



ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

May 11, 2018

SENT VIA EMAIL AND MAIL

U.S. Army Corps of Engineers
CESAJ-OC
P.O. Box 4970
Jacksonville, FL 32232-0019
E: foia-saj@usace.army.mil

**Re: Freedom of Information Act Request: Port Everglades Navigation
Improvement Project**

Dear FOIA Officer(s):

Earthjustice, on behalf of Miami Waterkeeper, submits this request to the U.S. Army Corps of Engineers (“Army Corps”) for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. The Army Corps is deepening and expanding ports along the East Coast in order to accommodate larger, Panamax-sized vessels. On January 29, 2016, the Army Corps approved the Port Everglades Navigation Improvement Project (“Port Everglades Project”) to deepen and expand Port Everglades in Fort Lauderdale, FL. In accordance with the National Environmental Policy Act (“NEPA”), the Army Corps completed an Environmental Impact Statement in May 2015 to evaluate the environmental impacts of the Port Everglades Project. In accordance with the Endangered Species Act (“ESA”), the Army Corps also consulted with the National Marine Fisheries Service regarding threatened coral species located in the area that will be affected by the Port Everglades Project, and received a Biological Opinion on March 7, 2014.

Miami Waterkeeper, along with a coalition of other plaintiffs, filed a lawsuit on August 16, 2016, challenging the Army Corps’ approval of the Port Everglades project for the agency’s failure to fully analyze and account for environmental impacts. As a result of the litigation, the Army Corps agreed to complete a new ESA consultation with the National Marine Fisheries Service. As part of that consultation, the Army Corps is preparing a draft biological assessment that it expects to submit to the National Marine Fisheries Service in the spring of 2018. The Army Corps has contracted with Dial Cordy and Associates, Inc. (“Dial Cordy”) to survey the Port Everglades Project area in order

50 CALIFORNIA STREET, SUITE 500 SAN FRANCISCO, CA 94111

T: 415.217.2000 F: 415.217.2040 WWW.EARTHJUSTICE.ORG

Exhibit A

to quantitatively estimate the population of ESA-listed coral species on coral reef and hardbottom habitats. In March 2017, Dial Cordy completed an ESA Listed Coral Species Survey Study Plan. The plan states that “[a]ll data including photos, videos, and spreadsheets will be shared via the internet or via external hard drive after data collection is completed. A draft report will be submitted 60 days after data collection is completed to [the Army Corps], and NMFS. . . . A final report will be issued 10 days of the receipt of all draft report comments.”

As a result of the above-listed litigation, the Army Corps also agreed to complete a supplemental NEPA document(s). The Army Corps plans to issue a draft supplemental NEPA document(s) by the spring of 2018. As part of that process, the Army Corps also contracted with Dial Cordy to conduct a Reconnaissance Survey to obtain information on natural communities in the area for Port Everglades Project planning and state permitting. Dial Cordy completed a Reconnaissance Survey Protocol for Port Everglades in March 2017. The Protocol states that “[d]ata deliverables will include digital photo and video files named with transect information, sorted by assessment area, copies of field datasheets . . . , and Excel spreadsheets with complete and accurate data.” The Protocol states that Dial Cordy will provide a written narrative report with descriptive statistics and that all data will be available and submitted to the Army Corps within 30 days after field data collection is completed. The Protocol states that Dial Cordy will submit a draft report to the Army Corps within 90 days after field data collection is completed and submit a final report within 10 days of receiving comments on the draft.

In addition, the Army Corps has been in the process of collecting data on the full impacts of a similar port expansion project at Port Miami that the Army Corps completed in the fall of 2015. The Army Corps expects the impacts from dredging during the Port Everglades Project to be similar to those that occurred in Miami. As a result, the Army Corps intends to use and data and information collected regarding the impacts of dredging at Port Miami on corals and the marine ecosystems when evaluating the environmental impacts of the Port Everglades Project.

