

Exhibit A



DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, CORPS OF ENGINEERS
111 NORTH CANAL STREET
CHICAGO, ILLINOIS 60606-7208

APR 19 2010

REPLY TO
ATTENTION OF:

Technical Services Division
Regulatory Branch
LRC-2009-455

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SUBJECT: Unauthorized Activities in Wetlands and Waters of the U.S. at Midlothian Creek Located South of 135th Street, North of 139th Street and West of Western Avenue in Blue Island, Cook County, Illinois, (Section 1, Township 36 North, Range 13 East)

EDF Plus, Inc.
1215 Heather Lane
Glenview, Illinois 60025

Dear Sir or Madame:

On November 13, 2009, a representative of the U.S. Army Corps of Engineers (Corps) Regulatory Branch conducted a site inspection at the above-referenced location and has determined that a discharge of fill and/or dredged material has occurred in wetlands without prior authorization of this office. The unauthorized activities are situated on parcels located south of 135th Street, north of 139th Street and West of Western Avenue in Blue Island, Cook County, Illinois, (Section 1, Township 36 North, Range 13 East), Land Trust #5468, PIN # 28-01-200-009. Photo-documentation of the site reveals numerous stockpiles of fill material located within wetlands that are situated adjacent to Midlothian Creek, and the installation of a road crossing over Midlothian Creek. Midlothian Creek drains to the Cal Sag Channel which is hydrologically connected to the Little Calumet River, a navigable waterway.

The activity is a violation of Section 301(a) of the Clean Water Act (33 U.S.C. 1311), since a review of our records indicates that a Department of the Army permit was not obtained pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344). You are hereby notified that the U.S. Army Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States. These waters (or aquatic resource) include, but are not limited to, lakes, rivers, streams and wetlands, such as swamps, marshes, bogs, etc. Violations of the Clean Water Act are punishable by potential penalties of civil fines of up to \$32,500 per day of violation, criminal fines of up to \$50,000 per day of violation and/or imprisonment; and you may also be required to restore the site.

You are hereby ordered to cease and desist work in the wetlands until this violation is resolved. Within 10 days of your receipt of this order, you shall submit a written statement of your intent to comply with this order. This statement will include the method you propose to resolve this violation. You may resolve your violation by either: a) voluntarily removing the dredged and fill material from the wetland within 60 days of receipt of this order in which case a

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dredged and fill material from the wetland within 60 days of receipt of this order in which case a timetable and restoration plan shall be submitted to my office for approval within 30 days or, b) submitting an After-the-Fact permit application (enclosed) within 30 days of receipt of this order to retain the fill material within the jurisdictional area.

The following information shall be submitted to this office, in writing, so that a determination of whether to accept or deny your After-the-Fact permit application can be completed:

- a. Statement indicating the present owner(s) of this property;
- b. Purpose of the project along with a clear description of work;
- c. A wetland delineation of affected aquatic resources, including wetlands, that existed on the property prior to construction activities. The delineation shall also include an assessment of existing aquatic resources at the site that had not been affected by the unauthorized activity(s). The findings shall be plotted onto an aerial photograph of the site and itemized for clarification purposes. All wetland delineations shall include a Floristic Quality Assessment as identified in Swink and Wilhelm, 1994, Plants of the Chicago Region.
- d. A statement indicating the type of fill and its source, the date(s) of filling, and the identity of the individual(s) performing the work;
- e. A list of all permits or authorizations received for this activity, including name of agency, date of permit and description of permitted activity;
- f. A statement indicating why you failed to obtain an Army Corps of Engineers permit prior to the discharge;
- g. Your signature on the enclosed Tolling Agreement;

By copy of this letter, this office is soliciting the views of appropriate federal, state and local agencies, which may also have jurisdiction, regarding this unauthorized activity. Based upon your response to this order and the comments received from the agencies, it will be determined whether to accept an After-the-Fact permit application or require you to restore the site to its original condition. If your response is not received by this office within the designated time periods, a decision will be made by this office without benefit of your comments.

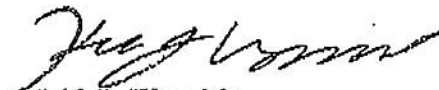
You should be aware that compliance with this order will not foreclose my options to initiate legal action, require corrective measures, or refer this case to the U.S. Environmental Protection Agency. Failure to comply with this order may result in a recommendation to the United States Attorney's Office to institute appropriate legal proceedings to enforce this order. Your complete cooperation and the expeditious resolution of your violation may avert these actions.

- 3 -

This matter is being coordinated with the U.S. Environmental Protection Agency which has independent enforcement authority under the Clean Water Act. Failure to comply with this order will result in appropriate enforcement action.

If you have any questions, please contact Kathy Chernich of my staff by telephone at (312) 846-5531, or email at kathy.g.chernich@usace.army.mil.

Sincerely,



Keith L. Wozniak
Chief, West Section
Regulatory Branch

Enclosures

Copy Furnished w/out Enclosure:

U.S. Environmental Protection Agency (Wendy Melgin)
ComEd (Race)
City of Blue Island (David Peloquin)
Village of Robbins (Irene Brodie)
Kim Sabo (CELRC-OC)

TOLLING AGREEMENT

WHEREAS, the United States of America, on behalf of the United States Army Corps of Engineers (Corps) may file a complaint against Charles Kory ("potential defendant(s)") for, inter alia, alleged violations of Sections 301(a), 309, & 404 of the Clean Water Act ("CWA"), 33 U.S.C. Sections 1311(a), 1319, & 1344 at sites located south of 135th Street, north of 139th Street and West of Western Avenue in Blue Island, Cook County, Illinois, Section 1, Township 36 North, Range 13 East, Land Trust #5468, PIN # 28-012-000-009, (Department of the Army file number LRC-2009-455)

WHEREAS, the purpose of any such complaint would be to obtain appropriate injunctive relief and to impose appropriate civil or criminal penalties for potential defendant's alleged violations of the statute(s) cited above;

WHEREAS, the Corps accepted an after-the-fact (ATF) permit application from the potential defendant(s) in an attempt to settle the above claims;

WHEREAS, both parties believe that their interests will best be served by continuing the ATF permit process without the disruption that might be occasioned should the United States file a complaint in the immediate future;

AND WHEREAS both parties acknowledge the requirement found at 33 C.F.R. 331.11(c) for an applicant for an ATF permit to provide a signed tolling agreement;

THEREFORE, the United States and potential defendant(s) stipulate and agree as follows:

1. The United States and potential defendant(s) agree that the time between the acceptance by the Corps of the ATF permit application and the final Corps decision (as defined at 33 CFR 331.10) will not be included in calculating any statute of limitations that might be applicable to the alleged statutory violation(s) described above. Potential defendants agree not to assert, plead, or raise in any fashion on behalf of any party, whether by answer, motion, or otherwise, any defense or avoidance based on the running of any statute of limitations that may apply during that period or any defense or avoidance based on laches or other principle concerning the timeliness of commencing a civil action, based on the failure of the United States to file its complaint during that period.

2. Potential defendants further agree not to transfer the property in question during the pendency of this tolling agreement nor during the pendency of any civil action brought as described above, without first notifying the United States and giving the United States a reasonable opportunity to oppose such transfer.

3. Nothing in this tolling agreement shall restrict or otherwise prevent the United States from filing a complaint regarding any alleged statutory violation(s) not described above, at any time.

4. This tolling agreement does not constitute any admission of liability on the part of potential defendants; nor does it constitute any admission or acknowledgment on the part of the United States that any statute of limitations has run or that any statute of limitations is applicable to the statutory claims described above.

5. This tolling agreement contains the entire agreement between the parties, and no statement, promise or inducement made by any party to this agreement, or any agent of such parties, that is not set forth in this agreement shall be valid or binding. This tolling agreement may not be enlarged, modified or altered except in writing signed by the parties. This tolling agreement may be executed in counterparts.

FOR the United States of America:

Kimberly Sabo
District Counsel
Chicago District, U.S. Army Corps of Engineers

Date

FOR _____

EIF Plus, Inc.
1215 Heather Lane
Glenview, Illinois 60025

Date


UNITED STATES POSTAL SERVICE

MAY 10 2010



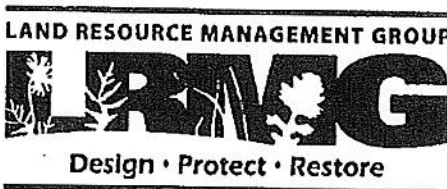
First-Class Mail
Postage & Fees
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •


 US ARMY CORPS OF ENGINEERS
 REGULATORY BRANCH
 111 NORTH CANAL ST 6TH FLOOR
 CHICAGO IL 60606-7206

LRC-2009-455 *K.C.*

Exhibit B



September 3, 2010

SENT VIA E-MAIL

Kathy Chernich, East Branch Section Chief
Regulatory Branch
Chicago District, Corps of Engineers
111 North Canal Street
Chicago, Illinois 60606-7206

RE: LRC-2009-455

Dear Ms. Chernich,

In reference to the above mentioned Corps of Engineers file and at your request, I am responding to your April 19, 2010 letter (the "Letter"). The name and address of the property owner in the Letter is incorrect. The correct name and address is as follows: EJF Plus Inc. ("EJF"), 1819 South Ashland Avenue #3, Chicago, Illinois 60608.

My response is based on the Letter, our related telephone conversations dated May 12, 2010 and August 25, 2010, the voicemail message you left on my mobile phone on August 25, 2010, and my on-site observations and data collections made on April 19, 2010 and May 3, 2010.

Based on my review of site resource maps, historic aeriels, historical evidence of site disturbance, and recent on-site observations and data collections, it is LRMG's professional opinion that NO "discharge of fill and/or dredged material has occurred in wetlands or other "waters of the U.S." located within the parcels of concern owned by EJF Plus Inc. or within the ComEd property which envelopes Midlothian Creek adjacent to the EJF Plus Inc. property.

The attached plat of survey (prepared by Emmet Kennedy and Co., dated March 3, 1975; the "Survey") shows the property owned by EJF Plus Inc. identified as Parcel 1 (± 0.35 acres), Parcel 2 (± 18.95 acres), and Parcel 3 (6.32 acres) (the "Property"). The ComEd property is also shown as an exception between Parcels 2 and 3. "Calumet Slough", now known as Midlothian Creek, runs west to east through the ComEd property. An existing 33' wide right-of-way grant aligns north and south across the ComEd property providing access to Parcels 1 and 2 of the Property. The Survey indicates this grant was recorded on June 27, 1955 as document #16281177 (the "ROW"). The existing bridge crossing is located within the ROW, and all indications are that the bridge has been in existence since as far back as 1955 when the ROW came into existence, but certainly no later than the date of the Survey, March 3, 1975, since the crossing is depicted thereon. Consequently the bridge came into existence well before Section 404 of the Clean Water Act or State Floodway regulations were enacted.

