

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MISSOURI COALITION FOR THE	)
ENVIRONMENT,	)
3115 So. Grand, Ste. 650	)
St. Louis, MO 63118	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. ARMY CORPS OF ENGINEERS,	)
441 G Street NW	)
Washington, DC 20314-1000	)
	)
Defendant.	)

Case No.

**COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF**

**NATURE OF THE CASE**

1. This Complaint challenges the unlawful denial of access to plaintiff Missouri Coalition for the Environment (“MCE”) of documents in the possession of defendant U.S. Army Corps of Engineers (“the Corps”) in violation of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.
  
2. On March 5, 2013, MCE, acting through Great Rivers Environmental Law Center, submitted a FOIA request (“March 5 FOIA request”) to the Corps of Engineers-St. Louis District seeking documents related to permits issued by the Corps pursuant to Section 404 of the Clean Water Act. Specifically, Plaintiff requested to inspect and copy documents related to sixteen (16) Section 404 permits.

3. Through a difficult and time-consuming process of communication (or lack thereof) with the Corps spanning many months, the Corps ultimately allowed Plaintiff to review and inspect thirteen (13) of the permit files. However, the Corps denied review and inspection of three (3) permits—P-2816, P-2817, and P-2818.

4. The Corps claimed that the entirety of the three (3) permit files were exempt from disclosure because they were “pre-decisional” under 5 U.S.C. § 552(b)(5).

5. Plaintiff filed an administrative appeal in accordance with 5 U.S.C. § 552(a)(6)(A)(ii) on November 8, 2013 challenging the Corps’ withholding of the three (3) permit files.

6. To date, the Corps has not ruled on the appeal filed by Plaintiff on November 8, 2013, in violation of 5 U.S.C. § 552(a)(6)(A)(ii), which requires Defendant to make a determination with respect to any appeal within twenty days (20) after receipt of the appeal.

7. The Corps’ withholding of the entirety of the three (3) permit files violates 5 U.S.C. §§ 552(a)(3), 552(a)(6), and 552(b).

### **JURISDICTION AND VENUE**

8. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under the FOIA.

9. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides that venue for FOIA cases against federal governmental agencies is proper in the District of Columbia.

10. Injunctive relief is appropriate under 5 U.S.C. § 552(a)(4)(B).

**PARTIES**

11. Plaintiff the Missouri Coalition for the Environment (“MCE”) is a not-for-profit corporation, qualified to do business in Missouri, with its principal office located in St. Louis City, Missouri. It has approximately 700 members, most of whom reside in Missouri. MCE exists for the purposes of promoting clean water, clean air, clean energy, protection of wetlands, and a healthy environment, and actively advocates for renewable energy and energy efficiency as alternatives to fossil fuels and nuclear power in Missouri. Many of MCE’s members are interested in promoting clean water, clean air, clean energy, and a healthy environment. MCE tracks mitigation projects intended to compensate for wetlands destroyed in development projects, and educates and informs the public about pending threats to wetlands as well as other issues, and disseminates information through its newsletters and active website to its own supporters, as well as the memberships of other conservation organizations, locally as well as nationally. MCE brings these claims on its own behalf, and on behalf of its members.

12. Defendant U.S. Army Corps of Engineers is an agency within the Department of the Army subject to the FOIA. 5 U.S.C. § 552(f)(1). It is charged, pursuant to Section 404 of the Clean Water Act, with regulating the discharge of dredge and fill material into the jurisdictional waters of the United States. The Corps has possession and control of the records Plaintiff seeks, which were compiled pursuant to § 404 of the Clean Water Act.

**FACTUAL BACKGROUND**

13. On March 5, 2013, MCE, acting through Great Rivers Environmental Law Center, submitted a FOIA request (“March 5 FOIA request”) to the Corps seeking documents related to permits issued by the Corps pursuant to Section 404 of the Clean Water Act, which the

Corps denominated as request “FA-13-0028.” Specifically, Plaintiff requested to inspect and copy documents related to sixteen (16) Section 404 permits.

14. In the March 5 FOIA request, Plaintiff, referencing 5 U.S.C § 552(b), stated that:

FOIA provides that if portions of a document are exempt from release, the remainder of the document must be segregated and disclosed. 5 U.S.C. §552(b). Please make available for inspection and copying all non-exempt portions of the documents that we have requested, and we ask that you justify any deletions by reference to specific exemptions allowed under FOIA.

15. On March 20, 2013, the Corps, acting through its agent and employee, Ms. Kelly Bertoglio, Paralegal Specialist, sent a letter to Plaintiff which stated that multiple inspection dates could be scheduled to review the sixteen (16) permit files in accordance with the District’s protocol for multiple permit requests, which consisted of reviewing four (4) to five (5) permits weekly.

