



CALIFORNIA AND PACIFIC OFFICE
*protecting and restoring natural ecosystems and imperiled species through
science, education, policy, and environmental law*

**SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

June 27, 2003

TO: FOIA Officer
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

RE: Request for Materials under the Freedom of Information Act

REQUEST FOR MATERIALS

The Center for Biological Diversity ("CBD") is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat and to fulfill the continuing educational goals of its membership and the general public in the process. Consistent with this mission, and consistent with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I respectfully request the following information on behalf of the CBD:

1.) A listing of all Section 404 Clean Water Act permits issued by all Army Corps of Engineers ("ACOE") Units for road building, culverts and other actions associated with silvicultural/forestry activities from the period 1/1/1995 to the present. If no listing exists please send copies of the actual permits issued. If a listing is sent please include the name of the applicant, waterway each permit was issued for, date permit was issued and nature of activity permit was issued for.

This request is being sent to the Washington, DC Office with the understanding that it will be forwarded to any other offices that contain the requested information.

REQUEST FOR FEE WAIVER

The CBD requests that you waive all fees in connection with this matter. As shown below, we meet the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), and in particular, that we have demonstrated beyond a doubt that the disclosure of this information will significantly contribute to public understanding of the operations or activities of the government.

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Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government

This requested information will significantly contribute to public understanding of the issues involved, as defined by the four factors discussed below. In considering whether the CBD meets this fee waiver criteria, it is imperative that the ACOE remember that FOIA, in general, carries a presumption of disclosure and that the fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as CBD access to government documents without the payment of fees. As stated by one Senator, "[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the 9th Circuit has stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." (citing Sen. Leahy). The amendment's main purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA. (citing Sen. Leahy). McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987).

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by "watchdog" organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the influential District of Columbia Circuit Court has stated this waiver provision was added to FOIA "*in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,*" in clear reference to requests from journalists, scholars, and, most importantly for our purposes, nonprofit public interest groups. Better Gov't Ass'n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added).

A. The subject of the request concerns "the operations and activities of the government".

The subject matter of this request is the Section 404 Clean Water Act permits issued by the ACOE, an activity that may have an adverse impact on the environment, and in particular on species listed as threatened or endangered under the Endangered Species Act (ESA). ACOE's involvement in this permit process and fulfillment of its duties under various federal statutes such as the ESA, Clean Water Act, and Administrative Procedures Act is clearly an identifiable activity of the government

B. The disclosure is "likely to contribute" to an understanding of government operations or activities (the informative value of the information to be disclosed).

In order to be deemed likely to contribute to an understanding of government operations or activities, the information requested must be "meaningfully informative in relation to the subject matter of the request." Freedom of Information Act Guide and Privacy Act Overview, ("FOIA Guide") U.S. Dept. Of Justice, 1997, p. 426, Carney v. U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994). The requested documents are clearly directly related to and extremely informative

about ACOE involvement in the Section 404 Clean Water Act permit process which may have an adverse impact on the environment and listed species. The requested lists and documents are not currently available in the public domain. Their release is not only "likely to contribute," but is in fact certain to contribute to better public understanding of ACOE or other agency activity that may be harming the environment.

C. Disclosure of the requested information will contribute to public understanding of the issues involved (ability to disseminate).

CBD is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws. We have been substantially involved in the management activities of numerous government agencies for years, and have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers.

