



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Washington, D.C. 20240



In Reply Refer To:  
FWS/AES/055426

**SEP 13 2013**

The Honorable David Vitter  
Ranking Member  
Committee on Environment  
and Public Works  
United States Senate  
Washington, D.C. 20510-6175

Dear Senator Vitter:

Thank you for your letters of February 28 and June 26, 2013, also co-signed by several of your colleagues requesting that the U.S. Fish and Wildlife Service (Service) provide you with documents and answers to a series of questions contained in the May 24, 2012, letter from The Honorable James Inhofe and the Honorable Jeff Sessions. You further asked that we reconsider our decision regarding our response to the request for all documents exchanged between and among the Service, Wild Earth Guardians (WEG), and the Center for Biological Diversity (CBD) in the multidistrict litigation (MDL) In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. MDL Docket No. 2165), related to the court-ordered settlement agreements. We have undertaken such reconsideration after consulting with the United States Department of Justice, which represents the Service in this and related litigation.

The Service appreciates your interest in obtaining additional information about the litigation and resulting MDL settlement agreements, as well as your offer to safeguard any information obtained. However, as indicated in previous responses, the rules of the U.S. District Court for the District of Columbia governing the court's mediation program prohibit us from disclosing "any written or oral communication made in connection with or during any mediation session." See L. R. Civ. P. 84.9. This local rule was put into place pursuant to the Alternative Dispute Resolution Act of 1998 (ADR Act), which requires each district court to adopt local rules that "provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." 28 U.S.C. § 652(d).

The vast majority of documents exchanged between the Service, WEG, and CBD related to the settlement agreements were "made in connection with or during [a] mediation session." Therefore, we are prohibited from disclosing those documents. However, we are enclosing the 14 documents previously identified in our response of March 23, 2012, as containing communications with the plaintiffs relating to the litigation that were not "made in connection with or during any mediation session."

In addition, below please find our more detailed responses to the series of questions posed in the May 24, 2012, letter from Senators Inhofe and Sessions:

**a. Has your agency sought permission from the relevant district court to provide the documents that are responsive to our request and, if not, why?**

Response: We have not sought permission from the United States District Court for the District of Columbia. The parties engaged in court-ordered mediation with the understanding that their communications during this process would be kept confidential. The parties are still in the process of implementing the MDL settlement agreements, and will be engaged in that process through 2016. In addition, there is ongoing litigation challenging several aspects of the MDL settlement agreements. In these circumstances, the important policy interests served by the confidentiality of mediation communications are fully present, and confidentiality should be maintained.

These policy interests were articulated by Congress in the ADR Act. Indeed, one goal in enacting the ADR Act was to “provide the federal courts with the tools necessary to present quality alternatives to expensive federal litigation.” H. Rept. 105-487, at 5 (Apr. 1, 1998). One of those tools was the requirement to provide for the confidentiality of alternative dispute resolution processes. Upholding the court-ordered confidentiality of communications made in connection with mediation preserves the strength and vitality of the alternative dispute resolution process. If parties conclude that communications during mediation will not be kept confidential, they will likely either decline to enter alternative dispute resolution processes or curtail the information they communicate in such processes and thereby thwart their quality and effectiveness. Therefore, seeking permission from the court to now disclose those confidential communications could undermine the Service’s continued ability to make use of judicial alternative dispute resolution processes.

**b. Please provide a copy of the court order(s) establishing mediation in the litigation.**

Response: The court order is attached.

**c. Has your agency sought consent from the other litigants to provide the documents that are responsive to our request and, if not, why? If you have sought such consent, what response were you given by the other litigants?**

Response: We have not sought permission from the other litigants to provide the responsive documents for the same reasons that we described in response to question (a).

- d. When, if at all, did the government bring our document request to the attention of the district court judge or the Compliance Judge? If not, why not?**

Response: The government did not bring the document request to the attention of the district court judge for the reasons we described in response to question (a).

- e. Why did your agency conclude that no exceptions, such as those listed in Local Rule 84.9(c), would allow disclosures to members of Congress?**

Response: We reviewed the exceptions in Local Rule 84.9(c), and none of them is applicable to this situation. Exception (1) applies to disclosures necessary to further the mediation discussion, and disclosure of this information would not fall within that category. Exception (2) applies to written stipulations entered into by the parties as a result of the mediation. The settlement agreement itself is not confidential, and we have therefore disclosed that document; however, there are no other documents that would fall within that category. Exception (3) applies only to information obtained through discovery or other means outside of the mediation, and there was no discovery or exchange of information in this case other than for the procedural filings that are among the 14 documents that we have provided. Exception (4) applies only to information requested by the Compliance Judge regarding a possible violation of the court's rules, which is not at issue here. Exception (5) applies only to information shared with the court's mediation program to allow the staff of that program to oversee the quality of the program. Finally, exception (6) is limited to disclosing the types of cases that are going through mediation, and would not allow for disclosure of information that was actually communicated in connection with the mediation.