Document(s) Requested

We request copies of all documents which were generated, received, kept, and/or considered by the Army Corps or Dial Cordy relating to:

1. The ESA-listed Coral Species Surveys and the Reconnaissance Surveys conducted by Dial Cordy for Port Everglades, including but not limited to methodologies, reports, surveys, or models produced in order to inform ESA

consultation or NEPA analysis for the upcoming Port Everglades expansion project.

2. Any post-project reviews, reports, or “lessons learned” documents, meeting minutes, or presentations by internal or external persons relating to the impacts of the Port Miami expansion dredging, including but not limited to emails or other communications or documents dated from April 1, 2017 through the present.

For this request, the term “document” should be interpreted to include copies of any and all summaries, spreadsheets, datasheets, photos, memoranda, assessments, evaluations, videos or video files, correspondence, or other responsive records, including, but not limited to, internal memoranda, memoranda and correspondence with any other federal, state or foreign agencies or individuals, papers, maps, data, scientific (clinical and nonclinical) studies, samples, schematics, field notes/reports, photos (digital and print), telephone logs, briefing/application documents, electronic mail, and notes documenting any communication (regardless of physical form or characteristics). **This request does not include publicly available documents that are readily available on the Army Corps’ website or Dial Cordy’s final reports on the impacts from the expansion project at Port Miami.**

Fee Waiver Requested

We are willing to pay up to \$50 of any fees associated with this request. For any fees in excess of that amount, we request a waiver. 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).

In addition to the statutory direction, the U.S. Department of Defense has issued regulations outlining factors that it considers in deciding whether a fee waiver is warranted. The regulations state the Department should grant a fee waiver if: (1) the disclosure of the requested information would shed light on the operations or activities of the Federal Government; (2) disclosure of the requested information would be likely to contribute significantly to public understanding of the government’s operations or activities; and (3) disclosure of the information is not primarily in the commercial interest of the requestor. 32 C.F.R. § 286.12(l)(2).

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 Miami Waterkeeper meets the required criteria and is entitled to a full fee waiver.

A. The Request Concerns the Operations and Activities of the Government.

This FOIA request seeks information relevant to the Army Corps’ efforts to deepen and widen a U.S. port. Specifically, it seeks information related to the Army Corps’ attempts to survey and protect threatened coral species and other marine ecosystems that will be directly affected by the Army Corps’ operations. Accordingly, the FOIA request directly concerns the operations and activities of the government in managing and protecting public resources. This request will allow Miami Waterkeeper to evaluate the strength and effectiveness of the Army Corps’ revised environmental analyses of impacts from its planned Port Everglades Project. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Accordingly, the FOIA request directly implicates the operations and activities of the government in surveying and analyzing environmental impacts of its planned projects.

B. The Request is in the Public Interest.

The Department of Defense regulations state that in order to determine whether a request is in the public interest, the following factors should be considered: (1) whether the request is meaningfully informative about government operations or activities; (2) whether the disclosure will contribute to the understanding of a reasonably broad audience of persons. 32 C.F.R. § 2.86.12(l)(2)(ii).

1. *The Requested Information Has Value to the Public and Will Likely Contribute to Public Understanding of Government Operations or Activities.*

There is a direct connection between the requested records and the Army Corps’ activities related its environmental analysis of the impacts of the Port Everglades Project. Access to these records will allow Miami Waterkeeper to evaluate the government’s compliance with environmental law, including NEPA and the ESA. Consequently, the requested documents are critical to a meaningful assessment of the

agency's actions and a thorough public understanding of the government's operations and activities.

Disclosure of these records will help illuminate how the government plans to regulate activities in our nation's public waters. Miami Waterkeeper is a Florida non-profit organization with a mission to defend, protect, and preserve the aquatic integrity of South Florida's watershed and wildlife through citizen involvement and community action. Miami Waterkeeper seeks to eliminate or mitigate threats to South Florida's coastal waters. Through its education, community outreach, and legal advocacy, Miami Waterkeeper hopes to ensure a clean and vibrant South Florida watershed and coastal culture for generations to come.