September 3, 2010
Kathy Chernich, East Branch Section Chief
Chicago District, Corps of Engineers
Page 2

During my site visits, I observed small piles of woody debris and refuse material on uplands adjacent to Midlothian Creek and the bridge within the ROW area. Further debris piles were observed collecting in-stream along the upstream perimeter of the old bridge structure. Evidently, the Property caretaker has occasionally removed debris jams at the bridge in order to maintain upstream water flow in Midlothian Creek. Since this minor amount of removed material has been placed on an adjacent upland condition, LRMG finds no Section 404 violation related to this activity. Furthermore, the piles observed are located within the ROW area, and the cleaning was done in the spirit of public service. It appears to us that EJF is within its rights to utilize and see to maintenance of the existing bridge within the ROW area since the maintenance of this bridge is critical for access to Parcels 1 and 2 of the Property. As an aside, it appears the bridge is also critical to ComEd since it is the only crossing whereby ComEd crews can legally access the north side of Midlothian Creek to maintain ComEd's only electrical transmission facilities on its property, which facilities are wholly contained along the north side of Midlothian Creek.

On April 19, 2010 and May 3, 2010, LRMG completed a thorough wetland evaluation and determination of Parcels 1 and 2 of the Property. One isolated wetland exists at the far north corner of Parcel 2, landlocked by Railroad property on two sides. This wetland is currently intact. However, there is no definable surface water connection between this wetland and Midlothian Creek to the south. It is our professional opinion that this wetland is not subject to Corps of Engineers regulation pursuant to "SWANCC and Rapanos Rulings". No other wetlands or "waters of the U.S." exist on the remaining Property.

During our above referenced phone conversations and your voice mail message to me, you indicated that that Corps issued the Letter, which constitutes a "cease and desist" violation letter, based on statements from ComEd representatives and that you were "hearing too many things from too many people". Further, you indicated that you have not been to the site yourself to date. When I asked you if Corps representatives had visited the site, or if any data had been collected as evidence of a violation, you refused to answer and stated you would need to discuss my inquiry with your in-house legal counsel. We cannot understand any reason why information about such data would not be provided over the phone, and must conclude that it does not exist.

You are undoubtedly aware this type of "hearsay" (i.e., site observations from non-regulatory entities without Corps verification) is insufficient evidence for you to pursue a Section 404 Corps violation case. As a result, we believe that the Corps of Engineers Regulatory Branch lacks a *prima facie* case without Corps verification or direct evidence to support the Letter. Therefore, to LRMG and EJF, the letter seems to be unjustified, unfounded, and unsupported in fact as a matter of law. Therefore, we are requesting that the Corps of Engineers promptly rescind the April 19, 2010 letter, thereby avoiding EJF further unnecessary delays and professional services costs related thereto.

Prior to receiving the Letter, LRMG and EJF were in the process of presenting a preliminary concept plan for improving the Property to City of Blue Island officials. This plan includes low-impact development (LID) design concepts including preservation and enhancement of the existing, isolated wetland resources. Further, there is desire to work closely, when necessary and appropriate, with ComEd, IDNR

September 3, 2010
Kathy Chernich, East Branch Section Chief
Chicago District, Corps of Engineers
Page 3

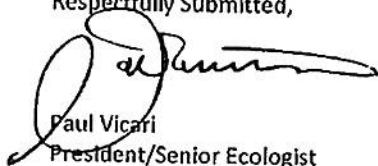
and your office to propose stream restoration work in combination with remedies for the water damming effect of the old bridge, all for the benefit of the local economy and community. We believe, due to this Letter, the local review process has been stalled since early May, 2010.

On behalf of EJF, LRMG intends to submit to and request a letter of no objection from the Chicago District, Corps of Engineers as one of the many conditions necessary for the City of Blue Island to approve of the development of the Property. I can assure you there is no plan to negatively impact existing water resources; on the contrary, the improvement objectives for the Property embrace green technologies and land conservation practices while providing for positive economic development impacts in the City of Blue Island and its neighboring communities.

In closing, we respectfully request that the Corps of Engineers consider contacting my office, indicating reasonable agreement to rescind the Letter on the basis of the facts presented, and further communicate its willingness to review our proposed project for Section 404 compliance. Thereupon, EJF has authorized LRMG to submit our completed wetland delineation report and project plans for Corps review including an anticipated on-site visit and consultation with your office. Meanwhile, you will need owner approval to enter the Property since it is POSTED, NO TRESPASSING. With your cooperation, LRMG is authorized to grant such approval so that the Corps may enter the property escorted by LRMG.

Thank you for your time and consideration. Please feel free to contact me if you have questions.

Respectfully Submitted,



Paul Vicari
President/Senior Ecologist

Enclosures
Copy w/out Enclosure
U.S. Environmental Protection Agency (Wendy Melgin)
ComEd (Sara Race, ComEd Environmental Services Dept.)
City of Blue Island (Mayor Donald E. Peloquin)
Village of Robbins (Mayor Irene H. Brodte)
Kim Sabo (CELRC-OC)
EJF Plus Inc

Exhibit C

Chernich, Kathy G LRC

From: Chernich, Kathy G LRC
Sent: Friday, November 19, 2010 4:24 PM
To: Wozniak, Keith L LRC
Subject: FW: Site Visit for LRC-2009-455 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

----- Original Message -----

From: Chernich, Kathy G LRC
To: Wozniak, Keith L LRC
Sent: Fri Oct 29 08:23:41 2010
Subject: FW: Site Visit for LRC-2009-455 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Fyi...

-----Original Message-----

From: Paul Vicari [mailto:pvicari@lrmg.net]
Sent: Wednesday, October 27, 2010 8:42 PM
To: Chernich, Kathy G LRC
Cc: sara.race@comed.com
Subject: RE: Site Visit for LRC-2009-455 (UNCLASSIFIED)

I have advised the owners to have their attorney file for the FOIA with your office of Counsel directly tomorrow since you apparently do not care to cooperate with me by simply providing the requested information as would be normal procedure if the enforceable data exists. We do not have the information requested back on September 3, 2010, you just let me know today October 27, 2010 that you require me to FOIA through a formal procedure, you do not have permission from the owners to enter the site. We see no reason to meet with you "in the area" or view from the ComEd property. Site conditions, viewed from a distance, do not constitute acceptable data collection on my clients property or any property.

Let me be clear on my client's position: Since you do not have permission to trespass onto my clients property, it is obviously their decision on whether or not to call the local police department should unlawful trespass occur. I believe they are well aware of their boundaries, their rights as owners, and I have notified them of your plans.

I was hoping you would respond to my reasonable requests and work with us professionally to get this resolved. Your approach is not working under the current Section 404 program as we know it. That's the problem. The basis of that program is field data. You won't provide it. I suspect, you do not have it. Therefore, this situation is out of my hands.

Paul Vicari President / Senior Ecologist
LAND RESOURCE MANAGEMENT GROUP
1299 Main Street
Crete, IL 60417
Phone: 708.279.7484 x 223
Fax: 708.279.7485
Website: www.LRMG.net

Land to Water Stewardship

-----Original Message-----

From: Chernich, Kathy G LRC [mailto:Kathy.G.Chernich@usace.army.mil]
Sent: Wednesday, October 27, 2010 6:59 PM
To: pvicari@lrmg.net
Subject: Re: Site Visit for LRC-2009-455 (UNCLASSIFIED)

A FOIA request form will need to be filled out which can be submitted to me via email. The form is on our website. Once I receive the completed form, I will submit it to our Office of Council who will then proceed with the request for information

----- Original Message -----

From: Paul Vicari <pvicari@lrmg.net>
To: Chernich, Kathy G LRC
Sent: Wed Oct 27 16:49:19 2010
Subject: RE: Site Visit for LRC-2009-455 (UNCLASSIFIED)

OK, Per the FOIA I am requesting all file content (both paper and electronic) of the file LRC-2009-455 including any site inspection information, all phone logs, and e-mail correspondences. Again, we have not received any form of request from the Corps to enter the private property owned by my client. I have notified my client that you plan to be in the area on Nov 5, 2010. and that you plan to view his property from the ComEd property.

Paul Vicari President / Senior Ecologist
LAND RESOURCE MANAGEMENT GROUP
1299 Main Street
Crete, IL 60417
Phone: 708.279.7484 x 223
Fax: 708.279.7485
Website: www.LRMG.net

Land to Water Stewardship

-----Original Message-----

From: Chernich, Kathy G LRC [mailto:Kathy.G.Chernich@usace.army.mil]
Sent: Wednesday, October 27, 2010 6:38 PM
To: pvicari@lrmg.net
Subject: Re: Site Visit for LRC-2009-455 (UNCLASSIFIED)

If permission to enter the site is not granted we will utilize the ComEd property for viewing the site.

Most of the information in our files is a matter of public record. A FOIA request would need to be submitted to our office for viewing information in a file

----- Original Message -----

From: Paul Vicari <pvicari@lrmg.net>
To: Chernich, Kathy G LRC
Sent: Wed Oct 27 16:15:46 2010
Subject: RE: Site Visit for LRC-2009-455 (UNCLASSIFIED)

If the Corps representatives have conducted the site inspections as you say, please send the data and/or findings that back the Cease and Desist order. I think this is a reasonable request and is the same request made in our original letter. We have not received any form of request from the Corps to enter the private property owned by my client. I have notified my client that you plan to be in the area.

Paul Vicari President / Senior Ecologist
LAND RESOURCE MANAGEMENT GROUP
1299 Main Street
Crete, IL 60417
Phone: 708.279.7484 x 223
Fax: 708.279.7485
Website: www.LRMG.net

Land to Water Stewardship

-----Original Message-----

From: Chernich, Kathy G LRC [mailto:Kathy.G.Chernich@usace.army.mil]
Sent: Wednesday, October 27, 2010 5:53 PM
To: Paul Vicari
Cc: sara.race@comed.com; Chernich, Kathy G LRC
Subject: RE: Site Visit for LRC-2009-455 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

The Corps will not be sending a formal response to your client at this time. However, I will inform you that Mike Machalek and Andrew Blackburn inspected the site for me initially and then a second inspection of the parcel was performed by Andrew Blackburn and Paul Leffler. The inspections were completed at my request.

The Corps and ComEd will be visiting the area on November 5, 2010 as planned. The invitation to your client to join us in the field on that day is still on the table.

-----Original Message-----

From: Paul Vicari [mailto:pvicari@lrmg.net]
Sent: Wednesday, October 20, 2010 2:04 PM
To: Chernich, Kathy G LRC
Cc: sara.race@comed.com
Subject: RE: Site Visit for LRC-2009-455 (UNCLASSIFIED)

We have not received a Corps response to LRMG's letter dated September 3, 2010. We ask again that you respond to that letter in writing. On behalf of the owners, I believe we explained in the September 3, 2010 letter that the Corps has no permission to enter the property until we receive a written response from your office. If we receive an official response in adequate time before your tentative inspection date of November 5, 2010, we will take a cooperative look at viability of that meeting and whether we can obtain

written permission from the property owner to enter.

Paul Vicari
President / Senior Ecologist

Land Resource Management Group<http://www.lrmg.net/logo/lrmg_logo.gif>
1299 Main Street
Crete, IL 60417
Phone: 708.279.7484 x 223
Fax: 708.279.7485
Website: www.LRMG.net <<http://www.lrmg.net/>>

Land to Water Stewardship

From: Chernich, Kathy G LRC [mailto:Kathy.G.Chernich@usace.army.mil]
Sent: Wednesday, October 20, 2010 1:12 PM
To: Paul Vicari
Subject: Site Visit for LRC-2009-455 (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Representatives of the Corps and ComEd have tentatively scheduled an inspection at the reference site on November 5, 2010. Please inform your client of the meeting and let me know if this is a viable date.

