



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

November 7, 2013

Linda T. Landis, Senior Counsel
Legal Department
Public Service Company of New Hampshire
780 No. Commercial Street
Manchester, NH 03101

Re: Incomplete PSNH Response to EPA's March 22, 2012, Request for Information Pursuant to Section 308(a) of the Clean Water Act

Dear Ms. Landis:

On March 22, 2012, the Region 1 office of the United States Environmental Protection Agency (EPA or the Agency) sent the Public Service Company of New Hampshire (PSNH or the company) an information request letter pursuant to section 308(a) of the Federal Clean Water Act (CWA) (the March 22, 2012 Information Request). 33 U.S.C. § 1318(a).¹ EPA and PSNH appear to disagree over whether PSNH is obliged to provide EPA with further information in response to the March 22, 2012 Information Request. As I understand it, PSNH's position is that the scope of the information sought by EPA's letter was excessive, and that the company has completed its response obligations under the letter. EPA disagrees on both points.

In EPA's view, the scope of the March 22, 2012 Information Request was reasonable and PSNH has yet to fully respond to it. As a result, PSNH remains obliged to provide additional information requested by EPA's letter. Despite this fact, EPA also plans to send PSNH a separate, follow-up information request letter under CWA § 308(a) reiterating its request for certain of the information sought by the March 22, 2012 Information Request. We are hopeful that doing so will facilitate the most rapid possible production of the required information by PSNH.

In addition, I am sending this letter to respond to issues that you have raised regarding the March 22, 2012 Information Request and PSNH's response to it.

¹ EPA's March 22, 2012, information request letter also sought certain information pursuant to authority under the Resource Conservation and Recovery Act, but this letter only addresses issues pertaining to information sought under CWA § 308(a).

Background

As you know, EPA has been working to develop a new (or “reissued”) National Pollutant Discharge Elimination System (NPDES) permit under CWA § 402, 3 U.S.C. § 1342, for PSNH’s Merrimack Station power plant. On September 30, 2011, EPA issued public notice that it had prepared a new draft NPDES permit for Merrimack Station and was making it available for public review and comment. Some time thereafter, Merrimack Station began operation of a new Flue Gas Desulfurization (FGD) scrubber system and associated Wastewater Treatment System (WWTS). Earlier, in its application for a new NPDES permit for Merrimack Station, PSNH requested that the new permit authorize the discharge of the facility’s FGD wastewater to the Merrimack River, subject to certain effluent limits. EPA’s draft NPDES permit proposed effluent limits for Merrimack Station’s FGD wastewater, but a final permit has yet to be issued. Therefore, discharges of FGD wastewater to the Merrimack River by Merrimack Station have not yet been authorized. Thus, EPA still must determine how to regulate this wastestream in the facility’s new final permit.

When EPA learned that Merrimack Station had begun operation of the FGD scrubber system and the FGD WWTS, the Agency also learned that PSNH was sending the FGD wastewater offsite for disposal. EPA did not, however, receive communications from PSNH confirming this. Moreover, EPA did not receive information about either the quantity or the quality of the FGD wastewater at issue or about which treatment facilities were taking the wastewater for disposal. EPA was interested in gathering this information for a number of reasons, as explained farther below.

As a result, EPA sent the March 22, 2012 Information Request to PSNH, which, in pertinent part, directs PSNH to submit the following to EPA:

- 1) Please provide the following information with regard to the offsite disposal of FGD WWTS effluent from Merrimack Station:
 - a) Each date on which any FGD WWTS effluent has been transported offsite from Merrimack Station for disposal.
 - b) For each of the dates on which FGD WWTS effluent was transported offsite for disposal, please provide:
 - (1) The location and identity of the recipient of the FGD WWTS effluent;
 - (2) The total volume of FGD WWTS effluent transported to each location/recipient. This volume shall be further broken down to show the volume of FGD WWTS effluent transported by each tanker truck dispatched from Merrimack Station.
 - (3) The results of any effluent sampling accomplished for each separate truck load of FGD WWTS effluent.

