

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5158

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United States Court of Appeals  
*for the*  
District of Columbia Circuit

PUBLIC EMPLOYEES FOR  
ENVIRONMENTAL RESPONSIBILITY

Appellant

v.

UNITED STATES SECTION, INTERNATIONAL  
BOUNDARY AND WATER COMMISSION,  
U.S. –MEXICO

Appellee

*Appeal from the United States District Court for the District  
of Columbia*

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**REPLY BRIEF OF APPELLANT,  
PUBLIC EMPLOYEES FOR  
ENVIRONMENTAL RESPONSIBILITY**

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**GLOSSARY**

Department of Homeland Security	DHS
Federal Bureau of Investigation	FBI
Federal Emergency Management Agency	FEMA
Freedom of Information Act	FOIA
Joint Appendix	JA
Mexican National Water Commission	CONAGUA
Public Employees for Environmental Responsibility	PEER
United States Section, International Boundary and Water Commission	USIBWC



## SUMMARY OF ARGUMENT

This case concerns a FOIA request for an Expert Report concerning the condition and safety of a major government dam, for maps delineating who would be impacted by flooding due to failure of two major dams, and for the government's plans for responding to dam failure emergencies. This information is of obvious concern to citizens, especially those living downstream from the dams. It is exactly the kind of information intended to be covered by FOIA so that citizens can know "what their government is up to" and whether it is effectively expending their tax dollars to protect their safety. Keeping this information secret prevents those potentially affected by dam failure from even knowing who they are, and from knowing the nature of the risks they face and whether their government is taking adequate measures to maintain its dams and to prepare for emergencies. Disclosure of these documents would serve the basic purpose of FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

No FOIA exemptions apply here, and nothing USIBWC has done in an attempt to throw a throw a cloak of national security over these documents can change that. Exemption 7 does not apply to the Emergency Action Plans and

inundation maps because USIBWC, whose function is to administer water treaties and joint water projects and to address boundary issues between the U.S. and Mexico, has no law enforcement functions. USIBWC's effort to claim a law enforcement function for itself and these documents by virtue of its membership on the Interagency Committee on Dam Safety fails because the Committee itself has no law enforcement functions. Extension of Exemption 7 to anything related to public safety would go far beyond its plain language and congressional intent.

USIBWC also has not shown that it performs any law enforcement functions as a member of the Dams Government Coordinating Council concerning critical infrastructure, and the statutory authority for law enforcement and terrorism prevention related to critical infrastructure lies with the Department of Homeland Security and the Department of Justice, not USIBWC.

Even if the USIBWC did perform law enforcement functions in relation to these committee memberships, the withheld documents are not related to any such functions, but concern the effects of dam failures and plans to respond to them, not terrorism prevention or law enforcement.

USIBWC does not meet the additional requirements of Exemption 7(E) because a risk of circumvention of the law alone cannot confer the exemption when the documents do not concern law enforcement investigations or prosecutions. USIBWC does not meet the requirements of Exemption 7(F)

because it has identified only an amorphous population subject to a public safety risk, not any individuals subject to risks stemming from law enforcement proceedings. Moreover, the Agency itself has downplayed the risk to life and safety which would result from the failure of its dams.

The Expert Report cannot be withheld under Exemption 5 because the participation of the Mexican National Water Commission prevents the Report from being inter- or intra-agency, and because the Report's factual information is not "deliberative." USIBWC has not supported its conclusory assertion that no factual information in the Expert Report can be segregated out.

## **ARGUMENT**

### **I. EXEMPTION 7 DOES NOT APPLY TO THE INUNDATION MAPS AND EMERGENCY ACTION PLANS.**

#### **A. USIBWC Cannot Meet the Threshold Requirement of Exemption 7.**

To meet the threshold requirement of Exemption 7, an agency must first show that it has law enforcement functions, and then that the particular withheld documents were compiled for a law enforcement purpose within the agency's jurisdiction. *See* Opening Br. at 17-18 (citing cases). While USIBWC acknowledges that it must meet this threshold requirement, USIBWC Br. at 34, it has failed to make either of these showings.

### **1. USIBWC Has Not Shown that it Has Any Law Enforcement Functions.**

Nothing in the information USIBWC has provided about its purposes and functions indicates *any* law enforcement function. USIBWC recites that it was established to administer a 1944 water distribution treaty between the U.S. and Mexico. *Id.* at 3. The Agency also cites to statutory provisions authorizing appropriations for its functions. *Id.* at 4. USIBWC received appropriations to conduct investigations relating to demarcating and preserving the boundaries between the United States and Mexico, and for investigations related to water resources and sanitation; for acquiring land for purposes of fulfilling treaties with Mexico, constructing new river channels and levees, and to preserve the Rio Grande and Colorado Rivers as the international boundary; and to address any damages to Mexico from works constructed in the United States. 22 U.S.C. § 277d-34. USIBWC also received appropriations for the construction and operation of international flood control works, 22 U.S.C. § 277d-41; to carry out treaty provisions and to operate and maintain stream gauging stations, 22 U.S.C. § 277d-3; to construct and operate a major storage dam on the Rio Grande jointly with Mexico, 22 U.S.C. § 277d-16; and for a joint sanitation project with Mexico. 22 U.S.C. § 277d-7.

