



APPEAL UNDER THE FREEDOM OF INFORMATION ACT

February 25, 2010

Director
Office of Hearings and Appeals
HG-1
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

RE: APPEAL of NREL (DOE) Response to October 5, 2009 FOIA Request – Communications regarding “Study of the Effects on Employment of Public Aid to Renewable Energy Sources” and “NREL Response to the Report *Study of the Effects on Employment of Public Aid to Renewable Energy Sources* from King Juan Carlos University (Spain)”

BY HAND DELIVERY

Dear Director of DOE Office of Hearings and Appeals,

I write to appeal in part the National Renewable Energy Laboratory's Initial Determination regarding my Freedom of Information Act (“FOIA”) Request styled by NREL as Golden Field Office (GO) Docket No. GO-09-060.

I.
JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552 (2010 West).¹ Pursuant to 10 C.F.R. § 1004.8, you have jurisdiction “When the Authorizing Official has denied a request for records in whole or in part,” provided certain procedural requirements are met. The DOE/NREL initial determination refused to release certain documents and portions of documents in its possession, thereby granting you jurisdiction over this appeal (Ex. 2 & 3). Further, all procedural rules have been complied with as this request is: (1) in writing, (2) properly addressed, (3) clearly identified as an “Appeal under the Freedom of Information Act” and includes a copy of the underlying requests and initial adverse determinations (Exs. 1-3), (4) sets forth grounds for reversal, and (5) was filed within 30 days of receipt of the initial adverse determination. *See Id.*

II.
PROCEEDINGS BELOW

This appeal involves one FOIA Request and NREL’s Initial Determination thereto, *FOIA Request GO-09-060*. On October 5, 2009, I sent, via certified mail, a FOIA request to NREL in both Washington, DC and Golden, CO, that sought:

copies of any and all record(s), correspondence, memoranda, analysis, email or other communications citing or otherwise relating to (1) “Study of the Effects on Employment of Public Aid to Renewable Energy Sources” (King Juan Carlos University, Spain)², and/or (2) “NREL Response to the Report *Study of the Effects on Employment of Public Aid to Renewable Energy Sources* from King Juan Carlos University (Spain)” [the latter authored by Eric Lantz and Suzanne Tegen], (3) for the period March 1, 2009 through September 30, 2009.

¹ Unless otherwise indicated all citations to the United States Code, Code of Federal Regulations, and Federal Registrar are to the 2010 West versions.

² Hereinafter “the Study.”

As numerous commenters including congressional offices have noted, NREL's enlistment to criticize research of foreign academics about the experience of a foreign country is unprecedented, and has drawn much interest.

We note that one of two co-authors of the above-cited NREL paper, which paper attests that "This report was prepared as an account of work sponsored by an agency of the United States government", is on record in an E&E News story announcing of the project, "*DOE requested the analysis be performed.*"

However, DOE Congressional Affairs is on record saying the following:

NREL initiated the report on their own as part of their on-going analytical role to assess emerging issues and monitor external studies and develop internal memos or external documents to address research that is at odds with DOE/EERE scientific understanding.

We therefore seek documents revealing the origins of the effort and clarifying the alternating, mutually exclusive claims of NREL saying *DoE told me to do it* and DoE telling Congress that *it was all NREL's idea*, fully aware of of DoE's extant protestations to congressional offices that the above-cited paper is of like kind with other NREL products (noting here that no paper DoE cites is comparable on any level³).

Further, DoE's implies in its response to congressional offices that one motivation for producing the paper was an apparently existing understanding of Spain's circumstances by the two non-economists tasked with writing this critique of an economic assessment, in explanation of the "response" to a paper these staff (or, alternately per the staff, someone at DoE) found to be "misleading". Nothing in the public record reveals such an understanding or familiarity by the two authors

³ DoE Congressional Affairs is on record offering the following examples of how the NREL paper is in fact consistent with past work: "For example, in recent years, NREL has developed materials countering misleading claims on ethanol or other technologies. These materials were not always published but were used to inform DOE/EERE positions and decisions. In this particular case, NREL felt compelled to publish due to the high outside interest in the Spanish jobs study.

