



May 16, 2013

CENWK-OC
601 E. 12th Street
Kansas City, MO 64106
Facsimile: (816) 389-2019
Email: foia-nwk@usace.army.mil

VIA Electronic Mail and Facsimile

*Re: EXPEDITED Freedom of Information Act Request –
Pre-Construction Notifications (PCNs) Submitted by Enbridge, Inc., for the
Proposed Pipeline from Flanagan, Illinois, to Cushing, Oklahoma (commonly
referred to as the Flanagan South Pipeline)*

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”) and the pertinent U.S. Army Corps of Engineers (“Corps”) regulations, 32 C.F.R. § 518.1 *et seq.*

The Sierra Club is the nation’s oldest grassroots organization. It has more than 700,000 members nationwide and is dedicated to the protection and preservation of the environment. One of the Sierra Club’s main national initiatives, the Beyond Oil Campaign, tackles the pressing problems of global warming, air pollution, water pollution, and our national dependence on destructive, non-renewable energy sources, like oil. A central goal of this initiative is decreasing the destructive impact of tar sands extraction and refining, and educating the public on foreign and domestic tar sands projects. This FOIA request is part of this initiative.

We are submitting this request to obtain documents that will provide a better understanding of the potential environmental impacts of the pipeline project proposed by Enbridge, Inc., which would originate in or near Flanagan, Illinois, and terminate in Cushing, Oklahoma. This proposed pipeline is also commonly referred to as the Flanagan South Pipeline, and will be referred to hereinafter as “Flanagan South.” Specifically, we are requesting copies of the preconstruction notifications (“PCNs”), which are used by the Corps to determine whether Nationwide Permit 12 applies to this proposed pipeline project.

Definitions

“Records” means 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,

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telephone conversations, telefaxes, e-mails, 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.

“Enbridge” as used in this request includes Enbridge, Inc.; any corporate parent, subsidiary, or other affiliate of Enbridge, Inc.; and any consultant or other entity acting on behalf of Enbridge, Inc. or and/or its corporate parents, subsidiaries, or other affiliates.

Records Requested

The Sierra Club submits an *open-ended* request for copies of all existing and future preconstruction notifications (PCNs) submitted by Enbridge for the proposed “Flanagan South” pipeline. This includes all PCNs and preliminary PCNs, including any PCNs submitted after the date of this request, as well as any preliminary or final jurisdictional determinations (JDs) regarding this project.

This request includes all preliminary and final PCNs and JDs received by the Corps regarding Enbridge’s proposed “Flanagan South” pipeline, including but not limited to all preliminary and final PCNs and JDs received by the Rock Island District, St. Louis District, Kansas City District, Tulsa District, Mississippi Valley Division, Northwestern Division, Southwestern Division, Illinois, Missouri, Kansas, and/or Oklahoma offices.

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 for the Sierra Club to appeal the denial. To comply with legal requirements, the agency must include the following information:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

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 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. Instead, our organization intends to use the requested information to inform the public so that the public can meaningfully participate in protecting the nation's natural resources.

As explained more fully below, the above referenced FOIA request satisfies the fee waiver criteria listed in 32 C.F.R. § 286.28(d) of the Department of Defense's General FOIA Provisions, 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), *see also* 22 C.F.R. § 171.17(a).

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 records requested here pertain to the Corps' application and consideration of Clean Water Act and associated environmental review requirements for the proposed “Flanagan South” pipeline. 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 “likely to contribute” to an understanding of how the Corps is permitting wetland projects, including the “Flanagan South” pipeline, because those documents are not otherwise in the public domain and are not accessible other than through a FOIA request. This information will facilitate meaningful public participation in the public discussion of tar sands projects, and their impact on our environment, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of tar sands mining, transportation, refining, and global warming impacts on the United States and the rest of the world.

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 Sierra Club and its members have long-standing experience and expertise in the subject area of FOIA requests, specifically the development and use of energy resources and global warming. One of the Sierra Club's current national conservation campaigns focuses on ending the environmental destruction created by dirty, non-renewable energy sources such as oil, by forcing tar sands pipelines to comply with environmental protection laws. The Sierra Club is familiar with the damage caused by fossil fuel emissions and the effect that such pipelines can have on their surrounding ecosystems.