Kathy Chernich
U.S. Army Corps of Engineers
Regulatory Branch
Chief, East Section
111 N. Canal Street, Ste. 600
Chicago, Illinois 60606
(312) 846-5531 desk
(312) 353-4110 fax

Classification: UNCLASSIFIED

Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Exhibit D



CHICAGO DISTRICT FOIA REQUEST FORM

Please Print and Fill Out Form with Signature.
Return via Fax or Mail to:

Office of Counsel
U.S. Army Corps of Engineers
Chicago District
111 N. Canal Street
Chicago, IL 60606-7206
Fax (312) 353-8710

Date of Request: November 8, 2010

Requestor Name: Juan B. Villarreal

Telephone: 773/803-3530

Address: 1819 S. Ashland Ave., Unit #3
Chicago, Illinois 60608

1. Under provisions of 5 USC 552, the Freedom of Information Act, and Department of the Army Regulation 25-55, the following information/documents are being requested:
 (Use back of form or attach additional pages if more space needed. If an identifying file number or permit number is known, please include it. Any location information will be helpful)
all file content (both paper and electronic) of the file LRC-2009-455, including any site inspection information, all phone logs, and e-mail correspondences

2. The Requestor understands that fees may be charged for search, review, and/or duplication of the records requested above. (Please check one)

- The Requestor agrees to pay any statutory costs for providing these records.
- The Requestor agrees to pay up to \$ _____ (fill in dollar amount) for these records. Please notify if costs exceed this amount.
- Please notify Requestor if there will be any charges before fulfilling this request.

3. Please check one:

- Requestor wishes to be called so that requested material may be picked up.
- Please mail requested material to requestor.

 Signature of Requestor and title if representative of organization

Exhibit E



DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
111 NORTH CANAL STREET
CHICAGO IL 60608-7208

REPLY TO
ATTENTION OF:

December 10, 2010

Office of Counsel

Juan B. Villarreal
1819 S. Ashland Avenue Unit #3
Chicago, IL 60608

RE: Freedom of Information Act (FOIA) Request FP-11-005644

Dear Mr. Villarreal:

I am writing in response to your request under the Freedom of Information Act dated November 8, 2010, to the United States Army Corps of Engineers, Chicago District. You requested the contents of file LRC-2009-455. Responsive records are enclosed, excluding information withheld pursuant to exemptions 5 and 7 of the FOIA, as noted herein.

Two documents were withheld pursuant to Exemption 5 of the FOIA because the documents contain a privileged communication between attorney and client. *See* 5 U.S.C. § 552(b)(5). These documents are also withheld pursuant to exemption 7(a), described below.

Exemption 7(a) authorizes the withholding of information compiled for law enforcement purposes to the extent that its release could reasonably be expected to interfere with an enforcement proceeding. 5 U.S.C. § 552(b)(7)(a). A total of 131 documents and 10 photographs were withheld under exemption 7(a).

You have the right to appeal the partial denial of your request through this office to the Office of the Chief Counsel for the U.S. Army Corps of Engineers, and finally to the Secretary of the Army's office, which is the final decision authority for the Department of the Army. You must submit your appeal in sufficient time to reach the Secretary of the Army no later than 60 calendar days from the date of this letter. Your letter should bear the notation "Freedom of Information Act Appeal." The envelope containing the appeal should be addressed to Office of Counsel, U.S. Army Corps of Engineers, Chicago District, 111 N. Canal St., Suite 600, Chicago, IL 60606.

Pursuant to the FOIA, we are required to charge for the direct cost of processing your request. But because the cost of processing your FOIA request was nominal, no fees will be assessed.

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If you have any questions about your request, please contact Kevin Jerbi of my office at (312) 846-5352 or by email at kevin.j.jerbi@usacc.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Sabo', followed by a long horizontal line extending to the right.

Kimberly J. Sabo
District Counsel
Chicago District, U.S. Army Corps of Engineers

Enclosure

Exhibit F



Via U.S. Mail

July 2, 2012

Ms. Leesa Beal
Chief, Regulatory Branch
U.S. Army Corps of Engineers Chicago District
111 North Canal Street, 6th Floor
Chicago, IL 60606-7206

Re: Request for Letter of No Objection
Blue Island Compost, Inc. Landscape Waste Facility (±19.3 acres)
139th and Unimproved Cleveland Avenue ROW, Blue Island, Cook County, Illinois
LRMG #12-09


Dear Ms. Beal:

On behalf of COM Enterprises, LLC, Land Resource Management Group (LRMG) is requesting that your office review the enclosed site improvement plan set and wetland determination report prepared for the ±19.3 acre proposed Blue Island Compost, Inc. Landscape Waste Facility, Blue Island, Illinois. It is LRMG's finding that no impact to regulated wetlands or other "waters of the U.S." will result from this project.

A completed and signed Letter of No Objection (LONO) request form is enclosed. We ask that your office review the information submitted and consider providing a LONO for the project.

We would greatly appreciate a responsive review by your office. Please have all correspondence, questions or concerns sent to me (see attached signed letter of agency). My e-mail address is pvicari@lrmg.net. Thank you.

Respectfully,



Paul Vicari
Principal Ecologist/President

Enclosures:

Blue Island Compost, Inc. Landscape Waste Facility Plans, last revised July 2, 2012, by LRMG
LRMG Wetland Delineation Report, dated May 25, 2012
Signed LONO request form
Signed Letter of Agency

cc: John Lardner, COM Enterprises, LLC
Juan Villareal, EJP Plus, Inc.

Exhibit G



Request for a Letter of No Objection

This form can be used when you want confirmation that a project on your property does not fall under the regulatory requirements of the U.S. Army Corps of Engineers (USACE). Please supply the following information and supporting documents described below. This form can be filled out online and then printed. It **must be signed by the property owner** to be considered a formal request. Submitting this request authorizes the US Army Corps of Engineers to field inspect the property site, if necessary, to help in the determination process. The printed form and supporting documents should be mailed to:

Regulatory Branch
 U.S. Army Corps of Engineers, Chicago District
 111 N. Canal Street, Suite 600
 Chicago, IL 60606-7206

Additionally, you may either call our branch telephone at (312) 846-5530 or view our website at <http://www.lrc.usace.army.mil/co-r/newapps.pdf> to determine which number and project manager has been assigned to your request. Project Manager contact information can be found here: <http://www.lrc.usace.army.mil/co-r/contacts.htm>. Please contact us if you need any assistance with filling out this form.

Location and Information about Property to be subject to a Letter of No Objection

Property Address/Location: 139th Street and 13601 S. Cleveland Avenue (unimproved right of way)
 City (name) or Unincorporated: Blue Island State: IL Zip: 60406
 County: Cook Township name: Bremen
 Quarter: NW Section: 1 Township: 36N Range: 13E of the 3 PM
 Lat/Long in Decimal Degrees: 52.06799 °N 107.73520 °W
 Size of Property in Acres: 19.61 Tax PIN: 28-01-102-010-000;28-01-205-009-000;
 Prior or related USACE project number: LRC-2009-455

Is the property subject to a conservation easement or deed restriction? (Yes or No)
 If yes, please explain and submit details of the project area.

Was the property a site for mitigation pursuant to a project previously permitted by USACE?
 (Yes or No) If yes, please explain and submit details of the project area.

Is the property neighboring/adjacent to/bordering a project previously permitted by the USACE?
 (Yes or No) If yes, please explain and submit the name of the project, the permittee's name and/or address, and Corps permit number, if available:

Property Owner Contact Information:

Property Owner Name (must be an individual): Juan B. Villarreal
 Property Owner Company (if applicable): EJF Plus Inc.
 Mailing Address: 1819 S. Ashland Ave.
 City: Chicago State: IL Zip: 60608
 Daytime Telephone: 312-563-9721 Fax: 312-277-2997
 E-Mail Address: villarreal@lawyer.com

If the person requesting the Letter of No Objection is **not** the Property Owner, please also supply the Requestor's contact information here:

Requestor Name: John Lardner, PE, CPESC, LEED AP - JPL Environmental Engineering
 Mailing Address: 112² North Clark Street #3803
 City: Chicago State: IL Zip: 60610
 Daytime Telephone: 630-362-4287 Fax: 312-943-2539
 E-Mail Address: jlardnerpe@aol.com

If you have any of the following information, please include it with your request: wetland delineation, grading plans, relevant maps, topographic survey, and site photographs. Please identify on the required site map, plat of survey, or in a separate drawing: the footprint, location, and type of potential work. It will assist us in determining if no permit is necessary, and will be referenced in our response letter.

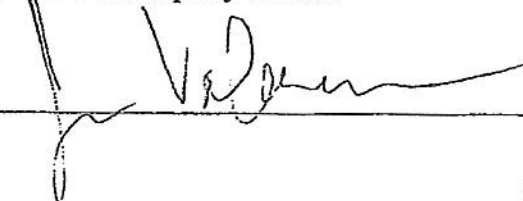
Please describe the proposed work on the property:

Proposed Blue Island Landscape Waste Compost Facility (see attached plans prepared by LRMG, (last revised ^{July 2} June, 2012). Wetland delineation has been completed (see attached report, May 23, 2012 by LRMG). No wetland impacts to occur resulting from the project.

I hereby certify that the information contained in the Request for a Letter of No Objection is accurate and complete:

Signature of Property Owner:

Date:



6/12/12

Exhibit H



DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, CORPS OF ENGINEERS
111 NORTH CANAL STREET
CHICAGO, ILLINOIS 60606-7208

REPLY TO
ATTENTION OF:

April 30, 2013

Technical Services Division
Regulatory Branch
LRC-2009-00455

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SUBJECT: Unauthorized Fill Activities in Wetlands at Parcel PIN #2801200-009 and PIN #2801200-003 Located South of 135th Street, North of 139th Street and West of Western Avenue in Blue Island, Cook County, Illinois (Section 1, Township 36 North, Range 13 East)

BIF Plus
1215 Heather Lane
Glenview, Illinois 60025

Dear Sir or Madame:

On March 14, 2013, a representative of the U.S. Army Corps of Engineers (Corps) Regulatory Branch conducted a site inspection at the above-referenced location and has determined that additional fill material had been brought onto the site and placed atop an existing fill violation. In addition to the fill material, final grading contours and associated utilities had occurred in areas that are currently under investigation from a previous Cease and Desist (C&D) order sent to you on April 19, 2010. Please be informed that there are now two active enforcement actions pending on the parcel PIN #2801200-009 and #2801200-003 located at South of 135th Street, North of 139th Street and West of Western Avenue in Blue Island, Cook County, Illinois (Section 1, Township 36 North, Range 13 East).

The activity is a violation of Section 301(a) of the Clean Water Act (33 U.S.C. 1311), since a review of our records indicates that a Department of the Army permit was not obtained pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344). The U.S. Army Corps of Engineers regulates the discharge of dredged or fill material into waters of the United States. These waters (or aquatic resource) include, but are not limited to, lakes, rivers, streams and wetlands, such as swamps, marshes, bogs, etc. Violations of the Clean Water Act are punishable by potential penalties of civil fines of up to \$32,500 per day of violation; criminal fines of up to \$50,000 per day of violation and/or imprisonment; and you may also be required to restore the site.

