

Kristin Davis

From: Kristin Davis <kdavis@selcva.org>
Sent: Thursday, January 11, 2018 1:19 PM
To: 'Karen Overcash (kovercash@fs.fed.us)'
Cc: 'Michelle Davalos (mdavalos@fs.fed.us)'; 'Diana Withen (dwithen@gmail.com)'; 'Steve Brooks (shbrooks@mounet.com)'; 'Annie Jane Cotten (anniejanecotten@gmail.com)'
Subject: FOIA Request for Nettle Patch Vegetation Management Project
Attachments: 1-11-18 Nettle Patch FOIA request.pdf

Dear Karen,

On behalf of the Southern Environmental Law Center and The Clinch Coalition, I submit the attached Freedom of Information Act request to the Forest Service regarding the Nettle Patch Vegetation Management Project. Please don't hesitate to contact me with any questions, concerns, clarifications, etc. about the request or how to most efficiently produce the responsive public records. As always, I greatly appreciate your help with these matters.

I am also copying District Ranger Michelle Davalos. Michelle, please forgive that this is the first official email you're receiving from me. I look forward to calling you soon to introduce myself and begin talking about the project. And I know we all look forward to welcoming you in person to this very special part of the world.

Best,
Kristin

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January 11, 2018

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VIA EMAIL AND U.S. MAIL

Re: Freedom of Information Act Request Regarding the Nettle Patch Vegetation Management Project

Dear Ms. Overcash:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center ("SELC") and The Clinch Coalition ("TCC") hereby request any and all of the following documents within the possession, custody, or control of the U.S. Forest Service:

1. Documents associated with, resulting from, and/or regarding the decision-making, design, implementation, and evaluation of the Nettle Patch Vegetation Management Project ("Nettle Patch project"), including but not limited to the following documents, which we request be produced first if possible:
 - A. Hydrology report referred to in the Final Environmental Assessment ("Final EA") and Final EA appendices (e.g., Final EA at 86, 88, 89, 168, 173; Appendix D Response to Comments at 152);
 - B. Final Specialist report referred to in Appendix D Response to Comments at 157;
 - C. Documents regarding the re-classification of forest community types referenced in the Final EA at 62;
 - D. Documents regarding forest community typing of Compartment 2059;
 - E. Stand exam data for the following stands:
 - i. 2059/53
 - ii. 2059/54
 - iii. 2059/57
 - iv. 2059/59
 - v. 2044/29
 - vi. 2044/35
 - vii. 2044/36
 - viii. 2044/38
 - ix. 2044/42
 - x. 2043/50
 - xi. 2042/30

- F. Documents regarding non-native invasive species (NNIS) surveys completed for the Nettle Patch Project;
- G. Documents regarding the treatment of NNIS on the Clinch Ranger District, including the amounts and product names of specific herbicides used over the last five years. This could include but is not limited to any district-level NNIS management plans, monitoring results, documentation that provides details of efforts to treat NNIS (including tracking of herbicide use).
- H. Documents regarding project-level and/or site-specific analysis of potential herbicide treatment of native species as part of the Nettle Patch project;
- I. Documents regarding on-the-ground conditions that have been field verified, as referenced in Appendix D Response to Comments at 187;
- J. Documents clearly identifying all identified, field-verified Old Growth patches;
- K. Old Growth tally sheets for the following stands:
 - i. 2043/26
 - ii. 2044/12
 - iii. 2059/15
 - iv. 2059/24
- L. Documents regarding results of the North Fork Pound and Flatwoods prescribed burns;
- M. Documents regarding the analysis and attempted departure analysis referred to in the Final EA Appendix D Response to Comments at 128;
- N. Documents related to sedimentation analysis in Hydrology section of Final EA;
- O. Documents related to the soils analysis in the Soils Resources section in Final EA;
- P. Documents regarding potential impacts of this project on the 303(d) reach of the Guest River;
- Q. Documents regarding potential impacts of this project on the 303(d) reach of the Eastland Creek;
- R. Documents regarding all 303(d) reaches within the hydrology analysis area for this project;
- S. Wildlife Data Sheets that identify the Compartment and Stand numbers;
- T. Documents regarding proposed harvesting in the extended Riparian Corridors/extended riparian buffer zones of project area;
- U. Documents regarding hydrology surveys completed for the Nettle Patch Project;
- V. Scoping comments received by individuals and organizations other than SELC and TCC.

