

February 14, 2013

FREEDOM OF INFORMATION ACT REQUEST

VIA EMAIL

U.S. Nuclear Regulatory Commission
FOIA.resource@nrc.gov

FOIA REQUEST
Case No: 2013-0135
Date Rec'd: 2/15/13
Requester: Phelps
Case: _____

RE: ESA Section 7 Consultation Related to Relicensing of the Pilgrim Nuclear Power Station in Plymouth, MA

Dear FOIA Officer:

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended. I make this request on behalf of the Jones River Watershed Association ("JRWA") and Earthrise Law Center.

JRWA is a 501(c)(3) non-profit, public interest conservation organization based in Kingston, Massachusetts. JRWA's mission is to protect, enhance and restore the natural resources of the Jones River watershed through advocacy, protection of sensitive riparian lands, habitat restoration, and infrastructure improvements.

Earthrise Law Center ("Earthrise") is the environmental law clinic at Lewis & Clark Law School in Portland, Oregon. Earthrise maintains an East Coast office in Massachusetts. Earthrise's goals are to advance efforts to protect the environment by serving as a resource for public interest organizations that need free or low cost legal representation and to train and educate law students through direct involvement in complex environmental and natural resource cases.

The Nuclear Regulatory Commission ("NRC") consulted, pursuant to the Endangered Species Act ("ESA"), with the National Oceanic and Atmospheric Administration ("NOAA"), through the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") (collectively "the Services"), regarding the relicensing of the Pilgrim Nuclear Power Station ("PNPS") in Plymouth, Massachusetts. The ESA Section 7 consultation process resulted in a March 6, 2005 concurrence letter from FWS Endangered Species Specialist Michael Amaral to Stephen Bethay, Entergy Nuclear Generation Company (transmitted to NRC's Rani Franovich on May 23, 2006), and a May 17, 2012 concurrence letter from NMFS Acting Regional Administrator Daniel Morris to Andrew Imboden, U.S. Nuclear Regulatory Commission. JRWA and Earthrise are gathering information about this consultation process.

Kevin Cassidy
Staff Attorney

Records Requested

Pursuant to FOIA, please send Earthrise copies of any and all records and communications relating to the Section 7 ESA consultation that occurred between NRC and the Services related to the relicensing of PNPS. This includes, but is not limited to, the following documents:

- any and all documents NRC relied upon in reaching its conclusions regarding effects of PNPS relicensing on any ESA-listed species. Specifically, this request includes, but is not limited, to relevant records and correspondence related to NRC's Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Pilgrim Nuclear Power Station – Draft (2006) and Final (2007) Reports (NUREG-1437, Supplement 29);
- any and all correspondence between NRC and the Services regarding its conclusions regarding effects of PNPS relicensing on any ESA-listed species. Specifically, this request includes, but is not limited to, any records relating to a March 22, 2012 conference call held between NRC and NMFS regarding this matter;
- any and all internal communications, including emails and interoffice memoranda, within NRC regarding the Section 7 consultation process for PNPS relicensing;
- any and all documents related to NRC's response to the EcoLaw's June 28, 2012 request that NMFS reinstate ESA Section 7 consultation regarding the relicensing of PNPS, which resulted in an October 1, 2012 letter from Dr. Amy Hull of NRC to Daniel Morris of NMFS;
- any and all reports NRC has made to NMFS or FWS regarding observations of ESA-listed species since PNPS was relicensed.

To save resources and mailing expense, we request electronic copies of these documents if available.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, 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.

We emphasize that this request applies to all described documents the disclosure of which is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (1) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (2) explain in full the basis on which nondisclosure is sought; and (3) provide us with any segregable portions of the records for which you do not claim a specific exemption.

Fee Waiver Request

JRWA and Earthrise also request that you waive any applicable fees because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of Federal Government operations or activities” and the requestor has no commercial interest that would be furthered by the records’ disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. § 9.41(d). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as JRWA and Earthrise, access to government documents without the payment of fees. The courts have stated that the statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (stating “that Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, JRWA and Earthrise meet the two-pronged test for a fee waiver established in FOIA and outlined in the NRC’s FOIA implementing regulations.