This year, here are just two examples of studies NREL initiated on their own:

Recovery Act Impact on Renewable Project Financing: NREL and LBNL recognized that the ARRA legislation would open up a new possibility for RE project financiers and initiated this analysis to provide clarification and objective information on how to access the options:

Bolinger, M.; Wiser, R.; Cory, K.; James, T. (2009). PTC, ITC, or Cash Grant? An Analysis of the Choice Facing Renewable Power Projects in the United States. 21 pp.; NREL Report No. TP-6A2-45359; LBNL-1642E.

Wind land use requirements: Literature has used a 'standard' density of wind power in many estimates (from state level to global level) for calculating potential contributions of wind to electric power systems and to evaluate possible local, regional and global climate impacts. No study had been conducted to evaluate, in detail, the actual power density (MW/acre) of modern wind farms in the US. NREL conducted this study to provide concrete data and information to improve the knowledge base for wind-potential discussions and analysis.

Land-Use Requirements of Modern Wind Power Plants in the United States
<http://www.nrel.gov/docs/fy09osti/45834.pdf>

of NREL's paper with Spain's regulatory history and performance. As such, we also are interested in the selection of the authors in addition to the selection of the paper and the project.

A series of telephone voice messages and conversations followed with the FOIA officer at NREL's Golden field office, Ms. Michele Altieri, relating progress in the document production and review process, and difficulties NREL was experiencing in attempting to coordinate with DOE's Office of Energy Efficiency and Renewable Energy (EERE) to jointly produce documents including under a similar FOIA Request seeking the same information from EERE. That FOIA Request, to which DOE provided documents in response yesterday (February 24, 2010), is not at issue in this Appeal, though some responsive documents establish one of our arguments as described, *infra* (excerpted in limited pertinent part as Ex. 4).

In December 2009 NREL's FOIA officer ultimately informed CEI that she was abandoning her effort to coordinate with DOE EERE, and would produce NREL's responsive documents. After several more telephone voice messages and one conversation, on January 25, 2010, NREL provided the documents included in Exhibit (3, 663 pages).

In these documents NREL included redacted documents, including on occasion heavily redacted documents.

CEI objects to and Appeals NREL withholding numerous documents in part or whole, through redaction and omission.

III.
The Initial Determination Not To Release Numerous Withheld Documents Should Be Reversed

A Standards of Review: All Doubts Must be Resolved in Favor of Disclosure

The agency's Initial Determination concerning the above-cited, redacted e-mails concerning the NREL paper is premised on a misapplication of FOIA. Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, "general philosophy of full agency disclosure" that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents—as DOE/NREL has—the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an Exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. at 142 n. 3; *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d at 515.

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in my requests to DOE/NREL to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, "a democracy requires accountability, and accountability requires transparency," and "the

Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

The presidential directive also states that:

Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (Agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

The Presidential directive merely reflects DOE's longstanding position on information dissemination and access.⁴ DOE regulations similarly inform a conclusion that the information at issue should be released.⁵

IV.

DOE/NREL Has Not Made a Reasonable Search and Production of Records Responsive to Request # GO-09-060 and Hence Must Initiate a Comprehensive De Novo Search.

NREL's initial determination regarding Request # 09-060 states that all responsive documents were produced. This is demonstrably incorrect. Many of the documents produced establish the existence of additional responsive documents. Others

⁴ See, e.g., DOE O 241.1A Chg 1, Scientific and Technical Information Management (Oct 14, 2003) (establishing requirements and responsibilities for managing DOE's scientific and technical information (cancelling DOE O 241.1)); DOE G 241.1-1A, Guide to the Management of Scientific and Technical Information (Nov 23, 2001) ((providing nonmandatory guidelines for implementing the objective, requirements, and responsibilities of Department of Energy (DOE) O 241.1A, Scientific and Technical Information Management. Cancels DOE G 241.1-1).

⁵ 10 C.F.R. 1004.2(e)(3) reads in pertinent part: "The policies stated in this paragraph: ... (ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment . . ." The documents at issue inarguably "pertain to concerns about the environment " as "the environment" is the principal driving rationale for NREL, renewable energy sources, and other relevant matters.

strongly hint at the existence of additional responsive documents. Those indications that the agency has not made a complete production cast substantial doubt on the integrity and thoroughness of the agency's search.

