

Exhibit 1

Jesse DeNike

Subject: FW: [EXTERNAL] RE: Programmatic BA for shellfish activities (UNCLASSIFIED)

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

From: Sanguinetti, Pamela NWS [mailto:Pamela.Sanguinetti@usace.army.mil]
Sent: Thursday, November 12, 2015 12:30 PM
To: Margaret Barrette
Cc: Hynes, Richard M NWS
Subject: RE: [EXTERNAL] RE: Programmatic BA for shellfish activities
(UNCLASSIFIED)

Margaret,

You are very welcome. To request a copy of the Programmatic Biological Assessment please go to <http://www.nws.usace.army.mil/>, select Freedom of Information Act Requests on the home page, and fill in the requested information.

The decision to release a document is made by the Corps Office of Counsel.
If you have any questions on how to submit a request, please contact Richard Hynes. I have included him on this email.

Pam

Pamela Sanguinetti,
Senior Project Manager
U. S. Army Corps of Engineers - Seattle District CENWS-OD-RG Post Office Box
3755
4735 East Marginal Way South
Seattle, Washington 98134-2385

Phone: (206) 764-6904
Corps Website: <http://www.nws.usace.army.mil/> General Regulatory Assistance:
<http://www.ora.wa.gov/>

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

From: Margaret Barrette [mailto:margaretbarrette@pcsga.org]
Sent: Thursday, November 12, 2015 8:15 AM
To: Sanguinetti, Pamela NWS <Pamela.Sanguinetti@usace.army.mil>
Subject: [EXTERNAL] RE: Programmatic BA for shellfish activities
(UNCLASSIFIED)

Pam,

Thank you for letting me know that the Programmatic Biological Assessment was sent to the Services. Could you please provide me with a copy of the document?

Thank you. I look forward to hearing from you soon.

Margaret

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

From: Sanguinetti, Pamela NWS [mailto:Pamela.Sanguinetti@usace.army.mil]

Sent: Friday, October 30, 2015 3:22 PM

To: margaretbarrette@pcsga.org

Subject: FW: Programmatic BA for shellfish activities (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Margaret,

I just wanted to let you know the Programmatic BA was just sent to the Services.

Have an enjoyable weekend!

Pam

Pamela Sanguinetti,

Senior Project Manager

U. S. Army Corps of Engineers - Seattle District CENWS-OD-RG Post Office Box
3755

4735 East Marginal Way South

Seattle, Washington 98134-2385

Phone: (206) 764-6904

Corps Website: Blocked<http://www.nws.usace.army.mil/> General Regulatory

Assistance:

Blocked<http://www.ora.wa.gov/>

Classification: UNCLASSIFIED

Caveats: NONE

Classification: UNCLASSIFIED

Caveats: NONE

Exhibit 2

Jesse DeNike

From: Terri Tyni
Sent: Friday, November 20, 2015 11:04 AM
To: foia-nws@usace.army.mil
Subject: FOIA Request
Attachments: FOIA-ACOE.112015.pdf

To Whom It May Concern:

Attached please find a Freedom of Information Act request. Thank you in advance for your assistance in this matter. If you have any problem opening the attachment, please let me know. All questions or concerns or requests for further information regarding this request should be directed to Jesse DeNike (jesse@plauchecarr.com) or Samuel Plauché (billy@plauchestock.com). You may also contact our office at 206-588-4188.

Thank you.

Terri

Terri A. Tyni / Administrator / Plauche & Carr LLP / 811 First Avenue, Suite 630 / Seattle, WA 98104
terri@plauchecarr.com / Phone: 206-973-1260 (direct) or (206) 588-4188 (main) / Fax: 206-588-4255

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FOIA Request for Documents



**US Army Corps
of Engineers**
Seattle District

FOIA Request for Documents
PO Box 3755
Seattle, WA
98124-3755
Phone: 206-764-3735
E-Mail: g3nwsoc@usace.army.mil
<http://www.nws.usace.army.mil>

First Name: Jesse

Last Name: DeNike

E-Mail: jesse@plauchecarr.com

Company/Org.: Plauche & Carr LLP

Address 1: 811 First Avenue, Suite 630

Address 2:

City: Seattle

State, Zip Code: WA, 98104

Telephone Number: (206) 588-4188

Pursuant to regulations set forth in the FOIA and Army Regulation 25-55, I understand that there may be search and duplication costs (and review fees for commercial requesters) that may be associated with this request.

In order to submit a request for documents, any requester must agree to the terms set forth in the previous paragraph. To accept responsibility for reasonable fees and costs that may be associated with this request, select the I AGREE button.

- I agree to pay
- I request a fee waiver (explain below)

Description of Document(s) Requested:

On behalf of the Pacific Coast Shellfish Growers Association, I request a copy of the Programmatic Biological Assessment for Shellfish Activities In Washington State Inland Marine Waters, U.S. Army Corps of Engineers Regulatory Program. This document was recently sent from the Seattle District of the Corps to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, as stated in the attached email from Ms. Pamela Sangulnetti, Senior Project Manager, dated October 30, 2015.

Submit FOIA request to g3nwsoc@usace.army.mil
or
Seattle District
U.S. Army Corps of Engineers
Office of Counsel
PO Box 3755
Seattle, WA 98124-3755

Exhibit 3

Terri Tyni

From: Seattle District FOIA <foia-nws@usace.army.mil>
Sent: Friday, November 20, 2015 11:17 AM
To: Terri Tyni
Subject: RE: FOIA Request

I have received your request, and it is being processed.

Richard Hynes
FOIA Officer
U.S. Army Corps of Engineers
206-764-3735

From: Terri Tyni [mailto:terri@plauchecarr.com]
Sent: Friday, November 20, 2015 11:04 AM
To: Seattle District FOIA <foia-nws@usace.army.mil>
Subject: [EXTERNAL] FOIA Request

To Whom It May Concern:

Attached please find a Freedom of Information Act request. Thank you in advance for your assistance in this matter. If you have any problem opening the attachment, please let me know. All questions or concerns or requests for further information regarding this request should be directed to Jesse DeNike (jesse@plauchecarr.com) or Samuel Plauché (billy@plauchestock.com). You may also contact our office at 206-588-4188.

Thank you.

Terri

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terri@plauchecarr.com / Phone: 206-973-1260 (direct) or (206) 588-4188 (main) / Fax: 206-588-4255

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Exhibit 4

Jesse DeNike

From: Jesse DeNike
Sent: Monday, December 21, 2015 4:41 PM
To: 'foia-nws@usace.army.mil'
Cc: Terri Tyni; Billy Plauche
Subject: RE: FOIA Request
Attachments: FOIA-ACOE.112015.pdf

Good Afternoon Mr. Hynes,

Today is the response deadline for the below-referenced FOIA request. See also attached. We have not received a response. If you already sent it to us, please confirm the date and address of transmittal. If you have not yet sent the response, please send it to me electronically by the end of today. Thank you.

Jesse

Jesse DeNike
Plauché & Carr LLP
811 First Avenue
Suite 630
Seattle, WA 98104
(206) 588-4188
jesse@plauchecarr.com

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From: Seattle District FOIA [<mailto:foia-nws@usace.army.mil>]
Sent: Friday, November 20, 2015 11:17 AM
To: Terri Tyni <terri@plauchecarr.com>
Subject: RE: FOIA Request

I have received your request, and it is being processed.

Richard Hynes
FOIA Officer
U.S. Army Corps of Engineers
206-764-3735

From: Terri Tyni [<mailto:terri@plauchecarr.com>]
Sent: Friday, November 20, 2015 11:04 AM
To: Seattle District FOIA <foia-nws@usace.army.mil>
Subject: [EXTERNAL] FOIA Request

To Whom It May Concern:

Attached please find a Freedom of Information Act request. Thank you in advance for your assistance in this matter. If you have any problem opening the attachment, please let me know. All questions or concerns or requests for further information regarding this request should be directed to Jesse DeNike (jesse@plauchecarr.com) or Samuel Plauché (billy@plauchestock.com). You may also contact our office at 206-588-4188.

Thank you.

Terri

Terri A. Tyni / Administrator / Plauche & Carr LLP / 811 First Avenue, Suite 630 / Seattle, WA 98104
terri@plauchecarr.com / Phone: 206-973-1260 (direct) or (206) 588-4188 (main) / Fax: 206-588-4255

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Exhibit 5

Terri Tyni

From: Seattle District FOIA <foia-nws@usace.army.mil>
Sent: Tuesday, December 22, 2015 10:03 AM
To: Terri Tyni
Cc: Jesse DeNike
Subject: RE: FOIA Request
Attachments: Response.pdf

Attached is our response to your request.