- (4) Any analyses that PSNH or its consultants have prepared concerning whether or not the FGD WWTS effluent would either cause any water quality exceedances in the water body (or bodies) ultimately receiving the wastewater or would cause any permit violations by the facilities receiving the FGD WWTS effluent.
- c) Please also provide copies of any notices or notifications that PSNH may have filed with either EPA or the New Hampshire Department of Environmental Services (NH DES) concerning the offsite disposal of FGD WWTS effluent.
- 2) Beginning in May 2012, please submit a monthly report containing all the information requested in Item No. 1. This report is due by the fifteenth day of the following month.

As indicated in the text, the monthly report required by item No. 2 above simply calls for the information requested in item No. 1 to be compiled and submitted on a monthly basis.

On May 7, 2012, PSNH submitted its initial response to EPA's letter. PSNH objected that EPA's request was "overly broad, unduly burdensome ... and disturbingly vague in its scope." The company further stated that "PSNH believes that the request for monthly reports going forward exceeds EPA's authority under Section 308 of the Clean Water Act ("CWA")" Nevertheless, the company also submitted responsive information and stated that "[d]espite these objections, PSNH has made a good-faith effort to provide the information requested and believes the information contained herein to be fully responsive."

In a similar vein, PSNH's May 7, 2012, response further stated that:

PSNH objects to this information request as unduly burdensome, not reasonably limited with respect to time, and to the extent it calls for PSNH to create documents not otherwise in its possession, custody, and/or control as of March 26, 2012, the date PSNH received EPA's March 22, 2012 correspondence, as beyond the statutory authority of Section 308(a) of the Clean Water Act Subject to and without waiving the foregoing objections, PSNH hereby agrees to provide EPA documents and/or reports created during the normal course of business that are responsive to Question 1, subparts (a) through (c), that PSNH has in its possession, custody, and/or control on a monthly basis.

After its May 7, 2012, response, PSNH submitted additional information in a number of subsequent months. At that time, it was EPA's understanding that PSNH was submitting the requested information for every month in which it disposed of FGD wastewater off-site, despite its objections to EPA's request. Not only was PSNH required to do so, but, despite its objections, the company had agreed to do so. Thus, if PSNH did not submit

information for a particular month, it was EPA's understanding that the reason for this was only that Merrimack Station had not sent any FGD wastewater off-site for disposal that month either due to the facility's intermittent operations or because it had implemented a "zero liquid discharge" treatment system.

On December 19, 2012, Allan Palmer of PSNH sent John King of EPA an email attaching PNSH's information report for October 12, 2012, and indicating that no monthly report was needed for November 2012 because there had been no offsite shipments of FGD wastewater that month. Allan's email further stated, however, that: "[b]ased upon my understanding, this report concludes our commitment to provide information in response to your 308 letter."

In response, John sent an email to Allan on the same day that stated as follows:

I assume when you state in your email that "... this report concludes our commitment to provide information in response to your 308 letter," that PSNH will no longer be trucking Merrimack Station FGD treated wastewater off-site. However, I cannot comment on whether PSNH has fully complied with the requirements of EPA's 308 letter dated March 22, 2012. I suggest PSNH's attorney, Linda Landis, contact Region 1's attorney, Mark Stein to discuss this matter.

You did not contact me about this, however, and we never had the conversation that John suggested.

On August 13, 2013, John King sent another email to Allan Palmer, you and me. John's email mentioned a telephone conversation he had with Allan concerning Merrimack Station's FGD wastewater and requested certain information from PSNH on that subject. John's email also asked you and me to discuss the matter of PSNH's response to EPA's March 22, 2012, information request letter.

