

August 17, 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 Gray bats (*Myotis grisescens*)**

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 Gray bats (*Myotis grisescens*) in Tennessee. Specifically, we request copies (electronic copies, if possible) of the following documents that were created, received, or reviewed by FWS:

1. Beginning January 1, 2012 until the date of the search for responsive records, all Biological Opinions and associated appendices and attachments created or approved by the FWS analyzing the effect a proposed action may have on Gray bat populations or their habitats in Tennessee.
2. All records related to any biological assessments undertaken to determine the effects the proposed Cumberland Project—an approximately 32 mile, 30 inch pipeline which would traverse Stewart, Houston, and Dickson Counties in Tennessee—may have on Gray bats or their habitats.<sup>1</sup> This request includes but is not limited to documents created or approved by the Federal Energy Regulatory Commission, Tennessee Valley Authority, Tennessee Gas Pipeline Company, L.L.C., Kinder Morgan, Inc., or Jackson Group.

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.

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<sup>1</sup> More information regarding the Cumberland Project is available at:  
<https://www.kindermorgan.com/Operations/Projects/cumberland-project>.

### 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). FWS is the federal agency that administers the federal Endangered Species Act. And the Cumberland Project has been proposed in furtherance of another federal agency’s—the Tennessee Valley Authority’s—proposal to construct and operate a gas-fired power plant in Stewart County. The requested records contain information relevant to historical projects which have been analyzed for potential impacts to a species on the Federal List of Endangered and Threatened Wildlife, published in the Federal Register by FWS. The requested records also relate to potential impacts to listed a species caused by a proposed action from a federal utility to shift its power supply at one of its power generating locations. 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 a federally listed endangered 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 a vulnerable species in Tennessee. Further, the public will be deprived of information regarding the federal government’s historic analysis of impacts to this species and its habitat within the State.

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.<sup>2</sup> TVA is currently considering whether to retire and replace two coal plants, including the Cumberland Fossil Plant,<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 TVA's energy operations<sup>6</sup> and endangered species.<sup>7</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.<sup>8</sup> 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 an endangered species due to the Cumberland Fossil Plant retirement and replacement as well as FWS' historical analysis of impacts to this species in Tennessee. The requested disclosures are likely to significantly contribute to public understanding

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<sup>2</sup> <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/>.

<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/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>7</sup> 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/>.

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

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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 exemption. *See id.* at § 552(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](mailto: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](mailto:sbiggs@selctn.org)