



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

April 28, 2020

Erin Thomas
Hall and Associates
1629 K Street NW
Suite 220
Washington, DC 20006

Re: Freedom of Information Act Appeal No. EPA-HQ-2020-003870 (Request No. EPA-R1-2020-002670)

Dear Ms. Thomas:

I am responding to your March 27, 2020 Freedom of Information Act (FOIA) appeal. You appealed the March 20, 2020 decision of Ken Moraff (“decision”), Water Division Director, Region 1, of the U.S. Environmental Protection Agency (EPA or Agency), to partially deny the request you submitted to EPA on January 31, 2020. Your request sought records related to the Draft NPDES Great Bay General Permit. Specifically, the request sought:

1. Any analysis prepared by EPA or DES that evaluated whether the hydrodynamic and other physical characteristics of Great Bay Estuary are similar to the systems studied by authors Valiela, Cole, and Latimer in the papers cited in EPA’s General Permit Fact Sheet.
2. Any EPA records identifying the forms and sources of nitrogen used to estimate system nitrogen loadings in the charts developed by Valiela, Cole, and Latimer cited in EPA’s General Permit Fact Sheet.
3. Any records used to develop the General Permit effluent limitations in concluding that TN must be limited on an annual and not growing season basis to protect eelgrasses in the Great Bay system

The decision stated that the Agency response included 8 records produced in full, 5 records withheld in part, and 2 records withheld in full. Your appeal states that: “[Hall and Associates] hereby appeals as arbitrary and capricious (1) EPA’s improper withholding of portions of responsive documents citing to 5 U.S.C. §552(b)(5), and (2) EPA’s inadequate search for records” Appeal at 2.

I have carefully considered your request, EPA’s decision, and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, denied.

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The Agency Properly Applied Exemption 5.

You appeal the withholding of five records in part pursuant to Exemption 5, deliberative process privilege, 5 U.S.C. § 552(b)(5). The five partially withheld records are: “FW_Information request regarding GB System – confidential communication_Redacted,” “RE_Latimer Working Responses (3)_Redacted,” “RE_Latimer Working Responses (8)_Redacted,” “Great Bay Total Nitrogen Draft General Permit and Fact Sheet_Redacted,” and “RE_Great Bay Total Nitrogen draft Draft General Permit and Fact Sheet_Redacted.”

Information subject to the deliberative process privilege must be both pre-decisional and deliberative. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). The portions of the records withheld in part fall within the deliberative process privilege. As explained in the decision, the withheld information, “includes internal, pre-decisional records concerning the development of the draft NPDES general permit for the Great Bay Estuary and communications and pre-decisional records exchanged between EPA and the New Hampshire Department of Environmental Services used to inform and improve the Agency’s decision-making and issuance of this draft permit.” Decision at 1. Additionally, EPA properly withheld draft language. *See Reliant Energy Power Generation, Inc. v. F.E.R.C.*, 520 F. Supp. 2d 194, 204 (D.D.C. 2007) (an agency need not demonstrate the extent to which the draft differs from a final document.). Lastly, I have confirmed the Agency properly segregated non-exempt material in its initial response. Your appeal of the Agency’s partial withholding of records pursuant to 5 U.S.C. §552(b)(5) is denied.

The Agency Conducted a Reasonable Search.

The appeal challenges the Agency’s search for records. I have confirmed that the Agency conducted a search reasonably calculated to uncover all responsive records. Your appeal of the adequacy of the Agency’s search is denied.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 202-741-5770 or 1-877-684-6448; and fax, 202-741-5769.

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Should you have any questions concerning this matter, please contact Peter Bermes of my staff at bermes.peter@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Miller". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: Ken Moraff, Director, Water Division, EPA Region 1
Cris Schena, EPA Region 1 FOIA Officer