Consistent with these activities, USIBWC identifies its mission as follows:

Our mission is to provide binational solutions to issues that arise during the application of United States-Mexico treaties regarding boundary demarcation, national ownership of waters, sanitation, water quality, and flood control in the border region.<sup>1</sup>

Because none of these purposes or functions is remotely related to law enforcement, USIBWC posits a complex web of relationships that supposedly confer on it the law enforcement functions necessary to invoke Exemption 7. The Agency states that it is a member of the Interagency Committee on Dam Safety, which in turn works with the Office of Infrastructure Protection of the Department of Homeland Security (DHS). USIBWC Br. at 4-5. DHS has been directed by statute and Presidential Directives to establish a National Infrastructure Protection Plan, and is the Sector-Specific Agency for the Dams Sector of that Plan. USIBWC serves on the Dams Government Coordinating Council for the Dams Sector. *Id.* at 4-5, 35-37. This, USIBWC claims, gives it a “national critical infrastructure protection mission,” and thereby satisfies the threshold for Exemption 7. *Id.* at 37.<sup>2</sup>

What exactly USIBWC claims to do that constitutes law enforcement as a result of its memberships on the Interagency Committee on Dam Safety and the

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<sup>1</sup> Available at <http://ibwc.gov/home.html>.

<sup>2</sup> USIBWC’s role on the Dams Government Coordinating Council was not raised before the district court. Documentation concerning this Council was introduced for the first time in the USIBWC Brief’s “Addendum.” Thus, it is questionable whether this argument should even be considered on appeal. *See Potter v. District of Columbia*, 558 F.3d 542, 547, 550 (D.C. Cir. 2009).

Dams Government Coordinating Council is not revealed, rendering the invocation of these memberships insufficient to support its claim of Exemption 7. *See Pub. Citizen, Inc. v. Office of Mgmt. and Budget*, 569 F.3d 434, 439 (D.C. Cir. 2009) (the agency bears the burden of showing that a claimed exemption applies); *Campbell v. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998) (summary judgment inappropriate if agency declarations fail to supply facts in sufficient detail to determine a law enforcement purpose underlying withheld documents); *Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 393 (S.D.N.Y. 2011) (fact that information “arguably falls under the broad topic of national security” not sufficient to uphold exemption 7).

What is clear is that regardless of USIBWC’s membership in these bodies, the statutory responsibility for detecting, identifying and assessing terrorist threats to critical infrastructure lies with DHS, 6 U.S.C. § 121(d), and the responsibility to investigate and prosecute terrorism related to critical infrastructure lies with the Department of Justice.<sup>3</sup>

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<sup>3</sup> The Homeland Security Presidential Directives concerning critical infrastructure give the Department of Justice, including the Federal Bureau of Investigation (FBI), the responsibility to “reduce domestic terrorist threats, and investigate and prosecute actual or attempted terrorist attacks on, sabotage of, or disruptions of critical infrastructure and key resources.” USIBWC Br. Addendum 5, (22)(b). *See also* Addendum 12 (The Department of Justice, including the FBI, “shall lead counterterrorism and counterintelligence investigations and related law enforcement activities *across the critical infrastructure sectors.*”) (emphasis added).

USIBWC identifies no statute conferring authority on it to engage in any law enforcement activities whatsoever. The Agency claims only that its statutory designation as a member of the Interagency Committee on Dam Safety confers law enforcement authority on it, because the Committee purportedly has “law enforcement responsibilities” by virtue of its role in protecting public safety. USIBWC Br. at 38. Even assuming that an agency could be found to have law enforcement functions by virtue of serving on a committee with law enforcement functions, in the absence of any identification of its own role in law enforcement, there is nothing to support a claim that the Interagency Committee on Dam Safety actually has law enforcement functions.

The Dam Safety Act which established the Committee contains nary a word about terrorism or law enforcement. Instead, it establishes a dam safety program administered by the Federal Emergency Management Agency (FEMA). This program is primarily directed at reducing hazards from dams through appropriate site selection, design, construction, operation, maintenance, and emergency preparedness – not law enforcement. 33 U.S.C. § 467f(c)(1) and (2). The duties of the Interagency Committee on Dam Safety established under the Act are solely to:

encourage the establishment and maintenance of effective Federal programs, policies, and guidelines intended to enhance dam safety for the protection of human life and property through coordination and information exchange among Federal agencies concerning implementation of the Federal Guidelines for Dam Safety.

