SIERRA CLUB
FOUNDED 1892

August 11, 2015

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Via Electronic Mail and Facsimile

Attention: FOIA Coordinator
Fort Worth District
CESWF-OC
FOIA Request
P.O. Box 17300
Fort Worth, TX 76102-0300
Email: foia-swf@usace.army.mil
Fax: (817) 886-6415

RE: Freedom of Information Act Request – DREIS documents (USACE Project No. SWF-2010-00244) and documents related to Letters of Permission granted

Dear FOIA Coordinator:

On behalf of the Sierra Club, I write to request the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and the pertinent Army Corps of Engineers ("Corps") regulations, 32 C.F.R. § 518.1 *et seq.*

Sierra Club is the nation's oldest grassroots organization. It has more than 632,000 members nationwide, including over 22,000 members in Texas. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

One of Sierra Club's priority national conservation campaigns involves promoting smart energy solutions. Sierra Club is particularly interested in ensuring that coal export facilities comply fully with all applicable statutes and regulations. This campaign organizes individuals regionally and nationwide to work on coal-related issues and educates the public on these issues, including the impacts of coal on air and water quality. This FOIA request is made as part of this Campaign.

Description of Records Sought

Sierra Club hereby requests copies of the following records:[1]

(1) All unposted (or non-publicly available) documents related to the Draft Regional Environmental Impact Statement ("DREIS") for USACE Project No. SWF-2010-00244;[2] and
(2) All documents related to Letters of Permission ("LOP") granted by the Fort Worth District since March of 2012.

Exempt Records

If you regard any of the requested records to be exempt from required disclosure under FOIA, I request that you disclose them nevertheless; as such disclosure would serve the public interest of educating citizens. *See* 10 C.F.R. § 1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

Should you decide to invoke a FOIA exemption, please include in your full or partial denial letter sufficient information for the Club to appeal the denial. To comport with legal requirements this information must include:

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 the records requested are exempt from disclosure, please segregate the exempt portions and mail the remaining records within the statutory time limits after the exempted material has been redacted from the records the Club is seeking.

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[1] For purposes of this request, "records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, telephone conversations, faxes, e-mails, documents, data bases, 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 above at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of Fort Worth District, whether they are located in the main district office or in district field offices.

[2] *See* 80 FR 39763 (July 10, 2015), Availability of a Draft Regional Environmental Impact Statement to Analyze Potential Impacts within Defined Geographic Regions in Texas that may be Affected by Future U.S. Army Corps of Engineers, Fort Worth District, Permit Decisions for Future Surface Coal and Lignite Mine Expansions or Satellite Mines within the District's area of Responsibility (USACE Project No. SWF-2010-00244); *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-07-10/pdf/2015-16656.pdf.

Fee Waiver Request

The Sierra Club respectfully requests that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 5 C.F.R. § 1303.70. Our environmental organization 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 from the Army Corps of Engineers and other federal agencies. The Club intends to use the requested information to inform the public so the public can meaningfully participate in discussions about coal mining and wetlands protection in Texas.

Sierra Club is a national, non-profit, environmental organization with no commercial interest in obtaining the requested information. Sierra Club is a nonprofit corporation incorporated in California, with more than 632,000 members and supporters nationwide, over 22,000 of whom reside in Texas. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of waterways, mountains, and the reduced use of coal and expanded use of clean energy. Sierra Club works with a number of environmental and human health issues related to air pollution, global climate change, and the use of coal. Activities at the state level include, but are not limited to, transportation, coal, energy, climate change, public and private lands, outdoor activities, and environmental justice.

As explained more fully below, the above referenced FOIA request satisfies all six factors identified in the Department of Justice FOIA Guide, which were incorporated into the Corps' FOIA regulations, and meets the statutory requirements for a fee waiver—that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of these 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* 32 C.F.R. § 518.24.

1. The subject matter of the requested records must specifically concern identifiable "operations and activities of the government."

The requested records are documents related to the preparation of the DREIS and the LOPs granted by the Fort Worth District. The Army Corps' decision-making processes regarding the DREIS and LOPs granted are unquestionably "identifiable operations or activities of the government." The Sierra Club also seeks these records for their informative value in evaluating the legality and reasonableness of these particular decisions and, the policies and procedures employed to make these decisions, and the environmental impacts associated with these decisions.

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable

operations or activities of the government. There can be no question that this is such a case. The above referenced FOIA request easily satisfies this "identifiable operations or activities of the government" factor because all of the materials requested relate to operations or activities of the government.

2. The disclosure of the requested documents must be "likely to contribute" to public understanding of specific government operations or activities, the disclosable portions of the requested information must be meaningfully informative in relation to the subject matter of the request.

The requested records are "likely to contribute" to an understanding of these operations and activities because most of them are not otherwise in the public domain and are not accessible other than through a FOIA request. It should be noted that the Freedom of Information Act Guide makes clear that, in the Department of Justice's view, determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.