Unless it is more efficient for the Forest Service to do so, we are not asking the agency to produce public records regarding the Nettle Patch project that it previously produced to SELC and/or TCC. These include:

- Timber stand Data Report from 4/21/2016 (except for stands listed above, which were not produced);

- Old Growth tally sheets for proposed harvest units (except for stands listed above, which were not produced);
- Maps entitled “NP 238C Stone Draft,” “NP 2420 GSC Draft,” “NP 2020 Vision Draft,” and “NP 2430 Fork Draft” (note that any handwritten markings on these maps is not visible or legible);
- 2015 Nettle Patch Timber Project Botany survey notes;
- Redacted 2015 Wildlife Data sheets;
- March 17, 2017 letter from Charles Lane to U.S. Fish and Wildlife Service requesting project review request;
- March 23, 2017 Biological Evaluation/Biological Assessment for Threatened, Endangered, and Sensitive (TES) Species; and
- April 14, 2017 letter from Jordan Richard (U.S. Fish and Wildlife Service) to Charles Lane regarding project review request.

To the extent, however, the agency has updated, additional, or different documents to supplement the previously produced documents, we request all such documents.

For the purposes of this request, please consider “documents” to include all written, printed, recorded or electronic: materials, communications, correspondence, email (whether received, deleted or sent), memoranda, reports, studies, working papers, notes, minutes, notations, copies, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages, and mail in the possession, custody or control of the Forest Service, whether in draft or final form.

Please include records up to the date that the agency commences its search for responsive records. As you know, FOIA requires a responding agency to make a “determination” on any request within twenty working days of receipt.¹ FOIA also requires the release of all reasonably segregable portions of a document that does not qualify for one of the several FOIA exemptions.² We therefore request that you make available for SELC and TCC’s review all segregable portions of responsive documents and justify redactions by reference to specific FOIA exemptions within twenty business days of receipt of this letter. Should SELC and TCC’s requests be denied, in full or in part, we further request that you inform us of the grounds for denial and the specific administrative appeal rights that are available.³

We understand that the majority of responsive documents may be available electronically. To reduce the administrative burden upon the Forest Service and minimize costs of printing and copying, we request that any responsive documents available in electronic form be produced electronically. Electronic documents might be produced on CD-ROMs, external USB “thumb drives” or “flash drives,” or by other means. We are happy to arrange transmission of documents over web-based document sharing services such as Sharefile. For any documents that cannot be provided electronically, we request hard copies of the documents. Please do not hesitate

¹ 5 U.S.C. § 552(a)(6)(A)(i).

² *Id.* at § 552(b).

³ *Id.* at § 552(a)(6)(A)(i)

to contact Kristin Davis to discuss any questions or concerns related to how to best and most efficiently produce the requested public records.

Additionally, in light of the fast-approaching February 5, 2018 deadline, we ask that you send these documents on a rolling basis. Please do not let a search for or deliberation concerning some documents delay producing others that the agency has already retrieved and elected to produce.

Finally, if fees will be incurred for search time or document reproduction, SELC and TCC request that the fees be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), because public disclosure of the requested information “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[s].”

The Forest Service will grant a FOIA fee waiver request if it determines that the disclosure is in the public interest.⁴ In deciding whether a fee waiver request is in the public interest, the Forest Service considers the following six factors:

- (i) The subject of the request, i.e., whether the subject of the requested records concerns “the operations or activities of the government”;
- (ii) The informative value of the information to be disclosed, i.e., whether the disclosure is “likely to contribute” to an understanding of government operations or activities;
- (iii) The contribution to an understanding of the subject of the general public likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to “public understanding”;
- (iv) The significance of the contribution to public understanding, i.e., whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities;
- (v) The existence and magnitude of a commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (vi) The primary interest in disclosure, i.e., 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.”⁵

All of these factors weigh in favor of the grant of a fee waiver here. First, “the subject of the requested records concerns ‘the operations or activities of the government.’”⁶ All of the requested information concerns the Forest Service’s analysis of the Nettle Patch Vegetation Management Project, which is proposed for implementation on the Clinch District of the Jefferson

⁴ 7 C.F.R. Part 1m Subpart A, App. A, § 6(a).

⁵ 7 C.F.R. Subtitle A, Part 1, Subpart A, Appendix A, § 6(a)(1).

⁶ *Id.* § 6(a)(1)(i).