16. On April 16, 2013, Plaintiff, acting through counsel, went to the Corps’ St. Louis District office and reviewed and inspected four (4) permit files.

17. On April 25, 2013, Plaintiff’s counsel returned to the Corps’ St. Louis District office and reviewed and inspected two (2) permit files.

18. On May 3, 2013, Plaintiff, acting through counsel, returned to the Corps’ St. Louis District office and reviewed and inspected three (3) files.

19. After Plaintiff’s May 3, 2013 visit to the Corps’ St. Louis District office, Plaintiff, acting through counsel, attempted on various occasions and through various means to arrange an inspection and review of the remaining seven (7) permit files with Ms. Bertoglio. Plaintiff’s counsel called Ms. Bertoglio by telephone and left phone messages on May 8, May 10, May 15, May 21, May 22, and May 29, but Ms. Bertoglio did not return any of Plaintiff’s calls or messages.

20. On June 3, 2013, Plaintiff sent a letter to Mr. William P. Levins, District Counsel for the Corps, requesting to review and inspect the remaining seven (7) permit files.

21. In response to this letter, the Corps allowed Plaintiff to review four (4) more permits. However, at the last review and inspection conducted by Plaintiff, the Corps denied access to, and disclosure of, three (3) permit files—P-2816, P-2817, and P-2818.

22. The Corps, acting through Ms. Bertoglio, stated in person to Plaintiff's attorney that these three (3) permit files were exempt from disclosure under FOIA because the permits had not been issued and, therefore, were "pre-decisional" under 5 U.S.C. § 552(b)(5), thereby denying Plaintiff access to the entirety of these three (3) permit files.

23. Plaintiff filed an administrative appeal on November 8, 2013, under 5 U.S.C. § 552(a)(6)(A)(ii), challenging the Corps' withholding of, or denial of access to, the entirety of three (3) permit files.

24. In the appeal, Plaintiff challenged the Corps' position that all documents in the three (3) permit files withheld by the Corps were exempt from disclosure under 5 U.S.C. §552(b)(5).

25. Plaintiff restated in the administrative appeal its position set forth in its original request that:

FOIA provides that if portions of a document are exempt from release, the remainder of the document must be segregated and disclosed. 5 U.S.C. §552(b). Please make available for inspection and copying all non-exempt portions of the documents that we have requested, and we ask that you justify any deletions by reference to specific exemptions allowed under FOIA.

26. To date, the Corps has not notified Plaintiff of its determination whether the agency would grant or deny Plaintiff's administrative appeal within 20 working days as required by 5 U.S.C. § 552(a)(6)(A)(ii), 32 C.F.R §§ 286.24(c)(2), and 518.17(c).

27. Plaintiff has exhausted its administrative remedies available under the FOIA. 5 U.S.C. §§ 552(a)(6)(A), (a)(6)(C)(i).

### **CLAIM FOR RELIEF**

#### **Unlawful withholding of records under the FOIA**

28. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 27 above.

29. The materials requested in the FOIA request dated March 5, 2013, and re-requested in the November 8, 2013 administrative appeal, are agency records of the Army Corps of Engineers within the meaning of 5 U.S.C. § 552. Plaintiff requested release of these records under the FOIA in both its original request of March 5, 2013, and its administrative appeal of November 8, 2013; the Corps did not respond to these requests within the statutorily mandated time frame; and Plaintiff has exhausted its administrative remedies because the Corps failed to comply with the applicable response time limit of 20 working days allowed by the statute for the initial request and the appeal.

30. Plaintiff has a statutory right under the FOIA to the release of some or all of the records it seeks. There is no legal basis for Defendant's failure to release those records promptly. The Corps' claimed exemption for non-disclosure is invalid because not all documents related to the three permits constitute inter-agency communications.

31. Based on the nature of Plaintiff's organizational activities, it will undoubtedly continue to employ the FOIA's provisions in information requests to Defendant in the foreseeable future.

32. Plaintiff's organizational activities will be adversely affected if Defendant is allowed to continue violating the FOIA's disclosure provisions as it has in this case.

33. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant will continue to violate the rights of Plaintiff to receive public records under the FOIA.

34. Defendant's failure to release the requested records is in violation of the FOIA. 5 U.S.C. § 552(a)(6). The court should order the production of the agency records that have been improperly withheld from MCE. 5 U.S.C. 552(a)(4)(B).

35. Plaintiff is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to the FOIA. 5 U.S.C. § 552(a)(4)(E).

**DEMAND FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court:

36. Order Defendant to promptly provide Plaintiff all of the information sought in this action.

37. Declare Defendant's failure to disclose the information requested by Plaintiff to be unlawful under the FOIA, 5 U.S.C. § 552(a)(6).

38. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E).

39. Grant such other and further relief as the Court deems just and proper.

/s/ Kathleen G. Henry  
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