You are hereby ordered to cease and desist work at the site until this violation is resolved. You may resolve your violation by either:

a) Voluntarily removing the dredged and/or fill material from the wetlands within 60 days of receipt of this order; which would require a wetland delineation to be performed for

verification of the amount of wetland impact or;

b) Submitting an After-the-Fact permit application (enclosed) within 30 days of receipt of this order to retain the fill material within the wetlands.

Within 10 days of your receipt of this order, you will submit a written statement of your intent to comply with this order. This statement will include the method you propose to resolve this violation.

If your decision is to restore the affected area(s), you shall submit written acknowledgement of your decision, along with a restoration plan and schedule within 30 days of receipt of this order. Please be informed that any proposed restoration work shall not commence until this office has approved the restoration plan. The restoration plan and schedule must include:

1. Appropriate figures with landmarks and dimensions detailing the proposed restoration efforts;
2. Activities to be undertaken in your restoration efforts. You must provide written information in narrative format on how the fill would be removed and erosion and sediment control measures to be installed prior to fill removal;
3. A schedule of implementation, with start and end dates for all restoration activities;
4. The area shall be replanted with native vegetation only. You shall provide information on the species/quantities to be replanted and;
5. Information on the permanent disposal location of the removed fill material.

If your decision is to leave the fill material in place, the following information shall be submitted to this office, in writing, so that a determination of whether to accept or deny your After-the-Fact permit application can be completed:

1. Purpose of the project along with a clear description of work;
2. Construction drawings (full-sized) showing all aspects of the proposed activity, including existing and proposed contours, utilities, the location of waters of the United States to be impacted and not impacted, and the Ordinary High Water Mark (OHWM) and/or the Normal Water Level (NWL) of all waterways, including wetlands. In addition, the drawings shall include detail plan and profile views of all regulated structures. If applicable, the drawings shall also depict buffer areas, best management practices, deed restriction areas, and restoration areas, if required under the permitting program;
3. The direct and indirect adverse environmental effects that the project would cause;
4. A delineation of affected special aquatic sites, including wetlands that existed on the

property prior to construction activities, with an overlay of the filled area;

5. A statement indicating the present owner of this property;
6. A statement indicating the type of fill and its source, the date(s) of filling, and the identity of the individual(s) performing the work;
7. A list of all permits or authorizations received for this activity, including name of agency, date of permit and description of permitted activity;
8. A statement indicating why you failed to obtain an Army Corps of Engineers permit prior to the discharge; and
9. Your signature on the enclosed Tolling Agreement.

By copy of this letter, this office is soliciting the views of appropriate federal, state and local agencies, which may also have jurisdiction, regarding this unauthorized activity. Based upon your response to this order and the comments received from the agencies, it will be determined whether to accept an After-the-Fact permit application or require you to restore the site to its original condition. If your response is not received by this office within the designated time periods, a decision will be made by this office without benefit of your comments.

You should be aware that compliance with this order will not foreclose my options to initiate legal action, require corrective measures, or refer this case to the U.S. Environmental Protection Agency. Failure to comply with this order may result in a recommendation to the United States Attorney's Office to institute appropriate legal proceedings to enforce this order. Your complete cooperation and the expeditious resolution of your violation may avert these actions.

This matter is being coordinated with the U.S. Environmental Protection Agency which has independent enforcement authority under the Clean Water Act. Failure to comply with this order will result in appropriate enforcement action.

If you have any questions, please contact Andrew Blackburn of my staff by telephone at 312-846-5543, or email at Andrew.J.Blackburn@usaco.army.mil.

Sincerely,



Kathleen G. Chernich
Chief, East Section
Regulatory Branch

CELK - TS - RD
11 - TS - KC

Enclosure

Copy Furnished w/out Enclosures:

U.S. Environmental Protection Agency (Wendy Meigin)

Cook County Building and Zoning (Donald Wlodarski)

City of Blue Island (David Peloquin)

Kimberly Sabo (CELRC-OC)

TOLLING AGREEMENT

WHEREAS, the United States of America, on behalf of the United States Army Corps of Engineers (Corps) may file a complaint against EIF Plus, potential defendant(s)" for , inter alia, alleged violations of Sections 301(a), 309, & 404 of the Clean Water Act ("CWA"), 33 U.S.C. Sections 1311(a), 1319, & 1344 at a site commonly known as South of 135th Street, North of 139th Street and West of Western Avenue in Blue Island, Cook County, Illinois, (Section 1, Township 36 North, Range 13 East) (Department of the Army number LRC-2009-00455)

WHEREAS, the purpose of any such complaint would be to obtain appropriate injunctive relief and to impose appropriate civil or criminal penalties for potential defendant's alleged violations of the statute(s) cited above;

WHEREAS, the Corps accepted an after-the-fact (ATF) permit application from the potential defendant(s) in an attempt to settle the above claims;

WHEREAS, both parties believe that their interests will best be served by continuing the ATF permit process without the disruption that might be occasioned should the United States file a complaint in the immediate future;

AND WHEREAS both parties acknowledge the requirement found at 33 C.F.R. 331.11(c) for an applicant for an ATF permit to provide a signed tolling agreement;

THEREFORE, the United States and potential defendant(s) stipulate and agree as follows:

1. The United States and potential defendant(s) agree that the time between the acceptance by the Corps of the ATF permit application and the final Corps decision (as defined at 33 CFR 331.10) will not be included in calculating any statute of limitations that might be applicable to the alleged statutory violation(s) described above. Potential defendants agree not to assert, plead, or raise in any fashion on behalf of any party, whether by answer, motion, or otherwise, any defense or avoidance based on the running of any statute of limitations that may apply during that period or any defense or avoidance based on laches or other principle concerning the timeliness of commencing a civil action, based on the failure of the United States to file its complaint during that period.
2. Potential defendants further agree not to transfer the property in question during the pendency of this tolling agreement nor during the pendency of any civil action brought as described above, without first notifying the United States and giving the United States a reasonable opportunity to oppose such transfer.
3. Nothing in this tolling agreement shall restrict or otherwise prevent the United States from filing a complaint regarding any alleged statutory violation(s) not described above, at any time.

4. This tolling agreement does not constitute any admission of liability on the part of potential defendants; nor does it constitute any admission or acknowledgment on the part of the United States that any statute of limitations has run or that any statute of limitations is applicable to the statutory claims described above.

5. This tolling agreement contains the entire agreement between the parties, and no statement, promise or inducement made by any party to this agreement, or any agent of such parties, that is not set forth in this agreement shall be valid or binding. This tolling agreement may not be enlarged, modified or altered except in writing signed by the parties. This tolling agreement may be executed in counterparts.

FOR the United States of America:

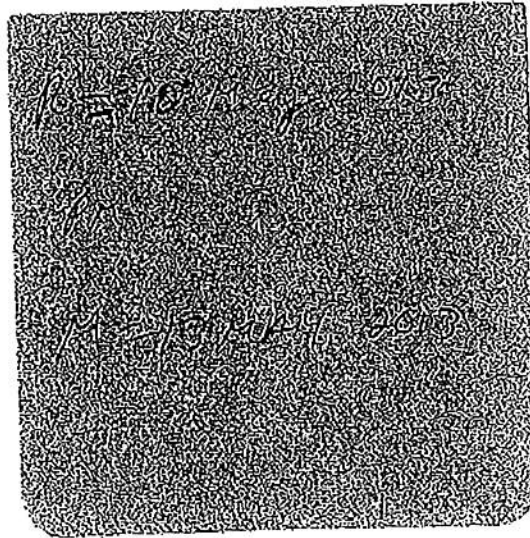
Kimberly Sabo
District Counsel
Chicago District, U.S. Army Corps of Engineers

Date

FOR EIF Plus:

EIF Plus

Date



7011 1570 0002 2746 8580

U.S. Postal Service™	
CERTIFIED MAIL™ RECEIPT	
<i>(Domestic Mail Only; No Insurance Coverage Provided)</i>	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage \$	Postmark Here
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
EIF PLUS	
1215 HEATHER LANE	
GLENVIEW IL 60025	
PS Form 3800, August 2006 See Reverse for Instructions	

Exhibit I

SAWYIER & WILLIAMS, LLP

Suite 2600 – 205 North Michigan Avenue
Chicago, Illinois 60601

Jason R. Williams

(312) 856-9740
(F) (312) 856-9743
jwilliams@olsonwilliamsllaw.com

October 22, 2013

VIA FACSIMILE & U.S. Mail

CELRC-OC
111 North Canal St
Chicago, IL 60606-7205

Re: FOIA Request

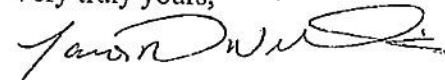
To Whom It May Concern:

This is a request under the Freedom of Information Act (5 U.S.C. § 552). I request that a copy of the following documents be provided to me: (1) all file content (both paper and electronic) of the file LRC-2009-455, including any site inspection information, all phone logs, and email correspondences; and (2) all results from the inspection performed on September 24, 2013, including any analyses of soil samples.

I understand that fees may be charged for search, review, and/or duplication of the records requested above. Please notify me via phone or by email if there will be any charges before fulfilling this request. I can be reached at (312) 856-9740 or jwilliams@olsonwilliamsllaw.com

Thank you for your cooperation in this matter.

Very truly yours,



Jason R. Williams

Exhibit J



DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
231 SOUTH LASALLE STREET, SUITE 1500
CHICAGO IL 60604

December 2, 2013

REPLY TO
ATTENTION OF

Office of Counsel

SUBJECT: Freedom of Information Act (FOIA) Request FP-14-002187

Mr. Jason R. Williams
Sawyer & Williams, LLP
205 North Michigan Avenue, Suite 2600
Chicago, Illinois 60601

Dear Mr. Williams:

This letter is in response to your FOIA request dated October, 22 2013, which was received on October 29, 2013, requesting copies of all documents relating to LRC 2009-455 and results of an inspection performed on September 24, 2013, including any analyses of soil samples.

The requested records are being withheld in full pursuant to exemption 7 of the FOIA. Exemption 7(a) of the Freedom of Information Act protects from disclosure records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings, including records not originally intended for law enforcement purposes, but subsequently compiled for such purposes. The records you have requested are the subject of an on-going enforcement action, and accordingly I have determined that they are subject to withholding under exemption 7(a).

You have the right to appeal the denial of your request through this office to the Office of the Chief Counsel for the U.S. Army Corps of Engineers, and finally to the Secretary of the Army's office, which is the final decision authority for the Department of the Army. You must submit your appeal in sufficient time to reach the Secretary of the Army no later than 60 calendar days from the date of this letter. Your letter should bear the notation "Freedom of Information Act Appeal. The envelope containing the appeal should be addressed to:

US Army Corps of Engineers
Chicago District Office of Counsel
231 South LaSalle Street, Suite 1500
Chicago, Illinois 60604

Under the FOIA, we are required to charge for the direct cost of processing your request. But because the cost of processing your FOIA request was nominal, no fees will be assessed.

If you have any questions about your request, please contact James Roth of my office at (312) 846-5353 or by email at james.l.roth@usace.army.mil.

2

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Sabo', with a long horizontal flourish extending to the right.