Richard Hynes
U.S. Army Corps of Engineers
206-764-3735

From: Terri Tyni [mailto:terri@plauchecarr.com]
Sent: Friday, November 20, 2015 11:04 AM
To: Seattle District FOIA <foia-nws@usace.army.mil>
Subject: [EXTERNAL] FOIA Request

To Whom It May Concern:

Attached please find a Freedom of Information Act request. Thank you in advance for your assistance in this matter. If you have any problem opening the attachment, please let me know. All questions or concerns or requests for further information regarding this request should be directed to Jesse DeNike (jesse@plauchecarr.com) or Samuel Plauché (billy@plauchestock.com). You may also contact our office at 206-588-4188.

Thank you.

Terri

Terri A. Tyni / Administrator / Plauche & Carr LLP / 811 First Avenue, Suite 630 / Seattle, WA 98104
terri@plauchecarr.com / Phone: 206 973-1260 (direct) or (206) 588-4188 (main) / Fax: 206-588-4255

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DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

December 22, 2015

Office of Counsel

Jesse DeNike
Plauche & Carr LLP
811 First Avenue, Suite 630
Seattle, WA 98104

Dear Mr. DeNike:

Your Freedom of Information Act (FOIA) request dated November 20, 2015, requested a copy of the Programmatic Biological Assessment for Shellfish Activities in Washington State Inland Marine Waters. This document (cover letter – 2 pages; Programmatic BA - 208 pages) is being withheld in its entirety under Exemption 5 as predecisional as we have not completed Section 7 ESA consultation. This privilege was enacted to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Withholding the BA pursuant to Exemption 5 is necessary to encourage open, frank discussion on matters of policy between subordinates and superiors; protect against premature disclosure of proposed policies before they are finally adopted; and protect against public confusion that might result from disclosure of reasons or rationales that are not in fact ultimately the grounds for an agency decision. Once the ESA Section 7 consultation has been completed and the permit issued the BA will be releasable under the FOIA.

I trust you will appreciate the considerations upon which this determination is based. However, because your request has been denied, you are advised of your right to appeal this determination through this office to the Secretary of the Army (ATTN: General Counsel). An appeal must be received by the appellate authority within 60 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal" and should be sent to: U.S. Army Corps of Engineers, ATTN: CENWS-OC, P.O. Box 3755, Seattle, WA 98124-3755.

Because the cost of processing your request was minimal, there is no charge. If you have any further questions, you can contact Richard Hynes at (206) 764-3735.

Sincerely,

A handwritten signature in black ink that reads "Siri C. Nelson".

Siri C. Nelson
District Counsel

Exhibit 6



PLAUCHÉ & CARR

LLP



Samuel W. Plauché

811 First Avenue, Suite 630, Seattle, WA 98104
TEL: (206) 588-4188 FAX: (206) 588-4255
www.plauchecarr.com

Amanda M. Carr

December 23, 2015

U.S. Army Corps of Engineers
ATTN: CENWS-OC
P.O. Box 3755
Seattle, WA 98124-3755

**RE: Secretary of the Army (ATTN: General Counsel)
Freedom of Information Act Appeal**

Dear Secretary of the Army:

We submit this appeal on behalf of the Pacific Coast Shellfish Growers Association (“PCSGA”) of the decision by the Seattle District, Corps of Engineers (“Seattle District”) to deny PCSGA’s Freedom of Information Act (“FOIA”) request to obtain a copy of the Programmatic Biological Assessment for Shellfish Activities in Washington State Inland Marine Waters (“PBA”). The Seattle District’s decision to deny PCSGA’s FOIA request (“Decision”) is enclosed as Attachment A. PCSGA’s FOIA request (“Request”) is enclosed as Attachment B.

I. Question Presented

Did the Seattle District appropriately determine that the PBA must be withheld under Exemption 5 to FOIA?

II. Background

PCSGA is a non-profit organization founded in 1930 to represent shellfish farmers in Washington, Alaska, Oregon, California, and Hawaii. PCSGA works on behalf of its members on a broad spectrum of issues, including environmental protection, shellfish safety, regulations, technology, and marketing. PCSGA’s members grow a wide variety of healthy, sustainable shellfish including oysters, clams, mussels, and geoduck. PCSGA has over 80 members in Washington State. Washington State shellfish farmers have been growing shellfish and sustaining local communities since before statehood, and they have a strong history of advocating for the health of the marine environment as their farms and livelihoods depend on high quality water and habitat. Attachment C (M. Barrette Declaration), ¶ 3.

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The Seattle District currently requires shellfish farmers throughout Washington State to obtain regulatory approvals under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The Seattle District takes the position that these regulatory approvals constitute Federal action that requires compliance with the Federal Endangered Species Act (“ESA”).

Section 7(a)(2) of the ESA requires Federal agencies to complete consultation with the National Marine Fisheries Service (“NMFS”) and/or the U.S. Fish and Wildlife Service (“USFWS”) (collectively, “Services”) on any Federal action that may affect an ESA-listed species or designated critical habitat. 50 C.F.R. § 402. Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) requires Federal agencies to consult with NMFS on any Federal action that may adversely affect essential fish habitat (“EFH”). 50 C.F.R. § 600. ESA consultations can be conducted on a project-specific basis or on a programmatic basis to cover a group of activities throughout a given geographic region. 50 C.F.R. § 402.14(c).

Before formal ESA consultation can occur, the Federal action agency must prepare and submit a biological assessment to the Services. *Id.* A biological assessment is a formal document, the preparation and contents of which are specifically proscribed in Federal regulations. 50 C.F.R. § 402.12. A biological assessment evaluates the potential effects of the action on listed and proposed species and critical habitat, and it determines whether any such species or habitat are likely to be adversely affected by the action. *Id.*

The PBA is a programmatic assessment of shellfish farming activities in Washington State that the Seattle District developed as part of a programmatic ESA/MSA consultation with the Services. Attachment C, ¶ 4. The Seattle District has been developing the PBA for over two years. During that time, it has prepared various drafts and had discussions with numerous individuals, both within and outside of the Federal government. *Id.*, ¶ 5.

The PBA was recently completed, and Pamela Sanguinetti with the Seattle District notified Margaret Barrette, the executive director of PCSGA, on October 30, 2015 that the PBA was officially transmitted to the Services. *Id.*, ¶ 6; Attachment B.

The PBA will have a profound impact on shellfish farming operations throughout Washington State. As growers currently understand it, the BPA will describe the specific farming activities and acreage limitations in each area of Washington State that are covered by the programmatic ESA/MSA consultation; define the farming activities that are excluded from programmatic coverage; inform how those activities are expected to impact ESA-listed species, critical habitat, and EFH; and influence the conditions imposed on shellfish farming activities that are covered by the formal programmatic ESA/MSA consultation. Attachment C, ¶ 7.

It is critical that the ESA/MSA consultation be based upon accurate information as to the nature and extent of shellfish farming in Washington, its environmental impacts, and the reasonableness and feasibility of any proposed conditions. Review by the regulated community (shellfish farmers) is essential to ensure that accuracy. Since the contents of the PBA will have a direct influence on shellfish farmers’ properties, businesses, and livelihoods, it is also essential

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that they be aware of its contents so that they can make informed plans and management decisions for their farms. *Id.*, ¶ 8.

Margaret Barrette requested a copy of the PBA from Ms. Sanguinetti, who informed her that PCSGA would have to request a copy of the PBA pursuant to FOIA. Attachment B. PCSGA submitted the Request for the PBA under FOIA on November 20, 2015. *Id.* The Request is clear and simple. It is limited to a single document (the PBA), and it identifies the requested document with particularity. *Id.* The Seattle District acknowledged receipt of the PBA on the same day. Attachment D. In spite of the relative simplicity of PCSGA's FOIA request (a request for a single document), the Seattle District failed to respond to the Request for over one month.¹

Finally, on December 22, 2015, the Seattle District responded to the Request by issuing the Decision. The Decision summarily denies PCSGA's request in its entirety. The only basis for the denial is "Exemption 5." The Decision fails to cite a specific provision of FOIA, and the only explanation it provides is that the PBA is "predecisional as we have not completed Section 7 ESA consultation." Attachment A. It further states: "Once the ESA Section 7 consultation has been completed and the permit issued the BA will be releasable under the FOIA." *Id.* It is not clear to what decision or document "the permit" refers and thus it is questionable when, if ever, the Seattle District will be willing to release the PBA.

III. Analysis

A. FOIA Requires Agencies to Provide Copies of Federal Records unless They Carry the Burden of Proving an Exemption Applies

FOIA's "core purpose" is to inform citizens about "what their government is up to" and to "open agency action to the light of public scrutiny." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989) (citation omitted). This purpose is accomplished by "permit[ting] access to official information long shielded unnecessarily from public view and attempt[ing] to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Env't Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973), *superceded by statute on other grounds, as recognized by Ray v. Turner*, 587 F.2d 1187, 1190-91 & n. 9 (D.C. Cir.1978). Such access, in turn, will "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted).