33 U.S.C. § 467e(b).

The Federal Guidelines for Dam Safety, in turn, address: “Emergency Action Planning for Dam Owners,” “Hazard Potential Classification System for Dams,” “Earthquake Analyses and Design of Dams,” and “Selecting and Accommodating Inflow Design Floods for Dams.” JA-116. The section on Emergency Action Planning, the only one which could conceivably relate to law enforcement, pertains mainly to the preparation of the Emergency Action Plans that are at issue in this litigation. That section addresses nothing about crime or terrorism prevention or detection or law enforcement, but is directed at preparing for and responding to dam failures. JA116-153. When it speaks to “preparedness,” it references providing emergency flood operating instructions and arranging for equipment, labor and materials for use in emergency situations. JA-140. “Surveillance” is described as monitoring a dam for emergency conditions, as evidenced by changes in the headwater or tailwater or excessive water elevations. JA-141-42.

USIBWC’s implication is that anything impacting public safety -- like building and maintaining dams so that they are less likely to fail and responding to emergencies if they do—constitutes law enforcement. This would stretch that concept far beyond any plain meaning of the term and far beyond Congress’ intent in enacting the exemption. Congress primarily intended to serve the “legitimate



needs” of “law enforcement agencies . . . to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases.” *Robbins Tire & Rubber*, 437 U.S. at 224. *See also Jefferson v. Dep’t of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002)

(Exemption 7 threshold requires assessment of “whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding”) (citations and internal quotation marks omitted); *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982) (noting “Congress’ concern [in Exemption 7] that inadvertent disclosure of criminal investigations, information sources, or enforcement techniques might cause serious harm to the legitimate interests of law enforcement agencies” ).

Extending the exemption to anything related to public safety certainly cannot be squared with the Supreme Court’s direction that FOIA exemptions be “narrowly construed.” *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1262 (2011).

Moreover, FEMA, which administers the program under the Dam Safety Act, and from whom USIBWC seeks to gain derivative law enforcement status, has not claimed that its emergency response activities constitute law enforcement for purposes of Exemption 7. In *News-Press v. DHS*, 489 F.3d 1173 (11th Cir. 2007), FEMA disclosed information about disbursement of disaster assistance, redacting only names and addresses under Exemption 6. The Eleventh Circuit denied the exemption, stating:

In light of FEMA's awesome statutory responsibility to prepare the nation for, and respond to, all national incidents, including natural disasters and terrorist attacks, there is a powerful public interest in learning whether, and how well, it has met this responsibility.

*Id.* at 1178. In *Citizens for Responsibility & Ethics v. DHS*, 514 F. Supp. 2d 36 (D.D.C. 2007), FEMA released thousands of pages of records concerning its preparation for and response to Hurricane Katrina, and withheld material only under Exemption 5. FEMA claims Exemption 7 only when its activities are actually part of law enforcement directed at investigating or apprehending criminals or terrorists. *See New York Civ. Liberties Union v. DHS*, 771 F. Supp. 2d 289 (S.D.N.Y. 2011) (FEMA supported claim of Exemption 7(E) for documents regarding surveillance cameras seeking to detect terrorist activity placed by the New York City Police Department with funding from DHS).

In sum, neither the Dam Safety Act nor participation in the Interagency Committee on Dam Safety confers a law enforcement function on USIBWC.<sup>4</sup>

As to participation on the Dams Government Coordinating Council, if merely serving on a committee related to critical infrastructure protection could confer law enforcement status on an agency for purposes of FOIA Exemption 7, nearly every agency in the federal government would obtain such status. There are 16 critical infrastructure sectors covering most of the business and government

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<sup>4</sup> USIBWC also cites statutory provisions which define “critical infrastructure,” USIBWC Br. at 38, citing 42 U.S.C. § 5195(c) and 18 U.S.C. § 2339D, but which have no relationship whatsoever to USIBWC.

activity in this country: chemicals, commercial facilities, communications, critical manufacturing, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, health care and public health, information technology, nuclear reactors, transportation systems and water and wastewater systems. USIBWC Br. Addendum 18-19. Sector-Specific Agencies in addition to DHS include the Department of Agriculture, Health and Human Services, the Environmental Protection Agency, the Department of Energy, the Department of Treasury, the Department of Interior, and the Department of Defense. USIBWC Br. Addendum 4. Inclusion of additional agencies such as USIBWC which merely serve on committees established by these Sector-Specific Agencies would even further expand the coverage of Exemption 7, contrary to congressional intent for narrow and focused exemptions.

USIBWC's interpretation of FOIA would prevent public access to documents concerning a myriad of federal government functions intended to protect public health, safety and the environment, merely because the agencies involved serve on some body related to critical infrastructure protection. For example, the Environmental Protection Agency could withhold documents about its plans to protect drinking water from contamination, or about its responses to contamination incidents, merely because such incidents *could* be caused by terrorists (although they would far more commonly have other causes), and

because it is a Sector-Specific Agency for this area of critical infrastructure. The Department of Agriculture could do likewise concerning food inspections and contamination incidents and the Department of Health and Human Services could do so in relation to public health issues. This would severely undermine FOIA's basic purpose to implement "citizens' right to be informed about 'what their government is up to' [and to direct disclosure of] [o]fficial information that sheds light on an agency's performance of its statutory duties . . .". *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989); *see also, News-Press*, 489 F.3d at 1178 (noting importance of public access to information about how FEMA preforms its emergency response responsibilities).

