

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF
TRANSPORTATION,

Defendant.

Case No. 19 Civ. 820

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Defendant United States Department of Transportation (DOT) is violating the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by failing to disclose records responsive to a request from Plaintiff Natural Resources Defense Council, Inc. (NRDC) regarding the environmental review, pursuant to the National Environmental Policy Act (NEPA), of an essential piece of American infrastructure—the Hudson River Tunnel.

2. The project, being developed jointly by the Federal Railroad Administration (FRA) (an agency within DOT) and the New Jersey Transit Corporation (NJ Transit), will add a critically needed rail tunnel under the Hudson River, connecting New York and New Jersey. But the project has been repeatedly delayed. NRDC seeks to identify whether the Trump Administration has further delayed the project by refusing to release an Environmental Impact Statement (EIS) that, on the government's own account, should have been completed in March 2018.

3. On September 27, 2018, NRDC submitted a FOIA request to DOT regarding records “that deal with the status and progress of the Hudson River Tunnel Gateway projects between October 1, 2017 and March 31, 2018.” DOT acknowledged receipt of the request that day. The agency was statutorily obligated to respond to NRDC by October 26, 2018. To date, DOT has failed to respond.

4. NRDC seeks a declaration that DOT has violated FOIA by failing to provide final determinations as to whether it will comply with NRDC's request and

by failing to produce responsive records by the statutory deadline. NRDC also seeks an injunction ordering DOT to provide all non-exempt, responsive records without further delay.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

6. Venue is proper in the U.S. District Court for the Southern District of New York because NRDC resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B); 28 U.S.C. § 1391(e)(1).

PARTIES

7. NRDC is a national and international, nonprofit environmental and public health membership organization with hundreds of thousands of members in the United States. NRDC engages in research, advocacy, public education, and litigation to advance public health and the environment.

8. DOT is a federal agency within the meaning of FOIA. 5 U.S.C. § 551(1). DOT has possession and/or control of the records sought by NRDC's FOIA Request.

STATUTORY AND REGULATORY FRAMEWORK

9. FOIA requires federal agencies to release, upon request, information to the public, unless one or more of nine statutory exemptions applies. 5 U.S.C. § 552.

10. Within twenty business days of an agency's receipt of a FOIA request, the agency must "determine . . . whether to comply" with the request. 5 U.S.C.

§ 552(a)(6)(A)(i). The agency must “immediately notify” the requester “of such determination and the reasons therefor.” *Id.* If the agency determines that it will comply with a FOIA request, it must “promptly” produce responsive records to the requester. *Id.* § 552(a)(6)(C)(i).

11. DOT’s regulations implementing FOIA provide that the agency will either “grant the request in full or in part” or “den[y] the request in full or in part.” 49 C.F.R. § 7.31(a)(3). In either case, DOT will notify the requester “in writing” and “include[] in the notice the reason for the determination.” *Id.* If DOT denies a FOIA request, it must “include[] in the notice the reason for the determination, the right of the requester to appeal the determination, the name and title of each individual responsible for the initial determination to deny the request, and the requester’s right to seek dispute resolution services from the FOIA Public Liaison or the Office of Government Information Services.” *Id.*

12. DOT’s regulations provide that DOT may, “[i]n unusual circumstances,” 49 C.F.R. § 7.34(a), extend the 20-day deadline “by up to ten Federal working days, or longer,” *id.* § 7.31. To extend its deadline, DOT must provide “written notice to the person making the request . . . , setting forth the reasons for the extension and the date on which a determination is expected to be issued.” *Id.* § 7.34(a). “Such notice may not specify a date that would result in a cumulative extension of more than ten Federal working days without providing the requester an opportunity to modify the request.” *Id.*

13. If an agency does not make a final determination about whether it will comply with a FOIA request by the statutory deadline, the requester is deemed to have exhausted administrative remedies and may immediately seek judicial relief. 5 U.S.C. § 552(a)(4)(B), (6)(C)(i).

FACTS

14. A single tunnel, built in the early 20th century, carries all Amtrak and NJ Transit train traffic, including Amtrak's Northeast Corridor service, between Manhattan and New Jersey. Every weekday, approximately 192,000 NJ Transit passengers and 20,500 Amtrak passengers pass through the tunnel. But that tunnel, the North River Tunnel, was damaged in Superstorm Sandy in 2012 and requires significant maintenance. That maintenance cannot take place, however, without a replacement tunnel to carry the substantial train traffic currently reliant on the tunnel.