Miami Waterkeeper intends to disseminate information that may be available in the requested records through various means, including newsletters, reports, newspaper and magazine articles, electronic action alerts, web sites, and through other formal and informal communications. Miami Waterkeeper can publicize information received from this request in its newsletters, blogs, website, social media, and media outreach initiatives. Miami Waterkeeper's communications staff can disseminate newsworthy information obtained from this request to the media. These types of public outreach are sufficient to warrant a fee waiver. *See W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1041 (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"). Miami Waterkeeper will also make any documents available to the public on request.

Miami Waterkeeper possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form. Miami Waterkeeper staff and board include experts on coral biology and environmental law. Our experts – and those we associate with – will scrutinize the scientific and legal underpinnings of the requested documents; these analyses will form the basis for responding to the Army Corps' actions, and educating the public. *See Friends of the Coast Fork v. United States Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997). *Cf. W. Watersheds Proj.*, 318 F. Supp. 2d at 1040-41. Miami Waterkeeper is highly qualified to extract, synthesize, analyze, and convey the requested information to its members, other organizations, and the public at large in a way that will increase understanding of government actions affecting public resources in Southeast Florida.

Miami Waterkeeper has a long history of evaluating information similar to that requested here and distributing it to help inform the public and encourage participation

in future planning processes. Miami Waterkeeper has gained a detailed understanding of the issues surrounding port expansion and deepening projects and how they can negatively impact the marine environment. Miami Waterkeeper has a dedicated campaign to protecting Florida's coral reefs. For example, staff at Miami Waterkeeper has generated over 20 media articles regarding the impacts of dredging on coral reefs. In addition, Miami Waterkeeper has engaged in a public awareness campaign to inform Florida citizens about the harmful impacts of port expansion activities. We routinely speak to citizen groups and students of various ages regarding the impacts of dredging on coral reefs.

Moreover, Miami Waterkeeper staff and members have participated extensively in the relevant public processes over the past few years, by, among other things, submitting extensive written comments to the Army Corps concerning its mismanagement of marine resources, and engaging in the more general public discourse over coral and associated marine life in various public and scientific symposia.

Finally, because this FOIA request expressly excludes information that is publicly available, the requested information is not already in the public domain. Rather, the disclosure will contribute significantly to the understanding of a broad public audience of persons interested in the subject. *See Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

2. *The Disclosure Will Contribute Significantly to Public Understanding.*

Disclosure of these documents will further the understanding of the public at large and is likely to be of interest to a broad audience. Miami Waterkeeper is a public-interest organization whose core mission is to protect the environment, public resources, and human health. The requested documents will undergo significant scientific and legal scrutiny by Miami Waterkeeper and these analyses will form the foundation for addressing the Army Corps' environmental evaluations.

Activities of the Army Corps are areas of interest to a reasonably broad segment of the public. The impacts on coral and the marine environment from the Army Corps' other, similar port expansion and deepening project in Miami have been the subject of significant public discourse as well as several public meetings. Conflicts about the Army Corps' compliance with the mandates of the ESA and NEPA in this context has led to litigation over the Army Corps' PortMiami project and the Port Everglades Project. The litigation over the Army Corps' Port Everglades Project forced the Army Corps to re-evaluate environmental impacts and reengage in ESA consultation

regarding those impacts. Litigation over the Army Corps' PortMiami expansion project has already led to the emergency rescue of hundreds of ESA-listed corals. Miami Waterkeeper will use the information it obtains from the disclosed records to educate the public at large about how the Army Corps' Port Everglades Project may still adversely affect threatened corals and marine ecosystems. *See W. Watersheds Proj.*, 318 F. Supp. 2d at 1040 (finding that the requestor "adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the [the agency] and also how . . . management strategies employed by the [the agency] may adversely affect the environment"). Staff at Miami Water Keeper has also published a number of scientific articles and reports about the biology and health of Florida's corals.

Through Miami Waterkeeper's synthesis and dissemination (by means discussed above), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984) (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F. Supp. 2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern surveys of threatened corals and other marine ecosystems that may be adversely affected by the Army Corps' activities during the Port Everglades Project. *See Cnty. Legal Servs.*, 405 F. Supp. 2d at 560 (because requested records "clarify important facts" about agency policy, "the [] request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987) ("[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.").