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure"). To be sure, reasonableness does not imply a perfect search, but the search must be "adequate" on the "facts of this case." *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir. 1986) (per Bork, Scalia and MacKinnon, J.J.) (internal citations omitted). Reasonableness is not judged at the initiation of the search but is evaluated based upon the information before the agency when it make its final determination. *Campbell*, 164 F.3d at 28. Moreover, the fact that a search is made in good faith is not dispositive of reasonableness; the reasonableness determination is holistic. *See Krikorian v. Dep't of State*, 984 F.2d 461, 468 (D.C. Cir. 1993). Finally, agencies cannot structure their search techniques so as to deliberately overlook even a small and discrete set of data. *See Founding Church of Scientology of Washington, D.C. v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (holding agency cannot create a filing system which makes it likely that discrete classes of data will be overlooked).

The following evidence citing information contained in documents provided by NREL either conclusively establishes or strongly indicates the existence of additional responsive documents neither identified nor produced by NREL:

(A) **May 19 email** from Suzanne Tegen (NREL) to Elizabeth Salerno at the wind energy lobby American Wind Energy Association (AWEA). Subject: “RE: Spanish Job Study” **This email states that a draft will be sent to AWEA sometime the week of May 25. If this email was sent, DOE did not include it in the documents produced.** There is no followup information provided reminding Ms. Tegen of an outstanding request for the document to be sent.

(B) **May 19 email** from Elizabeth Salerno (AWEA) to Suzanne Tegen (NREL). Subject: “RE: Spanish jobs report” **This email references attachments. DOE did not produce those attachments.** The agency did not cite any exemption, nor is any exception applicable.

(C) **May 19 email** from Elizabeth Salerno (AWEA) to Suzanne Tegen (NREL). Subject: “RE: Spanish jobs report.” **DOE did not produce the email from Salerno sent at 2:33 PM.** The agency did not cite any exemption, nor is any exception applicable..

(D) **May 18 email** from Suzanne Tegen (NREL) to Elizabeth Salerno (AWEA) about a proposed conference call about the “Spanish jobs report.” **DOE did not produce any documents or notes from Tegen concerning this call.**

(E) **June 5 email** from David Kline (NREL) to Eric Lantz (NREL). Subject: “RE: Spanish response internal review” This email references an attachment; “DK&GM-Comments on Spanish Report_EL_ST_1.docx.” **DOE did not produce the attachment.** The agency did not cite any exemption, nor is any exception applicable..

(F) **June 9 email** from Suzanne Tegen (NREL) to Ted James (NREL). Subject: “Spanish Jobs Report.” This email states “We have already sent it [their paper which served as the subject matter focus of our FOIA Request] out for external review.” **DOE did not produce these referenced emails, nor did the agency produce the emails that had been sent by this date seeking external review comments, or any such external review comments.** The agency did not cite any exemption, nor is any exception applicable..

(G) **June 16 email from Suzanne Tegen (NREL)** to Elizabeth Salerno (AWEA) and Jessica Isaacs (AWEA). Subject: “Looking for comments on our response to the Spanish Jobs report.” This email asks if the Center for American Progress (“CAP”) reviewed the report. **DOE did not produce any response from Salerno on that question, nor did the agency produce any prompt or other follow-up indicating that NREL never received the expected response.** That CAP provided no response seems implausible in light of the heavy communications traffic we received between NREL and CAP.

(H) **July 29 email** from Suzanne Tegen (NREL) to David Kline (NREL). Subject: “RE: Response to Spanish jobs report.” Tegen states that Kathy [sic] Zoi, Assistant Secretary of Energy for EERE, asked for the report, **but NREL did not produce any**

documents from Zoi or her assistant initiating any such request. Given the specific nature of the report created as a result of this request from Ms. Zoi, and the likelihood that parameters for such a request were provided as opposed to a merely in general and in passing, it seems implausible that no such documents exist.

V.

NREL Improperly Claims Exemption 5's Exclusion For Inter and Intra-Agency Memoranda From FOIA's Broad Disclosure Requirement As Basis For Withholding Documents A. NREL's Initial Determination Not To Release Numerous Inappropriately Applies FOIA's Deliberative Process Exemption 5

A. NREL's Initial Determination Not To Release Numerous Documents Inappropriately Applies FOIA's Deliberative Process Exemption 5

Department of Justice Guidelines make clear that the only privilege that should apply in this case is the deliberative process privilege. As DOJ states, "The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as 'executive privilege'), the attorney work-product privilege, and the attorney-client privilege. First, however, Exemption 5's threshold requirement must be considered." U. S. Department of Justice, Freedom of Information Act Guide, May 2004, available at <http://www.justice.gov/oip/exemption5.htm>.

