

The following list contains the entire submission submitted April 24, 2020 09:40:02am ET, and is formatted for ease of viewing and printing.

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Request

Request ID	122996
Confirmation ID	122471

Please find attached a full FOIA request detailing the records I am requesting. Under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center (“SELC”) requests access to documents created, received, or reviewed by the United States Fish and Wildlife Service (“FWS”) related to the 2019 U.S. Department of Interior Solicitor’s Opinion reversing a long-standing interpretation of the Coastal Barrier Resources Act (“CBRA”), 16 U.S.C. § 3501, et seq, and the Wilmington Beach and Carolina Beach Coastal Storm Risk Management (“CSRSM”) Projects currently under consideration by the U.S. Army Corps of Engineers (“the Corps”) and for which the FWS recently conducted Interagency CBRA Consultation, including but not limited to copies (electronic copies, if possible) of the following: 1. Any documents related to a 2019 U.S. Department of Interior Solicitor’s Opinion announcing the reversal of the 1994 legal memorandum interpreting section 6(a)(6)(G) of CBRA and explaining why the 1994 legal memorandum was flawed, including but not limited to the 2019 opinion itself; 2. Any documents related to environmental review of the CSRSM Projects pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, et seq., including but not limited to draft and final environmental reviews, Record(s) of Decision, and Finding(s) of No Significant Impact; 3. Any documents related to consultations or other analyses conducted pursuant to the Endangered Species Act, 16 U.S.C. 1531, et seq., related to the CSRSM projects, including but not limited to biological opinions; and 4. Any documents related to the Interagency Consultation between the Corps and FWS related to the CSRSM Projects, including but not limited to consultation request(s) by the Corps, addenda to consultation request(s), and the FWS’ response to the Corps’ request. For the purposes of this request, the term “documents” includes all written, printed, recorded or electronic: materials, communications, correspondence, emails, memoranda, notations, copies, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages and mail in the possession or control of FWS or its agents. Fee Waiver Request SELC is requesting copies without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester. The public interest standard of the fee waiver provision of the FOIA should be “liberally construed” in favor of waivers. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984). The goal of the statute is to avoid the “roadblocks and technicalities which have been used by various Federal agencies to deny waivers...” *Pederson*, 847 F. Supp. at 855. In determining whether the first prong of the public interest test is met, four factors are considered. First, the records must “concern the operations or activities of the Federal government.” 43 C.F.R. § 2.48(a)(1). The requested records concern a change to long-standing interpretation of federal law and how this change in interpretation will impact the CSRSM Projects. The subject of the requested records clearly and directly concerns operations or activities of the federal government. Second, the information contained in the records must be “likely to contribute to public understanding of those operations or activities,” which is judged by whether the records will be “meaningfully informative,” “will contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and “would confirm or clarify data that has been released previously.” *Id.* at § 2.48(a)(2)(i);(iii);(vi). Other factors are “the logical connection between the content of the records and the operations or activities,” and “[h]ow the public’s understanding of the subject in question will be enhanced to a significant extent by the disclosure.” *Id.* at § 2.48(a)(2)(ii);(vii). These records are meaningfully informative of government

Supporting documentation

Additional Information	2020-04-24 FOIA to FWS Wrightsville Beach Carolina Beach CSRM projects.pdf
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Fees

