



NATURAL RESOURCES DEFENSE COUNCIL

August 12, 2009

*Via Electronic Mail*

US Army Engineer District, Kansas City  
ATTN: CENWK-OC  
700 Federal Building  
Kansas City, MO 64106-2896  
[dll-nwk-oc-foia@usace.army.mil](mailto:dll-nwk-oc-foia@usace.army.mil)

*Via Facsimile*

Freedom of Information Officer  
U.S. Army Corps of Engineers  
Kansas City District  
Office of Counsel  
601 E. 12th Street  
Kansas City, MO 64106  
Fax: (816) 389-2019

**Re: Freedom of Information Act Request**

To Whom It May Concern:

The following request is made on behalf of the Natural Resources Defense Council, Inc. ("NRDC"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. NRDC requests the release and production of the following documents:

1. Any documents related to BNSF Railway Company's ("BNSF") application for a Clean Water Act Section 404 permit ("Proposed Permit") in connection with BNSF's proposed intermodal facility near Gardner, in Johnson County, Kansas ("Proposed Project").
2. Any documents related to the facts and conclusions contained in the U.S. Army Corps of Engineer's ("Corps") July 2009 Draft Environmental Assessment ("EA") for the Proposed Permit and Proposed Project.
3. Any documents exchanged between BNSF and the Corps in relation to the Proposed Permit and Proposed Project.

4. Any documents related to the potential environmental impacts from the Proposed Permit and Proposed Project, including but not limited to potential air quality, traffic, water, endangered species or land use impacts.

5. Any documents related to the potential environmental impacts from the Allen Group Logistics Park, including but not limited to potential air quality, traffic, water, endangered species or land use impacts. The Allen Group Logistics Park is described in the Corps' EA for the Proposed Project.

6. Any comments provided by members of the public, government agencies, or any other person or entity in relation to the Proposed Permit or Proposed Project, with the exception of comments filed by NRDC.

7. Any responses provided by the Corps, BNSF, or any other agency or entity to the comments described in Request No. 6.

The documents sought by this request include any written, recorded, or graphic material—whether or not prepared by the Corps—that is in the agency's possession, custody, or control, including forms, memoranda, reports, letters, telegrams, facsimiles, electronic correspondence (including e-mail in any form), "PowerPoint" presentations, and notes, minutes, and transcripts of conferences, meetings, and telephone or other communications. As such, the request should be understood to comprise, but not be limited to, all correspondence between the Corps and any other governmental agency; all correspondence between the Corps and any private party or organization, including BNSF, consultants and independent researchers; and all internal agency documents.

Additionally, we request that all charges (e.g., copying and search charges) be waived, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). As discussed below, NRDC meets the requirements for a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and the Army and Department of Defense ("DOD") FOIA regulations. Army Regulation ("Army Reg.") 25-55 at § 6-103; DOD Regulation 5400.7-R at § C6.1.4.<sup>1</sup>

First, 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," Army Reg. 25-55 at § 6-103(c)(1); *see also Judicial Watch v. Dept. of Transportation*, No. Civ. 02-566-SBC, 2005 WL 1606915 at \*3-\*4 (D.D.C. July 7, 2005). Here, the "subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the [Corps]." Army Reg. 25-55 at § 6-103(c)(1)(i). Specifically, the subject matter of this request pertains to the Corps' performance of the EA for the Proposed Permit, and its decision that an Environmental Impact Statement (EIS) under the National Environmental Policy

---

<sup>1</sup> The Army and Department of Defense FOIA regulations are identical. For convenience, we cite only to the Army regulations.

Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, is not warranted. The Proposed Project, however, will enable the construction of a nearly 500 acre highly industrial intermodal facility, and warehousing and distribution center that could encompass nearly 3 million square feet—creating undeniable potential for e.g., significant air, water, endangered species and traffic impacts. This request seeks information that would help the public understand how the Corps reached its conclusion that an EIS was not required and the factors the Corps will consider when determining whether to grant the Proposed Permit.

Further, the information requested is not publicly available and release of it will significantly contribute to the public’s understanding of the Corps’ operations and activities. Army Reg. 25-55 at § 6-103(c)(1)(ii),(iv). For example, while the EA is available online, the supporting documentation for that study is not.<sup>2</sup> The requested documents will help shed light on the environmental impacts of the Proposed Project, which are of great public interest, including its impacts on air quality in the Gardner City area. Moreover, this information will provide insight as to the basis for the Corps’ conclusions in the EA and whether the agency will grant BNSF the Proposed Permit. The conclusions within the EA for the Proposed Project and any agency action resulting from such conclusions cannot be fully assessed by the public without the disclosure of the requested information. To the extent this request seeks information that is publicly available, NRDC is willing to work with the Corps to narrow its request.