We are mindful of that which an Administrative Law Judge wrote in relevant part about the reach of the deliberative process privilege: "In order for a document to be covered by the deliberative process privilege, two prerequisites must be met. The document must be 'pre-decisional' or actually precede the adoption of an agency policy. Second, the document must be part of the deliberative process by which an agency policy decision is made. *Jordan v Dep't of Justice*, 591 F.2d 753, 773 (D.C. Cir. 1978). The

deliberative process privilege does not encompass documents that comprise the “working law” of an agency, i.e., material that explains or implements policies already adopted. *Taxation With Representation v. Internal Revenue Service*, 646 F.2d 666, 678 (D.C. Cir. 1981). Claims of deliberative process privilege, and claims made under Exemption 5 under the FOIA should be construed as “narrowly as consistent with efficient government operation.” *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (quoting the Senate report on the FOIA). “To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.” *Coastal States, supra*, at 866. USEPA vs. Borough of Naugatuck, Docket No. 2-I-97-1017, March 25, 1998, available at <http://www.epa.gov/oalj/orders/naugatuc.htm>

The documents sought do not qualify as attorney-client privileged materials. In fact, for reasons detailed *infra*, none of these cited factors support NREL’s application of Exemption 5. Instead all of the documents inform a conclusion that NREL’s claim of deliberative process exemption in the instant case is uniformly inapposite and misapplied.

B. NREL Failed To Establish That Any Documents Were Properly Withheld Pursuant To Exemption 5.

The agency bears the burden of demonstrating that the documents it has withheld are in fact predecisional and deliberative before it can invoke Exemption 5. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.3d 854, 868 (D.C. Cir. 1980). That requires the agency to identify “what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Id.* at 868; *see also Access Reports v.*

Dep't of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (noting that the agency met “its burden of identifying the decisionmaking process to which [the] memorandum contributed” – a study of how to achieve a particular legislative outcome).

In this case, the department has failed to describe the deliberative process or processes which the documents might be related to. Given that failure, it would be impossible for the agency to meet *Coastal States'* more demanding requirement of explaining the role the documents might play in such a process. The agency's sole discussion of its rationale for applying Exemption 5 to certain documents occurs in four paragraphs on pages 2-3 of its FOIA response. Those paragraphs provide a brief description of Exemption 5 and the legal requirements that must be met before the exemption applies. They do not contain a single sentence, however, explaining why Exemption 5's concerns apply to the withheld documents. The agency therefore has categorically failed to demonstrate the applicability of Exemption 5 to any of the documents it has withheld.

The documents withheld under Exemption 5 also must be released because to the extent they relate to a decision at all they are *post*decisional, not *pre*decisional; they do not involve the process of making or revising an agency decision, but rather to the defense of an existing decision, already made.

The DOJ FOIA manual succinctly states, “Exemption 5 ordinarily does not apply to *post*decisional documents.” As the Supreme Court has explained:

[T]he lower courts have uniformly drawn a distinction between *pre*decisional communications which are privileged, and communications made after the decision and designed to explain it, which are not. This distinction is supported not only by the lesser injury to the decision making process flowing from disclosure of *post*decisional communications, but also, in the case of those

communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. In contrast, the public is vitally concerned with the reasons which did supply the basis of an agency policy actually adopted. These reasons, if expressed within the agency, constitute the “working law” of the agency and have held by the lower court to be outside the protection of Exemption 5.

Sears, 421 U.S. at 151–52; *see also, In Re Sealed Case*, 121 F.2d 729, 737 (D.C. Cir. 1997) (“The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.”); *Judicial Watch, Inc. v. U.S. Dep’t of Health & Human Services*, 27 F.Supp.2d 240, 245 (D.D.C. 1998)

Simply put, as revealed in numerous budget and public pronouncements the Obama Administration, acting through DOE Secretary Steven Chu (“Chu”), has already made the relevant decision: the DOE will promote green jobs and the idea that green jobs will grow the economy, making up for jobs lost due to proposed environmental regulations. In this light, the NREL paper is nothing more than an explanation and defense of an existing policy and hence is not predecisional. Numerous emails in those provided by the Department of Energy in response to the aforementioned different FOIA Request state as much (Ex. 4).

