

DEPT. OF COMMERCE

NOV -2 2000

NATIONAL MARINE FISHERIES SERVICE



# CENTER FOR BIOLOGICAL DIVERSITY

*protecting and restoring the west's oceans, deserts, rivers, forests, and wildlife*

**VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

October 30, 2000

**TO: FOIA Coordinator**  
National Marine Fisheries Service Region 1  
Protected Resources Division  
525 NE Oregon St., Suite 500  
Portland, OR 97232-2797

DEPT. OF COMMERCE - NOAA  
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SOUTHWEST REGION  
NATL. MARINE FISHERIES SVC.

**RE: Request for Materials under the Freedom of Information Act**

## REQUEST FOR MATERIALS

The Center for Biological Diversity ("CBD" - formerly the Southwest Center for Biological Diversity) 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 copy of all records held regarding any application or any pre-application communications by Sierra Pacific Industries for a Habitat Conservation Plan. This request includes but is not limited to letters, email, and phone notes.

This request is being sent to the Region 1 office with the understanding that it will be forwarded to any other offices which may contain the requested documents.

## 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(s)(4)(A)(iii), as

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implemented by the Department of Commerce's regulations at 15 C.F.R. § 4.9(c), 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.

I. 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 Department of Commerce's four factors at 15 C.F.R. § 4.9(c) (each factor is addressed below). In considering whether the CBD meets this fee waiver criteria, it is imperative that the NMFS 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 (9<sup>th</sup> 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 Enlinger 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 NMFS' management of Habitat Conservation Plans and species protected under the Endangered Species Act ("ESA"). The NMFS' management of species and implementation of the ESA are clearly an identifiable activities 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).

The documents requested, any communications between the NMFS and Sierra Pacific Industries regarding a possible HCP, are clearly related to the subject matter of the request. These documents are certain to shed light on the NMFS' management of the steelhead trout, coho salmon and other species that occur within lands owned by Sierra Pacific Industries. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA.

CBD intends to fulfill its well established function of public oversight of agency action. CBD is not requesting these documents merely for their intrinsic informational value.

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 analyze and 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 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, October 5, 1998, January 28, 1999, February 16, 1999, March 16, 1999, March 29, 1999, April 8, 1999, and April 23, 1999.

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.

As discussed in more detail below, the information requested in this letter will be used to contribute to one or more of the following: administrative petitions, public interest litigation, court documents, local and national news stories contributed to or written by our members or staff, public presentations, and informational and educational materials. In addition to these channels of dissemination, CBD 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 are sent to nearly 3,000 people approximately once a week, and our web page, which is accessed several hundred times each month. Information concerning NMFS's management of the coho salmon and steelhead trout will be disseminated through both of these

means.

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

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994) (emphasis added). As discussed above, the CBD has more than met this standard.

In addition, CBD members' track record of active participation in and oversight of governmental agency activities and our consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. The CBD is considered one of the nation's leading conservation and endangered species advocates. Information received from FOIA requests like this one have led to administrative petitions and follow-up public interest litigation leading to the protection for species including the Cook Inlet population of the beluga whale, bowhead whale, white abalone, bowhead whale, northern right whale, Mexican spotted owl, cactus ferruginous pygmy owl, San Diego fairy shrimp, southwestern willow flycatcher, and dozens of others. The CBD currently has multiple cases pending against NMFS and other federal agencies in federal court due to information that was received from FOIA requests such as this one. The level of public understanding of the NMFS's compliance with environmental and administrative law in general, and the NMFS's management of species in particular, has been *significantly* enhanced by all these cases, past and present. The CBD intends to use the documents requested in this request in a similar manner.

The requested documents are not currently in the public domain. Their release is not only "likely to contribute," but is in fact certain to contribute to better public understanding of the NMFS's management of the coho salmon, steelhead trout, and any application for incidental take of these species by Sierra Pacific Industries. Public oversight and enhanced understanding of the NMFS' highly controversial management of our resources is absolutely necessary and an integral part of our democratic system.

The Center for Biological Diversity is monitoring the effect of Habitat Conservation Plans on listed species throughout the western U.S. The information requested in this FOIA request will be used to determine whether the NMFS and other agencies are fully complying with the law with regards to any application for incidental take pursuant to an HCP by Sierra Pacific Industries. This review could lead to public interest litigation, educational programs on the HCP's and steelhead trout and coho salmon, and/or press coverage on the issue of HCP's, incidental take, and listed species. Concurrent with any litigation or other action the CBD will publicize the action and the underlying activities of NMFS that have prompted the action. Such efforts are likely to lead to local and national media coverage of the action and of NMFS's compliance with the ESA. This review and oversight by the CBD is certain to *significantly* increase the public's understanding of the NMFS's compliance with environmental law in general and the NMFS's management of this species in particular.

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 (510) 841-0812 if you have any further questions about this request.

Sincerely,

  
Peter Galvin  
Conservation Biologist