Request category ID other

Fee waiver yes

SELC is requesting copies without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester. The public interest standard of the fee waiver provision of the FOIA should be “liberally construed” in favor of waivers. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984). The goal of the statute is to avoid the “roadblocks and technicalities which have been used by various Federal agencies to deny waivers...” *Pederson*, 847 F. Supp. at 855. In determining whether the first prong of the public interest test is met, four factors are considered. First, the records must “concern the operations or activities of the Federal government.” 43 C.F.R. § 2.48(a)(1). The requested records concern a change to long-standing interpretation of federal law and how this change in interpretation will impact the CSRM Projects. The subject of the requested records clearly and directly concerns operations or activities of the federal government. Second, the information contained in the records must be “likely to contribute to public understanding of those operations or activities,” which is judged by whether the records will be “meaningfully informative,” “will contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and “would confirm or clarify data that has been released previously.” *Id.* at § 2.48(a)(2)(i);(iii);(vi). Other factors are “the logical connection between the content of the records and the operations or activities,” and “[h]ow the public’s understanding of the subject in question will be enhanced to a significant extent by the disclosure.” *Id.* at § 2.48(a)(2)(ii);(vii). These records are meaningfully informative of government operations. The requested records are not already in the public domain, and contain information referenced in letters to congressional representatives and other documents upon which the federal government is basing its reasoning to reverse a long-standing interpretation and how the change in interpretation impacts the CSRM Projects. These documents would allow the public to better understand the reasoning of FWS officials, so that their comments can be better directed and informed. Additionally, the requestor must explain how their “identity, vocation, qualifications, and expertise” in relation to the requested information will allow them “to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject,” as well as their “ability and intent to disseminate” that information to that audience. *Id.* § 2.48(a)(2)(iv)-(v). SELC is a 501(c)(3) non-profit organization with over thirty years of experience disseminating public information regarding federal regulations and actions related to the environment. SELC maintains a website that includes both general and topic-specific information regarding the matters with which SELC is involved, including matters related to protection of coastal resources. Lawyers at SELC are interviewed by or otherwise provide information to the media to explain their work related to coastal protection and its significance. SELC’s website contains documents generated by SELC for the specific purpose of educating the public on particular issues. SELC also assists the public in locating information relating to particular topics by collecting and posting relevant information, documents, and links to other websites. The Corps’ proposal to mine sand from a site currently protected under CBRA is a subject of great public interest in New Hanover County, North Carolina and more generally. A broad audience is interested in the subject of the policy reversal and its impact on specific projects in North Carolina, and SELC is well-positioned to effectively convey this information to the public. The second consideration in whether a fee waiver is in the public interest is whether the request is primarily in the commercial interest of the requester. 43 C.F.R. § 2.48(b). As noted above, SELC is a 501(c)(3) non-profit organization dedicated to protecting the environment of the Southeast. It does not have

Explanation

Expedited processing

Expedited Processing

no

Additional information

are_you_seeking_these_records_from_a_particular_park_refuge_site

We are seeking any records in USFWS's possession related to this request. I expect many records related to this request will be from the Raleigh ES Field Office.

are_you_submitting_this_request_on_behalf_of_another_party_

No.

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450

601 WEST ROSEMARY STREET, SUITE 220
CHAPEL HILL, NC 27516-2356

Facsimile 919-929-9421

April 24, 2020

Via Web [<https://www.foia.gov>] and Email

U.S. Fish and Wildlife Service
FOIA Office
5275 Leesburg Pike MS:IRTM
Falls Church, VA 22041
Foiar4@fws.gov

Re: FOIA Request – Wilmington Beach and Carolina Beach Coastal Storm Risk Management Projects, New Hanover County, NC

Dear FOIA Officer:

Under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center (“SELC”) requests access to documents created, received, or reviewed by the United States Fish and Wildlife Service (“FWS”) related to the 2019 U.S. Department of Interior Solicitor’s Opinion reversing a long-standing interpretation of the Coastal Barrier Resources Act (“CBRA”), 16 U.S.C. § 3501, *et seq.*, and the Wilmington Beach and Carolina Beach Coastal Storm Risk Management (“CSRM”) Projects currently under consideration by the U.S. Army Corps of Engineers (“the Corps”) and for which the FWS recently conducted Interagency CBRA Consultation,¹ including but not limited to copies (electronic copies, if possible) of the following:

1. Any documents related to a 2019 U.S. Department of Interior Solicitor’s Opinion² announcing the reversal of the 1994 legal memorandum interpreting section 6(a)(6)(G) of CBRA and explaining why the 1994 legal memorandum was flawed, including but not limited to the 2019 opinion itself;
2. Any documents related to environmental review of the CSRM Projects pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, *et seq.*, including but not limited to draft and final environmental reviews, Record(s) of Decision, and Finding(s) of No Significant Impact;
3. Any documents related to consultations or other analyses conducted pursuant to the Endangered Species Act, 16 U.S.C. 1531, *et seq.*, related to the CSRM projects, including but not limited to biological opinions; and
4. Any documents related to the Interagency Consultation between the Corps and FWS related to the CSRM Projects, including but not limited to consultation request(s) by the Corps, addenda to consultation request(s), and the FWS’ response to the Corps’ request.

¹ See Letter from Pete Benjamin, FWS – Raleigh ES Field Office, to Christine Brayman, U.S. Army Corps of Engineers, March 10, 2020.

² See Letter from Secretary David Berhardt, U.S. Dep’t of Interior, to U.S. Representative Jeff Van Drew, et al., Nov. 4, 2019 (announcing reversal of legal interpretation).

For the purposes of this request, the term “documents” includes all written, printed, recorded or electronic: materials, communications, correspondence, emails, memoranda, notations, copies, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages and mail in the possession or control of FWS or its agents.

Fee Waiver Request

SELC is requesting copies without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester. The public interest standard of the fee waiver provision of the FOIA should be “liberally construed” in favor of waivers. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984). The goal of the statute is to avoid the “roadblocks and technicalities which have been used by various Federal agencies to deny waivers...” *Pederson*, 847 F. Supp. at 855.

In determining whether the first prong of the public interest test is met, four factors are considered. First, the records must “concern the operations or activities of the Federal government.” 43 C.F.R. § 2.48(a)(1). The requested records concern a change to long-standing interpretation of federal law and how this change in interpretation will impact the CSRM Projects. The subject of the requested records clearly and directly concerns operations or activities of the federal government.

Second, the information contained in the records must be “likely to contribute to public understanding of those operations or activities,” which is judged by whether the records will be “meaningfully informative,” “will contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and “would confirm or clarify data that has been released previously.” *Id.* at § 2.48(a)(2)(i);(iii);(vi). Other factors are “the logical connection between the content of the records and the operations or activities,” and “[h]ow the public’s understanding of the subject in question will be enhanced to a significant extent by the disclosure.” *Id.* at § 2.48(a)(2)(ii);(vii). These records are meaningfully informative of government operations. The requested records are not already in the public domain, and contain information referenced in letters to congressional representatives and other documents upon which the federal government is basing its reasoning to reverse a long-standing interpretation and how the change in interpretation impacts the CSRM Projects. These documents would allow the public to better understand the reasoning of FWS officials, so that their comments can be better directed and informed.

Additionally, the requestor must explain how their “identity, vocation, qualifications, and expertise” in relation to the requested information will allow them “to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject,” as well as their “ability and intent to disseminate” that information to

that audience. *Id.* § 2.48(a)(2)(iv)-(v). SELC is a 501(c)(3) non-profit organization with over thirty years of experience disseminating public information regarding federal regulations and actions related to the environment. SELC maintains a website that includes both general and topic-specific information regarding the matters with which SELC is involved, including matters related to protection of coastal resources.³ Lawyers at SELC are interviewed by or otherwise provide information to the media to explain their work related to coastal protection and its significance.⁴ SELC's website contains documents generated by SELC for the specific purpose of educating the public on particular issues. SELC also assists the public in locating information relating to particular topics by collecting and posting relevant information, documents, and links to other websites.⁵ The Corps' proposal to mine sand from a site currently protected under CBRA is a subject of great public interest in New Hanover County, North Carolina and more generally.⁶ A broad audience is interested in the subject of the policy reversal and its impact on specific projects in North Carolina, and SELC is well-positioned to effectively convey this information to the public.