John's email, in pertinent part, reads as follows:

Linda and Mark,

Allan indicated during our August 12th conversation that FGD distillate periodically is sent off site to a POTW. I stated to Allan that PSNH needs to provide a monthly report concerning off site transport of FGD distillate. This requirement is in accordance with EPA §308 letter of March 22, 2012. Allan countered that PSNH had met all the requirements of that §308 letter, and no further reporting is required. Since I did not want my conversation with Allan to become a heated discussion over the interpretation of EPA §308 letter reporting requirements, I ask the attorneys representing our respective organizations to discuss this matter. (Please note Linda that Mark is on vacation, but I will bring this matter to his attention when he returns ... a few days after he returns.)

Thank you for your attention to this matter,

John

As promised, John brought the issue to my attention. This prompted me to send you an email on September 4, 2013. My email stated, among other things, as follows:

[i]n accordance with ... [the March 22, 2012 Information Request], EPA Region 1 expects PSNH to continue to provide us with monthly reports containing the specified information concerning any off-site disposal by Merrimack Station of its Flue Gas Desulfurization (FGD) Wastewater Treatment System (WWTS) effluent

Allan has indicated that PSNH considers that it has completed its reporting obligations under EPA's information request letter and no longer needs to submit such reports. ... EPA does not agree and is unaware of any basis for concluding that the reports no longer must be submitted.

EPA was aware that Merrimack Station was operating less frequently in recent months than it had historically and, therefore, was unsure whether or not the facility was sending any FGD WWTS effluent offsite, but recent conversations between John and Allan have indicated that Merrimack Station has indeed been generating such wastewater and sending at least some of it offsite for treatment/handling. Therefore, EPA expects PSNH to submit the requested reports concerning such offsite disposal.

In response, you sent me an email dated September 10, 2013, in which, among other things, you stated the following:

[w]ith all due respect, I would like to add that we are not aware of any legal basis for an ongoing, essentially *ad infinitum* monthly reporting obligation regarding what are essentially limited shipments of treated wastewater to regulated POTWs with whom we have all necessary agreements and permits in place.

I am now sending this letter to address the apparent disagreement between EPA and PSNH over the latter's information submission obligations under EPA's March 22, 2012 Information Request, and the continuing difficulty that EPA has had in obtaining the requested information in accordance with that letter. As indicated above, EPA will also send another information request letter under CWA § 308(a) to reiterate the information that we are requesting from PSNH.

Discussion

CWA § 308(a), 33 U.S.C. § 1318(a), authorizes EPA to request from PSNH the information that the Agency sought in the March 22, 2012, information request. CWA § 308(a) provides, in pertinent part, as follows:

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 ..., 1345 and 1364 of this title –

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require;

33 U.S.C. § 1318(a). This statutory language gives EPA the discretionary authority to require the owner or operator of a point source to collect and submit certain information if the Agency concludes that it needs that information to carry out certain of its Clean Water Act duties, and if the information requirements are reasonable. *See, e.g., NRDC v. U.S. Environmental Protection Agency*, 822 F.2d 104, 118-119 (D.C. Cir. 1987); *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49, 53 (1st Cir. 1978); *United States v. Hartz Construction Company, Inc.*, 2000 U.S. Dist. LEXIS 12405, at [*11] (N.D. Ill. 2000); *In re Simpson Paper Co. and Louisiana-Pacific Corp.*, 3 E.A.D. 541, 549 (CJO 1991).

To break it down further, CWA § 308(a) authorizes EPA to issue information requests to the owner or operator of a “point source.” The term “point source” is defined by CWA § 502(14), 33 U.S.C. § 1362(14), to mean “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure ..., from which pollutants are or may be discharged.” Thus, a discernible, confined and discrete conveyance is a point source if pollutants *may* be discharged from it, whether or not they *are* being discharged. Moreover, the point source in question need not already be regulated by an NPDES permit. *See Hartz Construction*, 2000 U.S. Dist. LEXIS 12405, at [*11]. As EPA’s Chief Judicial Officer explained in *In re Simpson Paper*, “[s]ection 308(a) is an information gathering tool that is not oriented exclusively towards permittees: it applies to any owner or operator of a point source, without reference to whether such person has a permit.” 3 E.A.D. at 549.

