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District Counsel  
Portland District  
U.S. Army Corps of Engineers  
P.O. Box 2946  
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*Via Certified U.S. Mail*

**RE: Freedom of Information Act Appeal — Request FP-13-003287**

U.S. Army Corps of Engineers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on November 2, 2012, Columbia Riverkeeper (Riverkeeper) requested records from the U.S. Army Corps of Engineers (Corps) regarding Ambre Energy's proposed Morrow Pacific Project, a proposal to export 8.8 million tons of coal per year. The Morrow Pacific Project is described in the Corps' Public Notice NWP-2012-56. Ambre's proposal calls for transporting Powder River Basin coal via rail to the Port of Morrow, building a new dock to load coal onto barges, and transferring coal from barges to ocean-going vessels 219 miles downriver at Port Westward.

Riverkeeper submitted a FOIA request (enclosed) for information about the Corps' decision to prepare an Environmental Assessment (EA), instead of an Environmental Impact Statement (EIS), for the Morrow Pacific Project. The Corps assigned that request the identification number "FP-13-003287," and acknowledged receipt of Riverkeeper's FOIA request in a letter dated November 5, 2012.

Pursuant to 32 C.F.R. § 518.17(a), Riverkeeper hereby appeals the Corps' partial denial of FOIA request FP-13-003287 (hereinafter "Riverkeeper's FOIA request"). On March 22, 2013, the Corps sent a letter (enclosed) withholding or redacting 91 documents responsive to Riverkeeper's FOIA request on the basis of 5 U.S.C. § 552(b)(5) (hereinafter "Exemption 5"). Exemption 5 does not apply to many of the records that the Corps withheld. Moreover, the Corps' blanket assertion of Exemption 5 contradicts

recent executive branch directives regarding FOIA and government transparency. The specific bases for Riverkeeper's appeal are set forth below.

The Corps' broad-brush application of Exemption 5 violates the "presumption in favor of disclosure." *Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 74 Fed. Reg. 4,683 (Jan. 21, 2009). As a rule, agencies should disclose exempt records unless it is reasonably foreseeable that disclosure would harm an interest protected by an exemption. *Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 1–2 (Mar. 19, 2009) (available online at: <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>). "An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." *Id.* at 1. The Corps' partial denial of Riverkeeper's FOIA request recites the interests protected by Exemption 5, but does not explain why disclosing the requested information would harm those interests. Withholding records simply because those records fall within the ambit of an exemption is inappropriate in President Obama's "new era of open Government." *See* 74 Fed. Reg. 4,683.

In addition to improperly withholding records that may be technically exempt, the Corps illegally withheld records that are *not exempt* from FOIA disclosure. The Corps' FOIA denial stated that the 91 withheld or redacted documents were subject to Exemption 5 because of the "deliberative process," "attorney-client," and "attorney work product" privileges.<sup>1</sup> The deliberative process privilege requires three elements. First, the record must document a communication between or among agency employees. 5 U.S.C. § 552(b)(5). Second, that communication must be *deliberative*; "a direct part of the deliberative process" "that makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975). Third, the record must be *pre-decisional*; it must have been created while the agency was deliberating its decision. *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*). Many of the records withheld or redacted by the Corps do not qualify for the deliberative process privilege described above, or for the attorney-client or attorney work product privileges. Specifically, the Corps illegally withheld or redacted the following records or categories of records described below.

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<sup>1</sup> The Corps' FOIA denial did not explain which privilege(s) applied to each of the 91 withheld or redacted documents. The Corps' generic assertion of Exemption 5 prohibits Riverkeeper from crafting a more specific administrative appeal.

## **1. Communications Plans and Other Public-Relations Documents.**

The Corps illegally withheld draft and final communication plans and other documents regarding how the Corps intends to communicate with the media, stakeholders, and the public about the permitting process for the Morrow Pacific Project and the decision to prepare an EA. For example, the Corps released several emails referencing “comms plans” and other documents containing information about how the Corps would message its involvement with the Morrow Pacific Project. Most of those emails were partially redacted, and documents attached to or referenced in those emails, which are presumably responsive to Riverkeeper’s FOIA request, were rarely, if ever, disclosed.

Communication plans and similar documents do not qualify for the deliberative process privilege. First, they are not deliberative in nature because they are not a direct part of the deliberative process that informed the Corps’ substantive decisions about the Morrow Pacific Project. Second, such documents are not pre-decisional; the fact that the Corps was discussing how to *message* its decisions about the Morrow Pacific Project shows that the Corps had already made these substantive decisions. Finally, neither the attorney-client nor the attorney work product privileges apply to these public-relations documents. The Corps therefore must disclose draft and final communication plans and other similar documents regarding the Morrow Pacific Project.

## **2. Meeting Notes on Conversations between High-Level Corps and EPA Officials.**

The Corps illegally withheld draft and final meeting notes regarding communications between high-level officials in the Corps and the U.S. Environmental Protection Agency (EPA). Emails released by the Corps entitled “RE: Comment Letter on Port of Morrow Terminal” (April 10, 2012) and “FW: Comment Letter on Port of Morrow Terminal” (April 10, 2012) show that Dennis McLerran (Regional Administrator of EPA’s Region 10) and John Eisenhower (Commander and District Engineer for the Corps’ Portland District) planned a phone meeting to discuss the Morrow Pacific Project. Another email released by the Corps entitled “Coal call with EPA.docx\_Redacted” (April 24, 2012) indicates that both “final” and “marked up” versions of notes from that phone meeting between Corps and EPA officials exist. Notes from this phone meeting are not ‘deliberative’ because there is no indication that anything discussed at the meeting became “a *direct* part of the deliberative process” by which the Corps made decisions about the Morrow Pacific Project. *Cf. Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (emphasis added). Exemption 5 is not triggered simply because two agency

employees have a substantive discussion. Accordingly, Exemption 5 does not protect any version of the notes from this phone meeting.