¹ The Seattle District failed to provide PCSGA with an update as to the status of the Request or even an individual tracking number for the Request. Late on the afternoon of December 21, 2015 (the deadline for the Seattle District's response), PCSGA's counsel emailed the Seattle District to inquire as to the status of the Request. Attachment E. The Seattle District did not reply to this communication and did not respond to the Request on December 21, 2015. The Seattle District's failure to respond to the Request within 20 working days and to provide PCSGA with a tracking number for the Request constitute direct violations of FOIA. 5 U.S.C. § 552(a)(6)(i), (a)(7). These violations are in addition to the substantive violation to deny the Request, described more fully below.

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FOIA requires government agencies to disclose to the public any requested documents. 5 U.S.C. § 552(a). An agency may avoid disclosure only if it proves that the documents fall within one of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). FOIA's purpose is to encourage disclosure, and therefore its exemptions are interpreted narrowly. *Assembly of State of Cal. v. U.S. Dept. of Commerce* (“*Assembly*”), 968 F.2d 916, 920 (9th Cir. 1992); *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Department of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976). The government has the burden to prove that a requested document falls within one of FOIA's exemptions. 5 U.S.C. § 552(a)(3).

B. It Is Inappropriate to Withhold the PBA under Exemption 5

The sole basis provided in the Decision for denying the Request is “Exemption 5.” While the Decision fails to cite any specific statutory provision, the Seattle District appears to be referencing 5 U.S.C. § 552(b)(5), which applies only to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”

Exemption 5 merely covers internal communications in the Executive Branch that are legally “privileged.” The most commonly encountered privilege under Exemption 5 is the “deliberative” privilege, which covers “predecisional” materials written as part of the decisionmaking process in Federal agencies. The purpose of this privilege is “to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny.” *Assembly*, 968 F.2d at 920, (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975)). Thus, Exemption 5 covers “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Dep't of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8 (2001) (citation and internal quotation marks omitted).

To fall within the deliberative process privilege, a document must be both predecisional and deliberative. *Assembly*, 968 F.2d at 920.

A “predecisional” document is one “prepared in order to assist an agency decisionmaker in arriving at his decision,” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. A predecisional document is a part of the “deliberative process,” if “the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.”

Id. (quoting *Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1122 (D.C. Cir.1989)) (internal citations omitted).

In this case, the document that the Seattle District is seeking to withhold is a biological assessment. Subsection 50 C.F.R. § 402.12 describes in detail the contents and preparation of biological assessments. A biological assessment is a document that “shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the

Secretary of the Army

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action and is used in determining whether formal consultation or a conference is necessary.” 50 C.F.R. § 402.12(a). Federal ESA regulations require that the Federal agency submit “the completed biological assessment” to the Director of the Services for review. 50 C.F.R. § 402.12(j) (emphasis added). Submittal of the completed biological assessment is a prerequisite to initiating formal ESA consultation. 50 § C.F.R. 402.14(c). The Services will use the results of a biological assessment for several purposes in an ESA consultation, and 50 C.F.R. § 402.12 nowhere indicates that a completed biological assessment is predecisional or subject to further revision during the ESA consultation process.

The PBA, as a completed biological assessment, is not predecisional or deliberative and thus does not fall within Exemption 5. While courts have found draft documents or incomplete documents to be predecisional, the PBA is a completed document that represents the agency’s final decision as to the scope and impact of the proposed action, and it has already been submitted to the Services for review. *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988); *Lahr v. National Trasp. Safety Bd.*, 569 F.3d 964, 983-84 (9th Cir. 2009); Attachment B. The PBA will not be amended at any later date. Therefore, it is not predecisional.

The Seattle District’s Decision to deny PCSGA’s Request for the PBA is not supported by the language or intent of FOIA, and its reasoning—that the PBA falls within Exemption 5 because the overall ESA consultation has not been completed—has been expressly considered and rejected. Specifically, the D.C. District Court has determined that agencies cannot withhold a biological assessment based on Exemption 5. In *Center for Biological Diversity v. U.S. Marine Corps*, No. Civ. 00-2387(TFH), 2005 WL 3262901 (D.D.C. Sep. 19, 2005), the D.C. District Court held a biological assessment could not be withheld under the deliberative process privilege. The court reasoned and held as follows:

The Biological Assessment is almost an exclusively factual document. It contains a significant amount of scientific data, research, and statistical figures about Camp Pendleton and Defendant’s activities on base. Such compilations of data include information about the ongoing military activities for which Defendant uses Camp Pendleton, detailed descriptions of the base’s topography and the critical habitat areas, information about the endangered and threatened species of animals and plants that are at issue, and projected effects of ongoing military training and other base activities on the species in question. None of this information is advisory or deliberative in any way, but a plain account of factual information . . .

Regarding any statements in the Biological Assessment that are not a pure recitation of scientific data, the Court rejects Defendant’s assertion that the ongoing consultation with FWS constitutes one long deliberative process with Defendant making its final decision after it receives the biological opinion from FWS . . . Such a broad interpretation of the scope of the deliberative process is inconsistent with case law . . . Accepting Defendant’s interpretation of the scope of the deliberative process would virtually foreclose all public knowledge regarding agency decisions and undermine the principles of FOIA . . .

The Biological Assessment does not reflect the personal views of individuals employed by Defendant, but instead is Defendant's official position on the impact of military and other base activities on listed threatened and endangered species, which indicates that the assessment is not predecisional . . .

Defendant's Biological Assessment is the consummation of its decision making process up to the time it submitted the assessment to FWS to initiate a formal consultation. Defendant engaged in a deliberative process to determine to what extent base activities impacted threatened and endangered species, making the assessment itself the culmination of that decision making process. The fact that the policy may change as a result of FWS's biological opinion does not affect the biological assessment from being Defendant's final decision at the time the assessment was given to FWS . . .

This Court determines that the release of the Biological Assessment will in no way risk stifling honest and frank communication within the agency nor will its release inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. Defendant's Biological Assessment constitutes a final agency opinion and is, therefore, releasable to the public under the principles of the FOIA. Because the Court determines that the Biological Assessment contains no material that would be protected by the Exemption 5 deliberative process privilege, there is no need for a segregability determination. Defendant must release the Biological Assessment in its entirety.

Attachment F at 1-2 (internal quotations and citations omitted).

The Ninth Circuit does not appear to have directly addressed the issue of whether a completed biological assessment can be withheld under Exemption 5 to FOIA, but decisions from district courts within the Ninth Circuit support a narrow application of the deliberative process privilege in the ESA context. In *Northwest Environmental Advocates v. EPA*, No. 05-1876-HA, 2009 WL 349732, at *7 (D. Or. Feb. 11, 2009), the court stated "relatively few Section 7(a)(2) consultation documents qualify for the deliberative process privilege simply because of the nature of the decisions being made." The court reasoned that the Federal action agency is charged with providing quality scientific information and the Services are charged with analyzing that information, and such congressionally mandated decisions "are less likely to result in the creation of documents which might expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency." *Id.*² Similarly, in *Greenpeace v. NMFS*, 198 F.R.D. 540 (W.D. Wash. 2000), NMFS withheld certain documents in an administrative record supporting an ESA biological opinion, asserting that they were protected by the deliberative process privilege. The withheld documents contained observations and criticisms of the draft "Revised Final Reasonable and Prudent Alternatives." The Western District of Washington explained that a determination of jeopardy and adverse modification under the ESA requires the agency to collect scientific facts and data, and to reach expert

² The court addressed the common law deliberative process privilege in this case, and it noted this privilege has been incorporated into Exemption 5 of FOIA and that Federal courts regularly apply FOIA precedent when interpreting the common law privilege. *Id.* at n. 1.

Secretary of the Army

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December 23, 2015

conclusions based on these facts. However, “the fact that scientific expertise is brought to bear ‘does not transform interpretations of facts into communications protected by the deliberative process privilege.’” *Id.* at 544 (citing *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1163 (W.D. Wash. 1986)). The court concluded that “a determination of jeopardy or adverse modification is limited to objective, fact-based scientific conclusion” and thus, “the process as a whole is not ‘deliberative’ within the meaning of the privilege.” *Id.*

C. PCSGA Requests Urgent Resolution of this Appeal and to Immediately Be Provided a Copy of the PBA

PCSGA respectfully requests urgent resolution of this appeal and that it be immediately provided a copy of the PBA.³ As discussed above, the PBA will greatly influence shellfish farmers’ properties and businesses. There is an urgent need for shellfish farmers to review the information contained within the PBA to ensure its accuracy and make informed management decisions for their farms. Attachment C, ¶¶ 7-8.