**2. USIBWC Has Failed to Demonstrate that the Particular Withheld Documents Were Compiled for a Law Enforcement Purpose within its Jurisdiction.**

Even assuming that USIBWC demonstrated that it had law enforcement functions, the Agency would still have to show that the particular documents were compiled in connection with those functions. *If* USIBWC were an agency whose primary function was law enforcement, it could meet this requirement by showing a rational nexus between the documents and the "agencies' legislated functions of preventing risks to the national security and violations of the criminal laws and of apprehending those who do violate the laws." *Pratt*, 673 F.2d at 420-21.

However, since USIBWC is obviously *not* primarily a law enforcement agency, it

is subject to a more “exacting standard” to show a connection between the withheld documents and its claimed law enforcement functions. *Tax Analysts v. Internal Revenue Serv.*, 294 F.3d 71, 77 (D.C. Cir. 2002).

USIBWC’s citation to *Ctr. for Nat’l Security Studies v. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003), is inapposite, because that decision applied the more deferential “rational nexus” test after finding that the Department of Justice was an agency “specializing in law enforcement.” *Id.* at 926. Moreover, the Court found that the documents were related to a law enforcement investigation concerning the September 11, 2001 terrorist attacks, *id.* at 921, which was one of the Department’s chief law enforcement duties at that time. *Id.* at 926. There is nothing comparable here.

In any event, regardless of the standard applied, USIBWC has not and could not show that the inundation maps and Emergency Action Plans were compiled for law enforcement purposes. The Agency’s Declarations state that the inundation maps “identify and delineate areas that would be affected by floods in the event of a dam failure,” and were “created to assist emergency management officials . . . in the event of a dam failure or flood condition, and affect decisions on evacuation and emergency response.” JA-61, ¶22. According to FEMA’s Dam Safety Guidelines, the purpose of inundation maps is “to facilitate timely notification and evacuation of areas affected by a dam failure or flood condition.” JA-122.

The only apparent connection to law enforcement is the mention in an Agency Declaration of local sheriff's departments and the local offices of the FBI and Border Patrol as agencies the maps were intended to "assist." JA-61, ¶22. There is no explanation as to why or how those agencies would use the inundation maps, or that they would use them for a law enforcement purpose, as opposed to "facilitat[ing] timely notification and evacuation." JA-122.

Moreover, the inundation maps are obviously not concerned with law enforcement or prevention of terrorist or criminal acts – they merely delineate the areas that would be affected in the event of dam failure from any cause, and assist after-the-fact actions to notify and evacuate those in harm's way.

The Emergency Action Plans are not directed at preventing criminal or terrorist acts, but at monitoring dams in order to have advance warning of impending failures, and at notification and evacuation when failures occur. JA-114-153. The FEMA Guidelines present the following description:

An Emergency Action Plan (EAP) is a formal document that identifies potential emergency conditions at a dam and specifies preplanned actions to be followed to minimize property damage and loss of life. The EAP specifies actions the dam owner should take to moderate or alleviate the problems at the dam. It contains procedures and information to assist the dam owner in issuing early warning and notification messages to responsible downstream emergency management authorities of the emergency situation. It also contains inundation maps to show the emergency management authorities of [sic] the critical areas for action in case of an emergency.

JA-120.

The Emergency Action Plan contains six basic elements, none of which is related to law enforcement: 1) a notification flow chart which shows who is to be notified in the event of an emergency; 2) emergency detection and evaluation and classification of the situation to inform what actions are to be taken based on the urgency of the situation; 3) a determination of responsibilities under the Plan; 4) preparedness, to modify or alleviate the effects of a dam failure; 5) inundation maps to facilitate timely notification and evacuation; and 6) appendices to support and supplement the rest of the material in the Plan. JA-122. “Preparedness” actions are described to include providing emergency flood operating instructions and arranging for equipment, labor, and materials for use in emergency situations. JA-140.

The Agency’s Declarant claims that the Emergency Action Plans are meant to assist not only USIBWC, but the FBI, U.S. Border Patrol and U.S. Air Force, JA-62, without any explanation as to how or why these agencies use these Plans, or how their use is related to law enforcement. This bare claim that other agencies with law enforcement authority use the Plans in unspecified ways cannot confer a law enforcement purpose on these documents, which plainly do not concern law enforcement.