Examples of DOE’s statements of policy are legion. Secretary Chu has the following statement on the DOE’s Recovery Act website: “Each of the ten initiatives will put Americans back to work and begin to transform the way we use energy. We will reduce our carbon emissions and create entire new industries based on America’s resources, America’s ingenuity, and America’s workers—and these will be jobs that can’t

be outsourced.” (Ex. 5). Similarly, when announcing the joint DOE-HUD “weatherization” of homes incentive Secretary Chu stated: “This partnership will help put Americans back to work while saving families hundreds of dollars on their energy bills . . .it reflects the Obama-Biden Administration’s strong commitment to moving swiftly to restore our economy and offer real help to hardworking families who are struggling to make ends meet.” (Ex.5)

These statements began issuing, officially, nearly one year and a half before the NREL paper at issue in our FOIA Request by more than eighteen months. Prior to that NREL paper ever was conceived or discussed by DOE or NREL (the first responsive email was dated in May 2009 and includes an email thread going back just to April 2009). Still prior to these initial discussions, President Obama released his FY 2010 budget in which he called for massive “green job” and other related renewable energy expenditures. Secretary Chu wholeheartedly adopted and endorsed the President’s initiative as agency policy:

If we our children, our grandchildren, are to prosper in the 21st century, we must decrease our dependence on oil, use energy in more efficient ways possible, and lower our carbon emission. Meeting these challenges will require both swift action in the near-term and sustained commitment for the long-term to build a new economy powered by clean, reliable, affordable and secure energy.

Chu 3/11/2009 FY 2010 Budget Testimony. (Ex. 5) *See also*, 3/12/2009 Chu Press Conference with Joe Biden (“We’re just at the beginning of a long and close collaboration. The recovery act will create or save more than 3.5 million jobs over the next two years and will make bold investments in our national priorities. For the Department of Energy, these investments mean the beginning of our transformation to a

clean energy economy. By revolutionizing how we use energy, we'll create new jobs, new industries and promote energy independence.”). (Ex.5)

Indeed, documents already released in this case demonstrate that the requested documents are simply an explanation and defense of existing DOE policy. For example, on April 7, 2009, Dr. James Walker sent Dennis Boyd, Tom Weis and Don Furman an e-mail enclosing a Roundtable Newsroom article in which the Spanish “green jobs” Study to which the NREL paper responded was explained as casting doubt on the DOE policy of green energy. In the course of forwarding the article he wrote, “ I do not know how much traction this group or study has but we should look at the study and anticipate others.” Similarly, on April 17, 2009, Dr. Avi Gopstein at DOE’s Department of Energy Efficiency and Renewable Energy, forwarded a detailed rebuttal of the study to a multitude of DOE “HQ” policy officials, as high-ranking as Deputy Assistant Secretary for Renewable Energy, writing, “While the report is still in draft form, domestic U.S. exposure through news and web outlets is increasing [3 hyperlinks inserted], and it is important that we proactively respond to the erroneous claims and methodology of the Spanish study.”

The withheld documents are postdecisional and must be released. Even if the documents are not “postdecisional,” however, they are not “deliberative” as the cases use that term. The documents withheld are nondeliberative because they do not “make[] recommendations or express opinions *on legal or policy matters.*” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). That is, they make no recommendations about or as part of the formulation of policy decisions. Instead they discuss how to *publicly dispute an academic paper* calling into question the economics of an existing policy and

the president's serial call to "think of what's happening in countries like Spain" as a way to support his decision to pursue similar policies.⁶

None of the purposes motivating the deliberative process privilege justify withholding any of the documents DOE failed to produce. The D.C. Circuit has emphasized that whether a document is deliberative should be examined "in light of the policies and goals that underlie" the privilege. *Wolfe v. HHS*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). The "ultimate questions posed by the deliberative process privilege" are "whether the materials 'bear on the formulation or exercise of agency policy-oriented judgment'" and "whether disclosure would tend to diminish candor within an agency." *The City of Virginia Beach v. Dep't of Commerce*, 995 F.2d 1247, 1254 (1993) (quoting *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992)).