The Seattle District has largely shut PCSGA out of discussions over the status and content of the PBA, despite the fact that shellfish farmers have the most knowledge of the regulated activities and will be the greatest impacted by the PBA. *Id.*, ¶ 9. Shellfish farmers are also applicants for Corps regulatory approvals that are the subject of the PBA and programmatic ESA/MSA consultation, and they are entitled to stay apprised and involved in the consultation. The Services have developed a lengthy ESA Consultation Handbook that “demonstrates the latitude available within [ESA] section 7 to work with applicants and agencies during this analytical process.” ESA Consultation Handbook, at 1-2.⁴ Applicants should be fully informed and involved in the development of alternatives and conditions developed under ESA. *Id.*, at xxii. Applicants have a legal right to review ESA-related documents, even when those documents programmatically address activities over a large geographic area. *Hawaii Longline Association v. National Marine Fisheries Service*, No. 01-765, 2002 WL 732363 (D.D.C. April 25, 2002) (holding the Hawaii Longline Association must be provided a copy of a draft biological opinion developed during section 7 ESA Consultation on a fishery management plan for Pacific pelagic fisheries). In this case, the Services have been in possession of and reviewing the PBA for almost two months. It is critical that PCSGA be immediately provided a copy of this document so that shellfish farmers can review its accuracy, provide any needed corrections, and make informed farm management and business decisions.

IV. Conclusion

For the reasons stated above, the Seattle District’s Decision denying PCSGA’s Request should be reversed. We respectfully request an order reversing the Decision and directing the

³ PCSGA appreciates that this appeal is being filed before the holidays. While the timing is unfortunate, it is the result of the Seattle District waiting to respond to the Request until immediately before the holidays. As discussed above, despite the clarity and simplicity of the Request, the Seattle District exceeded its statutory time limit for issuing the Decision. Moreover, this appeal presents a simple legal issue that has been directly addressed by a Federal court, and thus it is amenable to a speedy resolution.

⁴ Available at: http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf

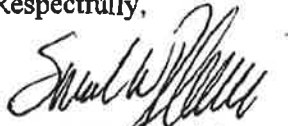
Secretary of the Army

-8-

December 23, 2015

Seattle District to immediately produce a copy of the PBA to PCSGA. And, given the urgency of this matter and the delays that have already occurred, we request that Secretary of the Army expedite its review of this appeal.

Respectfully,



Samuel W. Plauché, WSBA #25476

Jesse DeNike, WSBA #39526

:tat

cc: Assistant Secretary of the Army, Jo-Ellen Darcy (via email)
Deputy Chief, Regulatory Program, Jennifer Moyer (via email)
Brigadier General Scott A. Spellmon (via email)
Director of Programs, Northwestern Division, Dave Ponganis (via email)
Commander, Seattle District, Colonel John G. Buck (via email)

Attachment A

Terri Tyni

From: Seattle District FOIA <foia-nws@usace.army.mil>
Sent: Tuesday, December 22, 2015 10:03 AM
To: Terri Tyni
Cc: Jesse DeNike
Subject: RE: FOIA Request
Attachments: Response.pdf

Attached is our response to your request.

Richard Hynes
U.S. Army Corps of Engineers
206-764-3735

From: Terri Tyni [mailto:terri@plauchecarr.com]
Sent: Friday, November 20, 2015 11:04 AM
To: Seattle District FOIA <foia-nws@usace.army.mil>
Subject: [EXTERNAL] FOIA Request

To Whom It May Concern:

Attached please find a Freedom of Information Act request. Thank you in advance for your assistance in this matter. If you have any problem opening the attachment, please let me know. All questions or concerns or requests for further information regarding this request should be directed to Jesse DeNike (jesse@plauchecarr.com) or Samuel Plauché (billy@plauchestock.com). You may also contact our office at 206-588-4188.

Thank you.

Terri

Terri A. Tyni / Administrator / Plauche & Carr LLP / 811 First Avenue Suite 630 / Seattle, WA 98104
terri@plauchecarr.com / Phone: 206 973-1260 (direct) or (206) 588-4188 (main) / Fax: 206 588-4255

This email is intended only for the use of the individual or entity to whom it is addressed and may contain confidential, privileged information. If the reader of this email is not the addressee, please be advised that any dissemination, distribution or copying of this email is strictly prohibited. If you receive this communication in error, please call (206) 588-4188 x 109 and return this email to Terri A. Tyni at the above email address and delete from your files. Thank you.



DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

December 22, 2015

Office of Counsel

Jesse DeNike
Plauche & Carr LLP
811 First Avenue, Suite 630
Seattle, WA 98104

Dear Mr. DeNike:

Your Freedom of Information Act (FOIA) request dated November 20, 2015, requested a copy of the Programmatic Biological Assessment for Shellfish Activities in Washington State Inland Marine Waters. This document (cover letter – 2 pages; Programmatic BA - 208 pages) is being withheld in its entirety under Exemption 5 as predecisional as we have not completed Section 7 ESA consultation. This privilege was enacted to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Withholding the BA pursuant to Exemption 5 is necessary to encourage open, frank discussion on matters of policy between subordinates and superiors; protect against premature disclosure of proposed policies before they are finally adopted; and protect against public confusion that might result from disclosure of reasons or rationales that are not in fact ultimately the grounds for an agency decision. Once the ESA Section 7 consultation has been completed and the permit issued the BA will be releasable under the FOIA.

I trust you will appreciate the considerations upon which this determination is based. However, because your request has been denied, you are advised of your right to appeal this determination through this office to the Secretary of the Army (ATTN: General Counsel). An appeal must be received by the appellate authority within 60 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal" and should be sent to: U.S. Army Corps of Engineers, ATTN: CENWS-OC, P.O. Box 3755, Seattle, WA 98124-3755.

Because the cost of processing your request was minimal, there is no charge. If you have any further questions, you can contact Richard Hynes at (206) 764-3735.

Sincerely,

A handwritten signature in cursive script that reads "Siri C. Nelson".

Siri C. Nelson
District Counsel

Attachment B

Jesse DeNike

From: Terri Tyni
Sent: Friday, November 20, 2015 11:04 AM
To: foia-nws@usace.army.mil
Subject: FOIA Request
Attachments: FOIA-ACOE.112015.pdf

To Whom It May Concern:

Attached please find a Freedom of Information Act request. Thank you in advance for your assistance in this matter. If you have any problem opening the attachment, please let me know. All questions or concerns or requests for further information regarding this request should be directed to Jesse DeNike (jesse@plauchecarr.com) or Samuel Plauché (billy@plauchestock.com). You may also contact our office at 206-588-4188.

Thank you.

Terri

Terri A. Tyni / Administrator / Plauche & Carr LLP / 811 First Avenue, Suite 630 / Seattle, WA 98104
terri@plauchecarr.com / Phone: 206-973-1260 (direct) or (206) 588-4188 (main) / Fax: 206-588-4255

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FOIA Request for Documents



**US Army Corps
of Engineers**
Seattle District

FOIA Request for Documents
PO Box 3755
Seattle, WA
98124-3755
Phone: 206-764-3735
E-Mail: g3nwsoc@usace.army.mil
<http://www.nws.usace.army.mil>

First Name:	Jesse
Last Name:	DeNike
E-Mail:	jesse@plauchecarr.com
Company/Org.:	Plauche & Carr LLP
Address 1:	811 First Avenue, Suite 630
Address 2:	
City:	Seattle
State, Zip Code:	WA, 98104
Telephone Number:	(206) 588-4188

Pursuant to regulations set forth in the FOIA and Army Regulation 25-55, I understand that there may be search and duplication costs (and review fees for commercial requesters) that may be associated with this request.

In order to submit a request for documents, any requester must agree to the terms set forth in the previous paragraph. To accept responsibility for reasonable fees and costs that may be associated with this request, select the I AGREE button.

- I agree to pay
- I request a fee waiver (explain below)

Description of Document(s) Requested:

On behalf of the Pacific Coast Shellfish Growers Association, I request a copy of the Programmatic Biological Assessment for Shellfish Activities in Washington State Inland Marine Waters, U.S. Army Corps of Engineers Regulatory Program. This document was recently sent from the Seattle District of the Corps to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, as stated in the attached email from Ms. Pamela Sanguinetti, Senior Project Manager, dated October 30, 2015.

