



Kevin Cassidy
Senior Staff Attorney

Earthrise Law Center
Lewis & Clark Law School
phone 781-659-1696
cassidy@lclark.edu
earthriselaw.org

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FREEDOM OF INFORMATION ACT REQUEST

United States Army Corps of Engineers
CENAE-OC
696 Virginia Rd
Concord, MA 01742-2751
foia-nae@usace.army.mil
Phone: 978-318-8057

Sent VIA Electronic Mail

Re: Second Supplemental Freedom of Information Act Request Concerning Central Maine Power Company's Transmission Line Project.

Dear FOIA Officer,

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, Earthrise Law Center, on behalf of the Sierra Club, requests copies of public records in the custody of the U.S. Army Corps of Engineers ("the Corps"), as identified below. On May 7, 2019, the Sierra Club submitted a FOIA request regarding the same project that was designated as FOIA 19-188 (hereinafter "May 2019 FOIA Request"). The Corps responded to the May 2019 FOIA Request by providing records on May 31, 2019.¹ On January 13, 2020, the Sierra Club submitted a Supplemental FOIA Request regarding the same project that was designated as CENAE-OC File No. 20-022 (hereinafter "January 2020 Supplemental FOIA Request").² This **Second** Supplemental FOIA request is not intended to duplicate the May 2019 or the January 2020 requests; rather this FOIA request seeks any responsive records generated by the Corps or that

¹ The Corps did not provide a final response letter with the produced records, nor did the Corps indicate whether it was withholding any records under claims of privilege or otherwise provide a privilege log. Accordingly, Sierra Club does not consider the May 31st production as the Corps' final and complete production of records responsive to the May 7, 2019 FOIA Request.

² The Corps made a final determination on the January 2020 FOIA Request on February 12, 2020.

came into the Corps' possession after the cut-off date for its response to the January 2020 Supplemental FOIA Request.³

Sierra Club is a national non-profit working with a chapter located in Maine. The Maine Chapter of the Sierra Club is a volunteer-run, grass roots organization representing approximately 18,000 members and supporters who care deeply about Maine's natural environment. The Maine Chapter works to, *inter alia*, protect Maine's wilderness heritage, fight global warming, safeguard Maine's clean water, and promote clean air and energy efficiency. Sierra Club has many members who regularly visit and recreate in the areas of Maine where Central Maine Power Company ("CMP") proposes to construct its high voltage transmission lines and related facilities, and the Sierra Club's members' use and enjoyment of those areas will be directly and/or indirectly affected by the proposed project.

Factual Background

Sierra Club requests the information identified below because it is concerned about impacts to Maine's environment and natural resources that will be caused by CMP's plan to construct and operate high voltage transmission lines totaling approximately 175 miles and stretching from the Maine-Canada border to Lewiston. For nearly a decade, Massachusetts has sought electrical power from large hydropower dams in northern Canada. On July 27, 2017, CMP applied to DOE for a Presidential Permit for the project. *See* 82 Fed. Reg. 45,013 (Sept. 27, 2017). While a decision on that permit is pending, CMP also applied for a permit from the Corps to conduct work in the waters of the United States, including the filling of wetlands and horizontal directional drilling under the Kennebec River. On March 26, 2019, the public portion of the federal evaluation of the CMP Transmission Project began with the issuance by the Corps of Notice of CMP's permit application and providing the public with an opportunity to comment. On April 25 and June 6, 2019, Sierra Club submitted comments pursuant to the Corps' public notice, but, as Sierra Club's comments made clear, the Corps did not provide the necessary information to the public to facilitate fully informed comments. The U.S. Environmental Protection Agency, in an April 25, 2019 letter to the Corps commenting on the proposed project, agreed with Sierra Club regarding the deficiencies of the Corps' public notice. Sierra Club now seeks information from the Corps related to the CMP Transmission Line project through the FOIA process.

