

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

MISSOURI COALITION FOR THE)	
ENVIRONMENT,)	
6267 Delmar Blvd., Suite 2E)	
St. Louis, MO 63130)	
)	
Plaintiff,)	
)	
v.)	
)	
U.S. ARMY CORPS OF ENGINEERS;)	
441 G Street NW)	
Washington, DC 20314-1000)	
)	
Defendant.)	

Case No.

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

NATURE OF THE CASE

1. This Complaint challenges the unlawful denial of access to plaintiff Missouri Coalition for the Environment (“MCE”) of documents in the possession of defendant U.S. Army Corps of Engineers (“the Corps”) in violation of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. The Corps failed to respond to either Plaintiff’s original FOIA requests or to Plaintiff’s administrative appeals of those requests in the time and the manner required by FOIA.

2. On January 11, 2013, MCE submitted FOIA requests to three Corps districts, the Kansas City, Rock Island and St. Louis Districts, seeking “copies of all documents in your possession relating to Enbridge Energy Co. and its affiliate Enbridge Pipelines (FSP) LLC’s Flanagan South pipeline project, including but not limited to all preconstruction notifications,

wetlands delineations, habitat conservation plans and consultation on this project with the U.S. Fish and Wildlife Service.”

3. All three districts acknowledged receipt of the requests but refused to make the determination required by FOIA within the statutory twenty days on the grounds that the project in question was being discussed among the districts.

4. MCE repeated its requests on March 20 and made a much narrower request for information on June 5. Finally, in letters dated between June 17 and June 21, the three districts denied the requests, claiming that the information sought was privileged under Exemption 5 for deliberative process, 5 U.S.C. § 552(b)(5).

5. On June 26, MCE mailed to the three districts its administrative appeals. The Corps did not respond within 20 working days as required by FOIA. Defendant is unlawfully withholding public disclosure of information sought by Plaintiff, information to which it is entitled and for which no exemption applies. Plaintiff seeks disclosure of the requested information under FOIA, 5 U.S.C. § 552.

JURISDICTION AND VENUE

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

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

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

PARTIES

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

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

FACTUAL BACKGROUND

11. On January 11, 2013, MCE submitted FOIA requests to the Corps’ Kansas City, Rock Island and St. Louis Districts, seeking “copies of all documents in your possession relating to Enbridge Energy Co. and its affiliate Enbridge Pipelines (FSP) LLC’s Flanagan South pipeline project, including but not limited to all preconstruction notifications, wetlands delineations, habitat conservation plans and consultation on this project with the U.S. Fish and Wildlife Service.”

12. MCE did not seek expedited processing of its requests under 5 U.S.C. § 552(a)(6)(E).

13. The FOIA officer for the St. Louis District, Kelly Bertoglio, replied in a letter dated January 16, “This agency will strive to respond to your request and petition within the statutory 20-day deadline.” There was no further response. MCE renewed its request in a letter faxed to Ms. Bertoglio on March 20. Her letter in response dated April 18 stated, “Your request remains under review for release.” She sent another letter dated May 30 that was identical except for the date. On June 5, MCE sent a letter that, without waiving the original request, asked for the bare information, and documentation recording, (1) when the Corps reaches its determination that Enbridge’s application is complete and (2) when the Corps verifies the applicability of Nationwide Permit 12. The St. Louis District finally denied the original request in a letter from its District Counsel on June 21 (on letterhead of the Rock Island District) making a blanket claim of the “deliberative process privilege of Exemption 5”.

14. The Rock Island District FOIA officer, Shannon McCurdy, in a letter dated Jan. 22, 2013 acknowledged receipt of MCE’s January 11 request and sought a 30-day extension because the material was voluminous. On Jan. 31 an email from Ms. McCurdy asked for consent to certain withholdings and redactions of documents and again asked for a 30-day extension until March 4. MCE agreed to these terms by a reply email on the same day. The next day, Feb. 1, Ms. McCurdy sent an email saying that there was to be an internal meeting about this request and asking for an extension till Feb. 19. MCE agreed to this by reply email on Feb. 6. On Feb. 14 Ms McCurdy emailed that internal meetings were still ongoing and that the District would not be able to respond by Feb. 19. MCE renewed its request in a letter faxed to Ms. McCurdy on March 20. Her email response on the same day was that the request “was still being discussed within the

Corps of Engineers at levels higher than the Rock Island District.” On June 5, MCE sent a letter that, without waiving the original request, asked for information, and documentation recording, (1) when the Corps reaches its determination that Enbridge’s application is complete and (2) when the Corps verifies the applicability of Nationwide Permit 12. The Rock Island District finally denied the request in a letter dated June 17, also claiming that all the records were veiled by the “deliberative process privilege of Exemption 5”.

15. Ms. Kacy S. Campbell-Patti, a paralegal specialist for the Kansas City District, acknowledged receipt of MCE’s January 11 request in a letter dated January 24 saying, “We are in the process of coordinating with other Corps Districts...” Her email response on March 21 to the renewed request of March 20 was to the same effect as her first letter. On June 5, MCE made the additional request referred to in paragraphs 13 and 14, and received no immediate response. By letter dated June 20, the District Counsel denied the request with the same claim of deliberative process privilege.

16. The initial determinations by the three districts were not made within 20 working days as required by 5 U.S.C. § 552(a)(6)(A)(i) and 32 C.F.R §§ 286.23(e)(1) and 518.16(i).

17. The Corps did not comply with the provisions of 5 U.S.C. § 552(a)(6)(B) for extension of time.

18. On June 26, 2013, MCE mailed to all three districts letters initiating the administrative appeal process as outlined on the Corps’ web site. The Corps failed to respond to the administrative appeal within 20 working days, as required by 5 U.S.C. § 552(a)(6)(A)(ii) and 32 C.F.R. §§ 286.24(c)(2) and 518.17(c). In response to a telephone inquiry, Army General Counsel sent an email on August 9 stating that General Counsel had received the appeal from the Corps on July 29 and would likely need six-to-eight weeks to complete the appeal.

19. As of the date this action was filed, the Corps has not provided a final determination on Plaintiff's pending FOIA appeal.

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

21. Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute this action.

CLAIM FOR RELIEF

Unlawful withholding of records under FOIA

22. Plaintiff realleges and incorporates by reference paragraphs 1 through 21 above.

23. The materials at issue in this action are agency records of the Army Corps of Engineers within the meaning of 5 U.S.C. § 552. MCE requested release of these records under the FOIA; the Corps untimely denied release; and MCE has exhausted its administrative remedies by filing a timely appeal, which has not been ruled upon within the 20 working days allowed by the statute.

24. The requested documents are not exempt from release under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), because the Corps has not demonstrated that the documents are "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." *Id.* Nor has the Corps attempted to demonstrate that there are any records, or portions of records, that, if subject to the privilege, would not be segregable and releasable.

25. MCE has a statutory right under the FOIA to the release of some or all of the records it seeks. There is no legal basis for Defendant's failure to release those records promptly, and specifically no legal basis to assert that any of FOIA's nine exemptions applies. 5 U.S.C. §

552(b)(1)–(9).

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

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

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

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

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

DEMAND FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

1. Order Defendant to promptly provide Plaintiff all of the information sought in this action.
2. Declare Defendant’s failure to disclose the information requested by Plaintiff to be unlawful under the FOIA, 5 U.S.C. § 552(a)(5).
3. Declare Defendant’s failure to make a timely determination on Plaintiff’s administrative appeal to be unlawful under the FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i) and (ii).
4. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. §

552(a)(4)(E).

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

/s/ Kathleen G. Henry
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