Submit FOIA request to g3nwsoc@usace.army.mil
or
Seattle District
U.S. Army Corps of Engineers
Office of Counsel
PO Box 3755
Seattle, WA 98124-3755

Jesse DeNike

Subject: FW: [EXTERNAL] RE: Programmatic BA for shellfish activities (UNCLASSIFIED)

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

From: Sanguinetti, Pamela NWS [mailto:Pamela.Sanguinetti@usace.army.mil]
Sent: Thursday, November 12, 2015 12:30 PM
To: Margaret Barrette
Cc: Hynes, Richard M NWS
Subject: RE: [EXTERNAL] RE: Programmatic BA for shellfish activities
(UNCLASSIFIED)

Margaret,

You are very welcome. To request a copy of the Programmatic Biological Assessment please go to <http://www.nws.usace.army.mil/>, select Freedom of Information Act Requests on the home page, and fill in the requested information.

The decision to release a document is made by the Corps Office of Counsel.
If you have any questions on how to submit a request, please contact Richard Hynes. I have included him on this email.

Pam

Pamela Sanguinetti,
Senior Project Manager
U. S. Army Corps of Engineers - Seattle District CENWS-OD-RG Post Office Box
3755
4735 East Marginal Way South
Seattle, Washington 98134-2385

Phone: (206) 764-6904
Corps Website: <http://www.nws.usace.army.mil/> General Regulatory Assistance:
<http://www.ora.wa.gov/>

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

From: Margaret Barrette [mailto:margaretbarrette@pcsga.org]
Sent: Thursday, November 12, 2015 8:15 AM
To: Sanguinetti, Pamela NWS <Pamela.Sanguinetti@usace.army.mil>
Subject: [EXTERNAL] RE: Programmatic BA for shellfish activities
(UNCLASSIFIED)

Pam,

Thank you for letting me know that the Programmatic Biological Assessment was sent to the Services. Could you please provide me with a copy of the document?

Thank you. I look forward to hearing from you soon.

Margaret

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

From: Sanguinetti, Pamela NWS [mailto:Pamela.Sanguinetti@usace.army.mil]

Sent: Friday, October 30, 2015 3:22 PM

To: margaretbarrette@pcsga.org

Subject: FW: Programmatic BA for shellfish activities (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Margaret,

I just wanted to let you know the Programmatic BA was just sent to the Services.

Have an enjoyable weekend!

Pam

Pamela Sanguinetti,

Senior Project Manager

U. S. Army Corps of Engineers - Seattle District CENWS-OD-RG Post Office Box

3755

4735 East Marginal Way South

Seattle, Washington 98134-2385

Phone: (206) 764-6904

Corps Website: Blocked<http://www.nws.usace.army.mil/> General Regulatory

Assistance:

Blocked<http://www.ora.wa.gov/>

Classification: UNCLASSIFIED

Caveats: NONE

Classification: UNCLASSIFIED

Caveats: NONE

Attachment C

**DECLARATION OF MARGARET BARRETTE IN SUPPORT OF ADMINISTRATIVE
FREEDOM OF INFORMATION ACT APPEAL**

I, Margaret Barrette, declare as follows:

1. I am over the age of 18 years, and I am making this declaration based upon my personal knowledge and belief.
2. I am the Executive Director of the Pacific Coast Shellfish Growers Association (“PCSGA”).
3. PCSGA is a non-profit organization that was founded in 1930 to represent shellfish farmers in Washington, Alaska, Oregon, California, and Hawaii. PCSGA works on behalf of its members on a broad spectrum of issues, including environmental protection, shellfish safety, regulations, technology, and marketing. PCSGA’s members grow a wide variety of healthful, sustainable shellfish including oysters, clams, mussels, and geoduck. PCSGA has over 80 members in Washington State. Washington State shellfish farmers have been growing shellfish and sustaining local communities since before statehood, and they have a strong history of advocating for the health of the marine environment as their farms and livelihoods depend on high quality water and habitat.
4. The Programmatic Biological Assessment for Shellfish Activities in Washington State Inland Marine Waters (“PBA”) is a programmatic assessment of shellfish farming activities in Washington State that the Seattle District of the U.S. Army Corps of Engineers (“Seattle District”) developed for consultation under Section 7(a)(2) of the Endangered Species Act (“ESA”) and Section 305(b) of the Magnuson Stevens Fishery Conservation and Management Act (“MSA”).
5. The Seattle District has been developing the PBA for over two years. During that time, it has prepared various drafts and had discussions with numerous individuals, both within and outside of the Federal government.

6. Pamela Sanguinetti with the Seattle District notified me on October 30, 2015 that the PBA was officially transmitted to the Services.

7. The PBA will have a profound impact on shellfish farming operations throughout Washington State. It will describe the specific farming activities and acreage limitations in each area of Washington State that are covered by the programmatic ESA/MSA consultation, as well as define the farming activities that are excluded from programmatic coverage, inform how those activities are expected to impact ESA-listed species, critical habitat, and essential fish habitat ("EFH"), and influence the conditions imposed on shellfish farming activities that are covered by the programmatic ESA/MSA consultation.

8. It is critical that the ESA/MSA consultation be based upon accurate information as to the nature and extent of shellfish farming in Washington, its environmental impacts, and the reasonableness and feasibility of any proposed conditions. It is essential that shellfish farmers review the PBA to ensure its accuracy and so that they can make informed farm management decisions.

9. The Seattle District has largely shut PCSGA out from discussions over the status and content of the PBA, despite the fact that shellfish farmers have the most knowledge of the regulated activities and will be the greatest impacted by the PBA. The Services have been in possession of the PBA for almost two months, and it is therefore critical that PCSGA be immediately provided a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Olympia, Washington this 23rd day of December 2015.


Margaret Barrette, Declarant

Attachment D

Terri Tyni

From: Seattle District FOIA <foia-nws@usace.army.mil>
Sent: Friday, November 20, 2015 11:17 AM
To: Terri Tyni
Subject: RE: FOIA Request

I have received your request, and it is being processed.

Richard Hynes
FOIA Officer
U.S. Army Corps of Engineers
206-764-3735

From: Terri Tyni [mailto:terri@plauchecarr.com]
Sent: Friday, November 20, 2015 11:04 AM
To: Seattle District FOIA <foia-nws@usace.army.mil>
Subject: [EXTERNAL] FOIA Request

To Whom It May Concern:

Attached please find a Freedom of Information Act request. Thank you in advance for your assistance in this matter. If you have any problem opening the attachment, please let me know. All questions or concerns or requests for further information regarding this request should be directed to Jesse DeNike (jesse@plauchecarr.com) or Samuel Plauché (billy@plauchestock.com). You may also contact our office at 206-588-4188.

Thank you.

Terri

Terri A. Tyni / Administrator / Plauché & Carr LLP / 811 First Avenue, Suite 630 / Seattle, WA 98104
terri@plauchecarr.com / Phone: 206-973-1260 (direct) or (206) 588-4188 (main) / Fax: 206-588-4255

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Attachment E

Jesse DeNike

From: Jesse DeNike
Sent: Monday, December 21, 2015 4:41 PM
To: 'foia-nws@usace.army.mil'
Cc: Terri Tyni; Billy Plauche
Subject: RE: FOIA Request
Attachments: FOIA-ACOE.112015.pdf

Good Afternoon Mr. Hynes,

Today is the response deadline for the below-referenced FOIA request. See also attached. We have not received a response. If you already sent it to us, please confirm the date and address of transmittal. If you have not yet sent the response, please send it to me electronically by the end of today. Thank you.

Jesse

Jesse DeNike
Plauché & Carr LLP
811 First Avenue
Suite 630
Seattle, WA 98104
(206) 588-4188
jesse@plauchecarr.com

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From: Seattle District FOIA [<mailto:foia-nws@usace.army.mil>]
Sent: Friday, November 20, 2015 11:17 AM
To: Terri Tyni <terri@plauchecarr.com>
Subject: RE: FOIA Request

I have received your request, and it is being processed.

Richard Hynes
FOIA Officer
U.S. Army Corps of Engineers
206-764-3735

From: Terri Tyni [<mailto:terri@plauchecarr.com>]
Sent: Friday, November 20, 2015 11:04 AM
To: Seattle District FOIA <foia-nws@usace.army.mil>
Subject: [EXTERNAL] FOIA Request

To Whom It May Concern:

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Thank you.

Terri

Terri A. Tyni / Administrator / Plauche & Carr LLP / 811 First Avenue, Suite 630 / Seattle, WA 98104
terri@plauchecarr.com / Phone: 206-973-1260 (direct) or (206) 588-4188 (main) / Fax: 206-588-4255

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FOIA Request for Documents



**US Army Corps
of Engineers**
Seattle District

FOIA Request for Documents
PO Box 3755
Seattle, WA
98124-3755
Phone: 206-764-3735
Email: g3nws00c@usace.army.mil
<http://www.nws.usace.army.mil>

First Name:	Jesse
Last Name:	DeNike
E-Mail:	jesse@plauchecarr.com
Company/Org.:	Plauche & Carr LLP
Address 1:	811 First Avenue, Suite 630
Address 2:	
City:	Seattle
State, Zip Code:	WA, 98104
Telephone Number:	(206) 588-4188

Pursuant to regulations set forth in the FOIA and Army Regulation 25-55, I understand that there may be search and duplication costs (and review fees for commercial requesters) that may be associated with this request.