Documents Requested

Requests for records maintained by the Corps are governed by the U.S. Department of Defense's and the Department of the Army's ("DA") FOIA regulations. *See* 32 C.F.R. § 286 & 32 C.F.R. § 518, respectively. Pursuant to these regulations, the Sierra Club requests any and all NEPA analyses, documents, or communications regarding the Central Maine Power Company's application to the Corps for a permit to conduct work in the waters of the United States related to the construction of a new High Voltage Direct Current electrical transmission line and related

³ Per a phone conversation between Sierra Club counsel Kevin Cassidy and Terry Negron, the Corps agreed to use January 31, 2020 as the cut off date for responsive records to the January 2020 Supplemental FOIA Request. Accordingly, this Second Supplemental request covers any responsive records post-January 31, 2020.

facilities capable of delivering up to 1,200 megawatts of electrical power from hydroelectric sources in Quebec to the New England Control Area ("CMP Transmission Project" or "Project"). As previously mentioned, this supplemental request seeks only those records responsive to the categories below that the Corps' generated or that came into the Corps' possession after its response to the January 2020 Supplemental FOIA Request. This request includes, but is not limited to:

1. Any and all documents related to or addressing impacts to wetlands and other waters of the United States associated with the CMP Transmission Project;
2. Any and all documents and communications between the Corps and any other state or federal agency, any elected official, or with Canada officials related to the CMP Transmission Project;
3. Any and all documents and communications between the Corps and the Central Maine Power Company and any other private companies involved in the CMP Transmission Project;
4. Any and all documents related to or addressing impacts to species listed under the Endangered Species Act associated with the CMP Transmission Project.
5. Any and all documents related to analyses of greenhouse gas emission impacts associated with the CMP Transmission Project;
6. Any and all documents related to impacts to historic or culturally significant properties associated with the CMP Transmission Project.

This request applies to all such records in whatever form, including (without limit) correspondence, memoranda, notes, telephone conversation notes, e-mail messages and electronic files, the release of which is not expressly prohibited by law. It also covers any nonidentical duplicates of records that, by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. This request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. To save resources and mailing expense, we request electronic copies of these documents if available.

Finally, the Sierra Club respectfully requests that the Corps include in its response an explanation of which documents, if any, may be privileged or exempt from this FOIA request. If you claim that the records should not be disclosed, please justify your refusal by referring to the specific exemption that you are invoking under the FOIA. 5 U.S.C. § 552(b); *see* 32 C.F.R. § 518.13. Also, please provide those portions of documents with information requested that are not specifically exempted from disclosure. *Id.* § 518.16(h). Sierra Club reserves the right to appeal any denial.

Fee Waiver Request

Sierra Club also requests a waiver of all fees associated with this request, consistent with the Corps' decision to grant Sierra Club's fee waiver request for the May 2019 FOIA. According to Army FOIA regulations, documents shall be furnished without charge or at a reduced rate when "the Activity determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of

the operations or activities of DA and is not primarily in the commercial interest of the requester.” 32 C.F.R. § 518.19(d). See *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984) (“The legislative history of the FOIA clearly indicates that Congress intended that the public interest standard for fee waivers embodied in 5 U.S.C. § 552(a)(4)(A) be liberally construed.”); see also *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (“FOIA is to be liberally construed in favor of waivers for noncommercial requesters.”).

I. Disclosure of This Information Is in the Public Interest Because It Will Contribute Significantly to Public Understanding of the Operations and Activities of the Government.

DA regulations outline four factors to determine whether a fee waiver is in the public interest. The agency must consider:

- whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of DA;
- the informative value of the information to be disclosed to determine whether disclosure is meaningful, and shall inform the public on the operations or activities of DA;
- whether disclosure will inform, or have the potential to inform, the public rather than simply the individual requester or small segment of interested persons; and
- the significance of the contribution to public understanding, including the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure.

32 C.F.R. § 518.19(d)(2)(i)-(iv).

Here, Sierra Club’s request for disclosure of the above information is in the public interest because it will significantly contribute to the public’s understanding of the Corps’ operations and activities throughout the state of Maine along the 175-miles of transmission corridor related to the project. Indeed, as shown below, the Sierra Club’s request meets all of the regulatory factors, and therefore this fee waiver request should be granted.

a. The Subject Matter of the Request Involves Issues That Will Significantly Contribute to the Public Understanding of the Operations or Activities of the Corps.

First, the subject matter of the Sierra Club’s request directly concerns the operations and activities of a federal government department—the Corps—related to work in the waters of the United States. 32 C.F.R. § 518.19(d)(2)(i). The Corps is a federal agency under the Department of Defense. The relevant activities are the Corps’ permitting of and related environmental analysis for CMP’s Transmission Project. The Corps is in the process of analyzing the impacts of this project, and the Sierra Club merely seeks all of the documents surrounding the NEPA process in order to fully understand the scope of the Corps’ analysis. Therefore, the subject of the request involves issues that will significantly contribute to public understanding of the operations or activities of the Corps.

b. The Informative Value of the Information to Be Disclosed Is High, and Disclosure Will Be Meaningful.