15. The Hudson River Tunnel Project is a joint initiative of the FRA and NJ Transit to develop a new tunnel under the Hudson River. The tunnel is part of a larger project, known as the Gateway Program, that is intended to improve critical rail infrastructure between Newark and New York City.

16. News reports reflect, however, that the Trump Administration has sought to use funding for the tunnel as a bargaining chip, in particular as a means to obtain Senator Charles Schumer's support for a border wall. *See* Michael Grunwald, *The Tunnel that Could Break New York*, POLITICO (July/Aug. 2018), <https://www.politico.com/magazine/story/2018/07/06/gateway-tunnel-new-york-city->

infrastructure-218839 (reporting that President Trump told Sen. Schumer that “Schumer could have his tunnel if Trump got his border wall with Mexico”). The Administration has not confirmed or denied these accounts.

17. Pursuant to NEPA, the FRA and NJ Transit released a draft EIS on June 30, 2017. The agencies then accepted public comments on the draft EIS from July 7, 2017, to August 21, 2017, including at public hearings in New York and New Jersey.

18. DOT anticipated releasing a final EIS by March 30, 2018. To date, the agency has not done so. The Agency has not provided any further updates on the final EIS.

19. On September 27, 2018, NRDC requested from DOT all records “that deal with the status and progress of the Hudson River Tunnel Gateway projects between October 1, 2017 and March 31, 2018.” The letter is appended to this complaint as Attachment A.

20. In its request, NRDC sought “information dealing with the status and progress of the environmental and permit reviews, the reason the EIS was not completed on time, and the rationales why the processes were stopped or delayed, found inadequate, or returned to staff for additional actions.”

21. NRDC’s request identified several named appointees within DOT whose records were particularly likely to be relevant. The request also sought records identifiable by search terms including shorthand names for the project.

22. Upon information and belief, one such believed codename, “mushroom,” may have been adopted specifically to stymie FOIA requests.

23. NRDC’s request asked DOT to waive any fees for the search and production of the requested records on the grounds that disclosure of the requested records is in the public interest, 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 49 C.F.R. § 7.43(c), and that NRDC qualifies as “a representative of the news media,” 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 49 C.F.R. § 7.42(g)(3).

24. On September 27, 2018, DOT issued an initial acknowledgment of NRDC’s request. DOT’s initial acknowledgement letter is appended to this complaint as Attachment B.

25. The agency has not otherwise responded.

CLAIM FOR RELIEF

26. NRDC incorporates by reference all preceding paragraphs.

27. DOT has violated, and is in continuing violation of, its statutory duty under FOIA to release all non-exempt, responsive records to NRDC. *See* 5 U.S.C. § 552(a). NRDC has a statutory right under FOIA to immediately obtain all requested records that are not exempt from disclosure under FOIA. The statutory deadline for DOT to respond to NRDC’s FOIA request and to provide such documents has passed.

28. The burden of justifying a decision to withhold or partially withhold documents requested under FOIA rests on the agency. *See id.* § 552(a)(4)(B). DOT has identified no basis, let alone any valid basis, for withholding or partially

withholding the records that are responsive to NRDC's FOIA Request. Therefore, DOT may not withhold or partially withhold any responsive records.

REQUEST FOR RELIEF

NRDC respectfully requests that this Court enter judgment against DOT as follows:

A. Declare that DOT has violated FOIA by failing to provide a final determination as to whether it will comply with NRDC's FOIA Request and by failing to produce non-exempt records responsive to NRDC's FOIA Request by the statutory deadline;

B. Order DOT to disclose to NRDC all responsive records without further delay;

C. To the extent DOT contends that any responsive records are exempt or partially exempt from disclosure under FOIA, order DOT to produce a log identifying any such records or parts thereof and the basis for DOT's withholdings, and require DOT to prove that the agency's decision to withhold or redact any such records is justified by law;

D. Award NRDC its reasonable costs and attorneys' fees; and

E. Grant such other and further relief as the Court deems just and proper.

DATED: January 28, 2019

Respectfully submitted,

/s/ Nancy S. Marks

Nancy S. Marks (NM 3348)

Natural Resources Defense Council

40 West 20th Street, Fl. 11

New York, NY 10011

Tel.: (212) 727-4414

nmarks@nrdc.org

*Counsel for Plaintiff Natural Resources
Defense Council, Inc.*

Attachment A

September 27, 2018

Via U.S. Mail and Email

*Kathy Ray
1200 New Jersey Ave., SE
W94-122
Washington, DC 20590*

Phone: (202) 366-4542 or (202) 366-5546

Fax: (202) 366-8536

Email: ost.foia@dot.gov

Re: FOIA Request for Records concerning the Environmental Impact Statement dealing with the Hudson River Tunnel.

