



August 11, 2014

**VIA ELECTRONIC MAIL AND FACSIMILE**

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**Re: Freedom of Information Act Request - Endangered Species Act  
Section 7 Consultation Programmatic Biological Opinion on the U.S.  
Environmental Protection Agency's Issuance and Implementation of  
Final Regulations Under Section 316(b) of the Clean Water Act**

Dear FWS FOIA Officer Allen:

On behalf of Sierra Club, I am writing to request that the U.S. Fish and Wildlife Service (FWS) provide copies of the records described below pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. This request is sent to you because you were identified as the proper person to receive such requests. If this request should be directed to another person, please forward this request to that person.

The Sierra Club is the nation's oldest environmental organization. It has more than two million members, supporters, and donors nationwide and is dedicated to the protection and preservation of the natural and human environment. The Sierra Club is committed to solving the pressing environmental and health problems associated with the mining, burning, and disposal of coal and its combustion by-products.

**Documents Requested:**

- (1) All FWS drafts of all or portions of the Endangered Species Act (ESA) Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act (the "BiOp"), Incidental Take Statement and its appendices;

- (2) All documents<sup>1</sup> exchanged between FWS staff and between FWS and the Environmental Protection Agency (EPA), or any other governmental agency or official, during interagency review of, and concerning, drafts of the BiOp and/or Incidental Take Statement;
- (3) All documents between FWS staff and between FWS and EPA, or any other governmental agency or official, concerning the ESA section 7 consultation on EPA's most recent 316(b) rule;
- (4) All documents serving as the basis for, or which were considered by, the FWS in connection with its "no jeopardy" and/or "no adverse modification" of critical habitat findings on the ESA section 7 consultation for the most recently proposed 316(b) rule;
- (5) All documents between FWS staff and between FWS and EPA, or any other governmental agency or official, concerning any ESA section 7 consultation on EPA's previously proposed 316(b) rule(s), including for new sources as well as existing sources; and
- (6) All documents exchanged and all documents related to any meetings, telephone conversations, emails, or any other communications between FWS and the utility (i.e., electric generation) industry or manufacturing industry, representatives of the utility or manufacturing industries, trade groups, special interest groups, and/or other non-governmental parties relating to the ESA section 7 consultation on the 316(b) rule;

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In connection with this FOIA request, I also request the following:

- (1) If there are any records responsive to this request that can be emailed to me in electronic form, please do so to Legal Assistant Stephanie Hsiung at the Sierra Club, [stephanie.hsiung@sierraclub.org](mailto:stephanie.hsiung@sierraclub.org).
- (2) If there are any records that are in electronic form but cannot be emailed, please let me know whether they can be copied onto a CD and sent to me via U.S. Mail.

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<sup>1</sup> The terms "document," "record" or "communication" as used herein encompass any and all that are located at any level of the agency, and include without limitation, any writing, as well as all papers, maps, photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, paper documents, electronic mail, memoranda, notes, including telephonic or in-person meeting notes, records of discussions, guidelines, internal policy documents and inter-agency communications and intra-agency communications without exception.

- (3) If there are any records responsive to this request that cannot be emailed to me or copied onto a CD and sent to me via U.S. Mail, please contact me and let me know how many pages the remaining documents encompass and any charge for those pages.

**Exempt Records:**

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for Sierra Club to appeal the denial, in accordance with *Vaughn v. Rosen*<sup>2</sup> and related cases. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

Further, if you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them anyway. As you know, on his first full day in office, President Obama declared a "New Era of Open Government" and issued a memorandum to the heads of all agencies directing that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."<sup>3</sup> Agencies were directed to "adopt a presumption in favor of disclosure" and to apply that presumption "to all decisions involving FOIA."<sup>4</sup> Attorney General Holder's FOIA Guidelines explain that the presumption of openness called for by the President means that information should not be withheld "simply because [an agency] may do so legally." The Attorney General "strongly encourage[s] agencies to make discretionary disclosures of information."<sup>5</sup>

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<sup>2</sup> 484 F.2d 820 (D.C. Cir. 1973).

<sup>3</sup> President's FOIA Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009. 74 Fed. Reg. at 4,683 (Jan. 26, 2009).