### **3. EA / EIS Decision Memo**

The Corps illegally withheld a memo documenting the Corps' reasons for preparing an EA. Several emails released by the Corps—including those titled “Re: Draft memo & letter” (Sept. 8, 2012); “EA / EIS roll out” (Sept. 5, 2012), and; “RE: New Meeting: Regulatory Permitting Meeting” (Sept. 11, 2012)—reference this decision memo. Additionally, the email titled “EA / EIS roll out” indicates that the Corps sent the final version of this decisional memo to the proponent of the Morrow Pacific Project, Ambre Energy. This decisional memo, or at least the final draft thereof, is not ‘pre-decisional;’ it is the Corps’ final decision about whether, and why, to prepare an EA for the Morrow Pacific Project. The final draft of this memo is not part of the deliberations leading up to the Corps’ decision, it *is* the decision.

Moreover, if, the Corps sent this decisional memo to Ambre Energy, as the “EA / EIS roll out” email indicates, then the Corps has waived any privileges that may have existed. *See, e.g., U.S. v. Metropolitan St. Louis Sewer District*, 952 F.2d 1040, 1045 (8th Cir. 1992) (holding that “[v]oluntary disclosure ‘indicates[s] a diminished expectation of privacy,’ and therefore acts as a waiver”) (quoting *North Dakota v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978)). The Corps has also adopted this memo as part of the basis for its decision. *Cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). Finally, if the Corps indeed sent a copy of this decisional memo to Ambre Energy, then the memo is not an “inter-agency or intra-agency memorandum.” *See* 5 U.S.C. § 552(b)(5). For the reasons above, and because the attorney-client and attorney work product privileges do not apply, Exemption 5 does not allow the Corps to withhold the final draft of its EA / EIS decisional memo.

### **4. Letter to Amber Energy Regarding Preparation of an EA.**

The Corps illegally withheld a letter to the Morrow Pacific Project applicant, Ambre Energy, that explains the Corps’ decision to prepare an EA. Several emails released by the Corps—including those titled “Re: Draft memo & letter” (Sept. 8, 2012) and “EA / EIS roll out” (Sept. 5, 2012)—reference this letter to Ambre Energy. Though the Corps’ letter to Ambre Energy is responsive to Item 4 in Riverkeeper’s attached

FOIA request,<sup>2</sup> the Corps withheld this letter, presumably on the basis of Exemption 5. The Corps' letter to Ambre Energy is not an "inter-agency or intra-agency memorandum" within the meaning of 5 U.S.C. § 552(b)(5) because it is not a communication between agency personnel. Accordingly, and because the attorney-client and attorney work product privileges do not apply, Exemption 5 does not allow the Corps to withhold this letter, drafts of this letter, or any attachments thereto.

## **5. Failure to Disclose Reasonably Segregable Portions of Records Containing Exempt Information.**

Finally, and more generally, the Corps should have disclosed reasonably segregable portions of records containing exempt information instead of withholding those records entirely. 5 U.S.C. § 552(b) requires the Corps to provide "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt . . . ." *See also* 32 C.F.R. § 518.16(h) ("Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester . . . ."); *see also Mead Data Ctr. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (holding that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions").

The Corps' March 22<sup>nd</sup> letter responding to Riverkeeper's FOIA Request explained that the Corps "[w]ithheld ninety-one documents or portions of documents" pursuant to Exemption 5. The Corps' response included thirty redacted records that were presumably part of the total "[w]ithheld ninety-one documents or portions of documents," meaning that the Corps withheld sixty-one entire documents.

Because the Corps did not name these sixty-one documents or explain their contents, it is impossible for Riverkeeper to know whether it was appropriate for the Corps to withhold, rather than redact, each one. However, given the presumption in favor of redacting and releasing documents, and the probability that at least some of those documents contain reasonably segregable non-exempt information, Riverkeeper appeals the Corps' decision to withhold sixty-one entire documents.

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<sup>2</sup> The Corps' letter to Ambre Energy is also, and more specifically, responsive to Item 3 in Riverkeeper's attached FOIA request. On January 18, 2013, the Corps sent a letter (enclosed) and compact disc to Riverkeeper purporting to release all documents responsive to Item 3 of Riverkeeper's FOIA Request. The Corps' January 18<sup>th</sup> response to Item 3 withheld the responsive letter to Ambre Energy without stating that the letter (or any other responsive document) had been withheld or providing the reasons for doing so, in violation of 5 U.S.C. § 552(a)(6)(A)(i) and 32 C.F.R. § 518.16(i)(2). Riverkeeper hereby also appeals the Corps' (undisclosed) partial denial of Riverkeeper's FOIA request that occurred on January 18, 2013, respecting the Corps' letter to Ambre Energy and any other documents responsive to Item 3 that the Corps withheld, because those documents were improperly withheld and are not subject to Exemption 5.

## Conclusion

Riverkeeper reminds the Portland District that 32 C.F.R. § 518.17(a)(1) requires Acting District Counsel to forward all FOIA appeals to the Secretary of the Army. If the Corps does not respond to this appeal within 20 working days, Riverkeeper will deem the appeal denied and may file suit in federal district court to compel the Corps' compliance with the FOIA. *See* 32 C.F.R. § 518.17(d).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Miles Johnson', with a long horizontal flourish extending to the right.

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