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of the Army Corps' environmental evaluations. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested record to the public will educate the public

about the government's compliance with environmental laws and will help assess plans to regulate activities in our public waters.

Miami Waterkeeper is not requesting these documents merely for their intrinsic informational value. Disclosure of the documents will significantly enhance the public's understanding of the potential environmental threats of the Army Corps' planned Port Everglades Project, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested documents will help reveal more about the Army Corps' surveys of the threatened corals and other marine resources located in the project area.

The documents are also certain to shed light on the Army Corps' compliance with the ESA and NEPA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of FOIA.

C. Miami Waterkeeper Has No Commercial Interest in the Disclosure of the Information.

Miami Waterkeeper is a § 501(c)(3) tax-exempt nonprofit public interest organization with no commercial interest in obtaining the requested information. Miami Waterkeeper is dedicated to mitigating environmental threats to Florida's oceans and waterways, including threats to marine life, such as coral. Miami Waterkeeper's Protect Florida's Corals campaign includes the goal of preventing the same damage to corals and marine ecosystems that occurred at the Port of Miami from happening during the Port Everglades Project, and seeking proper mitigation to correct, in part, damage already done to our nation's coral reefs from dredging. The public will be the primary beneficiary of this requested information because Miami Waterkeeper has no commercial interest in the requested disclosure. *See McClellan Ecological Seepage Situation*, 835 F.2d at 1284 (noting that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requestors" (quoting legislative history)).

D. Miami Waterkeeper Is a Media Representative.

Members of the news media are entitled to waivers of search fees. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. 286.12(d)(1)(i), (e)(1). The Department of Defense regulations also state that a representative of the news media satisfies fee waiver criteria. 32 C.F.R. § 286.12(l)(2)(ii)(B), (iii)(B). A representative of the news media includes "publishers of periodicals . . . who make their products available for purchase

by or subscription by or free distribution to the general public." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 32 C.F.R. § 286.12(b)(6). News media broadly disseminate "information that is about current events or that would be of current interest to the public." *Id.* The waiver extends to a nonprofit organization that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)); *Cause of Action v. FTC*, 799 F.3d 1108, 1115-17 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr. V. Dep't of Def.*, 241 F. Supp. 2d 5, 12 (D.D.C. 2003).

Miami Waterkeeper publishes and transmits news to the public on a regular basis. Miami Waterkeeper publishes regular blogs, newsletters, website updates, social media posts, and is featured in periodicals. The communications staff at Miami Waterkeeper relies on information acquired under FOIA and through other means. The fact that Miami Waterkeeper is a public interest advocacy organization is inconsequential so long as "its activities qualify as those of a representative of news media," and Miami Waterkeeper's do. *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 12. Public interest organizations meeting the requirements "are regularly granted news representative status." *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *Cause of Action*, 799 F.3d at 1124 (for the news-media provision, an organization's website, newsletter, press releases, and press contacts will be considered in combination); *Judicial Watch v. U.S. Dept. of Justice*, 133 F. Supp. 2d 52, 53-4 (D.D.C. 2000) (website that disseminated information and radio show were sufficient to establish status of representative of media).

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of Miami Waterkeeper's publications or other suitable media channels. Staff at Miami Waterkeeper gather information from a variety of sources (including documents provided pursuant to FOIA requests) to write original articles and reports newsletters, blogs, and other Miami Waterkeeper-operated media outlets. Miami Waterkeeper seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

As provided by 5 U.S.C. § 552(a)(6)(A), we look forward to a reply within twenty (20) working days. If the agency chooses to withhold the requested documents from disclosure pursuant to FOIA exemptions, we request that it: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (ii) explain in full the basis on which non-disclosure is justified; and (iii) provide us with any segregable portions of the documents for which a specific exemption is not claimed. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases.

Please contact me if you have any questions, or if I can clarify this request in any way. I can be reached at (415) 217-2142. Thank you in advance for your assistance.

Sincerely,

s/ Brettny Hardy
Attorney
EARTHJUSTICE
500 California St., Suite 500
San Francisco, CA 94111
bhardy@earthjustice.org