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John De Clerck, FOIA Coordinator
US Fish and Wildlife Service
911 NE 11th Ave.
Portland, OR 97232

Submitted via email to: John_DeClerck@fws.gov

November 4, 2019

RE: ICL FOIA Request

Dear Mr. De Clerck:

Description of Records Sought:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §552 et seq., the Idaho Conservation League seeks:

1. The complete administrative record associated with the U.S. Fish and Wildlife Service’s (“Service”) Biological Opinion for the BNSF Sandpoint Connector Project, 01EFW00-2019-F00369, dated May 3, 2019. To expedite the processing of this FOIA request, ICL requests the Service exclude the public comments associated with this administrative record, as well as the documents that the U.S. Coast Guard has already released to the public as part of Docket ID: USCG-2018-1085 on regulations.gov.

We request the Service provide these documents in electronic form if possible, but hard copies would also be acceptable.

Please do not hesitate to call me to clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (208) 265-9565 and mnykiel@idahoconservation.org. As provided by FOIA, 5 U.S.C. § 552(a)(6)(A), we look forward to a reply within (20) working days. Thank you in advance for your time and assistance.

Sincerely,

Matthew Nykiel
Conservation Associate

Request for a Fee Waiver

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii).

FOIA mandates that agencies waive or reduce search and copying fees where the disclosure 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)(A)(iii).

As one court explained, if a non-profit organization has “identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership,” then a waiver is appropriate. *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (internal quotation omitted). The information provided below demonstrates that the Idaho Conservation League (“ICL”) meets the required criteria and are entitled to a full fee waiver.

ICL is a nonprofit organization dedicated to protecting Idaho’s clean water, wilderness and quality of life, including protecting the environment from the derailment of volatile and hazardous materials transported by major railroads. Since 1973, ICL has worked to protect these values through public education, outreach, advocacy and policy development. As Idaho's largest state-based conservation organization, we represent over 35,000 supporters, many of whom have a deep personal interest in protecting Idaho’s human health and environment.

We ask for a full fee waiver because “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). This request concerns a matter of over-riding public importance – the installation and operation of new railroad infrastructure over the State of Idaho’s largest lake and habitat to vulnerable and federally listed species, including bull trout.

Railroad derailments concern local residents in North Idaho because the major railroads that operate in Idaho’s northern counties transport large quantities of crude oil and other hazardous materials – in 2016 significantly more than 300,000 rail cars or tank cars carrying various forms of hazardous materials and crude oil traveled through Bonner County. Transporting such massive quantities of dangerous materials is particularly concerning to local residents given the recent history of train derailments both locally and nationally. In 2017 alone, there were three significant train derailments in Bonner and Boundary Counties, at least two of which occurred near waterways.

On May 3, 2019, the Service completed a Biological Opinion regarding BNSF Railway’s proposal to install a second railroad track and bridge nearly a mile across Lake Pend Oreille in Bonner County, Idaho. This proposal would entail three to five years of year-round construction and would likely alter the train operations through Bonner County and in the region for the foreseeable future. ICL is requesting the administrative record that forms the basis of this Service opinion.

The public has a right to be informed of all the information that supported the Service's opinion, finding that BNSF's rail bridge proposal will not jeopardize the survival and recovery of bull trout or adversely modify its designated critical habitat. ICL requests daylighting the information not already in the public domain because this information will contribute greatly to the public's understanding of how the Service reached its opinion and whether the Service's analysis was sufficient.

Moreover, ICL has the expertise to analyze the requested records and the ability to disseminate the information and its analysis to the public. ICL regularly scrutinizes proposals that could increase the transportation of hazardous materials by rail in Idaho to determine whether the proposals pose unacceptable risks to human health and the environment. ICL then disseminates this information to educate the public and allow increased participation in regulatory processes.

For example, ICL has been actively involved in gathering information about coal and oil refinery and distribution proposals in the Pacific Northwest, which would increase the transportation of coal and crude oil by rail through North Idaho. ICL staff participated in the NEPA and Washington's State Environmental Policy Act public comment process, submitting comments and testifying on various proposals over the past 5 years. More recently, ICL actively participated in the U.S. Coast Guard's regulatory decision-making process related to BNSF's proposal to construct a second rail bridge across Lake Pend Oreille. And, ICL held a community event and distributed information and materials focused on educating the public about this process and how to get involved.

ICL also works actively with other nonprofit organizations, local communities, tribal governments, and other individuals and entities confronting the risks of transporting hazardous materials by rail nationwide, including in Idaho specifically. ICL, and the groups it collaborates with, disseminate information about transporting crude oil and other materials by rail and the associated impacts of derailments and releases into waters of the United States through newsletters, web sites, action alerts, press releases, social media, and collaboration with others.

With its expertise and experience in this area, ICL will evaluate the records disclosed pursuant to this FOIA request and disseminate them appropriately. *See Friends of the Coast Fork v. United States Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997); *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1041 (D. Idaho 2004) (noting cases holding "statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public sufficient to entitle an organization to a fee waiver").

Finally, ICL is a nonprofit organization that has no commercial interest in the requested records. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (noting that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requestors" (quoting legislative history)). ICL's sole interest in obtaining the records is to analyze the information, incorporate it into educational materials, and disseminate the information along with its analysis to the public.

ICL is qualified and capable to analyze the requested records and appropriately disseminate the information on this important issue to the public. According to the information provided above, ICL is entitled to a fee waiver.