



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

JAN 24 2017

OFFICE OF
GENERAL COUNSEL

Stephen P. Samuels
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, OH 43215-3484

Re: Freedom of Information Act Appeal No. EPA-HQ-2016-007246 (Request No. EPA-R5-2016-005111)

Dear Mr. Samuels:

I am responding to your June 2, 2016, Freedom of Information Act ("FOIA") appeal. You appealed the May 6, 2016 determination of the United States Environmental Protection Agency (EPA or Agency) Region 5, denying in part the FOIA request submitted by Hannah Lubbers of your office, and received by EPA on March 28, 2016.

Your FOIA request sought copies of certain specified documents for the time period February 1, 2015 to March 28, 2016, pertaining to CECOS International, Incorporated, located at 5092 Aber Road, Williamsburg, Ohio, as more fully described in your request.¹ EPA Region 5 responded to your request on May 6, 2016 and released 2,897 pages of responsive documents. The determination from EPA Region 5 also stated that your request was denied in part because the documents listed in the index provided were exempt from disclosure under the deliberative process and attorney-client privileges of FOIA Exemption 5, 5 U.S.C. § 552(b)(5).

I have carefully considered your request, EPA's decision, and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, granted in part and denied in part. Redacted versions of certain documents previously withheld from you are being released at this time. Three documents previously withheld in full are being released to you and six documents are being provided to you in a redacted version. The remaining documents are being withheld from you under the deliberative process or attorney-client privileges of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). I'm also attaching an updated list of withheld documents to this letter. This list includes the exemption or exemptions applicable to the withholding of each document.

¹ One of the categories of documents you requested in your March 28, 2016 request was a copy of approximately 60 documents that you previously requested in FOIA request 05-FOI-2014-004269, and which were withheld by EPA in its response to you dated June 24, 2014. You did not appeal the withholding of this documents following EPA's June 24, 2014 response. In light of the 2016 amendments to the FOIA, EPA re-evaluated these documents.

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While the Region's response indicated that they had withheld 60 records, at this time they have been unable to locate ten of the documents at issue. Additionally, I have determined that eleven documents originally listed as withheld are non-responsive to your request. I am providing an updated list of responsive documents currently being withheld in full or in part following my review.

Identification of Withheld Documents

As a preliminary matter, you argue that EPA has not provided sufficient information concerning the withheld documents for you to evaluate the application of the FOIA exemptions. Your argument draws upon reasoning similar to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied sub nom. Rosen v. Vaughn, 415 U.S. 977 (1974), for the proposition that the Agency's response must contain for each withheld document an explanation as to why the document falls within the scope of the exemption that is claimed.

I find this argument to be without merit. Vaughn held that in litigation, the Agency must provide information for each withheld document about the author, the date of the document, a description of the subject matter of the document, and an explanation as to why the document falls within the scope of the exemption that is claimed and the harm that would arise from its disclosure. A federal agency is not required to provide the same documentation in administrative FOIA responses as is necessary in the litigation context. See Crooker v. CIA, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at *3-*4 (D.D.C. Sept. 28, 1984). More specifically, an agency is not required to provide a Vaughn index until ordered by the court in any judicial action you may bring after you have exhausted all available administrative remedies. See Judicial Watch, Inc. v. Clinton, 880 F. Supp. I, 11 (0.0.C. 1995), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996).

By statute, the denial of an initial FOIA request must inform the requester of the reasons for the denial, the right to appeal, and the name and title of each person responsible for the denial. 5 U.S. C. §§ 552(a)(6)(A)(i) and 552(a)(6)(C)(i). EPA regulations state that initial denials of some or a portion of responsive records will include "(1) The name and title or position of the person responsible for the denial; (2) A brief statement of the reason(s) for the denial, including an identification of records being withheld (individual, or if a large number of similar records are being denied, by described category), and any FOIA exemption applied by the office in denying the request; (3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and (4) A statement that the denial may be appealed under, and a description of the requirements of, paragraph (j) of this section." 40 C.F.R. § 2.104(h). I find that the response by EPA Region 5 complied with the above standard.

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Documents Withheld under Exemption 5: Threshold Requirement

Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” The withheld information contains internal discussions between EPA Region 5 staff as well as between regional staff and an Office of Regional Counsel attorney concerning CECOS International. The documents that were withheld under Exemption 5 of the FOIA are exempt from disclosure because they are inter-agency or intra-agency memoranda or letters generated by EPA employees, and because the documents contain information that is protected by the deliberative process privilege.