NRDC also has the expertise, ability, and commitment to effectively convey the requested information to the public at large. *See* Army Reg. 25-55 at § 6-103(c)(1)(iii). NRDC is an international non-profit organization dedicated to protecting the environment and public health. It has longstanding expertise in reviewing environmental documents performed under NEPA and studying the environmental and public health impacts of intermodal facilities, similar to the Proposed Project. NRDC has a robust communications and multi-media department enabling it to rapidly disseminate information to the public via press releases, special reports, newsletters and periodicals,<sup>3</sup> on its website, and through radio and television programming. Moreover, NRDC works closely with numerous non-profit organizations, community groups, government agencies and other entities and individuals in the area of pollution reduction from intermodal facilities and will convey pertinent information obtained through this request with those groups. NRDC’s ability to effectively convey information about the Proposed Project to the public at large has already been demonstrated by the fact that NRDC has

---

<sup>2</sup> On August 3, 2009, Mr. Joshua Marx of the Army Corps confirmed that the EA’s supporting documentation was not publicly available. Notably, Mr. Marx indicated that he would make the documents referenced in the EA available to NRDC if NRDC delineated the specific studies it desired. However, this FOIA request is a more efficient means to obtain all of the reports and studies underlying the EA and captures documents that are not cited in the EA but are nonetheless relevant to the public’s understanding of the Corps’ operations and decision-making.

<sup>3</sup> NRDC publishes a newsletter, *Nature’s Voice*, and a nationally-recognized magazine, *On Earth*.

been quoted at length in both print and radio media about the Proposed Project,<sup>4</sup> and the fact that NRDC spoke at an informational conference in Olathe, Kansas attended by approximately 100 people about the Proposed Project's environmental impacts.<sup>5</sup>

Second, the requested information is not sought for commercial purposes. Army Reg. 25-55 at § 6-103(c)(2). As stated, NRDC is an international environmental and public health non-profit organization. NRDC makes this request *solely* to further the public's understanding of the environmental impacts from the Proposed Project and Proposed Permit, and the Corps' conclusions regarding those impacts.

Under these circumstances, NRDC is entitled to a fee waiver. *See Carney v. Department of Justice*, 19 F.3d 807 (2nd Cir. 1994) (requester's right to fee waiver turns on subject matter of requests and ability of requester to disseminate information); *Larson v. CIA*, 843 F.2d 1481 (D.C. Cir. 1988) (fee waiver is proper where information is not sought for commercial purposes, and where disclosure would contribute significantly to understanding of government operations or activities); *see also Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'") (internal citation omitted).

Should the Corps determine that a fee waiver is not warranted, we request that it provide an estimate of costs prior to reproduction of the documents. As provided by 5 U.S.C. § 522(a)(6)(a)(i), we trust that we will receive a prompt response, no later than twenty business days from the date of receipt of this request.

//

//

---

<sup>4</sup> *See e.g.*, <http://www.kansascity.com/news/politics/story/1367378.html>;  
<http://www.kansascity.com/news/neighborhood/olathe/story/1370861.html?storylink=pd>;  
<http://www.kansaspublicradio.org/newsstory.php?itemID=16844>;  
<http://voices.kansascity.com/node/5352>.

<sup>5</sup> NRDC need not "outline a specific plan in addition to describing its methods of publication." *Judicial Watch*, 2005 WL 1606915 at \*5. To do so would amount to "pointless specificity." *Id.* (internal quotation omitted). Moreover, courts have granted fee waivers for requesters with far less robust distribution capabilities than NRDC in this case. *See e.g., Center for Food Safety v. United States Dept. of Agriculture*, Civ. No. 04-1324 (RMU) (D.D.C. February 7, 2005) (Memorandum Opinion overturning USDA's denial of fee waiver).

U.S. Army Corps of Engineers  
August 12, 2009  
Page 5 of 5

We appreciate your cooperation. Please direct any questions or documents produced pursuant to this request to:

Melissa Lin Perrella  
Natural Resources Defense Council  
1314 Second St.  
Santa Monica, CA 90401  
Tel: (310) 434-2300

Sincerely,



Melissa Lin Perrella  
Staff Attorney  
Southern California Air Program



Andrew E. Wetzler  
Deputy Director  
Midwest Program