<sup>4</sup> *Id.*

<sup>5</sup> Attorney General's FOIA Memorandum for the Heads of Executive Departments and Agencies, March 19, 2009. Available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

**Request for Expedited Processing:**

FOIA provides that each agency shall provide for expedited processing of records where there is a “compelling need.”<sup>6</sup> Department of Interior’s FOIA regulations state that the “bureau will provide expedited processing upon request if you demonstrate to the satisfaction of the bureau that there is a compelling need for the records” such as “an urgency to inform the public about an actual or alleged Federal government activity and the request is made by a person primarily engaged in disseminating information.”<sup>7</sup> In this case, employees of Requesters are persons primarily engaged in disseminating information to the public, and there is an urgent need to inform the public about the Federal government’s decision-making process and consideration of threatened and endangered species and critical habitat and impacts related to implementation for the final regulations for Section 316(b) of the Clean Water Act.

As the Section 316(b) regulations go into effect, state environmental regulators will be called upon to determine the best technology available (BTA) for minimizing adverse environmental impact at cooling water intake structures at approximately 1,200 in-scope facilities. There is a compelling need for Requesters to have access to the requested records in time for them to inform the public about the benefits of cooling water intake structure regulation so that they can provide information to state agencies (and EPA’s regional offices in non-delegated states) regarding implementation of the Section 316(b) regulations. If FWS does not expedite the processing of this request and disclose these records promptly to Requesters, it will have prevented Requesters from disseminating information to the public on the implementation of the cooling water intake structure rule in a prompt and useful manner.

**Fee Waiver Request:**

Sierra Club requests that FWS waive all fees associated with responding to this request. As noted above, Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Indeed, Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.

FOIA dictates that requested records be provided without charge or at a reduced charge if “[1] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester.”<sup>8</sup> As

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<sup>6</sup> 5 U.S.C. § 552(a)(6)(E)(i).

<sup>7</sup> 43 C.F.R. § 2.20(a)(2); *see also* 5 U.S.C. § 552(a)(6)(E)(v) (statutory definition of “compelling need”).

<sup>8</sup> 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a).

explained below, the requested disclosure would meet both of these requirements because Requesters' request complies with each of the factors agencies and courts consider in making fee waiver determinations.<sup>9</sup> In addition, Requesters qualify as "representative[s] of the news media" entitled to a reduction of fees under the FOIA.<sup>10</sup>

**A. Disclosure is in the Public Interest.**

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government."<sup>11</sup> Specifically, as we discuss immediately below in subsections IV.A.1-4, the requested disclosure would satisfy the elements identified in Department of Interior's FOIA Regulations<sup>12</sup> and in the U.S. Department of Justice's Fee Waiver Policy Guidance.

**1. The request concerns the operations or activities of the government.**

The requested records concern "the operations or activities of the government."<sup>13</sup> FWS is responsible for ensuring that actions that Federal agencies authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. One way in which FWS accomplishes this goal is to engage in formal consultation with Federal agencies whose actions may jeopardize listed species. Records regarding FWS's review of the potential and probable impacts on threatened and endangered species from the Final Regulations under Section 316(b) of the Clean Water Act plainly concern the operations or activities of government.

**2. The disclosure is likely to contribute to an understanding of government operations and activities.**

The requested records are "likely to contribute" to public understanding of the activities described above.<sup>14</sup> The FOIA Guide makes it clear that, in the Department of Justice's view, this determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain, as is the case

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<sup>9</sup> The U.S. Department of Justice (DOJ) has identified six factors to assess whether the two requirements have been met, and the courts have applied these factors. *See, e.g.,* Stephen J. Markman, U.S. Dep't of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm); *see also* *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

<sup>10</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. § 2.70.

<sup>11</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>12</sup> *See* 43 C.F.R. § 2.45.

<sup>13</sup> 43 C.F.R. § 2.45(b).

<sup>14</sup> 43 C.F.R. § 2.45(a)(1).

here. The materials Sierra Club requests will contribute meaningfully to public understanding of government activities, specifically FWS's findings and consideration of the Final Regulations under Section 316(b) of the Clean Water Act's impacts on listed species and critical habitat.

Since the BiOp is now complete, the requested records will shed light on a more complete assessment of the impacts by cooling water intake structures on threatened and endangered species and their critical habitat.

**3. The information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester – i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public – is examined.**

Disclosure of these records will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”<sup>15</sup> Sierra Club and its members have a longstanding interest and expertise in the subject of power plants. More importantly, the Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to digest and disseminate such information to the public quickly, through numerous and varied publications, including Sierra Magazine which is nationally distributed, Sierra Club websites and social media, educational programs, media initiatives, and public interest litigation. Sierra Club routinely uses FOIA to obtain information from federal agencies that Sierra Club legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality.

