

Exhibit G



Tulane Environmental Law Clinic

May 6, 2013

By Email to: FOIA.Appeals@sol.doi.gov and U.S. Mail

U.S. Department of the Interior
Freedom of Information Act Appeals Officer
1849 C Street, N.W., Mailstop 6556
Washington, D.C. 20240

Re: FREEDOM OF INFORMATION ACT APPEAL (FOIA FWS-2013-00355)

Dear FOIA Appeals Officer,

On behalf of the Atchafalaya Basinkeeper, Louisiana Crawfish Producers Association – West and the Louisiana Environmental Action Network (“Citizen Groups”), we file this administrative appeal of the United States Fish and Wildlife Service’s (“FWS”) partial denial of Freedom of Information Act (FOIA) request FWS-2013-00355.

On January 18, 2013, Citizen Groups requested documents under the FOIA.¹ On February 15, 2013, the Lafayette office of the FWS provided a partial response, including fourteen responsive documents on an enclosed compact disk.² On March 20, 2013, the FWS provided another partial response to the FOIA request, releasing three additional redacted documents and withholding the rest of the responsive documentation under Exemption 5 of FOIA.³ On April 17, 2013, the FWS provided additional information on the withheld documentation, expanding the index of withheld documentation to include a listing of all of the parties to the withheld correspondence, including cc’d persons.⁴

This appeal is timely, as it is filed within thirty workdays of the FWS’ April 17, 2013, final response to Citizen Groups’ FOIA.⁵ The Agency’s failure to disclose the requested items violates the federal Freedom of Information Act, 5 U.S.C. § 552 et seq., as amended. The documents should not be exempted under the Deliberative Process privilege, the Attorney Work Product privilege, or the Attorney Client privilege because it does not qualify for these exemptions. The agency should grant this appeal and release all of the responsive information.

¹ January 18, 2013, FOIA Request FWS-2013-00355, attached as Exhibit A.

² February 15, 2013, FOIA Response by Brad Rieck, attached as Exhibit B.

³ March 20, 2013, FOIA Response by Cynthia Dohner, attached as Exhibit C. This Response included an index of the withheld and redacted documentation, which is attached as Exhibit D.

⁴ April 17, 2013, Index entitled: “Final Decision on WH or Redact Docs_Expanded Index.xlsx,” attached as Exhibit E. *See also* email correspondence providing the expanded index from K. Graham, FWS, to Richard Walker on behalf of Citizen Groups is attached as Exhibit F.

⁵ Though the FWS’ March 20, 2013, is designated as the final response, and indicates that any appeal must be filed within 30 workdays from the date of that letter, the FWS provided additional information on April 17, 2013, as shown above, making this the date of final response.

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I. RELEVANT FACTUAL BACKGROUND

Citizen Groups are engaged in litigation against the U.S. Army Corps of Engineers (“Corps”) for after-the-fact dredge and fill permits it issued to Mallard Basin, Inc., in the Atchafalaya Basin in Louisiana.⁶ The Corps issued the permits on July 6 and October 6, 2010. The complaint includes allegations that the Corps violated the Endangered Species Act (ESA) when it issued the after-the-fact permits because it did not even mention the Louisiana black bear in its decision and did not even attempt to consult with FWS before issuing the permits, though the Mallard Basin project is in listed critical habitat for the black bear. **The FWS is not a part of the litigation.**

As required by the citizen suit provision of the ESA, on December 9, 2010, before filing suit, Citizen Groups sent a notice of intent to sue to the Corps.⁷ After receiving the notice, on February 2, 2011, nearly four months **after** issuing the permits, the Corps sent a letter to the FWS summarizing the Corps’ view of the project and “providing FWS with the opportunity to express any comments or concerns regarding both projects and their possible effects on Louisiana Black Bear habitat.”⁸ The Corps mentioned that it was “concerned with ensuring proper consultation with FWS.”⁹ On February 28, 2011, the FWS sent the Corps a response to its request for comments and consultation.¹⁰ In the letter, FWS stated that it had reviewed the Corps’ letter regarding the after-the-fact project authorizations and informed the Corps that “[t]he Service does not enter into section 7 consultations on permit applications when applicants are seeking ‘after-the-fact’ authorization for projects or portions of projects that have already been completed.”¹¹ The FWS explained its position and concluded with a statement of policy: “Therefore, the Service, **by policy**, does not consult after-the-fact on completed actions.”¹²

Subsequently, on October 15, 2012, the Corps sent another letter to FWS, asking yet again for consultation **on this same project**.¹³ The FWS responded by letter on December 17, 2012.¹⁴ It reiterated the same policy it had expressed in its February 28, 2011, letter: “To politely reiterate, it is the Service's policy that we do not enter into section 7 consultation for completed actions.”¹⁵

II. THE DELIBERATIVE PROCESS PRIVILEGE DOES NOT APPLY TO THE WITHHELD DOCUMENTS.

⁶ *Louisiana Crawfish Producers Association – West v. Van Antwerp*, No. 11-461 (W.D. La. filed Mar. 22, 2011).