The documents withheld raise neither concern. First, as implied by the department's failure to connect the withheld documents to any policymaking process, the documents do not bear on the formulation of any agency policy or judgment. The product of NREL's supposed deliberations was an economic analysis of the shortcomings of a certain economic study focused on debunking the economic conclusions reached in another study. That report does not bear on the formulation or exercise of any contemplated policy; indeed, the report makes no policy recommendations whatsoever.⁷

⁶ See, e.g.: http://change.gov/newsroom/entry/president-elect_obama_speaks_on_an_american_recovery_and_reinvestment_plan_/.

⁷The only part of the document that might even qualify as a recommendation is a blanket admonishment that "policy makers seriously evaluate the work presented to them; and even after careful scrutiny, place jobs estimates within the broader context of energy, the economy, the environment, and the future." Eric Lantz & Suzanne Tegen, *NREL Response to the Report Study of the Effects on Employment of Public Aid*

As a result, the inputs into that report that the department has withheld could not have made any bearing on any policy decisions. The documents are therefore outside of the purposes of Exemption 5's protection against disclosure. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975) (noting that the privilege protects recommendations that may potentially ripen into agency decisions).

The status of the withheld documents as pre-publication drafts and comments is not dispositive of the inquiry. Even drafts and comments must bear on some policy to fall within Exemption 5's protections. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) (*citing* *Coastal States*, 617 F.2d at 866)); *Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 37 (D.D.C. 2006); *Sears*, 421 U.S. at 150 (protecting draft-like documents that comprise "part of a process by which governmental *decisions and policies are formulated*" (emphasis added)). Because none of the drafts and comments contain "recommendations or policy judgments" in the manner required to invoke Exemption 5, as discussed, *supra*, Exemption 5 does not protect them. *Heartwood, Inc.*, 431 F. Supp. 2d at 37.

Second, because the withheld materials do not bear on policy matters but rather on academic deliberations about the most effective way to rebut an academic study -- further, while bringing in outside, non-governmental and non-contract, if highly interested parties (the wind energy lobby AWEA) to provide assistance on their deliberations, draft and response -- disclosure of drafts and comments to the final report could not discourage open and frank discussions of *policy matters within the agency*,

to Renewable Energy Sources *From King Juan Carlos University (Spain)*, at 5, available at <http://nrelpubs.nrel.gov/>.

protect against the disclosure of unripe *policies*, or confuse the public as to whether a discussed but discarded *policy* idea has been enacted. *See, e.g., Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (noting those policy-related rationales for the deliberative process privilege). The D.C. Circuit has emphasized that an agency wishing to protect the results of factual inquiries bears the burden of demonstrating that disclosure “would actually inhibit candor in the decision-making process.” *Army Times Publ'g Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993). The Department has not proffered an explanation as to how the drafts and comments withheld could inhibit candor within the agency. For that reason alone, Exemption 5 should not protect their disclosure. *See, e.g., Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). Indeed, in the context of academic deliberations—as opposed to policy deliberations—transparency will actually inure to—rather than detract from—the public benefit. *See Quarles v. Department of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (noting that “the prospect of disclosure is less likely to make an advisor omit or fudge raw facts”). Disclosure means that government agencies engaged in academic work are likely to publish better, more accurate studies rather than studies possibly tainted by their producers’ personal agendas.

Because NREL failed to identify even a generic deliberative process in which the documents withheld might play a role and what that role might be, CEI is entitled to complete production. Alternatively, CEI is entitled to complete production either because the documents are not predecisional or because they are not deliberative, which are threshold requirements that must be satisfied before an agency may withhold documents pursuant to Exemption 5.

Examples of documents that should not have been withheld in whole or in part under Exemption 5 include:

(A) May 15 email from David Kline (NREL) to Bill Babiuch (NREL). Subject: "FW: Very rough guidance for jobs estimates." The email has sections redacted.

(B) May 29 email from Suzanne Tegen (NREL) to David Kline (NREL) and others. Subject: "RE: draft of response to Spanish Jobs Report – internal draft only."

(C) June 2 email from NREL's Suzanne Tegen (NREL) to David Kline (NREL). Subject: "Questions on your comments."

(D) June 2 email from NREL's Suzanne Tegen (NREL) to Eric Lantz (NREL). Subject: "RE: draft of response to Spanish Jobs Report – internal draft only". This email references comments by David Kline (NREL) and Gail Mosey (NREL).

(E) The comments referenced in a June 9 email from Ted James (NREL) to Suzanne Tegen (NREL). Subject: "RE: Spanish Jobs Report."