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Department of Transportation (DOT) regulations at 49 CFR Subpart E.

I. Requested Records and Disclosure Method

1. Please produce records¹ that deal with the status and progress of the Hudson River Tunnel Gateway projects between October 1, 2017 and March 31, 2018. The publicly available data on the project website says the final Environmental Impact Statement was on time for completion on March 30, 2018 but as the date of this letter, no new updates have been published with the reason for the delay or new expected date of completion (<https://www.permits.performance.gov/projects/hudson-tunnel-project>). We are requesting information dealing with the status and progress of the environmental and permit reviews, the reason the EIS was not completed on

¹ “Records” means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, internal messaging systems, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). NRDC seeks responsive records in the custody of the Headquarters offices and Region 2.

time, and the rationales why the processes were stopped or delayed, found inadequate, or returned to staff for additional actions. This should include, but not be limited to, communications to and from Derek Kan, Jeff Rosen, Grover Burthay, Caryn Lund, Jim Ray, Stephen Bradbury, Ronald Batory, Gerry Solomon and other appointees to the Office of the Secretary of Transportation; the project lead Amishi Castelli and Barbara McCann. Search terms should include the many shorthand terms used to describe the Gateway projects and should include the term “mushroom,” a possible term used to describe the project.

Please either email responsive records to me at sslesinger@nrdc.org, or email me to request a link to a Dropbox folder where you can upload the records. **Please note that my email account cannot accept .zip files.** Please release responsive records to me on a rolling basis prioritizing communications on this topic from February 15, 2018, to March 30, 2018. If you determine that any of the records I’ve described above are already publicly available, please let me know where to find them.

II. Request for a Fee Waiver (or Reduction)

NRDC requests that DOT waive any fee it would otherwise charge for searching for and producing the requested records. FOIA dictates that requested records be provided without charge “if 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)(A)(iii); *see also* 49 C.F.R. § 7.43(c). As I explain below, NRDC’s requested disclosure meets both requirements. NRDC is also “a representative of the news media” entitled to fee reduction. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 49 C.F.R. § 7.42(g)(3).

Please disclose the records requested above regardless of your decision on whether to waive or reduce fees. To expedite disclosure, NRDC will, if necessary and under protest, pay fees in accordance with DOT FOIA regulations, 49 C.F.R. § 7.42, for all or a portion of the requested records. Please contact me before doing anything that would cause the fee to exceed \$250.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here is “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 49 C.F.R. § 7.43(c).

Each of the four factors used by DOT to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 49 C.F.R. § 7.43(c)(1)-(4).

1. Subject of the request

The records requested here concern the Agency's timely compliance with the requirements of the National Environmental Policy Act and whether the Agency is following the President's Executive Order to finish reviews in a timely fashion. The requested records thus directly concern "the operations or activities of the government." 40 C.F.R. § 7.43(c)(1). The Hudson River Tunnel project is a critical project key to the economy of not only the New York Metropolitan area but the entire country. *See* Laura Bliss, *The Clock is Ticking on America's Most Urgent Transportation Project*, CityLab, <https://www.citylab.com/transportation/2017/07/meet-mericas-most-urgent-transportation-project/532941/> (July 10, 2017) (Exhibit A). One key to begin construction is finishing the Environmental Impact Statement. The President and many cabinet officials have testified on the need to speed up the NEPA process, blaming the process on our nation's inadequate infrastructure. *See* Trump Administration Infrastructure Plan, C-SPAN, <https://www.c-span.org/video/?442129-1/secretary-chao-testifies-trump-administration-infrastructure-plan> (Mar. 6, 2018).

The President has had two Executive Orders to speed up the NEPA reviews and permitting. However, at the same time, the Secretary of Transportation has testified against the project. *See id.*, Chao Testimony at 1:16:04. Posted information on the Department's website had a deadline for the final EIS of March 30, 2018 that was expected to be met easily. 2017 Gateway Program Milestones, <http://www.gatewayprogram.org/content/dam/nec/gdc-board-items/2GDC%20Milestones-12-21-17.pdf>. The public, including the 200,000 people who daily use the Hudson Tunnel that was seriously damaged by Super Storm Sandy, has a right to understand how governmental processes are dealing with this project. In fact, a key to the NEPA process is citizen involvement. Clearly, the subject matter of this request "involves issues that will significantly contribute to the public understanding of" the Department's activities.

