



June 27, 2013

U.S. Army Corps of Engineers  
Kansas City District  
ATTN: Office of Counsel, Room 665  
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**VIA FACSIMILE AND U.S. MAIL**

*Re: Freedom of Information Act Appeal – Enbridge Flanagan South Pipeline Pre-Construction Notifications (PCNs)*

To whom it may concern:

I am writing on behalf of the Sierra Club to appeal the United States Army Corps of Engineers' ("Corps") denial of the above-captioned Freedom of Information Act request.

On May 16, 2013, the Sierra Club submitted a request for all preliminary and final pre-construction notifications (PCNs) submitted by Enbridge for the Flanagan South Pipeline, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). In a letter dated June 20, 2013, the Corps informed the Sierra Club that the requested records are being withheld under the deliberative process privilege contained in Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

Exemption 5 allows an agency to withhold from public disclosure "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." 5 U.S.C. § 552(b)(5). Incorporated in Exemption 5 is the deliberative process privilege, which protects advice, recommendations, and opinions that are part of the deliberative, consultative, decision-making processes of government. *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–54 (1975). A "deliberative" document is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Most importantly, information submitted to an agency by outside parties does not qualify for the deliberative process privilege. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001).

The deliberative process privilege is not relevant to this request because the requested documents are not "inter-agency or intra-agency memorandums or letters." The PCNs did not originate within the agency—they are factual materials describing plans for the proposed

Flanagan South Pipeline Project, and were submitted by Enbridge, the project proponent. The documents are not deliberative records that reveal the agency's decisionmaking process.

In order to invoke the deliberative process privilege, agencies must show that the withheld documents are both predecisional and deliberative. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (C.A.D.C. 1980). The Corps' letter states, "[a]ll documentation prepared by the Corps and Enbridge until the Corps renders its final permit decision is considered to be deliberative and not releasable..." The Corps has incorrectly classified all predecisional documents as necessarily deliberative. While the requested documents are predecisional, they are not deliberative as they do not "reflect the give-and-take of the consultative process."

Further, disclosure of these records would not threaten the integrity of the Corps' deliberative process nor would it mislead the public or confuse the issues. As factual records created and submitted by Enbridge, the PCNs could not be misinterpreted as containing or suggesting reasons and rationales for the Corps' course of action.

We respectfully request that the Corps reverse its decision to withhold the PCNs for the Flanagan South Pipeline, and release these documents in response to the Sierra Club's request.

Sincerely,



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