⁷ *Id.* at ECF No. 1-1.

⁸ February 2, 2011, letter from Ronnie Duke, Corps, New Orleans District (NOD) to Robert Smith, FWS, Lafayette office, at 2, attached as Exhibit G.

⁹ *Id.*

¹⁰ February 28, 2011, letter from Brad Rieck, FWS, Lafayette Office, to Ronnie Duke, Corps, NOD, attached as Exhibit H.

¹¹ *Id.*

¹² *Id.* (emphasis added).

¹³ October 15, 2012, letter from Ronnie Duke, Corps, NOD, to Robert Smith, FWS, Lafayette office, attached as Exhibit I. In the interim between the Corps’ original letter to FWS and this letter, the Mallard Basin property had changed hands and the purchaser had requested that the permits be transferred to him. The Corps was in the process of considering the transfer when it issued the October 15, 2012, letter to FWS. Notably, however, nothing about the project or the site had changed.

¹⁴ December 17, 2012, letter from Jeffrey Weller, FWS, Lafayette office, to Ronnie Duke, Corps, NOD, attached as Exhibit J.

¹⁵ *Id.* at 3. In its letter, the FWS additionally provided information about the black bear to the Corps as “technical assistance.” *Id.* at 2-3.

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The FWS asserts the deliberative process privilege as a basis to withhold all but one of the responsive documents.¹⁶ The deliberative process privilege protects from disclosure certain information generated or collected by government agencies in the course of their function as policymakers. For the deliberative process privilege to apply, the document must be both pre-decisional and deliberative. *Id.* The party asserting the deliberative process privilege bears the burden of justifying the application, and the privilege is to be narrowly construed. Pacific Gas & Elec. Co. v. United States, 70 Fed. Cl. 128, 133 (Fed. Cl. 2006).

A. All of the Responsive Documentation is Post-Decisional and, Therefore, Does Not Qualify for the Deliberative Process Privilege.

The deliberative process privilege does not apply because the withheld documentation is not pre-decisional, one of the two requisites for application of the privilege. To be “pre-decisional” the document must be prepared in order to assist an agency decision-maker in arriving at his decision. Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 945 (11th Cir. 1992); State of Missouri ex rel. Shorr v. United States Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998).

The documents the FWS claims the deliberative process privilege for are not pre-decisional. In fact, none of the responsive documentation is pre-decisional. The FOIA request sought “[d]ocuments dating from February 28, 2011, through the present date.”¹⁷ The FWS’ February 28, 2011, letter reflected the FWS’ policy and decision on the Corps’ request for consultation on the Mallard Basin after-the-fact permits. The FWS’ stated policy in the letter, by its express language, was reached after reviewing the facts about the project presented by the Corps. Likewise, according to its own language, the FWS’ later December 17, 2012, letter merely “reiterate[d]” its previously-expressed position and decision; this later letter does not constitute the FWS’ final decision. Rather, it is post-decisional.

Because the FWS’ decision and its policy statement regarding the Mallard Basin project/permits was reflected in the February 28, 2011, letter, any documentation related to that issue which post-dates the letter is post-decisional and not subject to the deliberative process privilege. All of the withheld responsive documentation dates from after February 28, 2011. Therefore, the deliberative process privilege does not shield any of the responsive documentation from release.

B. Much of the Withheld Documentation Has Not Been Shown to Be Deliberative.

In addition to failing to meet the requirement that deliberative process-privileged documents must be pre-decisional, the FWS has failed to show that the withheld documentation is deliberative – the second requirement for withholding materials under this privilege.¹⁸ To qualify as deliberative, a document “must address a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal policy matters.” Pac. Gas and Elec. Co. at 133 (internal citation and quotations omitted). Additionally, only opinions and recommendations are protected by the privilege; factual findings and conclusions are not protected. *Id.* at 134.

¹⁶ Exhibit E; see April 21, 2011, entry for document for which the deliberative process privilege was not claimed.

¹⁷ Exhibit A at 1.

¹⁸ Failure to meet the “pre-decisional” requirement alone renders the deliberative process privilege inapplicable, without even reaching the question of whether the material reflects deliberation. However, failure to meet the “deliberative” requirement is an additional reason that the privilege does not apply.