2. Informative value of the records to be disclosed

As explained under heading 1 the requested records are "likely to contribute to" the public's understanding of government operations and activities, 49 C.F.R. § 7.43(c)(2), on projects that have already attracted national public attention and the personal attention of the President. The disclosure of the records would also be "meaningful" and inform the public about the operations or activities of the Department in its critical task to timely

implement the National Environmental Policy Act, a statute where public involvement is key. The public does not currently possess comprehensive information regarding the government's role in addressing this project. There is more than a reasonable likelihood that these records have informative value to the public because of the importance of this project to the safety and economy of the millions of Americans whose livelihood is tied in some way to the New York Metropolitan area. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

3. Likely contribution to public understanding

Because NRDC is a "representative of the news media," as explained in Part II.C below, DOT must presume that this disclosure is likely to contribute to public understanding of its subject. *See* 49 C.F.R. 7.43 §(c)(3). Even if NRDC were not a media requester, its expertise in implementation of the National Environmental Policy Act through Congressional testimony, litigation and commentary on agencies' implementation of NEPA, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—show that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is, accordingly, a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC's more than three million members and online activists are "a reasonably broad audience of persons interested in the subject" of NEPA implementation 49 C.F.R. § 7.43(c)(3). When this group is combined with the other audiences for the numerous publications and other platforms to which NRDC contributes, the likely audience of interested persons to be reached is certainly "reasonably broad." 49 C.F.R. § 7.43(c)(3).

NRDC can disseminate newsworthy information collected through this FOIA request to its members, online activists and other members of the public through many channels, free of charge. As of summer 2017, these channels included:

- NRDC's website, <http://www.nrdc.org> (sample homepage at Att. 1), is updated daily, features blogs by NRDC's scientific, legal, and other staff experts, and draws approximately 1.3 million page views and 510,000 unique visitors per month.

- NRDC's Activist email list includes more than three million members and online activists who receive regular communications on urgent environmental issues. (sample at Att. 7) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 8).
- NRDC updates and maintains several social media accounts with tens to hundreds of thousands of followers. Its major accounts include Facebook (906,992 followers) (Att. 2), Twitter (271,551 followers) (Att. 3), Instagram (108,315 followers) (Att. 4), YouTube (Att. 5), and LinkedIn (Att. 6).
- NRDC also is a regular contributor to Medium (1,478 followers) (Att. 9) and the Huffington Post (Att. 10).

NRDC staff also write papers and reports; provide legislative testimony; present at conferences; direct and produce documentary films; and contribute to national radio, television, newspaper, magazine and web stories and academic journals. Some examples of these contributions include:

- Article, "Interior Department worked behind the scenes with energy industry to reverse royalties rule," *Wash. Post*, Oct. 6, 2017 (discussing documents obtained through a FOIA request submitted by NRDC and quoting NRDC Senior Policy Advocate Theo Spencer) (Att. 12);
- Documentary, *Sonic Sea* (2016), featured on the Discovery Channel (directed and produced by NRDC Deputy Director of Communications Daniel Hinerfeld) (Att. 13);
- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 14);
- Issue brief, "The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater," June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 15); *see also* "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates) (Att. 16);
- Congressional testimony, David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Conference brochure, "World Business Summit on Climate Change," May 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 18);

NRDC's legal, scientific, and other experts have a history of using information obtained through FOIA requests to inform the public about a variety of issues, including

energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. For example:

1. NRDC recently obtained through FOIA and publicized emails between the Trump transition team and industry officials regarding reversal of Obama-era preliminary restrictions on the proposed Pebble Mine. This cast light on an issue of considerable public interest. *See, e.g.*, Kevin Bogardus and Dylan Brown, "'Homework assignment' — how Pebble lobbied Trump's EPA," *E&E News*, June 8, 2017 (Att. 30).
2. In April 2014, NRDC used FOIA documents to prepare a report on potentially unsafe chemicals added to food, without FDA oversight or public notification. The report, *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are "generally recognized as safe" (Att. 28). *See also* Kimberly Kindy, "Are secret, dangerous ingredients in your food?" *Wash. Post*, Apr. 7, 2014 (discussing report) (Att. 29).
3. NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. NRDC used these documents to publish a January 2014 report, titled *Playing Chicken with Antibiotics*, that reveals decades of FDA hesitancy to ensure the safety of these drug additives (Att. 26). *See also* P.J. Huffstutter and Brian Grow, "Drug critic slams FDA over antibiotic oversight in meat production," *Reuters*, Jan. 27, 2014 (discussing report) (Att. 27).
4. NRDC has used White House documents obtained through FOIA and other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att.24). *See also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Magazine*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 25).
5. NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the

implications for global security. Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 23).