In order to submit a request for documents, any requester must agree to the terms set forth in the previous paragraph. To accept responsibility for reasonable fees and costs that may be associated with this request, select the I AGREE button.

- I agree to pay
- I request a fee waiver (explain below)

Description of Document(s) Requested:

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Submit FOIA request to g3nws00c@usace.army.mil
or
Seattle District
U.S. Army Corps of Engineers
Office of Counsel
PO Box 3755
Seattle, WA 98124-3755

Jesse DeNike

Subject: FW: [EXTERNAL] RE: Programmatic BA for shellfish activities (UNCLASSIFIED)

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

From: Sanguinetti, Pamela NWS [mailto:Pamela.Sanguinetti@usace.army.mil]
Sent: Thursday, November 12, 2015 12:30 PM
To: Margaret Barrette
Cc: Hynes, Richard M NWS
Subject: RE: [EXTERNAL] RE: Programmatic BA for shellfish activities (UNCLASSIFIED)

Margaret,

You are very welcome. To request a copy of the Programmatic Biological Assessment please go to <http://www.nws.usace.army.mil/>, select Freedom of Information Act Requests on the home page, and fill in the requested information.

The decision to release a document is made by the Corps Office of Counsel.
If you have any questions on how to submit a request, please contact Richard Hynes. I have included him on this email.

Pam

Pamela Sanguinetti,
Senior Project Manager
U. S. Army Corps of Engineers - Seattle District CENWS-OD-RG Post Office Box
3755
4735 East Marginal Way South
Seattle, Washington 98134-2385

Phone: (206) 764-6904
Corps Website: <http://www.nws.usace.army.mil/> General Regulatory Assistance:
<http://www.ora.wa.gov/>

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

From: Margaret Barrette [mailto:margaretbarrette@pcsga.org]
Sent: Thursday, November 12, 2015 8:15 AM
To: Sanguinetti, Pamela NWS <Pamela.Sanguinetti@usace.army.mil>
Subject: [EXTERNAL] RE: Programmatic BA for shellfish activities (UNCLASSIFIED)

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Thank you. I look forward to hearing from you soon.

Margaret

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

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Sent: Friday, October 30, 2015 3:22 PM
To: margaretbarrette@pcsga.org
Subject: FW: Programmatic BA for shellfish activities (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Margaret,

I just wanted to let you know the Programmatic BA was just sent to the Services.

Have an enjoyable weekend!

Pam

Pamela Sanguinetti,
Senior Project Manager
U. S. Army Corps of Engineers - Seattle District CENWS-OD-RG Post Office Box
3755
4735 East Marginal Way South
Seattle, Washington 98134-2385

Phone: (206) 764-6904
Corps Website: Blocked<http://www.nws.usace.army.mil/> General Regulatory
Assistance:
Blocked<http://www.ora.wa.gov/>

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Attachment F

Center for Biological Diversity v. U.S. Marine Corps, Not Reported in F.Supp.2d (2005)

2005 WL 3262901

2005 WL 3262901

Only the Westlaw citation is currently available.
United States District Court,
District of Columbia.

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff,
v.
UNITED STATES MARINE CORPS, Defendant.

No. Civ. 00-2387(TFH). | Sept. 19, 2005.

Attorneys and Law Firms

Katherine A. Meyer, Howard M. Crystal, Meyer Glitzenstein & Crystal, Washington, DC, Amy R. Atwood, Western Environmental Law Center, Eugene, OR, for Plaintiff.

Wyneva Johnson, U.S. Attorney's Office, Washington, DC, for Defendant.

MEMORANDUM OPINION

HOGAN, Chief J.

*1 Pending before the Court are renewed cross-motions for summary judgment by Plaintiff, Center for Biological Diversity and Defendant, United States Marine Corps. This dispute arises out of Center for Biological Diversity's ("Plaintiff") request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff seeks the release of documents from United States Marine Corps ("Defendant") regarding the impact of ongoing operations and future activities in upland habitats occupied by threatened or endangered species at Marine Corps Base Camp Pendleton in San Diego County, California, TFH Mem. Op. 8/21/03 at 3. On August 21, 2003, this Court ordered Defendant to turn over certain withheld documents for *in camera* inspection to determine whether they were privileged materials. This resulted in Defendant turning over five documents to the Court, including what was labeled as Exhibits 1, 5, 6, and 7 of the *Vaughn* Index and the Biological Assessment of Upland Habitats, Marine Corps Base Camp Pendleton, dated March 2000 ("Biological Assessment").

In the parties' renewed summary judgment pleadings, both Plaintiff and Defendant requested that the Court review *in camera* the remaining documents in dispute as the most efficient means of resolving the issue. Def.'s Reply to Pl.'s

Opp'n to Def.'s Renewed Mot. for Summ. J. at 7; Pl.'s Reply in Supp. of Renewed Cross-Mot. for Summ. J. at 8. The remaining documents concern Defendant's responses to additional information requested by the United States Fish and Wildlife Service ("FWS") after its review of the Biological Assessment submitted by Defendant. On July 8, 2005, this Court ordered Defendant to turn over for *in camera* review the remaining disputed documents. TFH Order 7/8/05. These fourteen documents are referred to as documents numbered 1, 4, 6, 11, 16, 27, 32, 36, 42, 48, 49, 50, 51, and 52 as described in the Base Responses Administrative Record matrix Table dated November 2003 attached to Defendant's Renewed Motion for Summary Judgment, Exhibit B ("Base Responses").

The facts surrounding this case as well as the relevant legal standard to be applied are discussed at length in pages 1-8 of this Court's Memorandum Opinion issued August 21, 2003. This Memorandum Opinion incorporates the legal discussion contained in the Memorandum Opinion of August 21, 2003 by reference and attaches that Memorandum Opinion in its entirety as attachment 1. Below, the Court puts forth its findings following the *in camera* inspection of the documents submitted and addresses whether each of the remaining nineteen documents should be released to Plaintiff and whether any portions of exempt documents can be segregated and released.

DISCUSSION

I. Biological Assessment of Uplands Habitats

The Biological Assessment is almost an exclusively factual document. It contains a significant amount of scientific data, research, and statistical figures about Camp Pendleton and Defendant's activities on base. Such compilations of data include information about the ongoing military activities for which Defendant uses Camp Pendleton, detailed descriptions of the base's topography and the critical habitat areas, information about the endangered and threatened species of animals and plants that are at issue, and projected effects of ongoing military training and other base activities on the species in question. None of this information is advisory or deliberative in any way, but a plain account of factual information. *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C.Cir.1977) (indicating that only subjective, advisory material falls under the protection of Exemption 5, and that factual material must be released).

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*2 Regarding any statements in the Biological Assessment that are not a pure recitation of scientific data, the Court rejects Defendant's assertion that the ongoing consultation with FWS constitutes one long deliberative process with Defendant making its final decision after it receives the biological opinion from FWS. Def.'s Reply to Pl.'s Opp'n to Def.'s Renewed Cross-Mot. for Summ. J. at 2. Such a broad interpretation of the scope of the deliberative process is inconsistent with case law. See *Mead Data*, 566 F.2d at 248, 250 (D.C.Cir.1977) (holding that the district court had applied an impermissibly broad scope to Exemption 5 when it protected documents merely because they reflected ongoing developments in a negotiating process and predated a final decision); *Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C.Cir.1975) (rejecting the government's argument that the "entire process of management appraisal, evaluation, and recommendations for improvement is a seamless whole, that is in its entirety a deliberative process" as too broad of an interpretation of the scope of Exemption 5). Accepting Defendant's interpretation of the scope of the deliberative process would virtually foreclose all public knowledge regarding agency decisions and undermine the principles of FOIA. See *id.* at 1145 (expressing the concern that accepting the government's broad interpretation of deliberative process would allow the policy development phase to swallow up the administrative process and would protect far more under Exemption 5 than it originally intended); see also *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C.Cir.1980) (reiterating that an agency is not allowed to develop a body of "secret law" that it uses to discharge its regulatory duties, but hides from the public behind a "veil of privilege because it has not designated a decision as ... 'final'").

The Biological Assessment does not reflect the personal views of individuals employed by Defendant, but instead is Defendant's official position on the impact of military and other base activities on listed threatened and endangered species, which indicates that the assessment is not predecisional. *Coastal States*, 617 F.2d at 866 (indicating that documents can lose their status as predecisional documents if the agency adopts them, formally or informally, as its position on an issue).

