



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

April 28, 2020

Erin Thomas
Center for Regulatory Reasonableness
1629 K Street NW
Suite 220
Washington, DC 20006

Re: Freedom of Information Act Appeal No. EPA-HQ-2020-003845 (Request No. EPA-R1-2020-003122)

Dear Ms. Thomas:

I am responding to your March 26, 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 February 18, 2020. Your request sought records concerning the Draft NPDES Great Bay General Permit. Specifically, the request sought, “any records concerning EPA Region 1’s basis for not granting the September 30, 2019 and October 7, 2019 peer review requests (excluding any records submitted by the communities to EPA through the peer review requests).” Request at 1. You also clarified your request sought non-email electronic records.

The decision stated that the Agency produced 4 non-privileged responsive records in full, 2 records with redaction, and that the Agency withheld 3 records in full. Decision at 1. Your appeal stated that you are appealing the two records withheld in part identified in your appeal as: (1) “Document entitled ‘Great Bay briefing_Redacted’” and (2) “Document entitled ‘Response to Jessica Kamer_12_12_19_Redacted.’” Appeal at 3. You did not appeal the Region’s search for responsive records or the withholding of three records in full.

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.

Your appeal challenges the portions of 2 records withheld in part pursuant to 5 U.S.C. § 552(b)(5), the deliberative process privilege. Contrary to the assertions in your appeal, the information contained in the two records at issue is properly withheld. 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). As explained in the March 20, 2020 decision, the withheld information constitutes internal, pre-decisional material, “concerning the development of the draft NPDES general permit for the Great Bay Estuary.” Decision at 1. The withheld information reflects, “the give-and-take of the consultative process,” and is deliberative. *Coastal States Gas Corp. v. DOE*,

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617 F.2d 854, 867 (D.C. Cir. 1980). As such, both requirements of the deliberative process privilege are met, and the information was properly withheld. Therefore, your appeal of the Agency's withholdings is denied. Furthermore, the December 19, 2019 response to the September 30, 2019 and October 7, 2019 letters requesting peer review explained that EPA would not conduct a peer review "unless a scientific or technical issue is identified during the public comment period that merits the Agency undertaking this task." December 19, 2019 Letter at 2.

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.

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

Sincerely,



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

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