(F) The comments referenced in a June 10 email from Avi Gopstein (DOE EERE) to Suzanne Tegen (NREL). Subject: "RE: Spanish Jobs Report".

(G) The attachments referenced in a June 18 email from Suzanne Tegen (NREL) to Eric Lantz (NREL). Subject: "Spanish Jobs".

(H) The attachment referenced in a June 29 email from David Kline (NREL) to Suzanne Tegen (NREL). Subject: "Spanish report critique."

(I) **The memorandum referenced in a August 24 email** from Eric Lantz (NREL) to Suzane Tegen (NREL) and others. Subject: “Spanish Jobs Memo FINAL draft”.

(J) **The draft report by Tegen and Lantz** dated May 22, 2009 is withheld, though it is not clear from the information in the responsive documents which email it belongs to as an attachment. We believe it likely is the June 3, 2009 email from Lantz to Newcomb and Kline, “Comments on Spanish Report_DKGMSTEL.docx”.

C. Documents Sent To And Produced In Part By Partisan and Financially Vested Non-Government Interests Pressing Points Of View Adverse To The Interests Of Other Parties Affected by DOE Decisions Are Not Inter or Intra-Agency Memoranda That Exemption 5 Protects From Disclosure.

Agency documents do not qualify as Inter or Intra-Agency memoranda subject to Exemption five if they were generated by or used in consultation with partisan, non-agency actors whose interests are adverse to other non-agency actors. That is the most narrow reading of the Supreme Court’s decision in *Department of the Interior v. Klamath Water Users Protection Ass’n*, 532 U.S. 1, 14 (2001), where the Court arguably limited its holding to removing communications between an agency and self-interested third-parties who may be advancing positions adverse to others subject to the agency’s regulatory decisions.⁸

⁸ While we recognize the existence of contrary lower court authority, we submit that Exemption 5 should not apply if the documents are sent to individuals outside of the government. The Supreme Court hinted at such a potential standard in *Klamath*, writing:

The Department seems to be saying that “intraagency” is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential. There is, however, no textual justification for draining the first condition of independent vitality, and once the intra-agency condition is applied.

In *Klamath*, the court expressed skepticism that communications between an agency and outside entities – particularly those advocating their own or their client’s interests – could constitute inter or intra agency communications protected by the exemption. *See id.* at 11-12. The court indicated that only communications with outside groups that act “enough like the agency’s own personnel” could “justify calling their communications ‘intra-agency.’” *Id.* at 14.

Noting the Court’s only tentative acceptance of protecting outside communications with disinterested outside groups, many courts have adopted broader readings of *Klamath* that emphasize that only communications with disinterested outside groups are protected under Exemption 5. For example, the in *Merit Energy Co. v. Dep’t of the Interior*, 180 F. Supp. 2d 1184 (D. Colo. 2001), the court held that communications between a Native American tribe and the agency did not meet the “inter or intra-agency” test because the tribe was advocating its own interests. And in *People for the Am. Way Found. v. Dep’t of Education*, 516 F. Supp. 2d 28, 37 (D.D.C. 2007), the court said that it does “not agree that *Klamath* stands for the proposition that communications must definitively meet [both the self-interested and adverse to another party tests] to fall outside of Exemption 5’s shield from disclosure.” *See also Stewart v. U.S. Dep’t of the Interior*, 554 F.3d 1236, 1245 (10th Cir. 2009) (question is whether outside consultant is “akin to an agency employee”).

Here, DOE withheld numerous communications between it and AWEA. AWEA defines its mission as “promot[ing] wind power growth through advocacy, communication, and education.” <http://www.awea.org/about/mission.html>. An

Klamath, 532 U.S. at 12.

organization like AWEA, which is invested in promoting non-carbon based energy sources, has a vested interest in pushing the DOE toward policies that disfavor carbon-based energy. It has an interest in pushing DOE to respond in particular ways to studies challenging policies promoting wind energy, as is precisely the instant case. The validity or invalidity of a study indicating that renewable energy policies actually destroy rather than create jobs is a flashpoint between these two sides competing for scarce DOE resources and mutually exclusive policy positions. And AWEA's views on the job-creating potential of a renewable energy policy are necessarily in competition with the views groups favoring carbon-based energy policies. Although DOE may consult with outside groups with particular viewpoints, even under the most restrictive reading of *Klamath* the documents that pass between the two do not qualify as inter or intra-agency memoranda excluded from FOIA's disclosure obligations under Exemption 5. See *Klamath*, 532 U.S. at 11-14.

