

May 6, 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 Documents Related to TVA's Cumberland Fossil Plant Retirement & Replacement

Dear Freedom of Information Act Officer:

Under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center ("SELC") requests access to certain documents created, received, or reviewed by the United States Fish and Wildlife Service ("FWS") related to the Tennessee Valley Authority's ("TVA") Cumberland Fossil Plant retirement and replacement efforts.¹ Specifically, we request copies (electronic copies, if possible) of the following documents that were created, received, or reviewed by FWS:

1. Beginning January 1, 2021, until the date of the search for responsive records, any records related to the proposed retirement and demolition of the Cumberland Fossil Plant and the construction and operation of facilities to replace part of the retired generation as well as related infrastructure. Such records include but are not limited to all communications between FWS and any of the following entities: TVA, the Tennessee Wildlife Resources Agency, the Tennessee Department of Environment and Conservation, Tennessee Gas Pipeline Company, LLC, and Kinder Morgan, Inc.

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.

Potential record holders include but are not limited to Daniel Elbert and David Pelren.

¹ Information about TVA's plans can be found at <https://www.tva.com/environment/environmental-stewardship/environmental-reviews/nepa-detail/cumberland-fossil-plant-retirement>.

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). 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 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. 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 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.* 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 may contain information that about the federal government’s analysis of threats to federally listed endangered and threatened species. Without these records, members of the public will be deprived of crucial information regarding the impacts of the Cumberland Fossil Plant retirement and replacement on vulnerable 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, 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). The public would benefit from this information, which SELC is well prepared to disseminate. TVA is the nation’s largest public utility, and it faces

significant decisions about the future of its generation assets.² TVA is currently considering whether to retire and replace two coal plants, including the Cumberland Fossil Plant,³ and that decision has garnered considerable public attention due to the significant environmental and economic implications.⁴ Additionally, threatened and endangered species are of great public interest in Tennessee.⁵ 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 TVA's energy operations⁶ and endangered species.⁷ 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.⁸ 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 clearly benefit the general public through increased knowledge of threats to endangered species due to the Cumberland Fossil Plant retirement and replacement. 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.

² <https://www.southernenvironment.org/news/as-tva-closes-coal-plants-it-must-begin-transition-to-clean-energy/>; <https://www.southernenvironment.org/news/tvas-reckless-gas-plans-threaten-communities-customers-and-the-climate/>.

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

⁴ <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/>.

⁵ 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>.

⁶ 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/>.

⁷ See, e.g., <https://www.southernenvironment.org/news/endangered-nashville-crayfish-at-risk-of-losing-protections/>; <https://www.southernenvironment.org/news/selc-condemns-administration-plan-to-dismantle-endangered-species-act/>; <https://www.southernenvironment.org/news/seismic-permits-threaten-future-of-north-atlantic-right-whales/>.

⁸ See <https://www.southernenvironment.org/about-selc>.

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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.* 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 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 me at (615) 921-9470 or sbiggs@selctn.org. I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,

s/Stephanie Biggs

Stephanie Biggs

Southern Environmental Law Center

sbiggs@selctn.org