



December 17, 2019

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VIA Electronic Mail and U.S. Mail

**Re: Freedom of Information Act Request – Mountain Valley Pipeline Project
(FERC Docket No. CP16-10; Project #05E2VA00-2016-F-0880 and #05E2WV00-2015-F-0046)**

To whom it concerns:

I am writing on behalf of the Sierra Club to request the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), concerning the Mountain Valley Pipeline Project.

Sierra Club is the nation’s oldest grassroots organization. It has 3.5 million members and supporters nationwide. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club’s purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of industrial discharges of air and water pollutants, development of natural resources, the use of fossil fuels, and the impacts of industrial operations on land, water, and fish and wildlife. Sierra Club conducts multiple public campaigns around these issues, including educating the public about the environmental impacts of fossil fuel projects such as the pipeline addressed in this request. This request is made on behalf of those education campaigns, as well as the organization’s long-standing interest in government accountability and transparency.

We are submitting this request to obtain certain records relating to the Mountain Valley Pipeline Project’s impacts on sensitive, threatened and endangered species.

Definitions

The terms “records” and “documents” mean information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing is included in this request if they are in the possession of or otherwise under the control of the United States Fish and Wildlife Service and all of its Offices, Regions, and other subdivisions (hereinafter, “USFWS” or “the Service”).

Records Requested

1. All documents or other records in the U.S. Fish and Wildlife Service’s project file for the Mountain Valley Pipeline Project (FERC Docket No. CP16-10; Project #05E2VA00-2016-F-0880 and #05E2WV00-2015-F-0046)
2. All documents and records related to the USFWS’s obligations under the Endangered Species Act, including but not limited to:
 - a. Documents and records related to the Biological Opinion and Incidental Take Statement issued on November 21, 2017, for the Mountain Valley Pipeline Project;
 - b. Documents and records related to the email and attached comments sent by Dr. Paul Angermeier to Cindy Schulz, Troy Andersen, and Sumalee Hoskin on October 23, 2018;
 - c. Documents and records related to the USFWS’s April 12, 2019 letter to FERC regarding the Mountain Valley Pipeline Project, including but not limited to information/data received in response to that letter;
 - d. Documents and records related to USFWS’s decision, on September 11, 2019, to accept FERC’s request for reinitiation of consultation;
 - e. Documents and records related to the subsequent reinitiation of consultation, including but not limited to responses to USFWS’s October 16, 2019 letter to FERC requesting additional data and information; to the November 27, 2019 technical meeting between USFWS, Mountain Valley Pipeline, LLC, and FERC; and to the decision to extend the re-consultation period by 60 days.
3. To the extent not captured above, this request includes all correspondence related to the Mountain Valley Pipeline Project.

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 regarding the basis for this position, including:

1. Provide an index of all documents containing the requested information, reflecting the basic factual information about each withheld item including the date, originator, author, addressee, number of pages/length, subject matter, and location of each document;
2. State the specific statutory exemption you deem to be applicable, in whole or in part, to each information request;
3. State with particularity the reason why such exemption is applicable, in whole or in part, to each information request;
4. In accordance with FOIA, 5 U.S.C. § 552(b), please produce all segregable portions of responsive documents and justify any redactions by reference to specific FOIA exemptions.
5. Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

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.

Fee Waiver Request

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.17(a). The Sierra Club has spent years promoting the public interest through the development of policies that provide enhanced human and environmental protection and has routinely received fee waivers under FOIA.

The Sierra Club is a national, non-profit, environmental organization with no commercial interest in obtaining the requested information. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of environmental protection including climate change, fossil fuel energy, clean energy and clean water. National Sierra Club members are concerned with the protection of endangered species and their habitats. Thus, our organization intends to use the requested information to inform the public and our members so that they can meaningfully participate in protecting the nation's natural resources.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). The 1986 fee waiver amendments were designed specifically to provide nonprofit organizations such as Sierra Club access to government records

without the payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and non-profit public interest groups.”).

The Fish and Wildlife Service will grant a FOIA fee waiver request if it determines that the disclosure is “[i]n the public interest because it is likely to contribute significantly to public understanding of government operations or activities” and “[n]ot primarily in [the requester’s] commercial interest.”¹ In deciding whether a fee waiver is in the public interest, the Service considers the following criteria:

- “How the records concern the operations or activities of the Federal government.”²
- “How disclosure is likely to contribute to public understanding of those operations or activities”³
- “How disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject”⁴
- “How the public’s understanding of the subject in question will be enhanced to a significant extent by the disclosure.”⁵

All of these factors weigh in favor of the grant of a fee waiver here, and as explained more fully below, the above referenced FOIA request satisfies the fee waiver criteria, as well as the requirements of fee waiver under the FOIA statute – that “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 is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(iii).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly states that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. This is such a case.

The requested records “concern the operations or activities of the Federal government.”⁶ The Fish and Wildlife Service is the federal agency charged with administering the Endangered Species

¹ 43 C.F.R. § 2.45(a).

² *Id.* § 2.48(a)(1).

³ *Id.* § 2.48(a)(2).

