

# Exhibit K



November 13, 2015

**VIA ELECTRONIC MAIL AND FOIAOnline**

Assistant General Counsel for Administration  
Freedom of Information Act Appeal  
U.S. Department of Commerce  
14th Street and Constitution Ave., NW  
Room 5898-C  
Washington, DC 20230  
FOIAAppeals@doc.gov

Re: **Freedom of Information Act Request # DOC-NOAA-2014-001474**  
**Appeal of NOAA/NMFS November 2, 2015 Response**

Dear Assistant General Counsel for Administration:

I write on behalf of Sierra Club regarding the above-referenced Freedom of Information Act (FOIA) request. On September 29, 2015, NOAA/NMFS informed us that the final document production would not be complete until January 30, 2016. On November 2, 2015, NOAA/NMFS partially denied our FOIA request by redacting 75 documents and withholding 688 documents.

**Background**

Sierra Club submitted its FOIA request to NOAA/NMFS on August 12, 2014 via FOIAOnline. Sierra Club requested documents related to NMFS' Section 7 Consultation on the Environmental Protection Agency's (EPA) 316(b) Rule (hereafter "the Rule"). On August 13, 2014, Sierra Club received a letter of acknowledgment confirming receipt of the FOIA request.

On August 27, 2014, Sierra Club participated in a scoping call with staff from NOAA/NMFS and FWS regarding the FOIA request. Sierra Club agreed to narrow the scope of the request to exclude records containing routine administrative matters and personally identifiable information.

On September 25, 2014, Sierra Club received an email following up on the August 27, 2014 scoping call, in which NOAA/NMFS stated:

- "During that call, we advised that we would provide a date by which we estimate we can provide our final response."
- "While we have begun our search and have begun review of the documents we have received, we believe that the earliest we can provide a response is November 21."

Freedom of Information Act Appeal

DOC-NOAA-2014-001474

Page 2

After the November deadline passed, Sierra Club requested a status update on December 3, 2014. On December 11, 2014, NOAA/NMFS responded stating:

- “We cannot now estimate a time for response to your request. However, by the end of January we anticipate being able to provide a date certain for providing our response.”

After the January deadline passed, Sierra Club requested a status update on February 24, 2015 and again on March 4, 2015.

On March 3, 2015, Sierra Club received notice that NOAA/NMFS was releasing 5 documents (totaling 51 pages) as part of the first interim release of records. This release consisted of a Federal Register entry, facility numbers from the Biological Evaluation, a map of cooling water intake structures, NMFS’ ESA Section 7 consultation plan, and a Biological Assessment for the Pilgrim Nuclear Power Station.

On March 4, 2015, Stephanie Hsiung of Sierra Club and Pamela Lawrence of NOAA had a telephone conversation about the status of the FOIA request. In a follow-up email the same day, Ms. Lawrence wrote:

- “The review of the documents responsive to the FOIA request will occur in conjunction with the preparation of the administrative record in the pending litigation... We anticipate being able to provide a final response approximately one month after filing of the administrative record.”<sup>1</sup>
- “We will provide interim releases of fully releasable documents when appropriate.”

On May 6, 2015, Sierra Club submitted a letter to NOAA/NMFS regarding the delay in responding to its FOIA request. On May 7, 2015, NOAA/NMFS responded with an email stating, “[w]e do anticipate completing our response prior to or at the same time of filing the administrative record.”

On July 10, 2015, Sierra Club participated in a call with staff from NOAA/NMFS and FWS regarding the FOIA request. NOAA/NMFS informed that the estimated completion date for the FOIA request would now be October 30, 2015 even though the administrative record in the pending litigation would be filed on July 13, 2015.

On July 13, 2015, the administrative record in the pending litigation was filed.

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<sup>1</sup> The reference is to the administrative record in the litigation on EPA’s Clean Water Act §316(b) rule, *Cooling Water Intake Structure v. U.S. Environmental Protection Agency*, U.S. Court of Appeals for the Second Circuit, No. 14-4645 and consolidated cases.

Freedom of Information Act Appeal

DOC-NOAA-2014-001474

Page 3

Between July 31 and September 17, 2015, NOAA/NMFS and Sierra Club exchanged several emails regarding the release of duplicative documents, copyrighted materials, and longitude/latitude data.

On or about August 3, 2015, Sierra Club received the second partial response consisting of 353 documents including emails with Riverkeeper, species information literature, and Biological Opinions for various facilities.

