system, only bacteria levels.
2. Any analysis showing that the Brayton Point temperature reductions occurring since 2004/05 and recently proposed discharge elimination did not/will not improve dissolved oxygen (DO) in the Taunton Estuary.
3. Any documentation showing that EPA's published guidance and technical methods for nutrient criteria development and estuary DO assessments specify that a "sentinel approach" is a valid method for setting applicable nutrient criteria and nutrient reduction targets in estuarine systems.
4. Any documentation confirming that EPA has previously peer-reviewed the "sentinel approach" as proposed for use in this system.
5. The data sonde information, and any analysis thereof, that EPA referred to as demonstrating Taunton nutrients are still causing problems and that little water quality improvement has occurred since 2004.
6. Any confirmation received from EPA HQ stating that the Regional office's "sentinel approach" was scientifically defensible.
7. Any information confirming EPA's claim that other entities may sue the agency if a 3 mg/l TN permit is not imposed and the data supplied by these entities in support of their position that a 3 mg/l TN limitation is necessary for this system.

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed \$250.00. Please duplicate the records that are responsive to this request and send it to the undersigned at the above address. If the requested record is withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary document is duplicated.

Respectfully,

A handwritten signature in blue ink, appearing to read "Alexander J. E. English". The signature is fluid and cursive, with the first name "Alexander" being the most prominent.

Alexander J. E. English
Hall & Associates
1620 I St., NW
Washington, DC 20006-4033
(202) 463-1166
aenglish@hall-associates.com

Attachment 2

EPA FOIA denial letter, dated November 3, 2014



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100

Boston, MA 02109-3912

VIA FOIA ONLINE

November 3, 2014

Mr. Alexander English
Hall & Associates
1620 I Street, NW, Suite 701
Washington, DC 20006-4033

RE: Freedom of Information Act Request No. EPA-R1-2015-000252

Dear Mr. English:

This is in response to your Freedom of Information Act request of October 7, 2014, in which you seek records associated with the development of EPA Region 1's National Pollutant Discharge Elimination System Permit for Taunton, Massachusetts (Permit No. MA0100897).

Your FOIA requests any records added to the permit's administrative record since the publication of the Draft Permit Fact Sheet that relate to a series of factual assertions or technical positions that you have formulated regarding the permit and that you appear to have attributed to Region 1. You seek records "addressing" what you variously term "analysis," "documentation" or "information" that 'show,' 'demonstrate' or 'confirm' the statements to be true.

The Region has concluded these requests do not reasonably describe the records being sought as required by 40 C.F.R. § 2.103(c) and are accordingly improper. The FOIA request as currently formulated does not permit the Region to identify and locate the requested records in a manner consistent with its obligations under the statute. Region 1 is not obligated to make interpretative judgments to determine whether administrative record materials amount to a "demonstration" or "confirmation" that a particular statement is true. The Region further notes that many of the requests contain additional subjective terms ("valid," "still causing problems," "little water quality improvement," "scientifically defensible") that require interpretation. A FOIA request that necessitates the agency to formulate opinions and analyses or to effectively conduct research in order to respond to a request is not appropriate under FOIA. *Lamb v. IRS*, 871 F. Supp. 301, 304 (E.D. Mich. 1994) (finding requests outside scope of FOIA when they require legal research, are unspecific, or seek answers to interrogatories).

In accordance with our regulations, we offer you the opportunity to discuss and modify your requests to meet the requirements of the regulations. Please contact Samir Bukhari at (617) 918-1095 if you would like to discuss modifications. If we have not heard from you within 30 calendar days of the date of this letter, we will assume you are no longer interested in pursuing your request, and your file will be closed.

If you consider any portion of this response to be a denial, you may appeal it by addressing your written appeal 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), FAX: (202) 566-2147, 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 20001. 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 RIN listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Sincerely,



Ken Moraff

Director

Office of Ecosystem Protection
EPA-Region 1