PSNH owns and operates a number of point sources at Merrimack Station. (Merrimack Station's FGD WWTS, from which PSNH has requested authorization to discharge pollutants to the Merrimack River, constitutes just one of such point sources.) As a result, EPA is authorized to send PSNH information request letters pursuant to CWA § 308(a) and PSNH is legally obligated to respond to them.

An information request letter under CWA § 308 may be sent by EPA for one or more of the purposes enumerated by the statute. Specifically, CWA § 308(a) authorizes EPA to send an information request letter to carry out the objectives of the statute, including but not limited to, gathering information that the Agency believes will help it develop effluent limits or pretreatment standards, help it determine whether a person has violated an effluent limit or pretreatment standard, and/or help it carry out certain sections of the CWA, such as 33 U.S.C. § 1342 regarding NPDES permits. 33 U.S.C. § 1318(a)(1), (2) and (4). As EPA's Environmental Appeals Board has explained:

[t]he Agency may, pursuant to CWA § 308(a), seek information to, among other things, aid enforcement, *develop permit limitations* and effluent standards, *and generate whatever information* it needs to carry out its statutory responsibilities. *In re Simpson Paper Co.*, 3 E.A.D. 541, 549 (CJO 1991).

In Re Arecibo & Aguadilla Regional Wastewater Treatment Plants, 12 EAD 97, 134-135 (EAB 2005) (emphasis in original) (footnotes omitted). *See also, e.g., NRDC*, 822 F.2d at 119; *Mobil Oil Corporation v. U.S. Environmental Protection Agency*, 716 F.2d 1187, 1189-1190 (7th Cir. 1983) (seeking information to assist in developing permit limits, identifying pollutants present in wastewater discharges, and/or determining compliance with applicable standards are proper purposes for which EPA may request information under CWA § 308); *Tivian Laboratories*, 589 F.2d at 53; *In re Simpson Paper*, 3 E.A.D. at 549.²

EPA sent its March 22, 2012, information request letter for proper purposes under the statute. As stated above, EPA is working on developing a new NPDES permit for Merrimack Station. The facility began operation of the FGD scrubber system and

² While there are many legitimate purposes for which EPA may seek information from the owner or operator of a point source under CWA § 308(a), the point source owner or operator does not have a protected interest in refusing to provide such properly requested information. As the court in *Mobil Oil* explained:

[a]ny interest Mobil may have in frustrating the EPA's efforts to assess the efficiency of its treatment processes and to detect trace amounts of toxic pollutants in waste water it dumps into the Des Plaines River is not entitled to protection.

* * *

These provisions of Section 308(a) leave no doubt that the Congress that enacted that Section was firmly convinced that the interest of permit holders such as Mobil in keeping secret information about the pollutants in its waste water is not entitled to protection.

716 F.2d at 1190.

associated WWTS, but direct discharges of FGD wastewater to the Merrimack River have yet to be authorized. EPA still needs to make decisions about how to regulate the FGD wastewater in the facility's new NPDES permit. Moreover, disposal of the FGD wastewater at a municipal sewage treatment plant is likely subject to pretreatment requirements under the CWA. Certain pretreatment requirements will apply to PSNH, as the indirect discharger, while others will apply to the municipal facility.