The Sierra Club also has the ability and intention to disseminate the information it receives through FOIA. The information is disseminated through a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, emailing and list serve distribution to our members, and posting on the Club's website. Each month, the Sierra Club website receives approximately 850,000 visits. Sierra Magazine, which is published bimonthly by the Sierra Club, reaches more than a million people across North America. Sierra Club Insider, our e-newsletter, is sent to over a million people twice a month. In addition, Sierra Club disseminates information obtained through FOIA through comments to administrative agencies, and when necessary, through the judicial system. The Sierra Club has already published, posted, and disseminated numerous sources of information on the impact of various tar sands oil pipelines.

Thus, Sierra Club unquestionably has the "specialized knowledge" to address the issue of tar sands oil pipeline infrastructure and importation; 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. The public's understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently little or no information publicly available regarding the Corps' permitting process and the potential individual and cumulative environmental impacts of the proposed "Flanagan South" pipeline. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private interests involved. The records requested will contribute to the public understanding of the government's role and the government "operations and activities" that affect how environmental assessments, and national interest determinations are made.

The disclosure of the requested records is also essential to public understanding of the impacts this pipeline has on the environment, including its contribution to climate change. Because the disclosure of such records will significantly enhance the public's understanding of

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these environmental impacts, the requirement that disclosure must contribute “significantly” to the public understanding is met.

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

The Sierra Club has no commercial interest in the requested records. Nor does the Club have any intention of using these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. Sierra Club is a tax-exempt organization under section 501(c)(3) and 501(c)(4) of the Internal Revenue Code. The requested records will be used for the furtherance of the Club’s educational mission to inform the public on matters of vital importance to the environment, wildlife, and natural resources.

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 under the six-part test set out under 22 C.F.R. § 171.17(a)(1). Pursuant to the same rule, the Corps should waive processing and copying fees for this FOIA request.

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

Request for Expeditious Processing

Sierra Club respectfully requests expeditious processing of this request pursuant to 22 C.F.R. § 171.12(b), and sets forth the following justification of a “compelling need” for urgent dissemination of these documents:

The information is urgently needed to inform the public concerning a government activity. Sierra Club has members along this proposed pipeline route who, along with other members of the public, are concerned about this project’s potential impacts, including impacts to U.S. waters and the risks of crude oil spills. These concerns have been validated by the recent oil pipeline spill in Mayflower, Arkansas.

The Army Corps of Engineers has confirmed to the Sierra Club that it has received PCNs to proceed under Nationwide Permit 12 from Enbridge, and that these documents are only available through FOIA. This means that, pursuant to NWP 12, the district engineer (DE) will determine whether the PCN is complete and/or request any additional information from Enbridge within 30 calendar days. 77 Fed. Reg. 10286. Enbridge may then commence with construction if it either receives written approval from the DE or if 45 days have passed and the Enbridge has not received written notice from the DE. *Id.* That means that the Corps could verify this project

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at any time, and thus Sierra Club and the public need this information immediately. As such, urgent fulfillment of this request is necessary because “the information has a particular value that will be lost if not distributed quickly.”

The Sierra Club’s primary activity involves publishing or otherwise disseminating this information to the public. As set forth above, the Sierra Club has the ability and intention to disseminate the information it receives through FOIA to the public through its website, media contacts, press releases, newsletters, monthly magazine, and other means. The Sierra Club has been actively involved in agencies’ permitting of tar sands pipeline since 2008, and has worked tirelessly to increase public awareness and understanding of these projects and their impacts. The Sierra Club will continue to do so with information received through this request.

As such, the Sierra Club has a “compelling need” for expeditious processing of this request.

Record Delivery

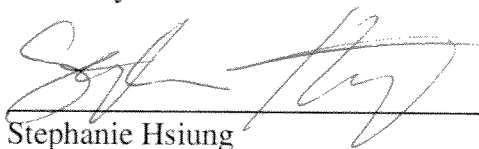
We request that the Corps, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA. 5 U.S.C. § 552, (a)(6)(A)(i). Please produce the forthcoming records, as noted above, as they are received by the Corps. Please produce the requested records on a rolling 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.

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

Stephanie Hsiung
Sierra Club
1650 38th Street, Suite 102W
Boulder, CO 80301
stephanie.hsiung@sierraclub.org

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.

Sincerely,



Stephanie Hsiung
Sierra Club, Program Assistant