I. Disclosure of This Information is in the Public Interest because It Will Significantly Contribute to Public Understanding of the Operations or Activities of the Government

JRWA and Earthrise qualify for the fee waiver because the requested information will significantly contribute to public understanding of Federal government operations or activities will be significant. *See* 10 C.F.R. § 9.41(d)(2). The requested information involves the activities of three separate federal government entities—NRC, NMFS and FWS—and how the federal relicensing of a nuclear power plant will affect federally-listed threatened and endangered species. PNPS’s new license will be in effect for the next 20 years. Through its operations, PNPS both withdraws water from and discharges heated effluent into Cape Cod Bay. Information about interactions between three federal agencies regarding a license issued by the NRC that has the potential to affect species listed under the federal ESA is precisely the type of information that JRWA and Earthrise are well positioned to analyze and disseminate to their members and the general public. The requested information will contribute to public understanding of operations and activities of the federal government including, *inter alia*, NRC’s relicensing process for nuclear power plants and the ESA consultation process that occurs between federal agencies.

A. The subject matter of the requested documents concerns operations or activities of the Federal government.

JRWA and Earthrise seek emails, reports, data, meeting notes, records, memoranda, and any other applicable or relevant information in whatever form regarding NRC’s consultation with the Services regarding the relicensing of PNPS. As NRC is the “action agency” with respect to PNPS’s relicensing, any information pertaining to NRC’s ESA consultation with the Services regarding that relicensing is presumed to be held by NRC. As such, the information requested

clearly “concerns the operations and activities of the federal government.” 10 C.F.R. § 9.41(d)(1).

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

Disclosure is “likely to contribute to an understanding of Federal government operations or activities,” 10 C.F.R. § 9.41(d)(2), by contributing to public understanding of the consultation process that took place between NRC and the Services related to PNPS’s relicensing. Specific information about the consultation process sought in this request, including internal communications between and among NRC and the Services’ staff, is not currently within the public domain. Disclosure of such information, in combination with evaluation and analysis of it by JRWA and Earthrise, will significantly increase the general public’s understanding of the consultation process. *See* 10 C.F.R. § 9.41(b)(4) (requirement to “[d]escribe the likely impact on the public’s understanding of the subject as compared to the level of public understanding of the subject before disclosure”). Further, it will help the public better understand the information relied upon to reach the “not likely to adversely affect” finding memorialized in NMFS’s May 17, 2012 and FWS’s May 23, 2006 concurrence letters to NRC, and whether or not the consultations complied with environmental laws. *See id.*; *see also* 10 C.F.R. § 9.41(b)(1) (requirement to “[d]escribe the purpose for which the requestor intends to use the requested information”). After obtaining and analyzing the information provided, JRWA and Earthrise will use their knowledge and expertise to inform and educate their members and the public regarding the ESA consultation process related to PNPS’s relicensing.

JRWA and Earthrise intend to disseminate information gleaned from the disclosed documents through a vast array of diverse and highly effective channels, including: JRWA’s website, which specifically highlights endangered species issues (*see* <http://jonesriver.org/> (blogging regarding endangered Right whale activity in Cape Cod Bay)); Earthrise’s environmental litigation teaching clinic and website; press releases; presentations at conferences, such as the Public Interest Environmental Law Conference; letters and emails to JRWA and Earthrise supporters; and involvement in public initiatives relating to species preservation issues. *See* 10 C.F.R. § 9.41(b)(6) (requirement to “[d]escribe the intended means of dissemination to the general public”). 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, 815 (2d Cir. 1994). Here, the information will be disseminated to a significant section of the interested and affected public. For example, JRWA has more than 600 families as contributing members in 82 communities and 14 states. In addition to maintaining its website, JRWA also has an email list of several thousand people that receive weekly updates. Finally, JRWA belongs to several larger associations and coalitions that reach additional members of the public with their outreach, including the Massachusetts Rivers Alliance (<http://massriversalliance.org/member-organizations/>). *See* 10 C.F.R. § 9.41(b)(5) (requirement to “[d]escribe the size and nature of the public to whose understanding a contribution will be made”).