⁴ *Id.* § 2.48(a)(3).

⁵ *Id.* § 2.48(a)(4).

⁶ *Id.* § 2.48(a)(1).

Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and as such, issued a Biological Opinion regarding the Mountain Valley Pipeline Project. The requested information concerns the Service’s review and analysis of the effects of the Project on ESA-listed species. Undoubtedly, this information concerns the operations and activities of the government.⁷ The Service 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. These requested records thus directly concern “identifiable operations or activities of the government.”

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not in the public domain. The requested records are “meaningfully informative” and have a “logical connection” to government activities, making them “likely to contribute to public understanding” of the Fish and Wildlife Service’s work.⁸ The requested information will illuminate, among other things, the factual and scientific information that the Service has received, generated, and considered regarding the effects of the Mountain Valley Pipeline Project on threatened and endangered species. It will also provide insight regarding the Service’s analysis of those potential effects. This will help the public better understand the Project’s potential consequences for imperiled species and the Service’s role in protecting those species.

Sierra Club has the “expertise,” “ability,” and “intent” to disseminate the requested information in a manner that will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”⁹ Sierra Club is an environmental organization that routinely shares information concerning the activities and operations of government agencies, including information concerning the MVP, via its website, press releases, published reports, interviews with the media, and direct communications with other interested organizations. Once the requested documents are made available, Sierra Club will analyze them and present its findings to its members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of USFWS’s oversight of this project. The documents requested will thus be “meaningfully informative” and “likely to contribute” to an understanding of USFWS’s operations and activities. Given the nature of the information sought, the high level of public interest in the MVP, and Sierra Club’s plan for sharing and publicizing the results of its findings with members of the public, there can be little doubt that the information requested will “contribute to public understanding.”¹⁰

⁷ See, e.g., *Forest Guardians v. Dep’t of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (holding that release of records regarding the scope of BLM’s permit program concerns the operations or activities of BLM).

⁸ 43 C.F.R. § 2.48(a)(2)(i)-(ii).

⁹ *Id.* § 2.48(a)(2)(iii)-(v).

¹⁰ 43 C.F.R. § 2.48(a)(2). See also *Forest Guardians v. Dep’t of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (online newsletter, email lists and website help show that requested information is likely to contribute to public understanding); *D.C. Tech. Assistance Org. v. U.S. Dep’t of Housing & Urban Dev.*, 85 F. Supp. 2d 46, 49 (D.D.C.

The requested records are not otherwise in the public domain and are not accessible other than through a FOIA request.

3. The disclosure must 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—including (1) expertise in the subject area of the request and ability and (2) intention to disseminate the information to the public—is examined.

The requested information will “significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and greatly “enhance[]” their “understanding of the subject in question.”¹¹ Sierra Club has long-standing experience and expertise in the subject area of the FOIA requests, including issues related to government accountability and transparency, the protection of the natural environment, including threatened and endangered species, and the development and use of energy resources and fossil fuel pipelines.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, such as: analysis and distribution to the media, distribution through publication and mailing, posting on its website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 26,298,200 unique visits and over 30 million page views; on average, the site gets 72,049 visits per day. Sierra Magazine is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. Sierra Club Insider, an electronic newsletter, is sent to nearly 3 million people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. For example, Sierra Club has published, posted, and disseminated numerous stories on coal and coal power plants regarding their impacts on health, the environment and alternative energy. This includes information on Sierra Club’s webpages, such as our [Beyond Coal Campaign](#) portal, our [Clean Energies Solutions](#) portal and our press releases.¹²

Sierra Club intends to share the information received from this FOIA request with our impacted members across the country, the media, and our allies who share a common interest in the Mountain Valley Pipeline Project and the operations and activities of USFWS.

2000) (noting that “technology has made it possible for almost anyone to fulfill th[e] requirement” that requested documents will likely contribute to an understanding of government activities or operations).

¹¹ *Id.* § 2.48(a)(3), (4).

¹² For example, Sierra Club sought information about coal export and permitting activities in Oregon via a state public records act request at the Port of Coos Bay. All correspondence is published online and has received extensive media attention from press releases on the subject. *See* Sierra Club Challenges Dirty and Dangerous Fossil Fuel Exports in Oregon, <http://content.sierraclub.org/environmentallaw/lawsuit/2013/sierra-club-challenges-dirty-and-dangerous-fossil-fuel-exports-oregon>. Sierra Club also recently publicized the results of its FOIA requests regarding agency job freezes, a story that was picked up by the Washington Post. Alexander Rony, *Trump Admin Policy Leaves 700 CDC Jobs Vacant*, The Planet, <http://www.sierraclub.org/planet/2017/05/trump-admin-policies-leave-700-cdc-jobs-vacant>.

Thus, Sierra Club unquestionably has the “specialized knowledge” to address the issues; the “ability and intention” to disseminate the information requested; and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure must contribute “significantly” to public understanding of government operations or activities.