USIBWC’s attempt to make it appear that the Emergency Action Plans have a law enforcement purpose by taking out of context terms like “surveillance plans”

is equally unavailing. USIBWC Br. at 38. The meaning of “surveillance plans” in Emergency Action Plans is monitoring, either in person or remotely by instrumentation, the levels of the dam’s headwater and tailwater, and employing warning systems when those conditions pose danger. JA-141-43.

Yet, USIBWC claims that the inundation maps and Emergency Action Plans are subject to Exemption 7 because they are “tightly connected to and associated with the U.S. Section’s statutory responsibilities as part of the Interagency Committee on Dam Safety which itself has law enforcement responsibilities by virtue of its role in protecting public safety.” USIBWC Br. at 38. As shown above, the Interagency Committee on Dam Safety is not a law enforcement entity, and thus a connection with it cannot confer a law enforcement purpose on USIBWC or on these documents. USIBWC also claims, with absolutely no support in the record, that “[t]hese materials are the product of investigation of possible terrorist attacks,” USIBWC Br. at 38, and that one of their purposes is “protection against terrorist acts.” *Id.* at 39. Nothing in the Agency’s or FEMA’s descriptions of the content of these documents supports such a claim.

In sum, USIBWC has not shown either that it has any law enforcement functions, or, even assuming that it does, that the inundation maps and Emergency Action Plans were compiled in connection with any such law enforcement function.



**B. Exemption 7(E) Does Not Apply to the Emergency Action Plans.**

Exemption 7(E) does not apply to the Emergency Action Plans most basically because the threshold for Exemption 7 has not been met, and therefore none of its subparts can be considered. *Pratt*, 673 F.2d. at 410. In addition, the Plans fail to meet the basic criteria of Exemption 7(E) because they would not disclose techniques, procedures or guidelines for “law enforcement investigations or prosecutions.” USIBWC refers to the Emergency Action Plans as containing “guidelines for law enforcement,” USIBWC Br. at 40, a highly questionable contention in itself, but does not claim they contain any material concerning law enforcement “investigations or prosecutions.”

Instead, the Agency merely skips over this inconvenient fact and argues that disclosure would “risk circumvention of the law.” Whether or not that is the case, which is highly doubtful, *see* Opening Br. at 24-27, 29-30, does not matter if the documents do not disclose techniques, procedures or guidelines for “law enforcement investigations or prosecutions.”

As the Supreme Court made clear in *Milner*, a risk of circumvention of the law, standing alone, does not confer a FOIA exemption. There, the Court accepted the Navy’s representation that disclosure of data and maps concerning its stored explosives “would significantly risk undermining the Navy’s ability to safely and securely store military ordnance.” 131 S. Ct. at 1270. Yet, the Court found that

such considerations did not allow it to go beyond the plain language of the FOIA exemptions. *Id.* at 1271. The Court found that the claim of Exemption 2 in *Milner* was invalid, but that sensitive information could possibly be withheld under Exemption 1 for classified information (and that information can be classified after receipt of a FOIA request); under Exemption 3, which shields documents which other statutes exempt from disclosure; or under Exemption 7, *if* it is compiled for law enforcement purposes. *Id.* The Court noted that the “circumvention of the law” standard in Exemption 7(E) only applies to law enforcement materials. *Id.* at 1268.

The Court held that:

If these or other exemptions do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress. . . . All we hold today is that Congress has not enacted the FOIA exemption the Government desires. We leave to Congress, as is appropriate, the question whether it should do so.

*Id.* (record citation omitted).

This decision also refutes USIBWC’s claim that because there have purportedly been terrorist threats against the Agency’s dams, the Court should defer to the Agency’s determination that access to information about these facilities should be restricted. USIBWC Br. at 19. In accordance with *Milner*, such considerations, even assuming they are valid, cannot create a FOIA exemption where one has not been enacted by Congress. If there were truly a need

to shield these materials, USIBWC could seek to have them classified as secret, or seek relief from Congress. But it cannot manufacture a FOIA exemption that does not exist.

USIBWC cites Justice Alito's concurrence in *Milner*, which suggests that Exemption 7(F) might apply to the documents at issue there. However, Judge Alito recognized that this could only be the case *if* the threshold requirement of Exemption 7 were met, i.e., “[i]f, indeed the ESQD information was compiled as part of an effort to prevent crimes of terrorism and to maintain security . . .” *Id.* at 1273 (Alito, J., concurring). The documents here do not meet that requirement, or the additional requirement in Exemption 7(E) that the records would disclose techniques, procedures or guidelines for law enforcement investigations or prosecutions.

**C. Exemption 7(F) Does Not Apply to the Inundation Maps.**

Here again, the subpart of the Exemption cannot apply because the threshold for invoking Exemption 7 has not been met. In addition, USIBWC has not met the requirement of 7(F) for a showing that disclosure “could reasonably be expected to endanger the life or physical safety of any individual.”