JRWA's and Earthrise's consistent contribution to public understanding of federal agency activities that affect the environment, as compared to the level of public understanding prior to disclosure, is well established. Collectively, JRWA and Earthrise are comprised of professionals with scientific and legal expertise who regularly write, speak, teach, and advocate on species conservation and other environmental issues. Specifically, JRWA employs a staff scientist who is familiar with the federally-listed endangered and threatened species at issue in this matter, and who will evaluate the federal agencies' analysis regarding potential effects to those species due to PNPS's relicensing. Earthrise employs environmental lawyers who specialize in the Endangered Species Act, including Section 7 consultations, who will evaluate the legal and factual sufficiency of the consultation process under the ESA. *See* 10 C.F.R. § 9.41(b)(2) & (3) (requirements to explain "the extent to which the requester will extract and analyze the substantive content of the agency record" and the specific qualifications of the requestor). Such analysis and evaluation will be used to inform the public about the ESA consultation process, potential effects on federally listed species due to PNPS's relicensing, federal agency decision-making and resource allocation, and will inform local affected groups regarding their rights vis a vis federal agency actions. *See* 10 C.F.R. § 9.41(b)(3) (requirement to "[d]escribe the nature of the specific activity or research in which the agency records will be used"). With the analytical input from JRWA and Earthrise, the requested documents will significantly enhance the public's understanding of NRC's consultation process regarding PNPS's relicensing, and any attendant issues concerning effects on ESA threatened and endangered species and the environment generally.

Thus, JRWA and Earthrise are uniquely qualified to analyze and disseminate the information to a large cross-section of the general population, allowing for disclosure to increase "the public's understanding of the subject as compared to the level of public understanding of the subject before disclosure." 10 C.F.R. § 9.41(b)(4). Given our organizations' expertise and abilities to contribute to public understanding through various channels, the contribution to public understanding of NRC's consultation process with the Services and the associated environmental and legal effects of PNPS's relicensing to operate for the next 20 years will be significantly enhanced.

II. Obtaining the Information is of No Commercial Interest to JRWA or Earthrise

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. The primary question that must be addressed is whether the requester has a commercial interest that would be furthered by the requested disclosure. 10 C.F.R. § 9.41(d)(3). Here, as a 501(c)(3) nonprofit entities, JRWA and Earthrise have no commercial, trade, or profit interest in the material requested. JRWA and Earthrise will not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. *See* 10 C.F.R. § 9.41(b)(8) (requirement to "[d]escribe any commercial or private interest the requestor or any other party has in the agency records sought"). The requested material will be disseminated to the public free of charge (*see* 10 C.F.R. § 9.41(b)(7) (requirement to indicate if

public access to the information will be provided free of charge)), solely for the purpose of informing and educating the public and will not be used for commercial use or gain.

Clearly, there is great public interest in the release of the materials sought because they will allow for a more thorough analysis of the ESA consultation process between NRC and the Services as it relates to the effects on ESA threatened and endangered species that live and spend time in Cape Cod Bay, including sea turtles and great whales. Thus, assuming for argument's sake that JRWA or Earthrise had some "commercial" interest in the documents requested—which they do not—a complete fee waiver would still be appropriate because JRWA's and Earthrise's "primary" interest in the material is to inform the public about the operations and activities of the government. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" JRWA or Earthrise and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

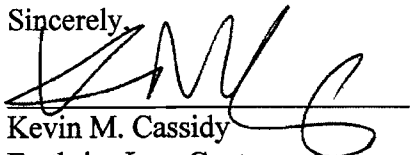
Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of NRC and the Services, will contribute significantly to a broad public understanding of the ESA consultation process between NRC and the Services related to the federal relicensing of PNPS, and will not serve any commercial interest on the part of JRWA or Earthrise. Under these circumstances, JRWA and Earthrise fully satisfy the criteria for a fee waiver. If for some reason the fee waiver is denied, please contact me before incurring any costs related to this request. If the fee waiver is not granted and costs are incurred prior to contacting me, neither JRWA nor Earthrise will be responsible for those costs. JRWA and Earthrise reserve the right to appeal any decision to deny the fee waiver request in this matter.

Pursuant to FOIA, NRC must respond to this request within **twenty business days** of receipt of this letter. 5 U.S.C. § 552(a)(6)(A)(I).

If you have any questions or if you require further information to rule on the fee waiver request, please feel free to contact me at (781) 659-1696 or cassidy@lclark.edu. Additionally, if you are not the proper recipient of this request, please identify which office has information responsive to this request.

Thank you in advance for your prompt reply.

Sincerely,


Kevin M. Cassidy
Earthrise Law Center