The second consideration in whether a fee waiver is in the public interest is whether the request is primarily in the commercial interest of the requester. 43 C.F.R. § 2.48(b). As noted above, SELC is a 501(c)(3) non-profit organization dedicated to protecting the environment of the Southeast.⁷ It does not have commercial, trade, or profit interests in seeking these disclosures. As SELC does not have any commercial interest in these disclosures, the public interest is clearly greater in magnitude than the commercial interest.

Given SELC's role in disseminating information regarding the effect of federal actions on coastal resources in the Southeast, disclosure of the requested materials will clearly benefit the general public through increased knowledge on the justification and background of the reversal of the long-standing interpretation of CBRA and its impact on the CSRM Projects. The requested disclosures are likely to significantly contribute to public understanding of government operations, and are not primarily in the requester's commercial interest. This request therefore meets the two requirements for a fee waiver, and so a fee waiver should be granted.

FOIA requires a responding agency to make a "determination" on any request within twenty (20) working days of receipt. *See* 5 U.S.C. § 552(a)(6)(A)(i). The statute favors disclosure of records and instructs the agency to withhold information only in narrowly defined circumstances in which the agency can articulate a reasonably foreseeable harm protected by an

³ *See, e.g., Governor Cooper Joins More Than 125 Coastal Communities in Opposing Offshore Drilling* (July 20, 2017), <https://www.southernenvironment.org/news-and-press/press-releases/governor-cooper-joins-more-than-125-coastal-communities-in-opposing-offshor>; *Coastal Groups Denounce Governor's Decision to Strip Georgia Coast of Protective Buffer* (Apr. 22, 2014), <https://www.southernenvironment.org/news-and-press/press-releases/coastal-groups-denounce-governors-decision-to-strip-georgia-coast-of-protoc>.

⁴ *See, e.g., Bill Walsh, Environmental groups sue over Ocean Isle Beach terminal groin*, Star News Online (Aug. 14, 2017), <https://www.starnewsline.com/news/20170814/environmental-group-sues-over-ocean-isle-beach-terminal-groin>; Justine Calma, *Offshore drilling has dug itself a deeper hole since Deepwater Horizon*, The Verge (Apr. 20, 2020), <https://www.theverge.com/2020/4/20/21228577/offshore-drilling-deepwater-horizon-10-year-anniversary>.

⁵ *See, e.g., https://www.southernenvironment.org/cases-and-projects/nc-coyote-rule-risks-endangered-red-wolves*.

⁶ Terry Lane, *Interior Dept. ruling could lower renourishment costs*, LUMINA NEWS (Nov. 12, 2019) <http://luminanews.com/2019/11/interior-dept-ruling-could-lower-beach-renourishment-costs/>.

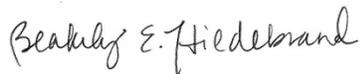
⁷ *See https://www.southernenvironment.org/about-selc*.

exemption. *See id.* at § 522(a)(8)(A)(i). FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt. *See id.* at § 552(b). Should FWS refuse to provide the information requested, FWS must inform SELC of the grounds for its refusal and the specific administrative appeal rights which are available. *See* 5 U.S.C. § 552(a)(6)(A)(i). SELC further requests preparation of a *Vaughn* index to facilitate evaluation of the completeness of FWS's response. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (index should include a detailed justification for claims of exemption, as well as specificity, separation, and indexing of the documents).

Should our request for reduced or waived fees be denied, we are prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact my colleague and me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves our right to appeal a fee waiver or reduction denial.

If you have any questions regarding this request, please feel free to contact my colleague Sierra Weaver (919-967-1450, sweaver@selcnc.org) and me (919-967-1450, bhildebrand@selcnc.org). I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,



Blakely E. Hildebrand
Staff Attorney
Southern Environmental Law Center