USIBWC erects a straw man when it asks the Court to reject PEER's reading of the term “any individual” in Exemption 7(F) to require

identification of at least one actual person by name. USIBWC Br. at 48-49. PEER did not contend that individuals had to be named, and neither did the decision in *Am. Civil Liberties Union v. Dep't of Defense*, 543 F.3d 59 (2d Cir. 2008) which USIBWC urges this Court to reject. The Second Circuit acknowledged that “the government does not need to identify an individual by name,” but cautioned that this “does not imply that the government does not need to identify an individual *at all*, or that the government may identify an individual only as being a member of a vast population.” *Id.* at 81 (emphasis in original).

Rather than being concerned with naming individuals, the court was concerned with expanding the exemption beyond its intended bounds of actual law enforcement, i.e. to “protect government agents, witnesses, informants, and others who have participated in law enforcement investigations or proceedings,” *id.* at 80, into diffuse areas of national security. *Id.* at 72-74. Likewise here, no one, by name or otherwise, has been identified who would be endangered by the release of information from any law enforcement proceeding. Instead, the exemption is sought on the basis of possible harm in a broad general area of public safety.

Whether or not the identification of “any individual” is sufficient here, the question remains as to whether release of the inundation maps could “reasonably

be expected to endanger the life or physical safety” of anyone at all. Other agencies with responsibility for dams routinely release this type of information, including for large, “high hazard” dams like the Falcon and Amistad Dams. Rather than as endangering anyone, this information is viewed as crucial for downstream communities to prepare for emergencies. *See* Opening Br. at 24-27. USIBWC asserts that it need not follow the lead of these other agencies, USIBWC Br. at 19-20, but it does not claim that the release of these materials endangered anyone’s life or physical safety.

In addition, the Agency has downplayed the risk to life and physical safety even in the event of a complete failure of its dams. The Agency’s official spokesperson, Sally Spener, stated in a public news report that a complete failure of Falcon Dam, either by accident or act of terrorism, would be extremely unlikely, and if it did occur, the waters would be guided into off-river floodways that guide floodwaters toward the Gulf of Mexico. *See* Opening Br. at 23. While USIBWC protests that “news articles contain hearsay,” USIBWC Br. at 18, it nowhere claims that Ms. Spener was not authorized to speak for the Agency or that she was misquoted in the article.

Instead, USIBWC relies on a claim that dam failure could cause “mass casualties,” USIBWC. Br. at 40, citing JA-55, relying solely on a general statement about dams nation-wide in the National Infrastructure Protection Plan. While this

statement may be true in some situations, USIBWC has publicly denied that this extreme risk exists with regard to its dams. The statements in the Agency's Declarations cannot support summary judgment when they are "controverted by contrary record evidence." *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987).

Accordingly, the inundation maps do not meet the requirements of Exemption 7(F).

## **II. USIBWC HAS NOT SHOWN THAT THE EXPERT REPORT IS EITHER INTER- OR INTRA-AGENCY OR DELIBERATIVE.**

To qualify under Exemption 5, USIBWC must first establish that the Expert Report is an inter- or intra-agency communication, 5 U.S.C. § 552(b)(5), and then demonstrate that the Report is both "predecisional" and "deliberative." *Public Citizen*, 569 F.3d at 437.

### **A. The Expert Report is Not an Inter- or Intra-Agency Communication Because CONAUGUA Does Not Meet the Requirements of the Consultant Corollary.**

USIBWC failed to show that the Expert Report is an inter- or intra-agency communication, because the Mexican National Water Commission ("CONAGUA") was a contributor and does not fit within the requirements of Exemption 5's "consultant corollary." *See* Opening Br. at 33. The "consultant corollary" applies when an outside consultant to the agency effectively functions as

an agency employee. *Dep't of Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 10 (2001). In *Klamath*, the Court ruled that Exemption 5 did not encompass communications between the Department of Interior and several Indian Tribes. *Klamath*, at 16.

USIBWC's argument that CONAGUA is comparable to the Board of Governors ("Board") in *McKinley v. Bd. of Governors of Fed. Reserve*, 647 F.3d 331(D.C. Cir. 2011), but not to the Indian Tribes in *Klamath*, overlooks the obvious—both Mexico and Indian tribes are sovereign entities. CONAGUA is a representative of a foreign sovereign entity with interests even more distinct from those of the United States than the interests of Indian tribes, to whom the United States bears a trust responsibility. In contrast, the consultant corollary relationship in *McKinley* existed between the Board, "a central governmental supervisory authority" of the Federal Reserve System, and a Federal Reserve Bank, an "operating arm" of the Board. *McKinley*, at 333, 337.

CONAGUA cannot be considered a "consultant [that] does not represent an interest of its own," *McKinley*, at 337 (quoting *Klamath*, at 11), or as playing essentially the same role as an agency employee. *Klamath*, at 10. CONAGUA and USIBWC represent their two countries' distinct interests in the operation of Amistad Dam. Human safety and the availability of water and power from the Dam would be affected differently in the two countries by the various problems

discussed in the Expert Report. For example, the Second Fitten Declaration points out that a breach in Falcon or Amistad Dam would cause significant flooding on the Mexican side. JA-154, ¶4.

