



**SIERRA
CLUB**
FOUNDED 1892

July 14, 2011

FOIA/PA REQUEST

Case No.: 2012-0098

Date Rec'd: 12-28-11

Specialist: Kilgore

Related Case: _____

Beverly Smith, FOIA Coordinator
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
Public Reference Facility (OFA56)
1315 East West Highway (SSMC3), Room 10730
Silver Spring, Maryland 20910
Fax: (727) 824-5341

VIA FAX AND U.S. POSTAL SERVICE, FIRST CLASS MAIL

Re: *Freedom of Information Act Request – Process Energy Inc. and its
Crystal River Power Plant*

Dear Ms. Smith:

I am writing on behalf of the Sierra Club to request that the United States National Marine Fisheries Service ("NMFS") provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and the regulations of the United States National Marine Fisheries Service, 50 C.F.R. § 216.1 et seq.

The Sierra Club is the nation's oldest grassroots organization. It has more than 700,000 members nationwide and is dedicated to the protection and preservation of the environment. One of the Sierra Club's main national initiatives, the Beyond Coal Campaign, tackles the pressing problems of global warming, air pollution, water pollution, and our national dependence on destructive, non-renewable energy sources, like oil and coal. A central goal of this initiative is decreasing the destructive impact of existing power plants by requiring them to comply with federal environmental protection laws. This FOIA request is part of this initiative.

We are submitting this request to obtain documents that will provide a better understanding of the Crystal River Plant's impact on threatened and endangered fish and wildlife and the role of NMFS and other state and federal agencies regarding the Crystal River Plant cooling water intake.

Definitions

"Records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases,

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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 below 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 NMFS or any of its offices.

"Fish and wildlife" means "any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof." 16 U.S.C. § 1532(8)

"Threatened or Endangered Species" means any species listed or proposed for listing (i.e. a candidate species) under the Endangered Species Act, 16 U.S.C. § 1531 et seq. For purposes of this FOIA request this includes but is not limited to the following species: Atlantic Spotted Dolphin, Risso's Dolphin, Bottlenose Dolphin, Alabama Shad, Salt Marsh Topminnow, Mangrove Rivulus, Loggerhead Sea Turtle, Hawksbill Sea Turtle, Kemp's Ridley Sea Turtle, Green Sea Turtle, and Leatherback Sea Turtle.

Records Requested

The Sierra Club seeks records concerning the cooling water intake system of Process Energy Inc.'s Crystal River Power Plant Units 1,2, 4, and 5 in Citrus County, Florida ("Crystal River Plant") that are within possession of the NMFS. Specifically, we request the following:

1. All records that show, discuss, or relate to the existence of any and all federally listed endangered and threatened species of aquatic fish or wildlife in the waters surrounding and adjacent to the Crystal River Power Plant.
2. All records that show, discuss, or relate to the impact of the Crystal River Plant's water intake and water intake structures on any and all federally listed threatened or endangered species of fish or wildlife, including but not limited to any intake, impingement or entrainment of such species at the water intake. The impacts in question include but are not limited to any action that would constitute a "taking" under Section 9 of the ESA. The ESA defines "take" as "to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). This request includes any results of biological monitoring or assessment of plant related intake effects, such as any Fishery Report results or Fishery Data report.