Exemption 5 - Deliberative process privilege

Exemption 5 of the FOIA protects from disclosure a record, or portion of a record, that is subject to the deliberative process privilege. The deliberative process privilege protects documents that are both predecisional and deliberative. Deliberative discussions are protected when they contain pre-decisional advice, analysis, and recommendations that were part of the deliberative process of the agency.

The withheld emails and associated documents are protected by the deliberative process privilege because they reflect the internal advice, analysis, discussions and recommendations that were considered during EPA’s decision-making process concerning the CECOS site. Release of the withheld material would discourage open, frank discussions on matters of policy between subordinates and superiors, and could cause public confusion by disclosing reasons and rationales that were not in fact ultimately the grounds for EPA’s action. Therefore, I have determined that material withheld from you under Exemption 5’s deliberative process privilege is exempt from disclosure under Exemption 5 of the FOIA. As discussed in greater detail below, a number of documents have been redacted so that factual portions may be released to you.

Exemption 5 – Attorney-client privilege

Exemption 5 of the FOIA also protects from disclosure a record, or portion of a record, that is subject to the attorney-client privilege. The attorney-client privilege protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. The privilege applies to facts divulged by a client to the attorney, to opinions given by the attorney to the client based upon those facts, and to communications between attorneys which reflect client-supplied information. Some of the withheld documents are protected by the attorney-client privilege because they constitute communication between attorney Erik Olson of the Region 5 Office of Regional Counsel and EPA clients Mary Setnicar and Steve Johnson concerning legal issues regarding the CECOS site. Release of this withheld material would allow scrutiny of sensitive, confidential communication between the attorney and his clients. Therefore, I have determined that the withheld material is exempt from disclosure under Exemption 5 of the FOIA.

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Reasonably segregable information

Redacted versions of six documents previously withheld from you are being released at this time. I have determined that these documents contain reasonably segregable factual information that may be released. These pages are being provided to you in partially redacted form along with pages of the records which are not exempt.

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services ("OGIS") within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Should you have any questions concerning this matter, please call Alan Margolis at (202) 564-3672.

Sincerely,



Kevin M. Miller
Assistant General Counsel
General Law Office

cc: Erik Olson, Region 5

Enclosures: Released Documents
Updated Index of Withheld Responsive Documents

Daily News

New Suit Could Open Door To Court Review Of RCRA Orders After Sackett

Posted: January 11, 2013

A new federal district court suit challenging an EPA compliance order issued under the Resource Conservation & Recovery Act (RCRA) could test whether the recent Supreme Court precedent subjecting Clean Water Act (CWA) orders to pre-enforcement judicial review extends to RCRA orders as well.

Delaware chemical company Soco West last month filed a suit, *Soco West v. United States Environmental Protection Agency*, in the U.S. District Court for the Central District of California, challenging a Dec. 3 unilateral compliance order issued by EPA's Region IX office under section 7003 of RCRA.

In the order, EPA is seeking a host of remediation activities, including installation and maintenance of a slurry wall and cap on the site – a half-acre former waste processing facility located in Orange County, CA. The company faces up to \$7,500 in civil fines per day if it does not comply with the requirements, which took effect on Dec. 17.

But the company argues in its Dec. 18 complaint that the order is a final agency action and there is no "legal basis on which the final agency action may claim that the contamination associated with the site presents an imminent and substantial endangerment to human health or the environment." The order cites a 1992 EPA determination that there was no endangerment at the site.

Many court watchers have suggested that the high court's 2012 decision in *Sackett v. EPA* -- where the court ruled unanimously that the CWA orders are final agency action subject to judicial review -- could open the door to legal challenges of enforcement orders issued under other laws, most of which mirror the CWA.

Since the high court's ruling, industry plaintiffs have already filed several suits seeking judicial review of CWA compliance orders, as well as other EPA actions, such as jurisdictional determinations.

Industry plaintiffs have also filed a similar suit against an EPA enforcement action under the Clean Air Act, a system that EPA was forced to revise after a 2003 ruling from the 11th Circuit suggested the process was unconstitutional. And in *Range Resources v. EPA*, the plaintiff successfully cited *Sackett* to defend against an EPA enforcement action under the Safe Drinking Water Act (SDWA), prompting the agency in 2012 to withdraw its enforcement order.