The Department declined to produce numerous documents – including, but not limited to, drafts and comments and questions related to those drafts – sent to and received from outside groups like AWEA and the Center for American Progress, a partisan advocacy organization.⁹ If it is the administration position that either AWEA or CAP are akin to government agencies in this administration as grounds for justifying these withholdings then CEI requests this be stated directly. Otherwise, because such organizations are advocacy groups with interests adverse to other parties affected by DOE decisions, the Department may not withhold their production pursuant to

⁹ See, e.g., "The Center for American Progress is a think tank dedicated to improving the lives of Americans through ideas and action. We combine bold policy ideas with a modern communications platform to help shape the national debate, expose the hollowness of conservative governing philosophy, and challenge the media to cover the issues that truly matter." <http://www.americanprogress.org/aboutus>.

Exemption 5. At a minimum, even if other withheld documents are in fact subject to Exemption 5, the Department should immediately deliver to CEI documents withheld pursuant to Exemption 5 that passed between the agency, AWEA, and other similar advocacy groups.

Documents outside of Exemption 5 include, for example:

(i) One document withheld is a **May 29 email** from Suzanne Tegen (NREL) to David Kline (NREL) and others. Subject, “RE: draft response to Spanish Jobs Report – internal draft only” This email is included in a forwarded June 3 email from Eric Lantz (NREL) to James Newcomb (NREL), David Kline , and others. Subject “Net Jobs and Spanish Report Comments.” In the May 29 email, Tegen states that “we are working with AWEA (who is working with UCS¹⁰ and others) to put out a response to this report.” AWEA is the wind energy industry's lobby in Washington, DC.

(ii) **June 3 email** from Eric Lantz (NREL) to James Newcomb (NREL), David Kline (NREL), and others, Subject: “Net Jobs and Spanish Report Comments.” SIC, withholds the cited attachment citing Exception 5 although the email states the redacted attachment was sent to non-governmental, non-contractor private individuals, which outside parties also was produced the document in part according to documents produced by NREL. These include analysts and advocates at the wind energy lobby AWEA and the Political Economy Research Institute at University of Massachusetts-Amherst. In other words, because these comments were sent outside of DOE for review and comment by interested parties they cannot be considered inter-agency or intra-agency comments.

¹⁰ Union of Concerned Scientists, another advocacy group. See <http://www.ucsusa.org/about/>.

(iii) **June 9 email** from Suzanne Tegen (NREL) to Avi Gopstein (EERE), Elizabeth Salerno (AWEA), and others at AWEA. Subject: "NREL Response to Recent Spanish Jobs Report – Final draft for review." The draft report was withheld citing Exemption 5. This email was sent to people outside of the agency. Therefore Exception 5 cannot apply because it is not a inter-agency or intra-agency memorandum.

(iv) **June 17 email** from Jessica Isaacs (AWEA) to Suzanne Tegen (NREL) and Eric Lantz (NREL). Subject: "RE: Looking for comments on our response to the Spanish Jobs report." The comments from AWEA were withheld citing Exemption 5. These comments were from an non-governmental entity and are not properly withheld under Exemption 5.

(v) **August 13 email** from Eric Lantz to "greg@implan.com". Subject: "NREL response to recent Spanish Report on Jobs and RE". The attached document was withheld citing Exemption 5.

(vi) **August 19 email** from James Heintz (PERI) to Eric Lantz (DOE). Subject: "RE: comments on NREL response to Spanish report". The comments from Heintz were withheld citing Exemption 5.

(vii) Also, NREL provided three documents which purport to include draft versions of this "rebuttal" but did not provide the drafts. These communications were:


- (a) **June 30 email** from Eric Lantz to David Kline.
- (b) **July 15 email** from Suzanne Tegen to Doug Arent and David Cline.
- (c) **August 7 email** from Suzanne Tegen to Gian Porro.

As stated above, CEI objects to and appeals each of these and other similar withholdings in NREL's Initial Determination included with this Appeal.

**VII.
CONCLUSION**

The initial decision should be reversed in part on the grounds specified above.

Respectfully submitted,



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