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3. All records that show, discuss, or relate to the impact of the Crystal River Plant's water intake and water intake structures on habitat for any and all federally listed threatened or endangered species of fish or wildlife.
4. All records that show, discuss, or relate to the impact of the Crystal River Plant's water intake and water intake structures on any designated or proposed critical habitat for any and all federally listed threatened or endangered species of fish or wildlife. The term "critical habitat" refers to "the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of" the ESA, or "specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1522 of" the ESA. 16 U.S.C. § 1532(5)(A).
5. Any copy of the current NPDES permit (or permit allowing discharge under state law) that allows the Crystal River Plant to withdraw water for cooling purposes; as well as any documents pertaining to:
 - a. development of standards for the permit, e.g. any Fact Sheet or Technical Assessment;
 - b. actual or potential violations of any terms or conditions of that permit,
 - c. any state or federal enforcement actions regarding said permit for violations of any terms or conditions of the permit;
 - d. the Discharge Monitoring Reports for the last 2 years;
 - e. a copy of any draft future permit; and
 - f. if not otherwise included in the permit and related documents, any Clean Water Act §316(b) determination for the Crystal River Plant.
6. All records that relate to NMFS's role in granting the Crystal River Plant the right to withdraw water, including but not limited to any correspondence to and from the State of Florida and any of its agencies, and to and from any other federal agencies, regarding the withdrawal of water.
7. All records that relate to formal or informal consultation, discussion, or communication under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), between NMFS or any other federal agency and the U.S. Environmental Protection Agency and/or U.S. National Marine Fisheries Service concerning the Crystal River Plant's water intake or water intake structures and those structures' impact on federally listed species of fish, wildlife, or critical habitat.

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8. All records that relate to incidental take permits, any other "take permits," or habitat conservation plans related to the waters surrounding and adjacent to the Crystal River Power Plant.
9. All documents, communications, or conversations between this agency or any other federal agency and Process Energy Inc., that relate to the Crystal River Plant and its cooling water intake or its impacts to endangered fish and wildlife species and critical habitat.
10. Any NEPA documents related to the cooling water intake for this plant, e.g. any draft or final environmental assessment, environmental impact statement, or categorical exclusion discussing or covering the water intake system.
11. All records that relate to the Crystal River Power Plant's compliance with or failure to comply with environmental laws of the United States, the state of Florida, or any local government, including all environmental audits.

Exempt Records

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the agency must include the following information:

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 a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club.

Fee Waiver Request

I respectfully request 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. The Sierra Club 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.

The Sierra Club is a national, non-profit, environmental organization with no commercial interest in obtaining the requested information. Instead, our organization

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intends to use the requested information to inform the public so that the public can meaningfully participate in protecting the nation's natural resources.

As explained more fully below, the above referenced FOIA request satisfies the factors listed in NMFS's governing regulations for "Waiver or Reduction of Fees" as well as the requirements of fee waiver under the FOIA statute – that "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 and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(iii), *see also* 40 C.F.R. § 2.107(l)(2)

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

The Department of Justice Freedom of Information Act Guide expressly states that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. This is such a case.

The requested records relate to the role of NMFS and other federal agencies in the Crystal River Plant withdrawing water and its possible impact to threatened and endangered species. Specifically, this request asks for documents pertaining to NMFS and other federal agencies' processes related to this water intake, including any possible consultations with other agencies, issuances of "take" permits under the ESA, and any enforcement actions taken by the agencies. The records documenting the involvement of NMFS and other federal agencies with the Crystal River Plant are unquestionably "identifiable operations or activities of the government."

2. The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities."

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not in the public domain. The requested records are "likely to contribute" to an understanding of how the NMFS and other federal agencies address water intake structures' impacts on endangered species because they are not otherwise in the public domain and are not accessible other than through a FOIA request. This information will facilitate meaningful public participation in the protection of endangered species, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of the existence and possible protection of endangered species near the Crystal River Plant.

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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—including (1) expertise in the subject area of the request and ability and (2) intention to disseminate the information to the public—is examined.

The Sierra Club and its members have a long-standing experience and expertise in subject area of the FOIA request: the development and use of energy resources and protection of endangered species. One of the Sierra Club's current national conservation campaigns focuses on ending the environmental destruction created by dirty, non-renewable energy sources such as oil and coal by forcing coal-fired power plants to comply with environmental protection laws. The Sierra Club is familiar with the damage caused by coal-fired power plants and the effect that such plants can have on their surrounding ecosystems.