On or about September 10, 2015, Sierra Club received the third partial response consisting of 73 documents including species information literature, Biological Opinions for various facilities, NPDES permits, public comments on the Rule, the final Biological Opinion for the Rule, and various emails.

On September 22, 2015, Sierra Club requested confirmation from NOAA/NMFS that a final response would be produced by October 30, 2015. On September 29, 2015, NOAA/NMFS informed the Sierra Club that it would be unable to complete its final response by October 30 and it anticipates issuing a final release by January 31, 2016. On October 2, 2015, Sierra Club informed NOAA/NMFS that this extended deadline was unacceptable.

On October 9, 2015, NOAA/NMFS provided Sierra Club with a schedule of its remaining releases.

On or about November 2, 2015, Sierra Club received the fourth partial response consisting of 268 emails and attachments. This release included 90 unredacted documents, 75 partially redacted documents, and 103 fully redacted documents. NOAA/NMFS' letter notes that 585 responsive documents (402 emails plus attachments) were fully redacted and withheld from the release.

### **FOIA Appeal**

Sierra Club hereby appeals NOAA/NMFS' September 29, 2015 response for excessive and undue delays and NOAA/NMFS' November 2, 2015 partial denial.

#### **1) Excessive and Undue Delay constituting Denial**

Sierra Club submitted its FOIA request over one year ago. NOAA/NMFS initially provided Sierra Club with an estimated completion date within a month of filing the administrative record in the pending litigation. Then during a July 10 conference call, NOAA/NMFS pushed the estimated completion date to the end of October. Most recently, NOAA/NMFS has postponed the estimated completion date to January 31, 2016.

Because of the delay, the NOAA/NMFS actions constitute a *de facto* "adverse determination" on our FOIA request and/or a "constructive denial" of it. One reason for filing the FOIA request one year ago was to obtain the documents in time to review them for possible use in the pending CWA §316(b) litigation. We did not object to receiving the documents at or near

Freedom of Information Act Appeal

DOC-NOAA-2014-001474

Page 4

the filing of the Administrative Record, and have been relying on that representation. However, informing us it would now be January, 2016 potentially deprives us of getting the records in time for evaluation vis a vis that lawsuit, *i.e.* it affects the usefulness of the records.

In *CREW v. FEC* (D.C.Cir. no. 12-5004; April 2, 2014) the court rejected the agency's position that open-ended responses satisfied FOIA requirements for "prompt determination," 5 U.S.C. §552(a)(6)(A)(ii); and that once the agency agreed to produce documents it must make the actual documents "promptly available."

## 2) Misuse of the Deliberative Process Privilege

### a. NMFS Has Not Met Its Burden of Establishing Any Privilege Applies.

Exemptions under FOIA have consistently been construed narrowly in order to accomplish FOIA's purpose of promoting an open and honest government and assuring the existence of an informed citizenry that can hold the governors accountable to the governed.<sup>2</sup> Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>3</sup> Exemption 5 encompasses both statutory privileges and those commonly recognized by case law, including, deliberative process privilege, attorney work-product privilege, and attorney-client privilege.<sup>4</sup> The burden is on NMFS to establish that any of these privileges apply.<sup>5</sup>

An agency seeking to shield documents from disclosure on the basis of privilege must provide a reasonable basis to evaluate the claim of privilege.<sup>6</sup> In order to meet this standard, NMFS must identify each document withheld, state the statutory exemption claimed, and explain how the disclosure would damage the interests protected by the claimed exemption.<sup>7</sup> This is

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<sup>2</sup> *Nat'l Council of La Raza v. U.S. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005).

<sup>3</sup> 5 USC § 552(b)(5).

<sup>4</sup> See *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) (citing *FTC v. Grolier Inc.*, 462 U.S. 19, 26-27 (1983)).

<sup>5</sup> See *Nat'l Council of La Raza*, 411 F.3d at 356; *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003).

<sup>6</sup> *Tummino v. Von Eschenbach*, No. 05-366, 2006 U.S. Dist. LEXIS 81286, at \*40-41 (E.D.N.Y. 2006); *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 44 (N.D.N.Y. 1991) (holding that to sustain a claim under the deliberative process privilege the government "must specifically designate and describe the information that is purportedly privileged"); *Del. Riverkeeper Network v. Del. River Basin Comm'n*, 300 F.R.D. 207, 211 (D.N.J. 2014)

<sup>7</sup> *Judicial Watch v. FBI*, No. 00-745, 2001 U.S. Dist. LEXIS 25732, \*33 (D.D.C 2001)(citing *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995)).