Kimberly J. Sabo
District Counsel, Initial Denial Authority
U.S. Army Corps of Engineers

Enclosures

Exhibit K

Sawyer & Williams, LLP
205 North Michigan Avenue, Suite 2600
Chicago, Illinois 60601
P: (312) 856-9741 F: (312) 856-9743 www.epaclaw.com

January 15, 2014

US Army Corps of Engineers
Chicago District Office of Counsel
231 South LaSalle Street, Suite 1500
Chicago, Illinois 60604

Re: Freedom of Information Act Appeal of Request No. FP-14-002187 Denial

To Whom It May Concern:

On behalf of EJP Plus, Inc. ("EJP"), I am writing to appeal the US Army Corps of Engineers, Chicago District's ("Army Corps") denial of EJP's October 22, 2013 FOIA request for a copy of file LRC-2009-455, including any site inspection information, phone logs and email correspondences, and all results from the inspection performed on September 24, 2013, including any analyses of soil samples. *See* FOIA Request Letter (Oct. 22, 2013), attached hereto as Exhibit A. A response denying this request was sent to my office by letter dated December 2, 2013 from Kimberly J. Sabo, District Counsel. *See* FOIA Denial Letter (Dec. 2, 2013), attached hereto as Exhibit B.

As set forth below, the Army Corps' FOIA Denial Letter was based on an improper application of FOIA Exemption 7(A). The Army Corps' explanation, "The records you have requested are the subject of an on-going enforcement action, and accordingly I have determined that they are subject to withholding under exemption 7(a)," is conclusory and the Army Corps has not met its burden under FOIA or federal law. Additionally, the Army Corps has not supplied a catalogue of the information requested, thereby forcing EJP to rely on the single statement provided above as proof that each document in the Army Corps' possession is properly exempted from disclosure. As such, EJP respectfully appeals the Army Corps' FOIA denial.

I. Factual Background

EJP and the Army Corps have a long history of correspondence regarding the property located south of 135th Street, north of 139th Street and west of Western Avenue in Blue Island, Cook County, Illinois. The most recent discussions began with a Cease and Desist Order issued by the Army Corps on April 19, 2010. *See* Cease and Desist Letter (Apr. 19, 2010), attached hereto as Exhibit C. The Order was based upon a site inspection of the property that was conducted by the Army Corps on November 13, 2009. The Army Corps stated, "[A] discharge of

EJF Plus, Inc. FOIA Appeal
January 15, 2014

fill and/or dredged material has occurred in wetlands without prior authorization of this office . . . Photo-documentation of the site reveals numerous stockpiles of fill material located within wetlands that are situated adjacent to Midlothian Creek, and the installation of a road crossing over Midlothian Creek.” *See id.* EJF was informed that it may resolve the violation by either voluntarily removing the dredge and fill material from the wetland or submitting an After-the-Fact permit application, which required agreeing to the enclosed Tolling Agreement. *See id.*

Paul Vicari, the Principal Ecologist and President of Land Resource Management Group (LRMG), responded to the Cease and Desist Order on behalf of EJF on September 3, 2010. *See Response to Cease and Desist Letter (Sept. 3, 2010)*, attached hereto as Exhibit D. LRMG is involved in natural resources consulting, environmentally focused planning and design, environmental engineering and natural areas restoration management. For the property at issue, LRMG reviewed site resource maps, historic aerials and historical evidence of site disturbance, and also conducted on-site observations and data collections. *See id.* As stated, “[I]t is LRMG’s professional opinion that NO ‘discharge of fill and/or dredged material has occurred in wetlands[.]’ or other ‘waters of the U.S.’ located within the parcels of concern owned by EJF Plus Inc. or within the ComEd property which envelopes Midlothian Creek adjacent to the EJF Plus Inc. property.” *See id.*

Mr. Vicari requested that the Cease and Desist Order be rescinded based on a lack of evidence of a violation. *See id.* He further noted, “LRMG and EJF were in the process of presenting a preliminary concept plan for improving the Property to City of Blue Island officials. This plan includes low-impact development (LID) design concepts including preservation and enhancement of the existing, isolated wetland resources. . . . We believe, due to this Letter, the local review process has been stalled since early May, 2010.” *See id.* Finally, Mr. Vicari advised of LRMG’s intent to request a Letter of No Objection from the Army Corps, so that the City of Blue Island could approve the development of EJF’s property.

In October of 2010, emails were exchanged between Mr. Vicari and Kathy Chernich of the Army Corps. *See Email Correspondence (Oct. 2010)*, attached hereto as Exhibit E. In response to Ms. Chernich’s notification of the Army Corps scheduled site visit, Mr. Vicari asked that the Army Corps first respond to his letter of September 3, 2010. *See id.* Ms. Chernich stated that that Army Corps would not be formally responding to the letter, and notified that two site inspections had already been performed by Army Corps agents. *See id.* In response to Mr. Vicari’s request for the data relied upon in the April 2010 Cease and Desist Order, Ms. Chernich stated that a FOIA request was required to view the Army Corps’ file. *See id.*

On November 8, 2010, a FOIA request for “all file content (both paper and electronic) of the file LRC-2009-455, including any site inspection information, all phone logs, and e-mail correspondences,” was forwarded to the Army Corps. *See FOIA Request (Nov. 8, 2010)*, attached hereto at Exhibit F. The Army Corps responded on December 10, 2010, stating that it was withholding over 100 documents based on FOIA Exemption 5 and 7(A). *See FOIA*

EJF Plus, Inc. FOIA Appeal
January 15, 2014

Request Denial (Dec. 10, 2010), attached hereto as Exhibit G. The explanation justifying the use of the Exemptions was limited to a sentence each, which simply recited the applicable statutory language. *See id.* Aside from stating the number of documents and photographs withheld under Exemption 7(A), the Army Corps provided no other description of the contents of the requested file. *See id.*

On July 2, 2012, Mr. Vicari, forwarded to the Army Corps a site improvement plan set and wetland determination report prepared by LRMG. *See* LRMG Letter (July 2, 2012), attached hereto as Exhibit H. LRMG concluded that “no impact to regulated wetlands or other ‘waters of the U.S.’ will result from this project.” *See id.* Mr. Vicari also requested that the Army Corps provide the enclosed Letter of No Objection after review of the submitted documentation. *See* Letter of No Objection Request (June 12, 2012), attached hereto as Exhibit I.

The Army Corps responded on April 30, 2013 with another Cease and Desist Order. *See* Cease and Desist Order (Apr. 30, 2013), attached hereto as Exhibit J. The Army Corps stated that one of their representatives conducted a site inspection on March 14, 2013 and reported additional fill violations. *See id.* EJF was again ordered to either remove the dredged and/or fill material or submit an After-the Fact permit application, which again included agreeing to the enclosed Tolling Agreement. *See id.*

Finally, another FOIA request was mailed by this office on October 22, 2013, requesting “(1) all file content (both paper and electronic) of the file LRC-2009-455, including any site inspection information, all phone logs, and email correspondences; and (2) all results from the inspection performed on September 24, 2013, including any analyses of soil samples.” *See* FOIA Request (Oct. 22, 2013), attached hereto as Exhibit A. The Army Corps responded on December 2, 2013, denying the FOIA request based on Exemption 7(A). *See* FOIA Denial (Dec. 2, 2013), attached hereto as Exhibit B. The Army Corps provided a definition of Exemption 7(A), concluding, “The records you have requested are the subject of an on-going enforcement action, and accordingly I have determined that they are subject to withholding under exemption 7(a).” *See id.* The Army Corps FOIA denial is the issue of the present appeal.

II. Legal Background

Under FOIA, government agencies must disclose records upon request unless one of nine enumerated exemptions applies. *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370, 374 (7th Cir. 2004); *see* 5 U.S.C. § 552(b). These limited exemptions, however, “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 (7th Cir. 1998), quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The Freedom of Information Act generally contemplates a policy of broad disclosure of government documents, and serves the basic purpose of ‘ensuring an informed citizenry, vital to the functioning of a democratic society.’”). Per the President’s directive, “All agencies should adopt

EJF Plus, Inc. FOIA Appeal
January 15, 2014

a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA.” 74 Fed. Reg. 4683, at 4683 (Jan. 26, 2009).

Consistent with the Act’s purpose, the burden is properly on the agency to sustain its denial of a FOIA request. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991); *Solar Sources*, 142 F.3d at 1037. “[A]lthough other *statutes* may exempt specific information from disclosure under FOIA, no agency regulation can circumvent FOIA by prohibiting disclosure of information otherwise required to be disclosed under FOIA.” *Marzen v. U.S. Dept. of Health & Human Svcs.*, 632 F. Supp. 785, 794 (N.D. Ill. 1986).

Relevant here is Exemption 7(A), which applies to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. 552(b)(7)(A). Congress’ primary purpose behind enacting this Exemption was to “prevent ‘harm [to] the Government’s case in court’ . . . by not allowing litigants ‘earlier or greater access’ to agency investigatory files than they would otherwise have” through the normal discovery process. *Robbins Tire & Rubber*, 437 U.S. at 224-225, quoting from S.Rep.No.813 89th Cong., 1st Sess. (1965) and from H.R.Rep.No.1497, 89th Cong., 2d Sess. (1966), U.S. Code Cong. & Admin. News 1966, p. 2418. Therefore, “While the Court must give ‘meaningful reach and application’ to Exemption 7(A) given its purpose, the exemption must also be construed narrowly ‘given the general policy favoring disclosure.’” *Int’l Union of Elevator Constructors Local 2 v. United States Dep’t of Labor*, 804 F. Supp. 2d 828, 833-834 (N.D. Ill. 2011), citing *Solar Sources*, 142 F.3d at 1038 (internal quotation marks and citations omitted).

“To justify nondisclosure under Exemption 7(A), the government must show that both prongs of 7(A) are met: first, that the records or information were compiled for law enforcement purposes, and second, that disclosure might impede enforcement proceedings.” *International Union of Elevator Constructors*, 804 F. Supp. 2d at 834; see *Wright v. OSHA*, 822 F.2d 642, 644 (7th Cir. 1987). A conclusory statement is insufficient to prevail under Exemption 7(A). See *Campbell v. Department of Health & Human Svcs.*, 682 F.2d 256, 259 (D.C. Cir. 1982). Rather, the government agency “must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007). The agency must also show “*how* the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding.” *Campbell*, 682 F.2d at 259 (emphasis added). Though actual interference need not be proven, the agency’s explanation must be reasonable and show “that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.” *Wright*, 822 F.2d at 646-47; see *Solar Sources*, 142 F.3d at 1037.

To meet its burden and justify a withholding under FOIA, the government agency may

EJF Plus, Inc. FOIA Appeal
January 15, 2014

offer “affidavits or declarations that describe ‘the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.’” *Chesapeake Bay Foundation, Inc. v. U.S. Army Corps of Engineers*, 677 F. Supp. 2d 101, 104 (D.D.C. 2009), quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); accord *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973). Courts have provided further clarification:

“When Exemption 7(A) is invoked and the government relies upon generic categorizations, ‘the government must define functional categories of documents; it must conduct a document-by document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings.’”