6. Through FOIA, NRDC obtained an ExxonMobil memorandum advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 21). *See also* Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 22).
7. Through FOIA and other sources, NRDC obtained information on levels of arsenic in drinking water nationwide and used it in a report, *Arsenic and Old Laws* (2000) (Att. 19). The report explained how interested members of the public could learn more about arsenic in their own drinking water supplies. *Id.* *See also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC's report) (Att. 20).

In short, NRDC has proven its ability to digest, synthesize, and quickly disseminate to a broad audience newsworthy information gleaned through FOIA requests like this one.

4. Significance of the contribution to public understanding

The same facts outlined under headings 1-3 above explain why disclosure of the records requested here shed light on a matter of considerable public interest and concern with the Gateway projects and NEPA. *See* Exhibits A-F (collecting sample news stories). A News key word search on Google of *Gateway, NY NJ NEPA* received over 1000 hits; a general Google search of those terms turned up 5.3 million hits.

Public understanding of the decisions on the Gateway project would be significantly enhanced by disclosure of the requested records concerning this important project and the decisions delaying or impacting the completion of the project. Disclosure would help the public to more effectively evaluate the Agency's process on the Gateway project and to better understand and evaluate DOT's actions (or inaction) on the EIS surrounding the Gateway project.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 49 C.F.R. § 7.43(c)(5)]. NRDC is a not-for-profit organization; it uses information obtained under FOIA for its own public-information and advocacy purposes and does not resell this information. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the administrative process dealing with the Gateway project and its EIS. As noted at Part II.A, any DOT work on the Gateway project relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the project and its associated safety and environmental impacts.

C. NRDC Is a Media Requester

Even if NRDC were not entitled to a public interest waiver of all costs and fees, it would be a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and DOT's FOIA regulations, 49 C.F.R. § 7.42(i). A representative of the news media is “any person or entity 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.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 11) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. For example, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. As explained in Part II.A, NRDC also publishes a regular newsletter for its more than three million members

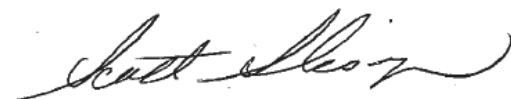
and online activists. NRDC also maintains a significant additional communications presence through its staff blogs on www.nrdc.org, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. See OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). These and the other communications channels referenced earlier in this letter routinely include information about current events of interest to the readership and the public. NRDC employs more than fifty specialized communications staff, including accomplished journalists and editors, and numerous other advocates able to disseminate, through these and other channels, newsworthy information acquired through FOIA.

Organizations with NRDC’s characteristics “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); see also *Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”).

III. Conclusion

Thank you for your help. Please call or email me with questions.

Sincerely,



Senior Advisor for Governmental Affairs
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1152 15th Street, NW #300
Washington, DC 20005
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Enclosures (appendices 1- 30) in support of fee waiver and reduction requests is provided via Dropbox

at:<https://www.dropbox.com/s/al29mh3xjdyoxq3/FOIA%20Request%20Attachments%201-30.pdf?dl=0>

Exhibit A

<https://www.citylab.com/transportation/2017/07/meet-americas-most-urgent-transportation-project/532941/>

The Clock is Ticking on America's Most Urgent Transportation Project

1. LAURA BLISS

JUL 10, 2017

The Trump administration is distancing itself from the Gateway Project, which will only get more expensive to fund.

- **SHARE**
- **TWEET**
-

Connecting New York and New Jersey beneath the Hudson River, the North River tunnels serve millions of passengers each day. More than 100 years old, the two tracks also suffer frequent delays due to mechanical failures, compounded by Hurricane Sandy's flooding. Senators on both sides of the Hudson have argued the tunnels could soon require an extended, full-scale closure for major overhauls—which would “essentially shut down the Northeast Corridor.”

So if you thought Penn Station's “summer of hell,” which kicked off Monday, sounded bad, remember that things could get much, much worse.