Therefore, when EPA learned that Merrimack Station had begun operating the FGD scrubber system and the FGD WWTS, and was shipping FGD wastewater off-site for disposal, EPA decided to send PSNH a request under CWA § 308(a) for certain information related to these subjects. EPA regarded the information request as necessary because the Agency had not received information about the quantity and quality of FGD wastewater being generated and shipped off-site or which facilities were accepting the wastewater for disposal. In addition, EPA reasonably decided that gaining such information could contribute to the Agency's determination of appropriate NPDES permit requirements for Merrimack Station's FGD wastewater by identifying the volume of wastewater at issue, the types of pollutants in the wastewater, the concentrations of such pollutants, and the treatment efficiencies achieved by the WWTS. EPA also reasonably decided that this information could help to identify whether or not compliance was being maintained with the restrictions on direct discharges of FGD wastewater by Merrimack Station and the pretreatment requirements governing industrial wastewater sent to municipal sewage treatment plants. *See* 33 U.S.C. §§ 1317(b) and (d); 40 C.F.R. Part 403. Furthermore, EPA concluded that this information could potentially contribute to an evaluation of whether any municipal sewage treatment plants accepting the wastewater for disposal were complying with their pretreatment program requirements, and whether such facilities were likely to be able to treat the wastewater adequately or, instead, were likely to allow the pollutants in the wastewater to "pass through" or "interfere" with the treatment plants and potentially harm the environment.

Consistent with these purposes, EPA's March 22, 2012, Information Request stated that:

EPA requires the requested information to help determine whether the removal and offsite disposal of the FGD WWTS effluent from Merrimack Station complies with CWA ... and whether it presents a potential adverse effect to the environment.

EPA's purposes for requesting the information from PSNH lie squarely within the purposes enumerated in CWA § 308(a).

In addition, the demands of EPA's information request are reasonable. The subject matter of EPA's request is narrowly targeted: it only requests information pertaining to any shipments by PSNH of FGD wastewater for off-site disposal. Indeed, your recent email to me states that EPA's information request pertains to "what are essentially limited shipments of treated wastewater[,]," which underscores the limited amount information requested by EPA. EPA's letter does not require any information when no FGD wastewater is sent off-site for disposal, with the exception that Item 1.b.4 of EPA's

letter requests a copy of any analyses that PSNH (or its consultants) might *already* have prepared regarding whether disposal of the FGD wastewater at a municipal sewage plant might cause water quality exceedances or permit violations at that facility. EPA's letter does not require preparation of such analyses; it only requires submission of a copy to EPA if such analyses have already been prepared by PSNH or its consultants.

The information sought by EPA should also be relatively easy for PSNH to collect. First, EPA's request seeks very basic information about any off-site disposal (*i.e.*, the dates, locations, and per truck wastewater volumes for each disposal event). Second, it requests the results of any effluent sampling and/or water quality analyses *to the extent that they have already been collected or prepared by PSNH or its contractors*. EPA's March 22, 2012 Information Request does not require PSNH to conduct additional wastewater sampling, although EPA is authorized to impose such requirements under CWA § 308(a)(A)(iii) and (iv). In addition, EPA's information request seeks copies of any notices that PSNH may *already* have filed with either EPA or NH DES regarding offsite disposal at a municipal sewage plant. Contrary to the complaints expressed in your May 7, 2012, letter, these requirements are far from "overly broad, unduly burdensome ... and disturbingly vague in ... scope."

Your May 7, 2012, letter also objected to EPA's information request "to the extent it calls for PSNH to create documents not otherwise in its possession, custody, and/or control as of March 26, 2012, the date PSNH received EPA's March 22, 2012 correspondence" Yet, this objection is unfounded. The owner or operator of a point source may not refuse to submit information requested by EPA in accordance with CWA § 308(a) on the grounds that it is not part of a document already in that party's possession or control at the time it receives the information request. A party also may not refuse to submit information properly requested by EPA under CWA § 308(a) on the grounds that responding would require it to create a new document. Information requests under CWA § 308(a) are not limited to seeking documents that already exist or are already in the possession of the recipient of the request. Indeed, under CWA § 308(a), EPA can require the future collection of effluent data and the submission of that data or reports concerning that data. In this case, EPA's information request does require the submission of specific information regarding any future off-site disposal of FGD wastewater, but the required information is limited in scope and well within the bounds of CWA § 308(a).