Defendant's Biological Assessment is the consummation of its decision making process up to the time it submitted the assessment to FWS to initiate a formal consultation. Defendant engaged in a deliberative process to determine to what extent base activities impacted threatened and

endangered species, making the assessment itself the culmination of that decision making process. The fact that the policy may change as a result of FWS's biological opinion does not affect the biological assessment from being Defendant's final decision at the time the assessment was given to FWS. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 159 n. 25, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (reiterating that the finality of a decision is unaffected by the fact that it may be overturned on appeal). Defendant even implies that the Biological Assessment is Defendant's final evaluation of the environmental impact in Base Response 6 when it notifies FWS to disregard previous draft biological assessments that were considered "draft only" for discussion purposes only" and to use the final information available in the Biological Assessment dated March 2000. Base Response 6.

*3 This Court determines that the release of the Biological Assessment will in no way risk stifling "honest and frank communication within the agency" nor will its release "inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that which is as yet only a personal position." *Coastal States*, 617 F.2d at 866. Defendant's Biological Assessment constitutes a final agency opinion and is, therefore, releasable to the public under the principles of the FOIA. Because the Court determines that the Biological Assessment contains no material that would be protected by the Exemption 5 deliberative process privilege, there is no need for a segregability determination. Defendant must release the Biological Assessment in its entirety.

II. Documents Titled "Exhibits 1, 5, 6, and 7 of the Vaughn Index"

According to Defendant's corrected *Vaughn Index*, Exhibit 1 is Upland Biological Assessment consultation notes of April 2000, which Defendant describes as an "[i]nternal Camp Pendleton document listing and discussing the Base's position and strategy on several aspects of the Upland BA [biological assessment] formal consultation. Prepared in advance of and as preparation for interagency discussions with the USFWS." Def.'s Notice of Filing of Corrected *Vaughn Index* 3/30/01, Corrected *Vaughn Index* at 1. The document includes four sections of Defendant's programmatic scheme for addressing the endangered and threatened species on Camp Pendleton. These four areas include Temporary Impacts: Avoidance and Minimization; Temporary Impacts: Compensation; Permanent Impacts: Avoidance and Minimization; and Permanent Impacts: Mitigation. These four sections include largely factual

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descriptions of Defendant's scheme and tables with factual data regarding the occupied habitat on base.

Exhibit 1 is not entirely protected by Exemption 5 because it contains largely factual material that does not express an individual's personal and subjective opinion about Defendant's policy for addressing environmental concerns. *Mead Data Cent. Inc. v. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C.Cir.1997) (holding that factual material is not privileged under Exemption 5). There are portions of Exhibit 1, however, that express the author's opinion as to ways in which Defendant's approach could be improved or reconsidered. These portions, labeled within the document as "Issues to consider," are exempt under Exemption 5 because they are predecisional and express the writer's personal opinion and recommendations about ways to improve the factual explanation contained in each section of the document. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980) (explaining that documents which express a personal position, rather than the view of the agency, are protected under Exemption 5). Additionally, the portion of page 1 labeled "Note on thresholds" also appears to express the writer's opinion regarding the give-and-take of the consultative process and does not reflect a final view of the agency. If these portions of the exhibit were released, there may be a chilling effect on open discourse about policies within the agency. *See Formaldehyde Inst. v. Dep't of Health and Human Serv.*, 889 F.2d 1118, 1125 (D.C.Cir.1989). Therefore, these portions of the exhibit qualify as deliberative and deserve Exemption 5 protection.

*4 The factual, nonexempt portions of Exhibit 1 are not so "inextricably intertwined with exempt portions" that they cannot be segregated and released. *Mead Data Cent.*, 566 F.2d at 260. Only the portions of Exhibit 1 labeled "Issues to consider" and the portion labeled "Note on thresholds" fall under the protections of Exemption 5. Therefore, the remaining portions must be released. Consequently, all of Exhibit 1 must be released, except for the bottom ten lines of text on page 1, page 2 in its entirety, the bottom 15 lines of text on page 9, the bottom 25 lines of text on page 11, and the final 15 lines of text on page 15, which constitute the sections that are exempt under the deliberative process privilege.

Exhibit 5 is a letter dated May 11, 2000 from Jim Bartel, Assistant Field Supervisor of FWS to Major General Edward Haulon Jr., Commanding General of Marine Corps Base at Camp Pendleton. This letter describes FWS's determination of the gaps in Defendant's environmental evaluation laid

out in the Biological Assessment. Such gaps include "informational gaps," wherein Defendant did not adequately describe elements of the plan, and "fundamental concepts," which are elements that the FWS felt that Defendant had misconstrued throughout the Biological Assessment.

Exhibit 5 does not fall within the deliberative process privilege because the letter does not express Mr. Bartel's individual opinion regarding Defendant's policy, but instead expresses the official position of FWS. *See Formaldehyde Inst.*, 889 F.2d at 1122. Indeed, Mr. Bartel even uses such expressions as "we noted substantial gaps" and "our major concerns with the BA [biological assessment] are as follows," which indicate that the expressed views are the agency's and not his personal views. The document is also not deliberative because releasing this letter to the public would not discourage candid discussion within the agency because it reflects no individual's opinion, thus no individual risks public censure for expressing her views. *Id.* at 1125. Because this document does not meet the criteria to fall under the deliberative process privilege, it is not subject to Exemption 5 protection. The document referred to as Exhibit 5 of the *Vaughn* index must be released.

Exhibit 6 is a four-page memo from FWS to the Uplands Consultation Working Group, dated May 31, 2000 and titled "Additional Information Needs." This memo contains a list of fifty-three items that FWS requested from Defendant in order to fill in information gaps that FWS determined existed in Defendant's Biological Assessment. The requests of FWS include copies of Defendant's policy on certain matters, explanations for why certain material was left out of the Biological Assessment, and specific statistics.

This memo simply requests further information and contains no personal advisory opinions regarding Defendant's policy. It does not "inaccurately reflect or prematurely disclose the views of the agency," nor is it "deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another." *Coastal States*, 617 F.2d at 866. Exhibit 6 must be released in its entirety because it does not fall within the parameters of Exemption 5.

*5 Exhibit 7 is described in the corrected *Vaughn* Index as "an internal MFR [Memorandum for the Record] detailing the discussions of the interagency Uplands BA [Biological Assessment] consultation kick-off meeting." *See Def.'s Notice of Filing of Corrected Vaughn Index 3/30/01, Corrected Vaughn Index* at 2. It is the minutes from a May 31,

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2000 meeting to address FWS's response letter regarding Defendant's Biological Assessment. The minutes of the meeting gives each individual panel member's opinion regarding how to respond to FWS's request for additional information.

The material contained within Exhibit 7 falls entirely within Exemption 5 as it is completely predecisional and deliberative. The entire document specifically names individuals employed by Defendant and reflects their personal views. Additionally, the document is deliberative because it reflects the give-and-take of the decision of how to respond to FWS's requests. *Costal States*, 617 F.2d at 866 (noting that documents reflecting individuals' opinions about agency decisions must be privileged so as to protect "honest and frank communication within the agency"). Disclosing this document would run the risk of stifling open discourse within the agency because individuals might fear public censure for openly expressing their views and keep their opinions private in the future.

Any non-exempt portions of Exhibit 7 are so "inextricably intertwined" with the privileged portions of the document that there is no releasable information that can be reasonably segregated from the privileged material. See *Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1026-27 (D.C.Cir.1999). Exhibit 7 is protected under Exemption 5 as a whole and there are no reasonably segregable portions that Defendant can release.

III. Base Responses Numbered 1, 4, 6, 11, 16, 27, 32, 36, 42, 48, 49, 50, 51, and 52

Following Defendant's submission of the Biological Assessment, FWS submitted a list of 53 items which requested further information and clarification of the scope of Defendant's Biological Assessment and the factual findings Defendant made. Exhibit 6 of the *Vaughn* Index is the memo from FWS to Defendant that lists these 53 requests. Remaining at issue in this case are fourteen of Defendant's responses to FWS's requests, referred to as Base Responses. These documents were turned over for *in camera* review pursuant to the Court's Order dated July 8, 2005. What follows is a brief description of each of Defendant's Base Responses that Defendant claims are protected by Exemption 5.

Base Response 1 responds to FWS's request for "An explanation of why only certain real estate agreements are included in the project description (pg.8)." Defendant's response is an explanation for its reasoning in leaving out

certain real estate agreements from its programmatic scheme described in the Biological Assessment. The response is entirely factual in nature and expresses no personal or subjective point of view from the author. It represents Defendant's decision for why it included certain real estate agreements in the programmatic instructions yet omitted others.

*6 Base Response 4 replies to FWS's request for "A summary table of Programmatic Instructions that apply *Basewide*, in '*status quo*' areas, and *Management Levels 1 and 2* (pg.10)." Defendant responded with an account of how this table came to be excluded from the Biological Assessment and where FWS could find the relevant information. This response is entirely factual as to the location of the requested information and the reasoning for the exclusion of a formal table.