National Forest. Therefore, the information that the Forest Service receives and considers in analyzing this issue and in making this important decision undoubtedly concerns the operations and activities of the government.⁷

Second, the disclosure of the information requested is “likely to contribute” to public understanding of these government operations or activities in “significant” ways.⁸ The requested documents will illuminate, among other things, the factual, scientific and economic information that the Forest Service received and considered in its analysis of the proposed management, any assumptions that the Forest Service relied on in its analysis, and the various mitigation measures and standards considered by the Forest Service. The requested documents will also provide valuable insight into the information that the Forest Service received from within the Forest Service or USDA or from other agencies and entities. The public disclosure of this information will provide more complete information underlying the Forest Service’s analysis of this topic in its Final Environmental Assessment and other documents, and will shed light on how the Forest Service’s analysis of this project was shaped. In this way, the requested information goes beyond the information the Forest Service already has provided to the public on its website for the Nettle Patch project.

As the Forest Service is well aware, the public already has taken great interest in the Nettle Patch project. The public’s interest in and concerns about potential impacts of this project have been documented in the press also. Especially given this strong level of public interest in this project, the release of the information requested by SELC and TCC will likely significantly contribute to “public understanding” of this issue by enhancing and expanding on the public’s knowledge of the Forest Service’s analysis of this project. SELC and TCC routinely share information concerning the activities and operations of government agencies, including information concerning the Nettle Patch project, via their respective websites, press releases, published reports, in-person presentations, interviews with the media, and direct communications with other interested organizations. SELC and TCC intend to review and analyze the requested documents and information and to share this information and their analysis with their supporters or members, other interested organizations, members of the press, and the general public through these various mediums. Given the nature of the information sought, the high level of public interest in the Nettle Patch project, as well as TCC and SELC’s plan for sharing and publicizing the results of its findings with members of the public, there can be little doubt that the information requested “is likely to contribute ‘significantly’ to public understanding of government operations or activities.”⁹

Finally, SELC and TCC have no “commercial interest[s] that would be furthered by the requested disclosure[s],” and “the primary interest in disclosure” is in the public interest, not any

⁷ See, e.g., *Forest Guardians v. Dep’t of Interior*, 416 F.3d 1173, 1181 (10th Cir. 2005) (holding that release of records regarding the scope of BLM’s permit program concerns the operations or activities of BLM).

⁸ 7 C.F.R. Subtitle A, Part 1, Subpart A, Appendix A, §§ 6(a)(1)(ii)-(iv).

⁹ See *Forest Guardians v. Dep’t of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (online newsletter, email lists and website sufficient to satisfy requirement); *D.C. Tech. Assistance Org. v. U.S. Dep’t of Housing & Urban Dev.*, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) (noting that “technology has made it possible for almost anyone to fulfill th[e] requirement” that requested documents will likely contribute to an understanding of government activities or operations).

commercial interests.¹⁰ SELC is a 501(c)(3) nonprofit organization and not-for-profit association; both have public interest missions and, by definition, have no commercial interests. The interest in disclosure is in the public interest of obtaining information about the government's analysis and decisions regarding the Nettle Patch project—not in promoting any commercial interests of SELC or TCC. Although it is a legal organization, SELC does not profit, or otherwise have a commercial interest, in document review or litigation. SELC does not charge its clients for attorney time or enter into contingency agreements, nor does it sell or distribute government information for financial gain. Further, it would not be proper for the agency to claim that, just because SELC is a legal organization, there is some abstract possibility of future litigation which creates a commercial interest, since any such possibility is not itself a commercial interest.¹¹

Congress intended federal agencies to be guided by the principle that “fee waivers play a substantial role in the effective use of the FOIA, and they should be *liberally granted* to all requesters other than those who are commercial users.”¹² “[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.”¹³ Given this presumption, as well as the strong likelihood that the release of the requested information will significantly contribute to the public's understanding of the activities and operations of the government, the Forest Service should grant SELC and TCC any necessary fee waivers.

In the event that the Forest Service declines to grant the fee waiver request, we understand that the first two search hours and 100 pages of documents are free.¹⁴ If the waiver is denied and the request will involve more than two search hours or more than 100 pages of documents, and the fees will exceed \$200.00, please contact Kristin Davis before the request is processed to discuss this matter.

¹⁰ 7 C.F.R. Subtitle A, Part 1, Subpart A, Appendix A, §§ 6(a)(1)(v).

¹¹ See *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 n.4 (9th Cir. 1987).

¹² 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy) (emphasis added); *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

¹³ *Ettlinger v. FBI*, 596 F. Supp. 867, 873 (D. Mass. 1984) (quoting legislative history).

¹⁴ See 7 C.F.R. Part 1, Subpart A, Appendix A, § 5(d).

If you have any questions, please do not hesitate to contact me. I am happy to work with you to clarify the scope of our request and facilitate the production of the requested public records. Thank you for in advance for your assistance.

Sincerely,



Diana Withen, President
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