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The documentation which the FWS identified as deliberative has not been shown to meet these requirements. First, the FWS has not shown that the withheld material is a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal policy matters.¹⁹

Further, it is likely that much of the rest of the withheld documents are factual and, therefore, not privileged as deliberative. In fact, in some instances, the information provided affirmatively suggests that the documents do not meet the deliberative requirement. For instance, two documents are described as “briefing statement[s]” on the Mallard Basin permitting events.²⁰ Such statements would not generally make recommendations or express opinions on legal policy matters. Any truly deliberative aspects of these factual documents could easily be redacted. An additional document which affirmatively appears to be purely or mostly factual and not connected with policy formation is the April 21, 2011, email with attachment which transmits aerial photos of the Mallard Basin area. Additional documents relate to the FWS’ discussions about a request from the Atchafalaya Basinkeeper to meet with the FWS to relate his understanding of the Mallard Basin project. Discussions about such a request did not relate to the FWS decision on the Corps request to consult on the Mallard Basin project.

In sum, most of the withheld documentation appears not to meet the “deliberative” requirement of the deliberative process privilege. Regardless, none of the documentation meets the “pre-decisional” requirement, which is a prerequisite for application of the privilege. The FWS cannot rely on the deliberative process privilege to withhold responsive information.

III. NEITHER THE ATTORNEY-CLIENT NOR THE ATTORNEY WORK PRODUCT PRIVILEGE APPLIES.

FWS additionally claims the attorney-client and attorney work product privilege as the basis of its withholding of much of the responsive documentation. However, the documentation has not been shown to meet the requirements of this privilege, and the FWS bears the burden of this showing.

The attorney-client and work-product privileges are included within the scope of the fifth exemption of FOIA. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975). The privilege protects confidential communications made by a client to his attorney. In re Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir.2001). However, in Mead Data Central, Inc. v. United States Dep’t of the Air Force, 566 F.2d 242, 253 (D.C. Cir. 1977), the D.C. Circuit explained that the attorney-client privilege “does not allow the withholding of documents simply because they are the product of an attorney-client relationship.... It must also be demonstrated that the information is confidential.” (footnote omitted). The court found certain documents not protected by the privilege because the government failed to meet its burden to show that the information provided was, in fact, confidential. The government only provided information as to the subject, source, and recipient of the legal opinion rendered. *Id.* at 254. The D.C. Circuit stated: “The Air Force has not shown that the information on which the legal opinions in documents 1 and 5 were based meets this confidentiality requirement,” and said that the court could not assume confidentiality because the government bears the burden to prove the applicability of the privilege. *Id.*

¹⁹ Indeed, if the material is all post-decisional, then it cannot be part of the deliberative process on an agency opinion on a legal policy matter.

²⁰ Exhibit E; see August 14, 2012, document with map and October 23, 2012, email entries.

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Here, FWS has failed to establish that the documentation it withheld under this privilege qualifies. In fact, in a number of incidents, none of the parties identified as part of the communication were even attorneys. As stated in Mead Data Central, it is not enough for the FWS to state that the information was between an attorney and client; the FWS must establish that the information provided was itself confidential. It has not done this.

Additionally, as to the three documents which FWS identifies as privileged under the attorney work product exception, these do not qualify because this exception has been held to only apply to documentation prepared in contemplation of litigation. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980) (citing Jordan v. U.S. Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978)). As stated, the FWS is not a party to the Citizen Groups' litigation. Further, as the Coastal States court suggested, when the attorneys who prepared or received the correspondence being withheld are not the ones responsible for handling litigation, it is questionable whether they are entitled to claim the work-product privilege at all. Id. at 865, n. 21.

IV. CONCLUSION

In sum, the FWS has not demonstrated that the FOIA exemptions which it relies upon in withholding the responsive documentation apply. Clearly with respect to the material withheld under the deliberative process privilege, the exemption does not apply because all of the withheld documentation is post-decisional. With respect to the material withheld under the attorney-client privilege, the FWS has not demonstrated that the information is confidential. Last, as to the material withheld under the attorney work product privilege, this privilege does not apply because it cannot be considered as having been prepared in contemplation of litigation. The FWS is not a part of the Citizen Groups' case against the Corps and, regardless, the attorneys on the correspondence are not the attorneys who would represent the FWS if it did somehow enter the litigation. This appeal should be granted and the materials released.

In the event this appeal is denied, the Agency is required to provide a written response describing the reasons for the denial, names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter. 5 U.S.C. § 552(a)(6)(ii), 7 C.F.R. § 1.8(d). If this appeal is denied or the Agency's response is not forthcoming within 20 working days, my clients reserve their rights under FOIA to seek judicial review, including the award of attorney's fees. I await your prompt reply.

Thank you for your consideration of this appeal.

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