Int'l Union, 804 F. Supp. 2d at 834, citing *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986); see *Campbell*, 682 F.2d at 259 (“Congress, we conclude, based on the words it employed and the relevant legislative history, did not authorize blanket exemption for such records. It required something more.”); *Chesapeake Bay Found.*, 677 F. Supp. 2d at 105-106 (“[A] categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.”) (internal quotation marks and citations omitted).

Additionally, FOIA places an affirmative duty on agencies to provide “any reasonably segregable portion” of an otherwise exempt record. 5 U.S.C. § 522(b); *Chesapeake Bay Found.*, 677 F. Supp. 2d at 108; *Davenport v. Comm’n of Internal Revenue*, 1986 U.S. Dist. LEXIS 21618 (N.D. Ill. 1986). “[T]he focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Stolt-Nielsen Transp. Group Ltd. V. U.S.*, 534 F.3d 728, 733-34 (D.C. Cir. 1996). Courts will not merely take on faith that an agency has fulfilled its obligation under FOIA. *Chesapeake Bay Found.*, 677 F. Supp. 2d at 109. “The [Army] Corps must supply the Court with the necessary tools to perform a review of segregability -- this includes not only a detailed justification of the reasons for withholding information, but also a description of the document from which the information was redacted.” *Id.*

III. The Army Corps’ Has Not Met its Burden Under FOIA

As a result of the Army Corps’ denials of two formal FOIA requests pertaining to file LRC-2009-455, EJF has been inexplicably restricted in its use of its property for multiple years.

The Army Corps identifies wetlands based upon one of three specific indicators: wetland hydrology, hydrophytic vegetation or hydric soil. U.S. ARMY CORPS OF ENGINEERS, REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: NORTHCENTRAL

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AND NORTHEAST REGION, 2.0 (2012), [hereinafter *SUPPLEMENT TO WETLAND DELINEATION MANUAL*]. As the property at issue has neither surface water nor vegetation indicators, the soil must be tested to determine if it is hydric and, thus, constitutes a wetland. The National Technical Committee for Hydric Soils (NTCHS) has provided the definition for “hydric soil” used in wetland determinations. *Id* at 32. NTCHS also publishes *Field Indicators of Hydric Soils in the United States* as a guide to identify and delineate hydric soils in the field. *Id*. The most recent NTCHS publication is available through the United States Department of Agriculture, Natural Resources Conservation Service’s website (<http://www.nrcs.usda.gov>).

The Army Corps’ *SUPPLEMENT TO WETLAND DELINEATION MANUAL* details the on-site investigation procedure required to determine if hydric soil is present. The manual methodically describes the steps for observing, digging and testing the subject soil. *Id* at 32-75. It also defines the procedures to employ when typical hydric soil indicators are not present on-site. *Id*. at 128-36. As such, the determination of whether a wetland exists is based on objective, scientific criteria.

According to the Army Corps, it has conducted five site visits of EJF’s property since November 2009. Based on the information currently available to EJF, September 2013 was the first time the Army Corps collected on-site soil samples. Yet, curiously, the Army Corps issued two Cease and Desist Orders and denied a FOIA request prior to its collecting said samples. Without visible surface water on the property, as is the case here, soil samples must be obtained and tested to determine if the soil is hydric. *See* US ARMY CORPS OF ENGINEERS, *RECOGNIZING WETLANDS* (1998), attached hereto as Exhibit K. The survey conducted by LRMG on behalf of EJF, which included the analysis of soil samples, showed that contrary to the Army Corps’ statement in its April 2010 Cease and Desist Order, no violations of the Clean Water Act had occurred on the property. *See* Response to Cease and Desist Letter (Sept. 3, 2010), attached hereto as Exhibit D. The data underlying the Army Corps’ actions over the last four years has yet to be disclosed, and EJF is entitled to said information under FOIA.

In its most recent FOIA denial letter, the Army Corps attempts to defend its withholding of information by citing Exemption 7(A). *See* FOIA Denial (Dec. 2, 2013), attached hereto as Exhibit B. The instant situation is distinguishable from cases where a denial based on Exemption 7(A) has been upheld. *See Solar Sources*, 142 F.2d at 1036 (concurrent criminal investigation into commercial explosives price fixing scheme); *City of Chicago v. U.S. Dept. of the Treasury*, 2002 U.S. Dist. LEXIS 3813 at *14 (N.D. Ill. 2002) (summary judgment inappropriate where some requested documents were specially flagged to identify federal firearms licensees that were potential targets for criminal or regulatory action). Notwithstanding, the Army Corps has not met its burden under FOIA, as it has not identified the contents of the withheld file or how its investigation would reasonably be impaired by releasing its data. Nor has the Army Corps provided any basis to reasonably conclude that it has conducted a thorough analysis of its file in search of segregable, non-exempt information.

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In a comparable case, *Chesapeake Bay Foundation*, Plaintiff made a FOIA request for records pertaining to permit requests and supporting documentation for the development of its property. The Army Corps responded a year later, producing 126 pages of records while withholding 497 pages based on Exemptions 5 and 7(A). The Court held that the Army Corps “fails to abide with consistent precedent requiring detailed explanations of why each claimed exemptions [sic] is relevant to, and correlated with, the withheld records.” *Chesapeake Bay Found.*, 677 F. Supp. 2d at 108. Furthermore, the Army Corps’ Exemption 7(A) claim “does not explain how its investigation would be impaired by the release of information that the targets of the investigation *already possess*.” *CB*, 677 F. Supp. 2d at 108.

Similar to the FOIA denial in *Chesapeake Bay Foundation*, the Army Corps has withheld requested information based on Exemption 7(A) without any explanation outside the language of the Act. *See* FOIA Denial (Dec. 2, 2013), attached hereto as Exhibit B. The purpose of Exemption 7(A) is inapplicable to this situation. Here, the sole concern is whether EJF’s land constitutes a wetland. This determination is based on objective, scientific data, which the Army Corps has presumably collected as recently as September 2013. As such, the evidence that the Army Corps requires is currently within its possession. EJF is devoid of any opportunity to alter the data collected, tamper with evidence or intimidate potential witnesses. Arguably, like the plaintiff in *Chesapeake Bay Foundation*, EJF already has a substantial amount of the information that the Army Corps is withholding as a result of conducting its own site analysis. Therefore, the concern under Exemption 7(A) that an ongoing investigation may be impeded is not present in this case.

Additionally, the Army Corps has provided neither a categorical list nor *Vaughn* index of the documents withheld, as is required under FOIA and federal law. Some courts have been hesitant to require a *Vaughn* index in Exemption 7(A) situations. *See e.g., Solar Sources*, 142 F.3d at 1040 (“[I]n many Exemption 7(A) cases, provision of a *Vaughn* index would itself disclose much of the information that the Exemption is intended to protect.”). However, as previously discussed, wetland determinations are based on objective, scientific criteria. The categories of data and information that the Army Corps is required to gather in wetland investigations are public knowledge. Therefore, it is *highly* unlikely that providing a categorical description or *Vaughn* index of file LRC-2009-455 will reveal information that EJF is either currently unaware of or capable of using to hinder the Army Corps’ investigation. By issuing a FOIA denial without giving any indication of the contents of the file, the Army Corps has not demonstrated that the information withheld logically falls within the claimed exemption.

Finally, in its conclusory statement that Exemption 7(A) applies, the Army Corps has seemingly disregarded its duty to analyze file LRC-2009-455 to determine whether any documents contain segregable, non-exempt information. *See* 5 U.S.C. § 522(b). Contrary to the circumstances in *Solar Sources*, this is not a situation where requiring the segregation of non-exempt information “would be significantly unwieldy.” *See Solar Sources*, 142 F.3d at 1039. In *Solar Sources*, the plaintiffs requested information regarding their civil antitrust claim arising out

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of a price fixing conspiracy, which the U.S. Department of Justice's Antitrust Division was concurrently investigating. In its FOIA denial based on Exemption 7(A), the Division provided six categories within which the requested information fell, as well as eight descriptive subcategories, noting which subcategories fell within each general category. With *over 5 million documents* that were responsive to Plaintiffs' FOIA request, the Court determined that the categorical descriptions were sufficient for the Court to randomly sample documents from subcategories through an *in camera* review. *Id.* at 1038-39. In addition, the Government aptly explained the numerous ways in which disclosure would potentially interfere with its ongoing *criminal* investigation, including the "destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation." *Id.* at 1039.

Despite the fact that the Army Corps has presumably been collecting information about EJF's property for at least four years, the subject matter of the Army Corps' investigation is reasonably limited. The sole purpose of collecting data is to determine whether the property is or is not a wetland. As such, the contents of file LRC-2009-455 will be less numerous than typical criminal investigations where Exemption 7(A) is invoked, making it realistic to expect the Army Corps to conduct its due diligence under FOIA. As the Army Corps has not provided *any* description of the information withheld, it has also not established a reasonable inference that the entire file is exempt.

IV. Conclusion

Although the Army Corps uses an objective, scientific test for asserting jurisdiction over jurisdictional wetlands it refuses to turn over the data that has supposedly formed the basis of its decision to assume jurisdiction over EJF's property. The Army Corps is in violation of FOIA by denying EJF's FOIA request without meeting its burden under Exemption 7(A). Accordingly, the Army Corps must release any portions of file LRC-2009-455 that it is unable to provide a detailed justification for withholding within twenty business days, as required by FOIA and the Army Corps' FOIA regulations. 5 U.S.C. § 552(a)(6)(A)(ii); 32 C.F.R. § 518.16(i)-(j).

Respectfully submitted,


Jason R. Williams

Enclosures

Exhibit L



DEPARTMENT OF THE ARMY
CHICAGO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
231 SOUTH LASALLE STREET SUITE 1500
CHICAGO IL 60604-1437

February 7, 2014

Office of Counsel

Jason R. Williams
Sawyer & Williams, LLP
205 N. Michigan Avenue, Suite 2600
Chicago, Illinois 60601

Mr. Williams:

I am writing in response to your letter, dated January 15, 2014, regarding the denial of your request under the Freedom of Information Act, FP-14-002187. Prompted by your letter, I asked my staff to review the requested file, and reconsider whether any records contained in the file could be released. Accordingly, enclosed are those records responsive to your original request that are not exempt from release.

Exemption 7(a) of the Freedom of Information Act authorizes the withholding of information compiled for law enforcement purposes to the extent that its release could reasonably be expected to interfere with an enforcement proceeding. 5 U.S.C. § 552(b)(7)(a). A total of 176 documents and 58 photographs were withheld under exemption 7(a).

You have the right to appeal the partial denial of your request through this office to the Office of the Chief Counsel for the U.S. Army Corps of Engineers, and finally to the Secretary of the Army's office, which is the final decision authority for the Department of the Army. You must submit your appeal in sufficient time to reach the Secretary of the Army no later than 60 calendar days from the date of this letter. Your letter should bear the notation "Freedom of Information Act Appeal." The envelope containing the appeal should be addressed to Office of Counsel, U.S. Army Corps of Engineers, Chicago District, 231 S. LaSalle Street, Suite 1500, Chicago, Illinois 60604.

Pursuant to the FOIA, we are required to charge for the direct cost of processing your request. But because the cost of processing your FOIA request was nominal, no fees will be assessed.

-2-

If you have any questions about your request, please contact Kevin Jerbi of my office at (312) 846-5352 or by email at kevin.j.jerbi@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Sabo', followed by a long horizontal line extending to the right.