But Soco West's complaint appears to mark the first time that industry plaintiffs are seeking to extend the precedent to RCRA. While the company does not cite *Sackett* directly, a legal source says the high court ruling is likely to spur similar suits challenging RCRA orders.

Section 7003 of the waste law allows EPA to issue orders against any person "who has contributed to the handling, storage, treatment, transportation or disposal of solid waste or hazardous waste to abate conditions within its jurisdiction that may present an imminent and substantial endangerment to health or the environment."

EPA routinely uses such orders to encourage parties to address potential violations or face penalties of \$7,500 per day for failure to comply. Because use of such orders is routine, EPA relies heavily on such measures to initiate enforcement actions that result in settlements in order to avoid more resource-intensive litigation.

District courts have typically sided with EPA, finding that unilateral administrative orders (UAOs) issued under sections 7003(a) of RCRA, the waste law's emergency provision, and 3013, which is used for investigatory actions, do not constitute final agency actions and that Congress intended the agency to be able to respond uninhibited to releases.

However, the issue remains murky, largely because few parties have actually sought to challenge RCRA orders in court, legal sources say. One industry attorney says the issue is "very much in play because of *Sackett*" and more challenges under the waste law are likely to come in the future. "I think people just gave up challenging" RCRA orders, but all of the applicable case law predates *Sackett*, the source says.

'Final Agency Actions'

In *Sackett*, the high court held that recipients of CWA compliance orders under section 309 of the water law may contest the underlying allegations of those orders as "final agency actions" under the Administrative Procedure Act (APA) before the agency can enforce the order or impose penalties, reversing years of lower court precedent.

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In its March 21 ruling, the Supreme Court unanimously held that while the APA presumption favoring judicial review may be overcome by inferences of intent drawn from the language of a particular statute, "the Government's arguments do not support an inference that the Clean Water Act's statutory scheme precludes APA review."

While some environmental laws, including Superfund, clearly have provisions intended to preclude pre-enforcement judicial review, the high court's reasoning about the CWA would seemingly also apply to RCRA, because the waste law contains no express preclusion, the legal source says.

The law firm Beveridge & Diamond in a web statement issued shortly after the *Sackett* ruling notes that EPA issues administrative compliance orders under the Clean Air Act, RCRA and Toxic Substances Control Act, all of which, like the CWA, do not expressly preclude judicial review of compliance orders. "As a result, though narrowly worded, the *Sackett* decision may affect EPA's enforcement activities under those laws as well as how lower courts apply *Sackett* to them," the statement said.

EPA in 1997 issued guidance asserting that orders issued under RCRA section 7003 are not subject to pre-enforcement judicial review, and that any court review would be strictly limited to the administrative record, a second industry attorney notes. "While there is some case law support for these assertions, the issues are far from settled."

In *Amoco Oil v. United States*, for example, the U.S. District Court for the District of Colorado held in 1997 that issuance of a RCRA corrective action order following site inspection is barred from judicial review prior to enforcement.

But the first legal source points out that EPA's decision to drop its high-profile enforcement action against Range Resources, a Texas gas driller, shortly after the high court's ruling, likely means that "*Sackett* ... it shows EPA's sensitivity to *Sackett* and its potential implications for other statutes."

In the suit, EPA withdrew its SDWA emergency order against Range in which the agency sought to stop alleged contamination of drinking water supplies from gas drilling, ending a constitutional challenge the company had brought in the 5th Circuit as well as an EPA enforcement effort in district court.

Further, Texas utility Luminant Generation Company is challenging an EPA air act notice of violation (NOVs) in a suit that could set a precedent for allowing pre-enforcement review of the notices. EPA began issuing NOVs under the air law instead of administrative orders following the 11th Circuit's ruling in *Tennessee Valley Authority v. EPA*, which found that the orders could not serve as the basis for civil and criminal penalties under the 5th Amendment's Due Process clause.

Soco West's Complaint

In its complaint, Soco West also argues that EPA's issuance of the order is arbitrary and capricious, contrary to law and an overreach of its authority under RCRA given that California's Department of Toxic Substances Control (DTSC) had delegated authority to oversee the site under its own hazardous waste program and DTSC initiated its own enforcement action in 2011, which are still pending.

"USEPA's involvement with the site, and its issuance of the final agency action 20 years after USEPA last had any involvement with the Site, combined with its prior decision to defer oversight to DTSC, and its conclusion that the Site did not present an immediate and substantial endangerment, shows that USEPA is equitably estopped from taking any action against Plaintiff at this time," the complaint says. The company argues that under RCRA, once EPA has granted a state delegated authority that state's enforcement program operates in lieu of the agency's with the same effect, precluding EPA from issuing its own order.