As discussed in section (2) above, the records requested will significantly contribute to the public understanding of governmental operations, and activities. Public concern about the Mountain Valley Pipeline Project has been documented in the press,¹³ including particular concern with the impact of the pipeline on threatened and endangered species.¹⁴ Especially given this high level of public interest, the release of the information requested by Sierra Club will significantly enhance public understanding by illuminating the Fish and Wildlife Service’s activities in relation to the Mountain Valley Pipeline Project, the data reviewed by the Service, and the Service’s analysis of potential effects on threatened and endangered species. To the best of our knowledge, the requested information has not been previously released.¹⁵ Thus, the disclosure would substantially “increase the level of public understanding” of the Service’s activities.¹⁶

5. The requester must not have a commercial interest that would be furthered by the requested disclosure.

Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. Sierra Club is a nonprofit, tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health. The interest in disclosure is in the public interest of obtaining information about the government’s analysis regarding the MVP’s proposed route and impact on imperiled species—not in promoting any commercial interests of Sierra Club.

Sierra Club respectfully requests that USFWS waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) because the public will be the primary beneficiary of this requested information. Congress intended federal agencies to be guided by the principle that “fee waivers play a substantial role in the effective use of the FOIA, and they should be liberally granted to all

¹³ See, e.g., *Virginia AG Herring files suit against Mountain Valley Pipeline, alleges environmental violations*, Dec. 7, 2018, available at https://www.washingtonpost.com/local/virginia-politics/va-ag-herring-files-suit-against-mountain-valley-pipeline-alleges-environmental-violations/2018/12/07/69b28f0a-fa65-11e8-8d64-4e79db33382f_story.html

¹⁴ See, e.g., *Appeals court puts Mountain Valley Pipeline permits on hold*, Oct. 11, 2019, available at https://www.washingtonpost.com/local/mountain-valley-virginia-settle-environmental-lawsuit/2019/10/11/71cbca80-ec4f-11e9-a329-7378fbfa1b63_story.html; *New questions raised about pipeline’s impact on endangered species*, May 2, 2019, available at https://www.roanoke.com/business/new-questions-raised-about-pipeline-s-impact-on-endangered-species/article_0039c513-71e4-5d66-a289-e44526f61550.html

¹⁵ 43 C.F.R. § 2.48(3)(i)-(ii), (iv).

¹⁶ *Id.* § 2.48(a)(3)(iii).

requesters other than those who are commercial users.”¹⁷ “[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.”¹⁸ Given this presumption, as well as the strong likelihood that the release of the requested information will significantly contribute to the public’s understanding of the activities and operations of the government, the Fish and Wildlife Service should grant Sierra Club any necessary fee waivers.

6. If the requester does have a commercial interest, the fee waiver must not be granted unless the public interest in disclosure outweighs the requester’s commercial interest.

As noted above, the Sierra Club has no commercial interest in the requested records. Therefore, this item is not applicable. If any commercial interest was present, however, it would be outweighed by the public interest in disclosure of the information sought.

For the aforementioned reasons, the Sierra Club qualifies for a fee waiver, and the Service should waive processing and copying fees for this FOIA request.

If the Service does not agree to this fee waiver request, then we request that you contact us before incurring any copying or production fees.

Format of Requested Records

We believe materials responsive to this request will be available electronically. To reduce the administrative burden on the Fish and Wildlife Service and minimize costs of printing and copying, we request that those materials be produced electronically if possible. Please provide all such records in a .pdf format that is text-searchable and OCR-formatted. Portfolios and embedded files within files are not readily-accessible. Please do not provide the records in a single, or “batched,”.pdf file. Electronic documents may be produced on CD-ROMs, external USB “thumb drives” or “flash drives,” or by other means. We appreciate the inclusion of an index. For any documents that cannot be provided electronically, we request hard copies of the documents.

Record Delivery

We appreciate a prompt determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in Sierra Club filing an action before the relevant U.S. District Court to ensure timely receipt of the requested materials. Please send documents on a rolling basis. USFWS’s search for—or deliberations concerning—certain records should not delay the production of others that USFWS has already retrieved and elected to produce.

¹⁷ 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy) (emphasis added); *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

¹⁸ *Ettlinger v. FBI*, 596 F. Supp. 867, 873 (D. Mass. 1984) (quoting legislative history).

Please mail hard copies or email electronic versions of all requested records as soon as possible to:

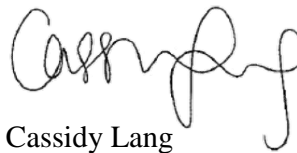
Cassidy Lang
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Conclusion

In responding to this request, please comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16. Per FOIA and Interior regulations, we expect a reply within twenty (20) working days, *see* 5 U.S.C. § 552(a)(6)(A)(i), and at minimum this reply "must . . . indicate within the relevant time period the scope of documents [USFWS] will produce."¹⁹ Please produce the records on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce. Further, as explained above, if this request is denied in whole or in part, please provide detailed justification for withholding the records, or portions thereof, and disclose any portion that is not properly subject to exemption under FOIA.

If you find that this request is unclear in any way, please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (303) 449-5595 ext. 104. Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Cassidy Lang". The signature is fluid and cursive, with the first name "Cassidy" being more prominent than the last name "Lang".

Cassidy Lang
Sierra Club

¹⁹ *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013).