The Sierra Club also has the ability and intention to disseminate the information it receives through FOIA. The information is disseminated through 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. Each month, the Sierra Club website receives approximately 850,000 visits. Sierra Magazine, which is published bimonthly by the Sierra Club, reaches more than a million people across North America. Sierra Club Insider, our e-newsletter, is sent to over a million people twice a month. In addition, Sierra Club disseminates information obtained through FOIA through comments to administrative agencies, and when necessary, through the judicial system. The Sierra Club has published, posted, and disseminated numerous articles on the impact of coal fired power plants such as the Crystal River Plant. .

Thus, Sierra Club unquestionably has the "specialized knowledge" to address the issue of coal fired power plant cooling water intake and threatened and endangered species; the "ability and intention" to disseminate the information requested, 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.

There is currently little or no information publicly available regarding how NMFS and other federal agencies have addressed or are addressing Crystal River Plant's water intake structure's impact on threatened and endangered species of fish and wildlife. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private interests involved. The records requested will contribute to the public understanding of the government's role and the government "operations and activities" that affect water intake at the Crystal River Plant.

The disclosure of the requested records is also essential to public understanding of the impacts this power plant has on the environment, including its effect on endangered

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species of fish and wildlife and the critical habitats that sustain such species. Because the disclosure of such records will significantly enhance the public's understanding of these environmental impacts, the requirement that disclosure must contribute "significantly" to the public understanding is met.

5. The requester must not have 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 of using 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. If the requester does have a commercial interest, the fee waiver must not be granted unless the public interest in disclosure outweighs the requester's commercial interest.

As noted above, the Sierra Club has no commercial interest in the requested records. Therefore, this item is not applicable. If any commercial interest was present, however, it would be outweighed by the public interest in disclosure of the information sought.

For the aforementioned reasons, the Sierra Club qualifies for a fee waiver under the six-part test set out under 40 C.F.R. § 2.107(l)(2), and NMFS should waive processing and copying fees for this FOIA request pursuant to 5 U.S.C. § 552(a)(4)(iii) and 5 C.F.R. § 1303.70.

If NMFS does not agree to this fee waiver request, then we request that you contact us before incurring any copying or production fees.

Record Delivery

We request that NMFS, in responding to this request, 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); 40 C.F.R. § 2.104. Please produce the records above by sending them to me at the address listed below. Please produce them on a rolling basis; at no point should the 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 mail copies of all requested records as soon as possible to.

Amber Williams
Sierra Club
1650 38th Street, Suite 102W
Boulder, CO 80301

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 (303) 449-5595 ext. 104.

Very truly yours,



Amber Williams
Sierra Club, Law Program Assistant



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southeast Regional Office
263 13th Avenue South
St. Petersburg, FL 33701
(727) 551-5762; (FAX) (727) 824-5341
<http://sero.nmfs.noaa.gov/>

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
#7008114000419048933

DEC 20 2011

F/SER1:BJS
SER11-076
FOIA #2011-00571

FOIA/PA Officer
U.S. Nuclear Regulatory Commission
Mail Stop T-5 F09
Washington, D.C. 20555-0001

RE: FOIA Request # 2011-00571 – Crystal River Nuclear Plant
Federal Agency Referral of Records

Dear Sir or Madam:

Enclosed you will find a copy of a request for agency records under the Freedom of Information Act (FOIA) 5 U.S.C. 552, *et seq.* from Amber Williams, Sierra Club, addressed to the National Oceanic and Atmospheric Administration dated July 14, 2011. Ms. Williams seeks the following information:

1. All records that show, discuss, or relate to the existence of any and all federally listed endangered and threatened species of aquatic fish or wildlife in the waters surrounding and adjacent to the Crystal River Power Plant.
2. All records that show, discuss, or relate to the impact of the Crystal River Plant's water intake and water intake structures on any and all federally listed threatened or endangered species of fish or wildlife, including but not limited to, any intake, impingement or entrainment of such species at the water intake. The impacts in question include but are not limited to any action that would constitute a "taking" under Section 9 of the ESA. The ESA defines "take" as "to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). This request includes any results of biological monitoring or assessment of plant related intake effects, such as any Fishery Report results or Fishery Data report.
3. All records that show, discuss, or relate to the impact of the Crystal River Plant's water intake and water intake structures on habitat for any and all federally threatened or endangered species of fish or wildlife.