Kimberly J. Sabo
District Counsel
Chicago District, U.S. Army Corps of Engineers

Enclosures

Exhibit M

J.R. Williams Law LLC
205 N. Michigan Ave., Suite 2600, Chicago, IL 60601
P: (312) 856-9740 F: (312) 856-9743
jrw@jrwilliamsllc.com

April 2, 2014

Office of Counsel
U.S. Army Corps of Engineers, Chicago District
231 South LaSalle Street, Suite 1500
Chicago, Illinois 60604

Re: Freedom of Information Act Appeal of Request No. FP-14-002187 Denial In Part

Dear Secretary of the Army:

On behalf of EJF Plus, Inc. ("EJF"), I am writing to appeal the US Army Corps of Engineers, Chicago District's ("Army Corps") partial denial of EJF's January 15, 2014, FOIA Appeal referencing file LRC-2009-455. *See* FOIA Request Appeal Letter (Jan. 15, 2014), attached hereto as Exhibit A. A response denying this request in part was sent to my office by letter dated February 7, 2014, from Kimberly J. Sabo, District Counsel. *See* FOIA Appeal Partial Denial Letter (Feb. 7, 2014), attached hereto as Exhibit B.

Prior to the above-mentioned January 15, 2014, FOIA Appeal letter, I had requested a copy of file LRC-2009-455, including any site inspection information, phone logs and email correspondences, and all results from the inspection performed on September 24, 2013, including any analyses of soil samples, in a letter dated October 22, 2013. *See* FOIA Request Letter (Oct. 22, 2013), attached hereto as Exhibit C. A response denying that request was sent to my office by letter dated December 2, 2013. *See* FOIA Denial Letter (Dec. 2, 2013), attached hereto as Exhibit D. The Army Corps offered the explanation that, "The records you have requested are the subject of an on-going enforcement action, and accordingly I have determined that they are subject to withholding under exemption 7(A)." *See id.* However, following my January 15, 2014, letter appealing that FOIA request denial, the Army Corps subsequently granted in part and denied in my FOIA request in a letter dated February 7, 2014. *See* Exhibit B.

As set forth below, the Army Corps' partial denial is again based on an improper application of FOIA Exemption 7(A). The Army Corps offers no explanation as to why various documents are still being withheld other than the conclusory statement that, "A total of 176 documents and 58 photographs were withheld under exemption 7(A)." *See* Exhibit B. Army Corps has not met its burden under FOIA or federal law for withholding said documents. Further, the Army Corps has again failed to supply a catalogue of the information requested,

thereby forcing EJF to rely on the single statement provided above as proof that each document in the Army Corps' possession is properly exempted from disclosure. As such, EJF respectfully appeals the Army Corps' partial FOIA denial.

I. Factual Background

EJF and the Army Corps have a long history of correspondence regarding the property located south of 135th Street, north of 139th Street and west of Western Avenue in Blue Island, Cook County, Illinois. The most recent discussions began with a Cease and Desist Order issued by the Army Corps on April 19, 2010. *See* Cease and Desist Letter (Apr. 19, 2010), attached hereto as Exhibit E. The Order was based upon a site inspection of the property that was conducted by the Army Corps on November 13, 2009. The Army Corps stated, “[A] discharge of fill and/or dredged material has occurred in wetlands without prior authorization of this office...Photo-documentation of the site reveals numerous stockpiles of fill material located within wetlands that are situated adjacent to Midlothian Creek, and the installation of a road crossing over Midlothian Creek.” *See id.* EJF was informed that it may resolve the violation by either voluntarily removing the dredge and fill material from the wetland or submitting an After-the-Fact permit application, which required agreeing to the enclosed Tolling Agreement. *See id.*

Paul Vicari, the Principal Ecologist and President of Land Resource Management Group (LRMG), responded to the Cease and Desist Order on behalf of EJF on September 3, 2010. *See* Response to Cease and Desist Letter (Sept. 3, 2010), attached hereto as Exhibit F. LRMG is involved in natural resources consulting, environmentally focused planning and design, environmental engineering and natural areas restoration management. For the property at issue, LRMG reviewed site resource maps, historic aerials and historical evidence of site disturbance, and also conducted on-site observations and data collections. *See id.* As stated, “[I]t is LRMG’s professional opinion that NO ‘discharge of fill and/or dredged material has occurred in wetlands[’] or other ‘waters of the U.S.’ located within the parcels of concern owned by EJF Plus Inc. or within the ComEd property which envelopes Midlothian Creek adjacent to the EJF Plus Inc. property.” *See id.*

Mr. Vicari requested that the Cease and Desist Order be rescinded based on a lack of evidence of a violation. *See id.* He further noted, “LRMG and EJF were in the process of presenting a preliminary concept plan for improving the Property to City of Blue Island officials. This plan includes low-impact development (LID) design concepts including preservation and enhancement of the existing, isolated wetland resources... We believe, due to this Letter, the local review process has been stalled since early May, 2010.” *See id.* Finally, Mr. Vicari advised of LRMG’s intent to request a Letter of No Objection from the Army Corps, so that the City of Blue Island could approve the development of EJF’s property.

In October of 2010, emails were exchanged between Mr. Vicari and Kathy Chernich of the Army Corps. *See* Email Correspondence (Oct. 2010), attached hereto as Exhibit G. In

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response to Ms. Chernich's notification of the Army Corps scheduled site visit, Mr. Vicari asked that the Army Corps first respond to his letter of September 3, 2010. *See id.* Ms. Chernich stated that that Army Corps would not be formally responding to the letter, and notified that two site inspections had already been performed by Army Corps agents. *See id.* In response to Mr. Vicari's request for the data relied upon in the April 2010 Cease and Desist Order, Ms. Chernich stated that a FOIA request was required to view the Army Corps' file. *See id.*

On November 8, 2010, a FOIA request for "all file content (both paper and electronic) of the file LRC-2009-455, including any site inspection information, all phone logs, and e-mail correspondences," was forwarded to the Army Corps. *See* FOIA Request (Nov. 8, 2010), attached hereto at Exhibit H. The Army Corps responded on December 10, 2010, stating that it was withholding over 100 documents based on FOIA Exemption 5 and 7(A). *See* FOIA Request Denial (Dec. 10, 2010), attached hereto as Exhibit I. The explanation justifying the use of the Exemptions was limited to a sentence each, which simply recited the applicable statutory language. *See id.* Aside from stating the number of documents and photographs withheld under Exemption 7(A), the Army Corps provided no other description of the contents of the requested file. *See id.*

On July 2, 2012, Mr. Vicari, forwarded to the Army Corps a site improvement plan set and wetland determination report prepared by LRMG. *See* LRMG Letter (July 2, 2012), attached hereto as Exhibit J. LRMG concluded that "no impact to regulated wetlands or other 'waters of the U.S.' will result from this project." *See id.* Mr. Vicari also requested that the Army Corps provide the enclosed Letter of No Objection after review of the submitted documentation. *See* Letter of No Objection Request (June 12, 2012), attached hereto as Exhibit K.

The Army Corps responded on April 30, 2013 with another Cease and Desist Order. *See* Cease and Desist Order (Apr. 30, 2013), attached hereto as Exhibit L. The Army Corps stated that one of their representatives conducted a site inspection on March 14, 2013 and reported additional fill violations. *See id.* EJF was again ordered to either remove the dredged and/or fill material or submit an After-the Fact permit application, which again included agreeing to the enclosed Tolling Agreement. *See id.*

Further, another FOIA request was mailed by this office on October 22, 2013, requesting "(1) all file content (both paper and electronic) of the file LRC-2009-455, including any site inspection information, all phone logs, and email correspondences; and (2) all results from the inspection performed on September 24, 2013, including any analyses of soil samples." *See* Exhibit C. The Army Corps responded on December 2, 2013, denying the FOIA request based on Exemption 7(A). *See* Exhibit D. The Army Corps provided a definition of Exemption 7(A), concluding, "The records you have requested are the subject of an on-going enforcement action, and accordingly I have determined that they are subject to withholding under exemption 7(A)." *See id.*

Lastly, following the Army Corps' denial on December 2, 2013, my office appealed the decision to withhold the requested documents in a letter dated January 15, 2014. *See* Exhibit A. Subsequently, the Army Corps mailed a letter dated February 7, 2014, partially granting and partially denying the FOIA request, and enclosing approximately 98 documents. *See* Exhibit B. However, the Army Corps cited that same 7(A) exemption language as provided in the December 2, 2013, letter as explanation for withholding, "[a] total of 176 documents and 58 photographs...under exemption 7(A)." *See id.* The Army Corps' partial denial is the issue of the present appeal.

II. Legal Background

Under FOIA, government agencies must disclose records upon request unless one of nine enumerated exemptions applies. *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370, 374 (7th Cir. 2004); *see* 5 U.S.C. § 552(b). These limited exemptions, however, "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 (7th Cir. 1998), quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The Freedom of Information Act generally contemplates a policy of broad disclosure of government documents, and serves the basic purpose of 'ensuring an informed citizenry, vital to the functioning of a democratic society.'"). Per the President's directive, "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA." 74 Fed. Reg. 4683, at 4683 (Jan. 26, 2009).

Consistent with the Act's purpose, the burden is properly on the agency to sustain its denial of a FOIA request. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); *Solar Sources*, 142 F.3d at 1037. "[A]lthough other statutes may exempt specific information from disclosure under FOIA, no agency regulation can circumvent FOIA by prohibiting disclosure of information otherwise required to be disclosed under FOIA." *Marzen v. U.S. Dept. of Health & Human Svcs.*, 632 F. Supp. 785, 794 (N.D. Ill. 1986).

Relevant here is Exemption 7(A), which applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(a). Congress' primary purpose behind enacting this Exemption was to "prevent 'harm [to] the Government's case in court' ... by not allowing litigants 'earlier or greater access' to agency investigatory files than they would otherwise have" through the normal discovery process. *Robbins Tire & Rubber*, 437 U.S. at 224-225, quoting from S.Rep.No.813 89th Cong., 1st Sess. (1965) and from H.R.Rep.No.1497, 89th Cong., 2d Sess. (1966), U.S. Code Cong. & Admin. News 1966, p. 2418. Therefore, "While the Court must give 'meaningful reach and application' to Exemption 7(A) given its purpose, the exemption must also be construed narrowly 'given the general policy favoring disclosure.'" *Int'l Union of Elevator Constructors Local 2 v. United States Dep't of Labor*, 804 F. Supp. 2d 828, 833-834 (N.D. Ill. 2011), citing

Solar Sources, 142 F.3d at 1038 (internal quotation marks and citations omitted).

“To justify nondisclosure under Exemption 7(A), the government must show that both prongs of 7(A) are met: first, that the records or information were compiled for law enforcement purposes, and second, that disclosure might impede enforcement proceedings.” *International Union of Elevator Constructors*, 804 F. Supp. 2d at 834; *see Wright v. OSHA*, 822 F.2d 642, 644 (7th Cir. 1987). A conclusory statement is insufficient to prevail under Exemption 7(A). *See Campbell v. Department of Health & Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982). Rather, the government agency “must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007). The agency must also show “*how* the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding.” *Campbell*, 682 F.2d at 259 (emphasis added). Though actual interference need not be proven, the agency’s explanation must be reasonable and show “that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.” *Wright*, 822 F.2d at 646-47; *see Solar Sources*, 142 F.3d at 1037.

