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10 **UNITED STATES DISTRICT COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA**

13 LEMIEUX & O'NEILL, EX REL. LAS
14 VIRGENES - TRIUNFO JOINT POWERS
15 AUTHORITY,

16 Plaintiffs,

17 v.

18 GINA McCARTHY, Administrator of the
19 UNITED STATES ENVIRONMENTAL
20 PROTECTION AGENCY, and DOES 1-10,
21 inclusive,

22 Defendants.

CASE NO.:

**EXHIBIT 5
TO COMPLAINT FOR INJUNCTIVE
RELIEF**

23
24
25
26
27
28 **EXHIBIT 5**

to Complaint for Injunctive Relief

Christine Han

From: Moffatt, Brett <Moffatt.Brett@epa.gov>
Sent: Thursday, July 9, 2015 9:07 AM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Christine, We will provide you with an index or other description of the withheld documents.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [mailto:C.Han@lemieux-oneill.com]
Sent: Tuesday, July 07, 2015 3:45 PM
To: Moffatt, Brett
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Brett -

While I understand that the emails were withheld because they allegedly contained information related to the deliberative process, the EPA bears the burden of showing the emails fall within the exemption. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). As such, I would like to request a privilege log or index of the 260 emails that have been withheld. See *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973). Please provide the dates, authors and recipients of the emails, a description of each email, etc., to ensure that the emails were predecisional and deliberative. See, e.g., *Hussain v. U.S. Dept. of Homeland Sec.*, 674 F.Supp.2d 260, 270-71 (D.C. 2009); *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 147-48 (D.C. Cir. 2006).

Thanks!
Christine

Christine N. Han
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From: Moffatt, Brett [<mailto:Moffatt.Brett@epa.gov>]
Sent: Monday, July 6, 2015 9:51 PM
To: Christine Han
Subject: RE: FOIA Request No. EPA-R9-2015-003385

Christine,

Thank you for contacting me first. We released all of the responsive emails to and from outside entities. All of the 260 withheld emails are communications between EPA staff and the staff of EPA's consultant, Tetra Tech, and pertain to the development of the TMDL and/or contracting matters. For the purpose of 5 U.S.C. § 552 (b)(5), consultant assistance is treated the same as internal agency staff work. *See, e.g., DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11. We released the Tetra Tech communications pertaining to the development of the TMDL which did not contain deliberative information.

Please contact me if you have any further questions.

Brett

Brett Moffatt
US EPA, Region 9
(415) 972-3946

From: Christine Han [<mailto:C.Han@lemieux-oneill.com>]
Sent: Monday, July 06, 2015 2:32 PM
To: Moffatt, Brett
Subject: FOIA Request No. EPA-R9-2015-003385

Brett,

After reviewing the partial denial letter, I have a question about the exemption that is cited in support of the EPA's inability to provide us with 260 emails sent between EPA and a contractor. The letter, which I attached hereto, cites 5 U.S.C. § 552 (b)(5), which exempts from disclosure "inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency." As you may or may not be aware, we represent Las Virgenes Municipal Water District and are currently involved in litigation against the EPA. We expect to be involved in said litigation for some time. Therefore, we don't believe this particular exemption applies to the 260 emails that were not provided to us.

Please let me know whether you will provide these emails or whether we need to go through a formal appeals process.

Thanks for your time and attention.

Christine

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