



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

300 Westgate Center Drive  
Hadley, MA 01035-9589

August 27, 2021

VIA EMAIL: [Cassidy.lang@sierraclub.org](mailto:Cassidy.lang@sierraclub.org)

In Reply Refer To:  
FWS/Region 5/FOIA FWS-2020-00399

Cassidy Lang  
Sierra Club  
1650 38<sup>th</sup> Street, Suite 102W  
Boulder, Colorado 80301

Dear Cassidy Lang:

The Department of the Interior (Department), U.S. Fish and Wildlife Service (Service), Hadley, Massachusetts Freedom of Information Act (FOIA) office received your FOIA request dated December 17, 2019, and assigned it control number FWS-2020-00399. Please cite this number in any future communications with our office regarding your request. You requested the following:

1. *All documents or other records in the U.S. Fish and Wildlife Service's project file for the Mountain Valley Pipeline Project (FERC Docket No. CP16-10; Project #05E2VA00-2016-F-0880 and #05E2WV00-2015-F-0046)*
2. *All documents and records related to the USFWS's obligations under the Endangered Species Act, including but not limited to:*
  - a. *Documents and records related to the Biological Opinion and Incidental Take Statement issued on November 21, 2017, for the Mountain Valley Pipeline Project;*
  - b. *Documents and records related to the email and attached comments sent by Dr. Paul Angermeier to Cindy Schulz, Troy Andersen, and Sumalee Hoskin on October 23, 2018;*
  - c. *Documents and records related to the USFWS's April 12, 2019 letter to FERC regarding the Mountain Valley Pipeline Project, including but not limited to information/data received in response to that letter;*
  - d. *Documents and records related to USFWS's decision, on September 11, 2019, to accept FERC's request for reinitiation of consultation;*
  - e. *Documents and records related to the subsequent reinitiation of consultation, including but not limited to responses to USFWS's October 16, 2019 letter to FERC requesting additional data and information; to the November 27, 2019 technical meeting between USFWS, Mountain Valley Pipeline, LLC, and FERC; and to the decision to extend the re-consultation period by 60 days.*
3. *To the extent not captured above, this request includes all correspondence related to the Mountain Valley Pipeline Project.*

On February 14, 2020, Ms. Amanda Bossie contacted you via email to determine if you were willing to exclude sensitive species location information, conference call/WebEx dial-in information, links to ftp sites, Google

document links, and other hyperlinks or passwords from your FOIA request. On February 20, 2020, you replied that Sierra Club agreed to that information being withheld understanding that:

1. Records containing specific species location information will otherwise be released with only the specific location information redacted, unless the specific location information is not separable. For example, files that consist entirely of shapefile data containing specific species location information will be withheld in their entirety.
2. Relevant documents that are linked to/in other documents (e.g., Google documents or documents housed at ftp sites) will be released (subject to other applicable privileges) to the extent those documents were downloaded or are still available and in FWS files.

### **RESPONSE**

In accordance with the Department's regulations (43 CFR 2.12(b)), in order for a record to be considered subject to a FOIA request, it must be in the possession and control of the Department at the time it begins its search.

This letter is to notify you that a search was conducted in offices believed to be most likely to have records responsive to your request; this included the Service's Virginia Field Office, West Virginia Field Office, and the Northeast Regional Ecological Services Offices.

This is the Service's eleventh and final response to your request. We are withholding one record consisting of 1,105 pages in full as described below:

#### ***Exemption 5 - 43 C.F.R. §§ 2.23, .24***

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges. We are withholding 1,105 pages in full under Exemption 5 because it qualifies to be withheld both because it meets the Exemption 5 threshold of being inter-agency or intra-agency and under the following privilege:

#### ***Deliberative Process Privilege***

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege, such as: (1) assuring that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations; (2) protecting against premature disclosure of proposed policies; and (3) protecting against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process 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.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decision. The record being withheld is a 2017 draft Environmental Impact Statement prepared by the Federal Energy Regulatory Commission (FERC) containing numerous proposed revisions that are the result of frank and open discussions among employees of FERC and with other Federal agencies. The contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the

agency's deliberative process. It would discourage candid discussion within FERC and among the agencies, and thereby undermine their ability to perform mandated functions.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

Eleanor Mcvey, FOIA Coordinator, is responsible for this partial denial. Amanda Bossie in the Office of the Solicitor was consulted.

### **MEDIATION SERVICES**

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road - OGIS  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Web: <https://www.archives.gov/ogis>  
Telephone: 202-741-5770  
Fax: 202-741-5769  
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

Contact information for the Department's FOIA Public Liaison, who you may also seek dispute resolution services from, is available at <https://www.doi.gov/foia/foiacenters>.

### **APPEAL RIGHTS**

You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this final response. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

**Your appeal must be made in writing.** You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe this response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and this response. Failure to include with your appeal all correspondence between you and the Service will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

*DOI FOIA/Privacy Act Appeals Office Contact Information*

Department of the Interior  
Office of the Solicitor  
1849 C Street, N.W.  
MS-6556 MIB  
Washington, DC 20240

Attn: FOIA/Privacy Act Appeals Office

Telephone: (202) 208-5339  
Fax: (202) 208-6677  
Email: [FOIA.Appeals@sol.doi.gov](mailto:FOIA.Appeals@sol.doi.gov)

**CONCLUSION**

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. *See* [5 U.S.C. 552\(c\)](#). This response is limited to those records that are subject to the requirements of FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You were granted a full fee waiver, therefore there are no billable fees associated with your request.

If you have any questions about our response to your request, please email the Service's FOIA Officer, Cathy Willis, at [FWHQ\\_FOIA@fws.gov](mailto:FWHQ_FOIA@fws.gov).

Sincerely,

Eleanor McVey  
Regional FOIA Coordinator

cc: Amanda Bossie (Solicitor)  
Virginia Field Office (C. Schulz)