To meet its burden and justify a withholding under FOIA, the government agency may offer “affidavits or declarations that describe ‘the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.’” *Chesapeake Bay Foundation, Inc. v. U.S. Army Corps of Engineers*, 677 F. Supp. 2d 101, 104 (D.D.C. 2009), quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); accord *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973). Courts have provided further clarification:

“When Exemption 7(A) is invoked and the government relies upon generic categorizations, ‘the government must define functional categories of documents; it must conduct a document-by document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings.’”

Int’l Union, 804 F. Supp. 2d at 834, citing *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986); *see Campbell*, 682 F.2d at 259 (“Congress, we conclude, based on the words it employed and the relevant legislative history, did not authorize blanket exemption for such records. It required something more.”); *Chesapeake Bay Found.*, 677 F. Supp. 2d at 105-106 (“[A] categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.”) (internal quotation marks and citations omitted).

Additionally, FOIA places an affirmative duty on agencies to provide “any reasonably segregable portion” of an otherwise exempt record. 5 U.S.C. § 522(b); *Chesapeake Bay Found.*, 677 F. Supp. 2d at 108; *Davenport v. Comm’n of Internal Revenue*, 1986 U.S. Dist. LEXIS 21618 (N.D. Ill. 1986). “[T]he focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Stolt-Nielsen Transp. Group Ltd. v. U.S.*, 534 F.3d 728, 733-34 (D.C. Cir. 1996). Courts will not merely take on faith that an agency has fulfilled its obligation under FOIA. *Chesapeake Bay Found.*, 677 F. Supp. 2d at 109. “The [Army] Corps must supply the Court with the necessary tools to perform a review of segregability—this includes not only a detailed justification of the reasons for withholding information, but also a description of the document from which the information was redacted.” *Id.*

III. The Army Corps’ Has Not Met its Burden Under FOIA

As a result of the Army Corps’ denial of two formal FOIA requests and partial denial of an appeal pertaining to file LRC-2009-455, EJF has been inexplicably restricted in its use of its property for multiple years.

The Army Corps identifies wetlands based upon one of three specific indicators: wetland hydrology, hydrophytic vegetation or hydric soil. U.S. ARMY CORPS OF ENGINEERS, REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: NORTHCENTRAL AND NORTHEAST REGION, 2.0 (2012), [hereinafter *SUPPLEMENT TO WETLAND DELINEATION MANUAL*]. As the property at issue has neither surface water nor vegetation indicators, the soil must be tested to determine if it is hydric and, thus, constitutes a wetland. The National Technical Committee for Hydric Soils (NTCHS) has provided the definition for “hydric soil” used in wetland determinations. *Id.* at 32. NTCHS also publishes *Field Indicators of Hydric Soils in the United States* as a guide to identify and delineate hydric soils in the field. *Id.* The most recent NTCHS publication is available through the United States Department of Agriculture, Natural Resources Conservation Service’s website (<http://www.nrcs.usda.gov>).

The Army Corps’ *SUPPLEMENT TO WETLAND DELINEATION MANUAL* details the on-site investigation procedure required to determine if hydric soil is present. The manual methodically describes the steps for observing, digging and testing the subject soil. *Id.* at 32-75. It also defines the procedures to employ when typical hydric soil indicators are not present on-site. *Id.* at 128-36. As such, the determination of whether a wetland exists is based on objective, scientific criteria.

According to the Army Corps, it has conducted five site visits of EJF’s property since November 2009. Based on the information currently available to EJF, September 2013 was the first time the Army Corps collected on-site soil samples. Yet, curiously, the Army Corps issued two Cease and Desist Orders and denied a FOIA request prior to its collecting said samples. Without visible surface water on the property, as is the case here, soil samples must be obtained

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and tested to determine if the soil is hydric. *See* US ARMY CORPS OF ENGINEERS, RECOGNIZING WETLANDS (1998), attached hereto as Exhibit M. The survey conducted by LRMG on behalf of EJF, which included the analysis of soil samples, showed that contrary to the Army Corps' statement in its April 2010 Cease and Desist Order, no violations of the Clean Water Act had occurred on the property. *See* Exhibit F. The data underlying the Army Corps' actions over the last four years has yet to be disclosed, and EJF is entitled to said information under FOIA.

In its FOIA denial letter dated December 2, 2013, the Army Corps attempts to defend its withholding of information by citing Exemption 7(A). *See* Exhibit D. The instant situation is distinguishable from cases where a denial based on Exemption 7(A) has been upheld. *See Solar Sources*, 142 F.2d at 1036 (concurrent criminal investigation into commercial explosives price fixing scheme); *City of Chicago v. U.S. Dept. of the Treasury*, 2002 U.S. Dist. LEXIS 3813 at *14 (N.D. Ill. 2002) (summary judgment inappropriate where some requested documents were specially flagged to identify federal firearms licensees that were potential targets for criminal or regulatory action). Notwithstanding, the Army Corps has not met its burden under FOIA, as it has not identified the contents of the withheld file or how its investigation would reasonably be impaired by releasing its data. Nor has the Army Corps provided any basis to reasonably conclude that it has conducted a thorough analysis of its file in search of segregable, non-exempt information.

In a comparable case, *Chesapeake Bay Foundation*, Plaintiff made a FOIA request for records pertaining to permit requests and supporting documentation for the development of its property. The Army Corps responded a year later, producing 126 pages of records while withholding 497 pages based on Exemptions 5 and 7(A). The Court held that the Army Corps "fails to abide with consistent precedent requiring detailed explanations of why each claimed exemptions [sic] is relevant to, and correlated with, the withheld records." *Chesapeake Bay Found.*, 677 F. Supp. 2d at 108. Furthermore, the Army Corps' Exemption 7(A) claim "does not explain how its investigation would be impaired by the release of information that the targets of the investigation *already possess*." *CB*, 677 F. Supp. 2d at 108.

Similar to the FOIA denial in *Chesapeake Bay Foundation*, the Army Corps has withheld requested information based on Exemption 7(A) without any explanation outside the language of the Act. *See* Exhibit B and D. The purpose of Exemption 7(A) is inapplicable to this situation. Here, the sole concern is whether EJF's land constitutes a wetland. This determination is based on objective, scientific data, which the Army Corps has presumably collected as recently as September 2013. As such, the evidence that the Army Corps requires is currently within its possession. EJF is devoid of any opportunity to alter the data collected, tamper with evidence or intimidate potential witnesses. Arguably, like the plaintiff in *Chesapeake Bay Foundation*, EJF already has a substantial amount of the information that the Army Corps is withholding as a result of conducting its own site analysis. Therefore, the concern under Exemption 7(A) that an ongoing investigation may be impeded is not present in this case.

Additionally, the Army Corps has provided neither a categorical list nor *Vaughn* index of the documents withheld, as is required under FOIA and federal law. Some courts have been hesitant to require a *Vaughn* index in Exemption 7(A) situations. *See e.g., Solar Sources*, 142 F.3d at 1040 (“[I]n many Exemption 7(A) cases, provision of a *Vaughn* index would itself disclose much of the information that the Exemption is intended to protect.”). However, as previously discussed, wetland determinations are based on objective, scientific criteria. The categories of data and information that the Army Corps is required to gather in wetland investigations are public knowledge. Therefore, it is *highly* unlikely that providing a categorical description or *Vaughn* index of file LRC-2009-455 will reveal information that EJF is either currently unaware of or capable of using to hinder the Army Corps’ investigation. By issuing a partial FOIA denial without giving any indication of the contents of the file, the Army Corps has not demonstrated that the information withheld logically falls within the claimed exemption.

Finally, in its conclusory statement that Exemption 7(A) applies to the remaining documents withheld, the Army Corps has seemingly disregarded its duty to analyze file LRC-2009-455 to determine whether any documents contain segregable, non-exempt information. *See* 5 U.S.C. § 522(b). Contrary to the circumstances in *Solar Sources*, this is not a situation where requiring the segregation of non-exempt information “would be significantly unwieldy.” *See Solar Sources*, 142 F.3d at 1039. In *Solar Sources*, the plaintiffs requested information regarding their civil antitrust claim arising out of a price fixing conspiracy, which the U.S. Department of Justice’s Antitrust Division was concurrently investigating. In its FOIA denial based on Exemption 7(A), the Division provided six categories within which the requested information fell, as well as eight descriptive subcategories, noting which subcategories fell within each general category. With *over 5 million documents* that were responsive to Plaintiffs’ FOIA request, the Court determined that the categorical descriptions were sufficient for the Court to randomly sample documents from subcategories through an *in camera* review. *Id.* at 1038-39. In addition, the Government aptly explained the numerous ways in which disclosure would potentially interfere with its ongoing *criminal* investigation, including the “destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government’s investigation.” *Id.* at 1039.


Despite the fact that the Army Corps has presumably been collecting information about EJF’s property for at least four years, the subject matter of the Army Corps’ investigation is reasonably limited. The sole purpose of collecting data is to determine whether the property is or is not a wetland. As such, the contents of file LRC-2009-455 will be less numerous than typical criminal investigations where Exemption 7(A) is invoked, making it realistic to expect the Army Corps to conduct its due diligence under FOIA. As the Army Corps has not provided *any* description of the information withheld, it has also not established a reasonable inference that the remaining documents are exempt.

IV. Conclusion

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Although the Army Corps uses an objective, scientific test for asserting jurisdiction over jurisdictional wetlands it refuses to turn over the data that has supposedly formed the basis of its decision to assume jurisdiction over EJF's property. The Army Corps is in violation of FOIA by partially denying EJF's FOIA request without meeting its burden under Exemption 7(A). Accordingly, the Army Corps must release any portions of file LRC-2009-455 that it is unable to provide a detailed justification for withholding within twenty business days, as required by FOIA and the Army Corps' FOIA regulations. 5 U.S.C. § 552(a)(6)(A)(ii); 32 C.F.R. § 518.16(i)-(j).

Respectfully submitted,


Jason R. Williams

Enclosures

Exhibit N



DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104

July 3, 2014

Mr. Jason Williams
Sawyer & Williams, LLP
205 North Michigan Avenue, Suite 2600
Chicago, IL 60601

Dear Mr. Williams:

This letter acknowledges the Office of the Army General Counsel's receipt of your appeal under the Freedom of Information act dated April 2, 2014. This office reviews appeals on a first-in, first-out basis. I assure you that we process appeals as expeditiously as possible, and we will respond to your appeal in turn.

Sincerely,

A handwritten signature in black ink, appearing to read "Angela Jenkins". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Angela Jenkins
Paralegal Specialist
Office of the Army General Counsel
(Operations & Personnel)

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104
OFFICIAL BUSINESS

MR JASON R WILLIAMS
SAWYIER & WILLIAMS, LLP
205 NORTH MICHAGAN AVENUE SUITE 2600
CHICAGO ILL 60601



207 DEC 100961410007/07/14
NOTIFY SENDER OF NEW ADDRESS
; SAWYIER & WILLIAMS LLP
333 W WACKER DR STE 2000
CHICAGO IL 60606-1288
BC: 60606128800 *0731-00366-07-44
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