The *Klamath* decision stated that the exemption could not be sustained even if the communications at issue were made in support of the agency's trust relationship with the Tribes. *Klamath* at 15 n. 5. Likewise the Exemption cannot be supported, as USIBWC argues, because "the U.S. Section's function includes furthering harmonious interaction between the U.S. and Mexico on issues touching their common border." USIBWC Br. at 29. Any such interest, the Supreme Court declared, must be subordinated to the broad policy of the maximum possible disclosure mandated by FOIA. *Klamath*, at 16.

**B. The Expert Report is Not Deliberative Because it Does Not Contain Legal or Policy Recommendations or Opinions.**

A "deliberative" document "must . . . make[] recommendations or expresses opinions on legal or policy matters." *Public Citizen, Inc. v. Office of Mgmt. and Budget*, 598 F.3d 865, 876 (D.C. Cir. 2009) (citation and internal quotation marks omitted). "The privilege is centrally concerned with protecting the process by which *policy* is formulated." *Public Citizen*, 569 F.3d at 444 (emphasis in original, citation and internal quotation marks omitted). Here, the Agency's own submissions demonstrate that the Expert Report concerns technical factual matters,



not policy or legal matters. Even if the facts in the Report were ultimately used in a decision-making process regarding the Dam's safety rating or what actions to take to address structural weaknesses in the Dam, that does not mean that those decisions were *policy* decisions. Even if they were, factual material considered in making policy decisions is not covered by Exemption 5. *Vaughn v. Rosen*, 523 F.3d 1136, 1145 (D.C. Cir. 1975) (“the evaluative reports appear to be informational in nature. They provide the raw data upon which decisions can be made; they are not themselves a part of the decisional process”); *McGrady v. Mabus*, 635 F. Supp. 2d 6, 18 (D.D.C. 2009) (documents are not exempt when they “reveal only the data used during the process, not the substance of the deliberations”).

The *Vaughn* Index notes that the Report was titled “Joint Expert Panel Review of the Foundation, Embankment and Concrete Structure for Amistad Dam,” and states that it was written “to aid in identification of potential deficiencies, risk reduction measures and consequences of inaction on recommendations.” JA-76. The Fitten Declaration describes the Report as “assist[ing] the USIBWC in its evaluation of the greatest potential of risks in the Amistad Dam’s foundation and embankment” and as “provid[ing] . . . recommendations about the Dam's safety rating.” JA-59, ¶18. The Hernandez Declaration states that the Expert Report contains information on “potential failure

modes . . . current seepage information and specific seepage locations, geology and foundation conditions/problems, piezometric data, estimated loss of life figures, communication plan, specific embankment problems and locations, etc.”. JA-107, ¶3. USIBWC’s brief says the Expert Report was intended to help the Agency “consider possible risks to the structural integrity of Amistad Dam and its classification rating,” USIBWC Br. at 30, and contains “considerations about the types of metrics that the [U.S. Section] might consider key in its continued examination of deficiencies, strengths, adequacies and projections.” *Id.*, citing JA-60.

None of these topics concern *legal* or *policy* opinions or recommendations, but instead they provide technical information about the condition of the dam, risks and risk reduction measures and potential consequences of inaction. Surely, USIBWC cannot be claiming that information about structural integrity, geology, and seepage are policy opinions or recommendations. Even the recommendations the Expert Report makes, such as with respect to the Dam’s safety classification or what actions should be taken to address the structural weaknesses found, relate to decisions which are technical in nature and which should not be influenced by policy considerations. As shown above, even if they could be considered policy decisions, the facts feeding into those decisions are not “deliberative.” Even

though Amistad Dam is rated as “Orange – Urgent – Potentially Unsafe,”<sup>5</sup> and Falcon Dam is rated as “Yellow – High Priority – Conditionally Unsafe,”<sup>6</sup> USIBWC is attempting to withhold from the public the technical information which led to those ratings.<sup>7</sup>

In sum, there is absolutely nothing in the Agency’s descriptions of the contents of the Expert Report which could support USIBWC’s conclusory assertion that “it is apparent that the Joint Report contains deliberative material associated with the U.S. Section’s ongoing activities relating to protecting property along the Rio Grande from floods.” USIBWC Br. at 30. The Expert Report is not inter- or intra-agency and has not been shown to be deliberative in nature. It should be released.

### **III. THE AGENCY FAILED TO JUSTIFY ITS CLAIM THAT THE EXPERT REPORT IS NOT SEGREGABLE.**

Even assuming that some portions of the Expert Report are deliberative under Exemption 5, USIBWC did not meet its burden to provide a “detailed justification,” and not just “conclusory statements,” in support of its claim of non-segregability. The Agency’s showing must include “the reasons behind [its]

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<sup>5</sup> Available at [http://www.ibwc.gov/Mission\\_Operations/SoD\\_Amistad.html](http://www.ibwc.gov/Mission_Operations/SoD_Amistad.html).