Freedom of Information Act Appeal

DOC-NOAA-2014-001474

Page 5

often accomplished by providing a *Vaughn* index accompanied by declarations.<sup>8</sup> The quality of an agency's declarations and *Vaughn* index are crucial to the agency's ability to meet its obligation.<sup>9</sup>

In withholding documents in full and parts of others under Exemption 5, NMFS has failed to identify each document or explain how the disclosure would damage the interests protected by the claimed exemption. Without providing any further explanation, NMFS has not met its burden.

**b. Factual or Scientific Information Cannot Be Withheld Under the Deliberative Process Privilege.**

In order for an agency to properly withhold responsive documents, it must establish every element of the privilege.<sup>10</sup> Documents withheld under the deliberative process privilege must be both predecisional and deliberative.<sup>11</sup> A deliberative document is one that “reflects the give-and-take of the consultative process.”<sup>12</sup> Factual material is not afforded the protection of the deliberative process privilege unless it would expose the deliberations within the agency.<sup>13</sup>

Determination of jeopardy and adverse modification under the Endangered Species Act (“ESA”) require the agency to collect scientific facts and data, and to reach expert scientific conclusions based on those facts. These documents are unlikely to be deliberative because they involve scientific determinations, not policy.<sup>14</sup> As one court explained:

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<sup>8</sup> *Tummino*, 2006 U.S. Dist. LEXIS 81286, at \*41.

<sup>9</sup> *See Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (criticizing “minimal information” provided in agency submissions as being inadequate for the court to determine if privilege was claimed properly); *Hall v. DOJ*, 552 F. Supp. 2d 23, 28 & 29 (D.D.C. 2008) (denying summary judgment to the agency noting that the agency “fails to correlate exemptions with the document portions to which they apply” and that the description of withheld documents was “too vague” and it had not established that harm would result from release of documents).

<sup>10</sup> *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003) (citing *United States v. International Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997) (holding that party invoking attorney-client privilege bears the burden of establishing “all of its elements”)).

<sup>11</sup> *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

<sup>12</sup> *Id.* (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

<sup>13</sup> *Id.*

<sup>14</sup> *Nw. Envtl. Advocates v. U.S. EPA*, No. 05-1876-HA, 2009 U.S. Dist. LEXIS 10456, at \* 20-21 (D. Or. Feb. 11, 2009); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000) (“A determination of jeopardy or adverse modification is limited to objective, fact-based scientific conclusions. Thus, . . . the process as a whole is not ‘deliberative’ within the

Freedom of Information Act Appeal

DOC-NOAA-2014-001474

Page 6

Relatively few [ESA] § 7(a)(2) consultation documents qualify for the deliberative process privilege simply because of the nature of the decisions being made. The EPA is charged with providing quality scientific information and the Services are charged with analyzing that information. Congressionally mandated scientific decisions, such as those made under § 7(a)(2), are less likely to result in the creation of documents which might expose an agency's decision-making process in such a way as to discourage candid discussion within the agency.<sup>15</sup>

Requesters appeal NMFS's withholdings to the extent that it asserts the deliberative process privilege over factual or scientific documents, especially those reflecting the Services' determination as to whether EPA's Section 316(b) rule will jeopardize the continued existence of threatened or endangered species or destroy or adversely modify their designated critical habitat.

**c. NMFS Has the Obligation to Produce Reasonably Segregable Information For Requesters' Review.**

Even to the extent that portions of documents might be exempt from FOIA, NMFS has not made a sufficient attempt to segregate out the non-exempt documents in violation of 5 U.S.C. § 552(b), which provides in relevant part: "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Moreover, "the focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material."<sup>16</sup> Thus, Exemption 5 may not protect compilations of factual data that may be reasonably segregated from deliberative material. In this instance, NMFS partially redacted and fully redacted or withheld responsive documents without attempting to segregate non-exempt material. It stretches credulity that non-exempt segregable facts do not exist anywhere in those responsive documents.

Accordingly, we ask you to grant this appeal, expedite our request and ensure that the documents will be made available in full as soon as possible, with a record of any documents withheld and the basis therefor if any.

Thank you for your attention to this matter.

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meaning of the privilege.").

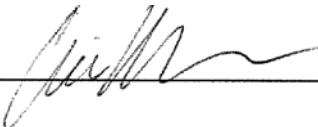
<sup>15</sup> *Nw. Envtl. Advocates*, 2009 U.S. Dist. LEXIS 10456 at \*20-21 (internal citations and quotations omitted).

<sup>16</sup> *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)).

Freedom of Information Act Appeal

DOC-NOAA-2014-001474

Page 7



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