Second, the informative value of the information to be disclosed is high, and disclosure will be meaningful because it will provide Sierra Club members and interested members of the public with the full picture of the Corps' NEPA analysis of activities that will directly impact Maine's environment and natural resources. 32 C.F.R. § 518.19(d)(2)(ii). Since the information requested was developed for the NEPA process, disclosure is not likely to be heavily redacted. Relatedly, the information requested is not fully available in the public domain because the Sierra Club requests all communications with other agencies, with CMP, and internal discussions of the Corps. Finally, the requested information is particularly meaningful because it will provide insight into the decision-making process in time for the Sierra Club and interested members of the public to comment on the CMP Transmission Project, both in the Corps' Clean Water Act § 404 permitting process, as well as in other state and federal level administrative proceedings.

c. Disclosure of This Information Will Inform the Public Rather Than Simply the Sierra Club or a Small Segment of Interested Persons.

Third, disclosure of this information will inform the public rather than simply the Sierra Club or a small segment of interested persons. 32 C.F.R. § 518.19(d)(2)(iii). Here, disclosure will reach a broad public audience. The Sierra Club's Maine Chapter has approximately 18,000 members and supporters and regularly sends email updates and alerts about issues affecting Maine's environment and natural resources to these members. The Sierra Club also publishes and sends to its members and others regular publications, including its newsletter, the Maine Sierran, which discuss developments and issues relating to the protection of the environment. The Spring 2019 issue of the Maine Sierran included an article on the CMP Transmission Project. The Sierra Club's website and social media pages contain public information as well. Through these media, the Sierra Club will reach a broad audience of interested persons. Finally, the Sierra Club has the ability to understand and process this information through its regional staff who are familiar with this issue on the ground and have written and testified about this issue in the past. As a result, disclosure of this information will inform the public rather than simply the Sierra Club or a small segment of interested persons.

d. Disclosure Will Contribute Significantly to Public Understanding of the Operations or Activities of the Corps.

Fourth, disclosure of the requested information will contribute significantly to public understanding of the operations or activities of the Corps because the Sierra Club plans to provide a unique summary of the requested records, many of which are not publically available. 32 C.F.R. § 518.19(d)(2)(iv). First, as noted above, based on information and belief, many, if not most, of the requested records are not publically available. Further, even if they are, the records are not available in a form or organized in a way that the public can easily access and/or understand. The Sierra Club plans to analyze and summarize the records through its unique perspective and expertise as an advocate for Maine's environment and natural resources with

staff and members on the ground. Considering all of these factors, disclosure of the requested records will significantly enhance public understanding of the issue.

II. Sierra Club Has No Commercial Interest in Disclosure.

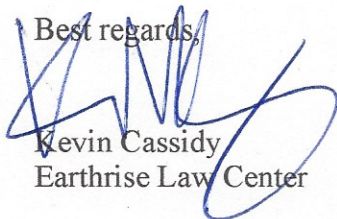
Lastly, Army regulations governing whether to grant fee waiver requests require the agency to determine that “[d]isclosure of the information ‘is not primarily in the commercial interest of the requester.’” 32 C.F.R. § 518.19(d)(3). This includes consideration of whether any commercial interest exists and if so, whether this interest outweighs the interest in public disclosure. *See id.* § 518.19(d)(3)(i)-(ii). The Sierra Club is a national non-profit with a mission to “explore, enjoy and protect the planet” and “to practice and promote the responsible use of the Earth’s ecosystems and resources.” As such, the Sierra Club has no commercial, trade, or profit interest in disclosure. Nor will the Sierra Club receive any commercial benefit or payment from the disclosure.

Further, since the Sierra Club does not have a commercial interest in disclosure, the public interest here clearly outweighs any other interests. Even assuming, *arguendo*, that the Sierra Club had a commercial interest, its primary interest is to inform the public of the activities of the Corps regarding an issue that will directly affect the public’s interest in and use of a large section of Maine’s environment and natural resources, including endangered species. Therefore, the Sierra Club’s primary interest in disclosure is a public interest.

Conclusion

Earthrise Law Center is representing Sierra Club for purposes of this FOIA request. As provided by FOIA, 5 U.S.C. § 552(a)(6), we trust that we shall receive a reply to this request within twenty business days of receipt. Thank you for your time and attention in this matter, and we look forward to hearing from you shortly. If you have any questions, feel free to contact me at Earthrise Law Center, using the contact information set forth above.

Best regards,



Kevin Cassidy
Earthrise Law Center