**4. The information will contribute “significantly” to public understanding of government operations or activities.**

Disclosure of the requested documents is “likely to contribute significantly to public understanding,”<sup>16</sup> because Requesters intend to disseminate any newsworthy information in the released records, and their analysis of such records, to their member bases and to the broader public, through one or more of the many communications channels referenced above. As Sierra Club's long history of incorporating information obtained through FOIA into reports, articles and other communications illustrates, Requesters are well prepared to convey to the public any relevant information it obtains through this records request.

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<sup>15</sup> 43 C.F.R. § 2.48(a)(2)(iii).

<sup>16</sup> 5 U.S.C. § 552(a)(4)(iii); 43 C.F.R. § 2.45(b).

None of the materials requested are now widely known (if they have been made public at all), yet they are essential to evaluating EPA's Section 316(b) rulemaking, the benefits of that rulemaking, the implementation of the final regulations, how endangered and threatened species will be impacted, and the benefits of installing the best technology available for minimizing the adverse environmental impacts of cooling water intake structures at existing facilities. As discussed above, these materials will allow the public and independent experts to critically evaluate the benefits of intake structure regulations and the Requesters to disseminate an informed understanding of the government's decision-making process and potential impacts of the implementation of the regulations.

Therefore, the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent.<sup>17</sup>

**B. Requesters have no Commercial Interest in this Information.**

Disclosure in this case would also satisfy the second prerequisite for a fee waiver because Requesters do not have any commercial interest that would be furthered by the requested disclosure.<sup>18</sup> Sierra Club is a not-for-profit organization and, as such, has no commercial interest.<sup>19</sup> "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"<sup>20</sup> Requesters' interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information about FWS's evaluation of EPA's Final Regulations under Section 316(b) of the CWA.

For all of the foregoing reasons, a fee waiver is warranted here.

**C. Requesters are Media Requesters.**

Even if FWS were to deny a public interest waiver of all costs and fees, Requesters should be considered representatives of the news media entitled to a reduction of fees under FOIA and the Department of Interior's FOIA regulations.<sup>21</sup> Under FOIA, a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw

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<sup>17</sup> 43 C.F.R. § 2.48(a)(4).

<sup>18</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a)(2).

<sup>19</sup> 43 C.F.R. § 2.45(a)(2).

<sup>20</sup> *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); *see also Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

<sup>21</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. § 2.48(b)(3)(ii).

materials into a distinct work, and distributes that work to an audience.”<sup>22</sup>

Sierra Club publishes a bi-monthly magazine, SIERRA, which has over 500,000 subscribers; issues electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. These publications routinely include information about current events of interest to the readership and the public.

As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of Requesters’ publications or other suitable media channels.

**Record Delivery:**

Please provide the records above irrespective of the status and outcome of your evaluation of Requesters’ fee category assertion and fee waiver request. In order to prevent delay in FWS’s provision of the requested records, Requesters state that they will, if necessary and under protest, pay fees in accordance with Department of Interior’s FOIA regulations.<sup>23</sup> Please consult with us, however, before undertaking any action that would cause the fee to exceed \$500. Such payment will not constitute any waiver of Requesters’ right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

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I believe this request reasonably describes identifiable records and I am aware of no express provision of law exempting the records from disclosure. In particular, documents exchanged between FWS and EPA plainly do not fall within the FOIA exclusion for “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Under EO 12866, FWS is obligated by law to release these particular inter-agency memoranda and letters to the public (*see* § 6(b)(4)(D)) and thus the Executive has waived any claim of privilege.

Given the plain requirements of Executive Order 12866 and FOIA § 552(a)(6)(A), we request that you make the referenced documents available, or respond in writing to explain your failure to do so, as soon as possible but in no case later than twenty days from the date of this request.

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<sup>22</sup> 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. United States Dep’t of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

<sup>23</sup> 43 C.F.R. § 2.56(b).

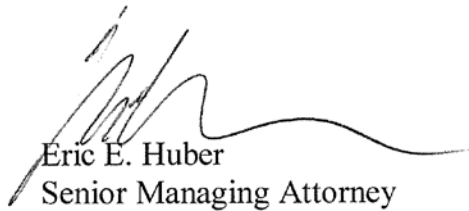


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I hope that you will be able to provide me with the requested materials at the earliest possible date. If there is anything I can do to facilitate this request, do not hesitate to call me at (303) 449-5595 ext. 101.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Eric E. Huber', with a long, sweeping horizontal line extending to the right.

Eric E. Huber  
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