The complaint seeks preliminary and permanent injunctions preventing EPA from enforcing the underlying requirements of the order or imposing penalties for noncompliance, enjoining any further enforcement action from the agency, and a declaratory judgment rendering the order voided. — *Bridget DiCosmo* (bdcosmo@jwnews.com)

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Olson, Erik

From: Johnson, Steve
Sent: Monday, March 25, 2013 3:45 PM
To: Olson, Erik
Subject: RE: Cecos update

Erik

Yes...I'm here today and all day tomorrow, tuesday from 9:30 till 5:30.

I think it was better you have some time to think. I didn't think we accomplished anything except to get a sense of where I was at. (b)(5) deliberative process//attorney-client

Steve

From: Olson, Erik
Sent: Monday, March 25, 2013 8:19 AM
To: Johnson, Steve
Subject: RE: Cecos update

Hi Steve,

Are you going to be in the office tomorrow? It would be very helpful for me to sit down with you and review all of this together. Any time between 9 and 3 for an hour or so would work for me.

I apologize for missing Wednesday's meeting.

- Erik

From: Johnson, Steve
Sent: Friday, March 22, 2013 4:34 PM
To: Olson, Erik
Subject: Cecos update

Erik,

I enclose an update of the material I presented on Wed.

The updates in the presentation reflect what was said with one exception. (b)(5) deliberative process

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(b)(5) deliberative process//attorney-client

(b)(5) deliberative process//attorney-client



(b)(5) deliberative process//attorney-client



(b)(5) deliberative process//attorney-client



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Setnicar, Mary

From: Johnson, Steve
Sent: Friday, May 03, 2013 5:04 PM
To: Olson, Erik
Cc: Setnicar, Mary
Subject: Ob...I updated the slide show...see slides at 235+

Erik,

I couldn't find your "Cecos" File on the G drive...so I made one myself yesterday. I put a big Cecos file in it yesterday. Today I added more slides related to CWA issues and GW problems. (b)(5) deliberative process//attorney-client
(b)(5) deliberative process//attorney-client

Anyway, I left the original slides in place. The arguments embodied in the attachments from my previous e-mail are excerpted and commented upon at 235 or so.

Steve



Re: Fw: CECOS Aber Road PCB results

Steve Johnson to: Mary Setnicar

04/18/2012 05:05 PM

History: This message has been replied to.

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Can't raise Bardo or Connie. Can change the time.

Steve Johnson

Mary Setnicar Steve: is Ken also going to be on the call? do w... 04/18/2012 04:50:45 PM

From: Mary Setnicar/R5/USEPA/US
To: Steve Johnson/R5/USEPA/US@EPA
Cc: Brandon Pursel/R5/USEPA/US@EPA, Kenneth Bardo/R5/USEPA/US@EPA
Date: 04/18/2012 04:50 PM
Subject: Re: Fw: CECOS Aber Road PCB results

Steve: is Ken also going to be on the call? do we need to meet first (say, at 9:30) just to confirm that Region 5 is speaking with one voice?

I am not available for the 10 o'clock call

Mary Setnicar
Chief, RCRA/TSCA Programs Section
U.S. EPA Region 5; 77 W. Jackson Blvd. (LR-8J)
Chicago, IL 60604
tel: 312/886-0976; FAX: 312/692-2027
e-mail: setnicar.mary@epa.gov

Steve Johnson Regarding tomorrow's phone conference with C... 04/18/2012 04:34:15 PM

From: Steve Johnson/R5/USEPA/US
To: setnicar.mary@epa.gov
Cc: Brandon Pursel/R5/USEPA/US@EPA, Kenneth Bardo/R5/USEPA/US@EPA
Date: 04/18/2012 04:34 PM
Subject: Fw: CECOS Aber Road PCB results

Regarding tomorrow's phone conference with Cecos and Post Closure...

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Steve Johnson

— Forwarded by Steve Johnson/R5/USEPA/US on 04/18/2012 04:21 PM —

From: "Joe Montello" <Joe.Montello@awin.com>
To: Kenneth Bardo/R5/USEPA/US@EPA, Steve Johnson/R5/USEPA/US@EPA
Cc: "Connie Dall" <Connie.Dall@awin.com>, "Dana Sincox" <dsincox@herstassociates.com>
Date: 08/12/2008 12:19 PM
Subject: CECOS Aber Road PCB results

Steve/Ken,

As requested, the attached file lists results for samples of groundwater, surface water (C-locations), underdrains (UD-locations), and leak detectors (LD-locations) for the CECOS Aber Road facility. We have highlighted in yellow those samples with a detect. In summary:

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Please contact Connie Dall or me with any questions.

