

January 26, 2022

*Via web: <https://foiaonline.gov>*

U.S. Fish and Wildlife Service  
Tennessee Ecological Services Field Office  
446 Neal Street  
Cookeville, Tennessee 38501

**Re: Freedom of Information Act Request for Records Related to Tennessee Gas Pipeline Company's Proposed Cumberland Project**

Dear Public Records Request Coordinator:

Under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center ("SELC") requests access to certain records created, received, or reviewed by the United States Fish and Wildlife Service ("FWS") related to the Cumberland Project, a pipeline Tennessee Gas Pipeline Company, LLC, has proposed to serve a potential Tennessee Valley Authority gas plant.<sup>1</sup> Specifically, we request copies (electronic, if possible) of the following public records that were created, received, or reviewed by FWS:

Beginning May 1, 2021, until the date of the search for responsive records, any records related to the Cumberland Project pipeline and related infrastructure. Such records include, but are not limited to, all communications between FWS and the following entities: Tennessee Gas Pipeline Company, LLC, Kinder Morgan, Inc., and the Tennessee Valley Authority.

Potential recordholders include, but are not limited to, staff members of the Tennessee Ecological Services Field Office.

For the purposes of this request, the term "records" includes all written, printed, recorded or electronic: documents, 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.

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 exemption. *See id.* § 552(a)(8)(A)(i). FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt. *Id.* § 552(b). Should FWS deny this

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<sup>1</sup> For a project description, see <https://www.kindermorgan.com/Operations/Projects/cumberland-project>.

request, FWS must inform SELC of the grounds for denial and the specific administrative appeal rights which are available. *See id.* § 552(a)(6)(A)(i).

### Fee Waiver Request

SELC is requesting photocopies 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. 5 U.S.C. § 552(a)(4)(A)(iii). 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). TVA is a federal corporation and the nation's largest public utility, and FWS is the federal agency that administers the federal Endangered Species Act. The requested records contain vital information relevant to TVA's proposal to build a new gas plant and related infrastructure, which may impact multiple species on the Federal List of Endangered and Threatened Wildlife, published in the Federal Register by FWS. Therefore, the subject of the requested records directly concerns the operations and activities of the federal government.

Second, the information contained in the records must be "likely to contribute significantly 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.* § 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.* § 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 may contain information about the federal government's analysis of threats to federally listed Endangered Species. Without these records, members of the public will be deprived of crucial information regarding the impacts of the Cumberland Project gas plant and pipeline on threatened and endangered species in Tennessee. Further, the public will be deprived of information regarding the federal government's protections for these species and their habitat, as well as its analysis of threats to both.

Additionally, requestors must explain how their expertise, identity, vocation, and qualifications 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). The public would benefit from this information, which SELC is well prepared to disseminate. TVA, the nation's largest public utility, faces significant decisions about the future of its generation

assets.<sup>2</sup> It is currently considering whether to retire and replace two coal plants, including Cumberland,<sup>3</sup> and that decision has garnered considerable public attention due to the significant environmental and economic implications.<sup>4</sup> Additionally, threatened and endangered species are of great public interest in Tennessee.<sup>5</sup> SELC is a 501(c)(3) non-profit organization with over thirty years of experience disseminating public information regarding the environment, including matters related to pipelines,<sup>6</sup> TVA's energy operations,<sup>7</sup> and endangered species.<sup>8</sup> A broad audience is interested in these subjects, 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 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 endangered species, disclosure of the requested materials will benefit the general public through increased knowledge of threats to endangered species due to the Cumberland Project and related infrastructure. 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.

Should FWS deny SELC's request for reduced or waived fees, SELC is prepared to bear the reasonable and necessary costs. However, I request you contact me before processing this

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<sup>2</sup> <https://www.southernenvironment.org/news/as-tva-closes-coal-plants-it-must-begin-transition-to-clean-energy/>.

<sup>3</sup> <https://www.federalregister.gov/documents/2021/05/11/2021-09945/environmental-impact-statement-for-cumberland-fossil-plant-retirement>.

<sup>4</sup> <https://abcnews.go.com/US/wireStory/tennessee-valley-authority-considers-replacing-coal-gas-78640645>; <https://www.reuters.com/business/energy/tennessee-valley-authority-plans-shut-coal-plants-by-2035-2021-05-03/>; <https://wpln.org/post/tva-faces-federal-scrutiny-over-climate-goals-electricity-rates/>.

<sup>5</sup> See, e.g., <https://www.newschannel5.com/news/public-can-speak-on-nashville-crayfish-endangered-status>; <https://www.newschannel5.com/news/officials-propose-taking-nashville-crayfish-off-endangered-species-list>; <https://fox17.com/news/local/officials-say-nashville-crayfish-no-longer-endangered>.

<sup>6</sup> See, e.g., <https://www.southernenvironment.org/news/victory-for-southwest-memphis-byhalia-pipeline-is-done/>; <https://www.southernenvironment.org/news/selcs-pipeline-team-reflects-on-the-path-to-victory/>.

<sup>7</sup> See, e.g., <https://www.southernenvironment.org/news/as-tva-closes-coal-plants-it-must-begin-transition-to-clean-energy/>; <https://www.southernenvironment.org/news/groups-urge-tva-to-halt-plans-for-new-natural-gas-plants-in-order-to-meet-carbon-goals/>.

<sup>8</sup> See, e.g., <https://www.southernenvironment.org/news-and-press/news-feed/endangered-nashville-crayfish-at-risk-of-losing-protections>; <https://www.southernenvironment.org/news-and-press/news-feed/selc-condemns-administration-plan-to-dismantle-endangered-species-act>; <https://www.southernenvironment.org/news-and-press/news-feed/seismic-permits-threaten-future-of-north-atlantic-right-whales>.

request if the fee is expected to exceed \$100.00. SELC reserves its right to appeal a fee waiver or reduction denial.

If you have any questions regarding this request, please feel free to contact me at (615) 921-9470 or [tbussey@selctn.org](mailto:tbussey@selctn.org). I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,



Trey Bussey  
Associate Attorney  
Southern Environmental Law Center