<sup>6</sup> Available at [http://www.ibwc.gov/Mission\\_Operations/SoD\\_Falcon.html](http://www.ibwc.gov/Mission_Operations/SoD_Falcon.html).

<sup>7</sup> These ratings are the second and third highest out of a five tier color-coded system that goes from Red – Urgent and Compelling (Unsafe) to Green – Normal (Safe). Available at [http://www.ibwc.gov/Mission\\_Operations/SoD.html](http://www.ibwc.gov/Mission_Operations/SoD.html).

conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.” *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). Segregability is such a fundamental aspect of FOIA that this Court informs the district courts that they have "an affirmative duty" to consider segregability "sua sponte." *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007).

USIBCW has admitted that the Expert Report contains an “assemblage of facts,” USIBWC Br. at 32, which are not exempt from disclosure. Yet it has not explained, except in the most conclusory terms, why *none* of these facts can be segregated out from the purportedly deliberative portions of the Expert Report.

As described in Section II.B, above, all of the descriptions of the content of the Expert Report that the Agency has provided lead to the conclusion that the Report is predominantly, if not exclusively, factual. It is hard to even imagine, how, for example, piezometric data, seepage information, geology, or information concerning potential risks to the dam’s foundation could be “inextricably intertwined” with non-factual deliberative material.

Yet, the Agency’s Declarations contain only a conclusory claim that “any non-exempt portions [are] inextricably intertwined with exempt portions,” JA-62, ¶24, and the Agency’s brief adds no relevant information supporting this claim. Instead, USIBCW attempts to circumvent the issue, first by relying on a “presumption” of compliance with the segregability requirement. USIBWC Br. at

21-22, citing *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) and *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013). However, these decisions do not override FOIA's statutory direction that "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). Nor do these cases overrule cases such as *Mead Data* which set out the standards for determining whether non-segregation can be upheld. Instead, they direct that in response to an agency's claims regarding segregation, "a requester need only 'produce evidence that would warrant a belief by a reasonable person' . . ." *Sussman*, 494 F.3d at 1117, citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Then, the burden of proof returns to the agency. *Sussman* at 1117.

Here, any requirement to produce evidence to overcome a presumption of compliance is met by the evidence outlined above that the Expert Report is largely, if not completely, factual, such that any reasonable person could easily believe that there must be segregable portions. Thus, the burden of proof returns to USBIWC.

Second, USIBWC claims that it somehow met the segregability requirement for the Expert Report by disclosing other documents related to the Report but not subject to this appeal. USIBWC Br. at 32-3. Finally, USIBWC accuses PEER of providing a mere "*thin speculation* that the records might have additional portions that could be released without amounting to gibberish. . ." *Id.* at 22 (emphasis added). However, as the record supports a conclusion that most if not all of the

Expert Report is factual, this is certainly not a case where only isolated words or phrases could be released. The USIBCW's tactics are not supported by the law and raise red flags as to USIBCW's willingness to comply with FOIA's segregability requirements.

USIBCWC cites *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) and *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) for the proposition that not all factual material need be released. USIBCWC Br. at 32. However, this rule only applies when the factual material would expose the deliberative process. *Wolfe*, 839 F.2d at 774; *Nat'l Wildlife Fed'n*, 861 F.2d at 1119. USIBCWC has not shown that disclosing factual material in the Expert Report would expose a deliberative process. USIBCWC proffers only speculative assertions such as that the assemblage of facts in the Report "*appears* itself to have been a product of discretion and judgment," USIBCWC Br. at 32 (emphasis added), and that the Expert Report contains a "distillation" and "screening" of existing technical facts about the Amistad Dam. *Id.* at 33. The latter claim is supported only by the fact that the Dam was constructed in 1969. *Id.* The fact that there may be a long history of technical facts about Amistad Dam certainly does not mean that a new technical report about the Dam selected facts in a manner which revealed a deliberative process.

In sum, USIBWC has not adequately justified its failure to segregate and disclose *any* factual information from the Expert Report.

### **CONCLUSION**

For the foregoing reasons, PEER requests that this Court reverse the decision of the District Court and order the release of the documents which are the subject of this appeal.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief contains 6,996 words based upon the information calculated by Microsoft Word 2010, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). Therefore, it complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Circuit Rule 32 of the United States Court of Appeals for the District of Columbia Circuit.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2010, 14 point Times New Roman font.

Dated this 25th day of April 2013.

/s/ Paula Dinerstein

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Reply Brief of Appellant, Public Employees for Environmental Responsibility was served upon the following through the Court's electronic filing system on April 25, 2013. In addition, two print copies will be mailed to the party listed below by priority mail on the date that the paper copies are filed with the court.

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