Joe Montello
Hydrogeology Manager - Allied Waste Industries, Inc.
440-338-1144
440-338-1873 fax
440-759-8459 cell

[attachment "Aber Road PCB results.xls" deleted by Mary Setnicar/R5/USEPA/US]

EPA Region 5

12/11/12

S.M. Johnson

Permit Writer

TSCA RCRA Sec.

Re: EPA/Clermont Co. Pre-Meeting Discussion
Cecos-Clermont County Agreement

On Dec. 13 at 9:00 we have a meeting with Clermont Co. to discuss the Cecos PCB Disposal Facility and EPA goals for closure/post-closure that need to be defined as a result of a new agreement between parties that had been in litigation for 20 years. The Clermont County agenda circulated last week calls for a discussion of the new agreement, a discussion to define USEPA's role at the site and the future of monitoring, reporting, file reviews and future communications.

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Note:

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Setnicar, Mary

From: Johnson, Steve
Sent: Thursday, April 11, 2013 3:42 PM
To: Setnicar, Mary
Cc: Olson, Erik
Subject: Attorney client communication; FOIA Exemption; re: FW: CECOS Financial Assurance
Attachments: 11-27-12 Financial Assurance update.pdf; Financial Assurance 2012 Spreadsheet.pdf; 11-6-98 USEPA financial assurance.pdf

This is the financial assurance plan for Cecos. It covers regular RCRA maintenance and monitoring.

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Steve

From: Dall, Connie [CDall@republicservices.com]
Sent: Wednesday, April 10, 2013 2:07 PM
To: Johnson, Steve
Cc: Montello, Joe
Subject: CECOS Financial Assurance

Hi Steve,

Attached please find the financial assurance instruments for CECOS Aber Road. The \$9,361,913 certificate of insurance covers the amount for the Ohio EPA approved post closure plan. The details of the cost estimate are given in the Ohio EPA approved format and are updated each year. As of 2012, there were 15 years remaining in the 30 year post closure care period so the instrument is for the remaining 15 years.

The \$2,574,812 certificate of insurance covers the amount for the US EPA RCRA Corrective Action area. The details are given in the approval letter from US EPA. The original amount was \$10,000,000. Once construction of the remedy was completed the amount was reduced to cover O&M.

If you would like to set up a call with Joe Montello and me to discuss further, just let me know.

Take care,
Connie

Olson, Erik

From: s_johnson@comcast.net
Sent: Friday, March 01, 2013 3:35 PM
To: Olson, Erik
Cc: Klemme, Christine
Subject: Cecos Inc. EPA Power Point Notes
Attachments: Cecos Facility, Clermont Co.ppt

Erik,

This is the other power point presentation.

Steve Johnson, Geologist
EPA Region 5
312-886-1330

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Setnicar, Mary

From: Olson, Erik
Sent: Tuesday, June 11, 2013 4:24 PM
To: Johnson, Steve; Setnicar, Mary
Subject: RE: Cecos PostClosure Plan considerations

Hi Steve,

I got your message and haven't had time to look at this today. Unfortunately I am out the rest of the week on furlough, but will take a look early next week.

Thanks,
Erik

Erik H. Olson
Associate Regional Counsel
U.S. Environmental Protection Agency - Region V
77 West Jackson Boulevard, C-14J
Chicago, Illinois 60604
office: (312)886-6829
fax: (312)697-2020
olson.erik@epa.gov

From: Johnson, Steve
Sent: Tuesday, June 11, 2013 2:35 PM
To: Setnicar, Mary; Olson, Erik
Subject: Cecos PostClosure Plan considerations

Mary,

This response is only intended on addressing monitoring issues we previously discussed with ORC.

Steve

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Setnicar, Mary

From: Johnson, Steve
Sent: Tuesday, June 11, 2013 2:35 PM
To: Setnicar, Mary; Olson, Erik
Subject: Cecos PostClosure Plan considerations
Attachments: What is the problem statement and basis for your opinion.docx

Mary,

This response is only intended on addressing monitoring issues we previously discussed with ORC.

Steve