U.S. Government agencies including the Air Force, Animal Damage Control, Army, Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Department of Agriculture, Department of Commerce, Department of Defense, Department of the Interior, Department of Justice, Department of Transportation, Federal Bureau of Investigation, Federal Aviation Administration, Fish and Wildlife Service, Forest Service, General Accounting Office, National Aeronautical and Space Administration, National Science Foundation, Office of Management and Budget, Rural Economic Community Development Agency, and the Smithsonian Institution, among others, consistently grant our request for the waiving of FOIA fees. Recent substantive FOIA responses consistently conforming with the spirit of the FOIA and consistently conforming with the FOIA fee waiver have been provided to our members from these Federal agencies on July 24, 1990, July 27, 1990, August 10, 1990, May 20, 1991, December 18, 1991, December 23, 1991, December 24, 1991 (2), December 27, 1991, January 2, 1992, January 3, 1992, January 7, 1992, January 9, 1992, January 10, 1992, January 13, 1992 (2), January 14, 1992, July 29, 1992, October 30, 1992, December 8, 1992, January 28, 1993, March 22, 1993, September 21, 1993, September 23, 1993, October 19, 1993, December 1, 1993, December 2, 1993, December 6, 1993, December 10, 1993, December 20, 1993, December 27, 1993, October 4, 1994, October 27, 1994, December 12, 1994, December 16, 1994, March 21, 1995, May 4, 1995, May 12, 1995, May 19, 1995, June 22, 1995, October 25, 1995, February 14, 1996, February 15, 1996, February 16, 1996, April 2, 1996, October 1, 1996, December 31, 1996, May 6, 1997, May 12, 1997, June 1, 1997, August 19, 1997, October 28, 1997, March 27, 1998, March 30, 1998, April 16, 1998, May 28, 1998, July 10, 1998, September 28, 1998, October 5, 1998, January 28, 1999, February 16, 1999, March 16, 1999, March 29, 1999, April 8, 1999, and April 23, 1999, February 13, 3003.

In consistently granting CBD's fee waivers, all of these agencies, among others, have recognized that (1) our requested information contributes significantly to the public understanding of the operations or activities of the government, (2) our requested information enhances the public's understanding to a greater degree than currently exists, (3) CBD possesses the expertise to explain the requested information to the public, (4) CBD possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that CBD is an established expert in the field of imperiled species and their threatened habitat.

D. The disclosure is likely to contribute *significantly* to public understanding of government operations or activities.

The ACOE's determination of whether disclosure of these documents is likely to significantly contribute to public understanding of government operations or activities must be objective. FOIA Guide, p. 432, Ettlinger v. FBI, *supra*. One guiding test in this determination is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. Carney, *supra* (emphasis added). As described above, our consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure, as well as CBD members' track record of active participation in oversight of governmental agency activities and are well established.

The information requested will be used to comprehensively review the effects of the issuance of Section 404 Clean Water Act permits by the ACOE on the environment, and the ACOE's and other agencies' compliance with all applicable federal and state law, in particular Section 7 of the Endangered Species Act. Public oversight and enhanced understanding of ACOE's highly controversial impact on our natural resources is absolutely necessary. The information requested in this FOIA request will be used to contribute to one or more of the following: public educational presentations and information dissemination, public interest litigation, production of or defense of listing petitions, court documents, local and national newsletters, and local and national news stories contributed to or written by CBD and its members. Concurrent with litigation or any other action, the CBD will the underlying actions of the ACOE which prompted the litigation or other action. This is certain to ensure a significant increase in public understanding of the ACOE's activities. The CBD has enforced the provisions of the ESA, APA, and Clean Water Act many times through information gained from FOIA requests like this one, including several recent cases against the ACOE. The CBD intends to use the documents requested in this request in a similar manner.

In addition to the above channels of dissemination, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which is sent to nearly 3,000 people approximately once a week, and our web page, which is accessed several hundred times each month. Information gained from review of the requested documents will be disseminated through both of these means.

II. Obtaining the information is of no commercial interest to CBD.

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to CBD's role of educating the general public. CBD, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

I hope that this letter has demonstrated to your satisfaction that CBD qualifies for a full fee waiver, and that you will immediately begin to search and copy the requested material. Should you decide not to waive fees, CBD plans to immediately appeal such a decision.

Should you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

1) Why is each document predecisional?

- A. To what decision are each of the documents leading?
- B. Has this decision been finalized?

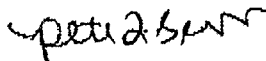
2) Why is each document deliberative?

- A. To what extent does each make a recommendation on a legal or policy matter?

3) What policy recommendation qualifies this document for exemption?

I look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. 552(a)(6)(A)(i). Please send all materials to the address on the letterhead. Please call me at (707) 986-7805 if you have any further questions about this request.

Sincerely,



Peter Galvin
CBD