- f. When did any such "mediation session" begin and conclude, and how many responsive documents in your agency's possession were dated either before mediation began or after mediation concluded?**

Response: Broadly speaking, the mediation process began with the court's order of August 3, 2010, which referred the case to the District Court's mediation program, requested appointment of a mediator with expertise in environmental law, and ordered counsel and the parties, including persons with settlement authority, to attend mediation. The mediation process ultimately concluded with the entry of the second settlement agreement with CBD on July 12, 2011. During this mediation process, the parties engaged in discussions on numerous occasions, including three all-day in-person mediation sessions and dozens of telephone conferences and email exchanges. Two of the in-person meetings occurred at Service headquarters in Arlington, Virginia (on September 24, 2010, and December 13, 2010). Another in-person meeting was held at a Service facility in Denver, Colorado (on November 9, 2010). Pursuant to the court's March 8, 2011, order, the mediation closed on April 13, 2011, without resulting in a settlement agreement acceptable to all parties. However, with the continued involvement of the mediator, the parties continued their negotiations. These communications were made in connection with the mediation process and with the mediation sessions that had led to that point in the process, and thus the disclosure

of these mediation-related communications would be inconsistent with the local rule implementing the ADR Act confidentiality provision. To allow these negotiations to continue, the parties requested that the court stay the litigation for an additional 30 days, until May 20, 2011, and the court granted that request. During this 30-day period, the Service and WEG were able to come to terms on the proposed settlement agreement filed on May 10, 2011. However, the Service was not able to reach a settlement with CBD at that time. On May 17, 2011, during a status conference, the court reopened the mediation for an additional 30 days, until June 20, 2011, and ordered the parties to continue their mediation discussions and appear for a status conference at the end of the 30-day period. On June 17, 2011, the court entered an order granting a continuance of this status conference to allow the Service and CBD to continue their mediation discussions. The Service was subsequently able to reach an agreement acceptable to both parties. This second settlement agreement was filed July 12, 2011.

With respect to the number of responsive documents in our possession that were dated either before mediation began or after mediation concluded, 10 of the 14 responsive documents we have already provided in response to the request from Senators Inhofe and Sessions were dated either before mediation began or after mediation concluded. In developing this response to your letters, we did identify two additional documents that are responsive to the request for “communications or documents between the Agencies and the Plaintiffs related to the [MDL] litigation and resulting settlement agreements.” These include an additional draft of the joint case management plan filed by the parties before the court-ordered mediation and the e-mail conveying that draft, and they are essentially identical to two of the documents we already provided. Nevertheless, to ensure that our response is complete, we have attached those documents. As far as we are aware, we do not have in our possession any other responsive documents that were dated either before mediation began or after mediation concluded.

- g. To the extent your agency is asserting some sort of privilege, what precise privilege are you asserting and were any of the documents marked as privileged?**

Response: The local court rules implementing a federal statute prohibit the Service from disclosing information communicated in connection with the mediation sessions that enabled the parties in the MDL case to reach agreement. This is a legal prohibition, not a privilege. We are not asserting that this is a privilege, but rather it is a court-ordered prohibition that limits our ability to make information public.

- h. Your letter provided a small set of documents. What distinguished the documents you disclosed from those you did not disclose, in terms of your agency’s view as to their protection under the local rules?**

Response: The documents disclosed were limited to court filings and other procedural documents that were not created in connection with any mediation session.

Therefore, the prohibition against disclosing mediation communications does not apply.

- i. **Your letter attached a January 2012 email from a U.S. government attorney regarding your agency's agreement setting a litigation settlement payment of \$167,602 for WEG and \$128,158 for CBD. Please provide the legal grounds for those payments and the methodology used to establish the payment amounts.**

Response: The payments were for attorneys' fees incurred by the plaintiffs in the course of litigating and mediating the MDL case, and reflect that the settlement agreement resolved not only the claims at issue but several other pending and threatened cases. Under 16 U.S.C. § 1540(g)(4), in any lawsuit brought under 16 U.S.C. § 1540(g)(1), the court may award attorneys' fees "whenever the court determines such award is appropriate." That provision applied to the MDL, because it involved lawsuits brought under 16 U.S.C. § 1540(g)(1)(C) alleging a failure of the Secretary to perform a non-discretionary duty. Those fees were payable by the Judgment Fund under 31 U.S.C. § 1304(a). The Department of Justice played the lead role in determining the fee amount. Such negotiations are based on a review of plaintiffs' billing records and justifications for payment of attorneys' fees, as well as the application of relevant legal standards and case law to the circumstances of this particular case.

In addition, your letter of June 26, 2013, included a new request—in particular, for all records of communication between the Service and CBD pertaining to the April 2013 settlement agreement. We are undertaking a search for responsive documents and will provide the results of that search as soon as possible. However, it is important at the outset to clarify two points contained in your letter. First, in that April 2013 agreement, the Service committed only to make 12-month findings on whether the petitioned action is warranted, not to make proposed or final listing determinations. Second, the number of species covered by that agreement was seven, rather than ten.

If you have any questions please contact me personally, or have your staff contact the Service's Assistant Director for Ecological Services, Mr. Gary Frazer at (202)208-4646.

Sincerely,



DIRECTOR

Attachments