4. All records that show, discuss, or relate to the impact of the Crystal River Plant's water intake and water intake structures on any designated or proposed critical habitat for any and all federally listed threatened or endangered species for fish or wildlife. The term "critical habitat" refers to the "specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of" section §1533 of the ESA, or "specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of" section 1522 of the ESA 16 U.S.C. § 1532(5)(A).

5. Any copy of the current NPDES permit (or permit allowing discharge under state law) that allows the Crystal River Plant to withdraw water for cooling purposes; as well as any documents pertaining to:

- a. Development of standards for the permit, e.g. any Fact Sheet or Technical Assessment;
- b. Actual or potential violations of any terms or conditions that permit;
- c. Any state or federal enforcement actions regarding said permit for violations of any terms or conditions of the permit;
- d. The Discharge Monitoring Reports for the last 2 years;
- e. A copy of any draft future permit; and
- f. If not otherwise included in the permit and related documents, any Clean Water Act § 316(b) determination for the Big Bend Plant.

6. All records that relate to NMFS' role in granting the Crystal River Plant the right to withdraw water, including but not limited to, any correspondence to and from the State of Florida and any of its agencies, and to and from any other federal agencies, regarding the withdrawal of water.

7. All records that relate to formal or informal consultation, discussion, or communication under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), between NMFS or any other federal agency and the U.S. Environmental Protection Agency and/or U.S. National Marine Fisheries Service concerning the Crystal River Plant's water intake or water intake structures and those structures' impact on federally listed species of fish, wildlife, or critical habitat.

8. All records that relate to incidental take permits, any other "take permits" or habitat conservation plans related to the waters surrounding and adjacent to the Crystal River Plant.

9. All documents, communications, or conversations between this agency or any other federal agency and Progress Energy, Inc., that relate to the Crystal River Plant and its cooling water intake or its impacts to endangered fish and wildlife species and critical habitat.

10. Any NEPA documents related to the cooling water intake for this plant, e.g. any draft of final environmental assessment, environmental impact statement, or categorical exclusion discussion or covering the water intake system.

11. All records that relate to the Crystal River Power Plant's compliance with or failure to comply with environmental laws of the United States, the state of Florida, or any local government, which may include, but is not limited to, administrative orders, settlement documents, consent decrees, consent orders, and notices of violation.

On November 15, 2011, Ms. Williams modified the scope of the request as follows:

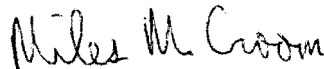
- Excluded Item #5 from the request, including its subparts a–f, regarding the current National Pollutant Discharge Elimination System (NPDES) permit records.
- Expanded the request to include all of the records regarding Crystal River Power Plant Unit 3 that have been provided by the Southeast Region's program offices in response to the request.

A copy of the modified scope confirmation e-mail dated November 18, 2011, is enclosed.

We found three documents (72 pages) pertaining to this request that are the exclusive or primary concern of the U.S. Nuclear Regulatory Commission, which are responsive to the request Item Nos. 1, 2, 3, 4, 7, 8, 9, and/or 11 and the modified scope. Accordingly, per our governing regulations, 15 C.F.R. Part 4 (copy enclosed), we hereby refer the request to you for further action related to these documents. Copies of the requested documents are enclosed with this letter on a compact disk. Please respond directly to Ms. Williams, pursuant to the instructions in the FOIA request, regarding these documents and provide us with a copy of your letter.

If you have any questions concerning this process, please contact Beverly J. Smith, Southeast Region FOIA Coordinator, at 727-551-5762, or beverly.smith@noaa.gov.

Sincerely,



for Roy E. Crabtree, Ph.D.
Regional Administrator

Enclosures (as stated above)

cc: (w/out enclosures)
Amber Williams
Sierra Club