Base Response 6 is in reference to FWS's request for "Clarification of acreages within Cantonment Areas," because there was a discrepancy between the draft Biological Assessment and the final one submitted in March 2000. Defendant quoted from the definition of "Cantonment Area," which was included in the Biological Assessment, and added a discussion of the term and its application to the Biological Assessment. Defendant noted that the figure in the final Biological Assessment was accurate and FWS should disregard the figures in the draft Biological Assessments. Defendant's description of the definition of "Cantonment Area" and its application to the Biological Assessment are completely factual in nature and contain no subjective material.

Base Response 11 follows FWS's request for "A discussion of how to address suitable habitat areas that have not been surveyed for QCB [Quino Checkerspot Butterfly] (pg.30)." Defendant explains that the species in question has never been recorded on Camp Pendleton, so it does not factor into its programmatic instruction analysis. This response is entirely factual.

Base Response 16 is in relation to FWS's request for "A map showing proposed PI [Programmatic Instructions] for Range 116 complex, Range 210 complex, Range 225, Range 227, Range 313, Range 407 complex, etc. (pg.49)." Defendant's response consists of an indication as to where in the Biological Assessment FWS can look to find the desired information. The response also explains the extent to which the Stephens' Kangaroo Rat occupies various firing ranges.

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The response is completely factual and contains no subjective or deliberative material.

Base Response 27 refers to FWS's indication that "Table 3-3 is incomplete for several AFAs [Artillery Firing Areas] and MPs [Mortar Positions] (# s 3,5,6,7)." Defendant responded with an explanation for why certain areas of the base were not evaluated for the Biological Assessment. Again, this response is entirely factual and contains no subjective material.

Base Response 32 responds to FWS's request for "A description of cantonment areas and associated impacts (e.g., lighting impacts from housing) (pg.97)." Defendant explains where the definition of "Cantonment" can be found in the Biological Assessment, and further explains why the associated impacts of cantonment areas were not included in the Biological Assessment. Defendant's response contains a purely factual explanation for its official position as to why it did not include associated impacts in the Biological Assessment. This is not a personal opinion of the author, but Defendant's position. Additionally, releasing this information poses no threat to Defendant's deliberative process.

*7 Base Response 36 follows FWS's question, "How will road maintenance activities through occupied habitat be coordinated with the Service? Class system or will long-term plan be developed within this consultation (pg.104)?" Defendant reports that this consultation will cover routine maintenance activities, but not address new road projects, which will be covered through a separate process. This response reflects Defendant's position as to the scope of the consultation and what matters will not be covered. It is not a personal recommendation, but a statement of an official agency decision.

Base Response 42 responds to FWS's request for "A description of how PIs [Programmatic Instructions] will be enforced (pg.135)." Defendant explains that it will respond to FWS's Biological Opinion by implementing appropriate Base Orders. It discusses the chain of command for environmental enforcement and a newly created environmental incident reporting system to track enforcement issues. This response constitutes a factual description of Defendant's plan for enforcing its environmental policy and is neither predecisional nor deliberative.

Base Response 48 refers to FWS's request for a "Definition of Class IV 'no impact' for PPM [Pacific Pocket Mouse] (pg.156) and SKR [Stephens' Kangaroo Rat] (pg.159)."

Defendant provides its definition for the term "no impact" as Defendant used it in the Biological Assessment. This response is factual, representing Defendant's definition of a given term in the Biological Assessment. It is neither predecisional nor deliberative in any way.

Base Response 49 replies to FWS's request for a "Definition of 'potential habitat' for [the plant species] Ea [*Eryngium aristulatum*], Nf [*Navarretia fossalis*], Bf [*Brodiaea filifolia*] (pgs. 173 & 176)." Defendant gives a technical description of the potential habitat for the plant species. This response is entirely factual in nature and contains no subjective material.

Base Response 50 is in reference to FWS's request for "A discussion of how Isolated Ephemeral Wetlands Management Plan fits into Uplands consultation (pg.164). How will ACOE be involved in process?" Defendant explains that it does not intend to develop a Vernal Pool Management Plan, either as part of this consultation or thereafter. Consequently, ACOE will not be directly involved in the consultation process. Defendant reiterates the scope of the consultation with FWS and how it plans to consult with FWS regarding listed species on Base. This represents Defendant's official position as to the scope of the consultation with FWS. This response also contains no subjective material and does not reflect the give-and-take of the deliberative process.

Base Response 51 follows FWS's request for "A map depicting which pool groups will be fenced and which will be posted (pg.166)." Defendant responded with an analysis of how it will make a determination of whether to post or fence areas to better manage selected vernal pools. Defendant also describes the data and factors it will consider when dealing with the threat to long term viability of vernal pools. This response is Defendant's official explanation of how it will make certain determinations regarding its environmental policy. It is not a personal, advisory opinion and releasing this information will not stifle the open discourse regarding agency actions among Defendant's employees.

*8 Base Response 52 replies to FWS's request for "An explanation of how projects/management programs will be tracked (pg.177)." Defendant responds by explaining how it tracked projects and management programs at the time it submitted the response to FWS. Defendant also explains its plans for improving its tracking system to better integrate tracking programs into one comprehensive system. This response is factual in nature and does not contain any personal, subjective recommendations. It provides the agency

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policy for tracking matters and explains its official decision to alter the agency plan to better suit its needs.

None of Defendant's Base Responses to FWS's requests for "Additional Information Needs" contain information that is protected under Exemption 5. None of these responses are "predecisional" because they do not contain individual employees' recommendations regarding the programmatic instructions and the extent of the environmental impact, but instead expound and clarify Defendant's official position. See *Formaldehyde Inst. v. Dep't of Health and Human Serv.*, 889 F.2d 1118, 1122 (D.C.Cir.1989). Additionally, these responses cannot be categorized as "deliberative" because disclosure of the information would not discourage candid discussion among Defendant's employees regarding the agency environmental policy and this information does not reflect the give-and-take of Defendant's decisional process. *Id.* (defining deliberative documents as those documents which, if released, would stifle open discourse within the agency regarding policies because individuals would fear public censure for expressing their ideas); see *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980). Furthermore, at the time these responses were issued, Defendant had made its decision regarding the impact on listed species and its environmental policy. All of these responses explain Defendant's analysis of the environmental impact and policy for mitigating that impact as it is described in the Biological Assessment. See *Tax Analysts*

v. IRS, 294 F.3d 71, 80 (D.C.Cir.2002) (explaining that the deliberative process privilege "does not ... apply to final statements of agency policy or to statements that explain actions that an agency has taken.") All of the Base Responses shall be released to Plaintiff because they do not contain any information protected under Exemption 5.

CONCLUSION

For the foregoing reasons, both Plaintiffs and Defendant's Renewed Motions for Summary Judgment are granted in part and denied in part. Specifically, the following documents will be released to Plaintiff in their entirety: Biological Assessment of Upland Habitats, dated March 2000; Exhibits 5 and 6 of the *Vaughn* Index; Base Responses numbered 1, 4, 6, 11, 16, 27, 32, 36, 42, 48, 49, 50, 51, and 52. Exhibit 7 of the *Vaughn* Index is exempt from disclosure under Exemption 5 of FOIA because it is entirely predecisional and deliberative and there are no segregable portions of the document. Exhibit 1 of the *Vaughn* Index must be disclosed, with the privileged sections labeled "Issues to consider" and "Note on thresholds" redacted. An appropriate Order will accompany this Opinion.


All Citations

Not Reported in F.Supp.2d, 2005 WL 3262901

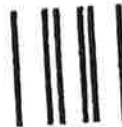
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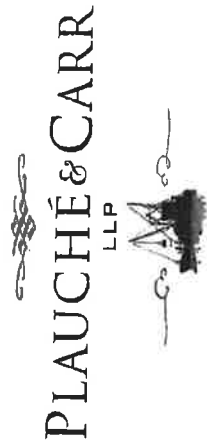
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Freedom of Information
Act Appeal

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Exhibit 8

Terri Tyni

From: Hynes, Richard M NWS <Richard.M.Hynes@usace.army.mil>
Sent: Thursday, February 04, 2016 8:43 AM
To: Terri Tyni
Subject: FOIA Appeal

We received your appeal and have forwarded same to our Headquarters for further review and determination. Your contact person is the Corps of Engineers FOIA Public Liaison, Mr. Richard Frank, who can be reached at 202-761-8557 or foia-liaison@usace.army.mil Please refer to FOIA No. FP-16-4266 when inquiring about your request.

Richard Hynes
U.S. Army Corps of Engineers
206-764-3735