Moreover, these documents are "meaningfully informative" in two respects—they provide the public with understanding on how the Fort Worth District is evaluating and preparing the DREIS and how the District is making its determinations regarding LOPs that have been granted. These documents are also "meaningfully informative" in understanding both the potential individual and/or cumulative adverse environmental impacts associated with the DREIS and LOPs granted. The requested records therefore satisfy this second factor because they will be "meaningfully informative" and are "likely to contribute" to an understanding of the Fort Worth District's CWA permitting and jurisdictional determination operations and activities.

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 – i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public – is examined.

Sierra Club has a long-standing interest and expertise in clean water; the conservation of ports, waters, and wetlands; and in and maintaining active environmental education and environmental defense programs to this end. Sierra Club and its members are particularly concerned about wetlands protection and about the Corps' administration of § 404 of the CWA.

The Sierra Club and its members are particularly concerned about jurisdictional determinations because they have far reaching impacts, not just on wetlands, but on all waters because wetlands act as a natural filter absorbing water-borne pollutants and damaging contaminants. The breadth of public interest in the issue is demonstrated by the fact that over 115,000 individuals and 11 national environmental groups (including Sierra Club) commented on the Administration's January 15, 2003 Advanced Notice of Proposed Rulemaking regarding the issue of the EPA and Army Corps' CWA jurisdiction over "waters of the United States." Sierra Club, along with eleven other national environmental organizations, submitted detailed

legal and scientific comments, over 150 pages, which demonstrates the Sierra Club's "specialized knowledge" and "ability and intention" to disseminate the information requested.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club's website, emailing and list serve distribution to our members in Texas and across the U.S., and via public meetings and events. Every year the Sierra Club website receives 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. Sierra Club Insider, an electronic newsletter, is sent to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. In the past, the Sierra Club has published, posted, and disseminated numerous stories on coal exports, ports, wetlands and the scope of the U.S. Army Corps' jurisdiction over these waters, energy sources, their health and environmental impacts, and alternative energy. This includes information on our various webpages, such as http://www.sierraclub.org/coal/coalexport/, and www.beyondcoal.org and our press releases.

Sierra Club unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner outlined above, 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.

Disclosure of the information requested will contribute "significantly" to the public's understanding of the Fort Worth District's evaluations and decision making related to the preparation of the DREIS. Disclosure will also contribute "significantly" to the public's understanding of the District's evaluations and determinations regarding the LOPs granted by the District. At present, very little information is available regarding the non-public DREIS documents and there are no publicly available documents related to the LOPS granted by the District.

The disclosure of these requested records is essential to public understanding Fort Worth District's evaluations and determinations regarding the DREIS and the LOPs granted. After disclosure of these records, the public's understanding of the Forth District's CWA permitting and jurisdictional determinations will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has 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 to use 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. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Sierra Club has no commercial interest in the requested records and thus disclosure of this information is not "primarily" in their commercial interest. Any publication of any analysis of the requested information would be for the sole purpose of disseminating to the public at large to educate and advocate for conservation of wetlands, wildlife, water quality, and strong Corps administration of the Clean Water Act and/or the Rivers and Harbors Act.

For the foregoing reasons, it is clear that the disclosure of the information requested is in the public interest because it is likely to contribute significantly to the public's understanding of the District's evaluations and determinations regarding the DREIS and the documents associated with the LOPs granted by the District. The public unquestionably will be the primary beneficiary of this requested information.

Therefore, we respectfully request that the Army Corps of Engineers waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4). If you need additional information to make your determination, we would be happy to so provide it. In the event that you deny the fee waiver request, please provide us with an estimate of fees prior to processing our request at the contact information provided below.

In any event, the request for a fee waiver should not be construed as an extension of time in which to reply to this FOIA request.

Record Delivery

I trust that, in responding to this request, the Fort Worth District will comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552, (a)(6)(A)(i); 5 C.F.R. § 1303.10(c). Please produce the records above by sending them to me at the address listed below. Please produce them on a rolling basis within the statutory time limits; at no point should the Fort Worth District's search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

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

David Abell
Sierra Club
Environmental Law Program
85 Second Street, 2nd Floor
San Francisco, California 94105
david.abell@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 (415) 977-5764.

Sincerely,

David Abell

5/9/9/2015

FA-15-0207
FP-15-026509

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SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
85 SECOND STREET, FOURTH FLOOR
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415.977.5693/415.977.5793 FAX

FAX COVER SHEET

Sender: David Abell

Sender's Phone: (415) 977-5764

Number of Pages (includes cover): 8

Date: August 11, 2015

Re: FOIA

Recipients: FOIA Officer

Recipient's Fax: 817-886-6415

PLEASE GIVE TO RECIPIENTS IMMEDIATELY!

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