Finally, PSNH objects to the fact that EPA's information request calls for the monthly submission of information about off-site disposal events without expressly stating an end-date on the requirement. As quoted above, PSNH's May 7, 2012, letter objected to the request on the ground that it was "not reasonably limited with respect to time"³ In addition, your September 10, 2013, email to me complains that EPA's information request creates an "ongoing, essentially *ad infinitum* monthly reporting obligation" While EPA understands that you have a concern about how long the information

³ The question here relates to time-frame of the information request's applicability, rather than the time provided for PSNH to gather and submit responsive information. Indeed, with regard to the time provided for response, PSNH requested an extension of time and EPA agreed to a reasonable extension. See April 6, 2012, Letter from Stephen S. Perkins, EPA, to Linda T. Landis, PSNH.

submission obligation will continue, we do not agree that this constitutes a basis for refusing to respond the March 22, 2012 Information Request.

To begin with, it should be understood that nothing in the CWA or EPA regulations places a specific limit on the time-period that can be covered by an information request under CWA § 308(a) or requires that an information request letter state a specific end-date. *Cf. Arcibo*, 12 EAD at 135 (“The Agency may exercise the authority section 308 confers at any time”). At the same time, of course, the terms of an information request letter under CWA § 308(a) must be reasonable. The reasonableness of the time-frame for an information request letter needs to be considered in light of the facts of the case at hand. *See Hartz Construction*, 2000 U.S. Dist. LEXIS 12405, at [*12].

Given the facts of this matter—a newly generated wastewater not regulated by Merrimack Station’s current permit and for which EPA must develop new permit limits, but about which EPA has limited information—EPA is appropriately interested in collecting the requested information during some or all of the period leading up to issuance of a new final NPDES permit for Merrimack Station. As stated above, EPA wants this information to contribute to the development of appropriate permit limits for Merrimack Station’s FGD wastewater and to aid in identifying and responding to any CWA compliance and/or water quality problems associated with the FGD wastewater disposal prior to issuance of the new permit. (EPA is *not* anticipating or expecting there to be such compliance or water quality problems, but the Agency is engaging in due diligence to monitor the situation.)

EPA has never had any intention of requiring PSNH to submit the information requested in the March 22, 2012, letter *ad infinitum*. EPA did not, however, place an end-date in the information request letter because the Agency is unsure when the new Final Permit will be issued and become effective, and because given Merrimack Station’s more irregular operations in recent months, it was unclear to EPA how much data would be generated by the facility over any particular period of time. In any event, given the limited nature of the information requested by EPA, as discussed above, the request was not unreasonable under the circumstances of this case, despite the lack of a stated end-date.

Nevertheless, PSNH unilaterally decided to stop submitting the requested information after only approximately nine months (*i.e.*, in December 2012). Moreover, PSNH did not even need to submit information in each of those nine months because, as the company indicated, it did not ship wastewater off-site in all of those months. EPA believes that it was improper for Merrimack to decline to respond further to the March 22, 2012, Information Request and EPA never assented to this action by the company.

EPA is now planning to send PSNH a new information request letter that seeks the same information sought by the earlier letter and that covers the same time period except that it will extend *only through September 30, 2014*. In other words, to obviate PSNH’s concern, the letter will state a specific end-date for the information submission requirements. EPA can renew the letter, if it needs additional information beyond that

date. Moreover, EPA can terminate the request earlier, if the need for the information ends prior to the end-date stated in the letter. By sending a new information request letter specifying an end-date for the period for which data is required, EPA is neither relieving PSNH of any of its past or current obligations under the March 22, 2012, Information Request, nor waiving any rights that the Agency has to enforce the requirements of that request.

If you have any questions regarding the above, please call me. Thank you for your cooperation.

Sincerely,



Mark A. Stein
Senior Assistant Regional Counsel

cc: Robert P. Fowler, Esq., Balch & Bingham
David Webster, EPA
Damien Houlihan, EPA
John King, EPA
Sharon DeMeo, EPA