Hundreds of thousands of commuters on New Jersey Transit, Long Island Railroad, and Amtrak trains are bracing for cancellations and delays today through the end of August, thanks to major track repairs at Penn Station. But this represents only the first wave of attention needed by the commuter hub and its corridors. The largest, and most critical, is called the Gateway Project, which would add a new rail tunnel under the Hudson River, adding redundancy in the case of a track closure on the North River tunnels. The plan would also further upgrade and increase tracks at Penn Station.

That sounds expensive!

Indeed it is: The price tag on the Gateway Project was projected to break the record \$24 billion spent on the Big Dig, the most expensive road project in U.S. history.

And that was before last week, when a new report released by Amtrak pegged the cost of the Hudson River Tunnel at nearly \$13 billion—a steep increase over an earlier estimate of \$7.7

billion. Amtrak explained to Crain's that the new cost represents refined engineering plans. With that price hike, the full package could ramp up to \$29.1 billion.

The cost is likely to keep creeping higher, because that's what mega-projects do—especially in New York. Stringent labor requirements, high construction costs, and long-term debt financing are important factors. New York is also prone to striking contracts that de-incentivize efficient work.

Tunneling is particularly prone to delays and hiccups, which cost project leaders by the minute. (This is a legitimate reason for Elon Musk to get into the boring business—subterranean cities and Martian colonization aside, better tunneling technology could speed up the process and bring costs down.)

How are they going to pay for this?

Under President Obama, New York and New Jersey agreed to split the cost with the federal government—but that was then. The Trump administration has called to slash the DOT's New Start program, which funds \$2.3 billion in transportation projects like Gateway every year. The president also hopes to dramatically cut Amtrak funding. That's why the Gateway Development Corporation is bending over backwards to signal willingness to take on private financing partners—a signature focus of Trump's infrastructure platform.

Elaine Chao, the secretary of transportation, has called the Gateway an “absolute priority”—but earlier this month, the DOT formally withdrew its representative from the advisory board that oversees the project. As with so much in the White House, Trump's rhetoric on infrastructure has so far produced mixed signals, anxiety, and zero legislation.

A new rail tunnel in the only corridor where Amtrak makes money could be an attractive prospect for private investors, indeed. But public-private partnerships need big public support to leverage that kind of buy-in. For the Gateway, some of that has got to come from the federal government.

Why should I care?

Love it or hate it, the economic functionality of New York City concerns the whole country—including, and especially, what goes in and out of by train. It's estimated that 10 percent of U.S. gross domestic product depends on transit between New York and New Jersey alone; the Northeast Corridor, of which New York City is at the center, is responsible for about 20 percent. The Partnership for New York City figures that every hour New Jersey and Long Island train commuters are delayed costs Manhattan employers alone \$15 million. Letting the Gateway project sit unattended long enough could make \$24 billion look like a bargain.

About the Author

Laura Bliss

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Laura Bliss is a staff writer at CityLab, covering transportation and the environment. She also authors MapLab, a biweekly newsletter about maps ([subscribe here](#)). Her work has appeared in the *New York Times*, *The Atlantic*, *Los Angeles* magazine, and beyond.

Exhibit B

<https://www.nytimes.com/2017/11/18/business/trump-wants-more-big-infrastructure-projects-the-obstacles-can-be-big-too.html>

Trump Wants More Big Infrastructure Projects. The Obstacles Can Be Big, Too.

Image



President Trump, with Treasury Secretary Steven T. Mnuchin and Transportation Secretary Elaine L. Chao, announcing the “streamlining” of permitting requirements for infrastructure projects. Credit: CreditAl Drago for The New York Times

By Barry Meier

Nov. 18, 2017

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President Trump says he is frustrated with [the slow pace of major construction projects](#) like highways, ports and pipelines. Last summer, he pledged to use the power of the presidency to jump start building when it became bogged down in administrative delays.

“No longer will we allow the infrastructure of our magnificent country to crumble and decay,” Mr. Trump said in August.

In [an executive order](#), the president directed federal agencies to coordinate environmental impact reviews for major projects with the goal of completing them within two years. Such reviews can often take four years and, in some cases, even longer.

Other presidents, including Barack Obama, have tried with mixed success to streamline the approvals for big infrastructure projects by pushing federal agencies to do environmental reviews faster. Frequently, delays are caused because multiple agencies, including the Environmental Protection Agency, the Bureau of Land Management and the United States Army Corps of Engineers, weigh in on the scope of an environmental review or have to issue separate permits before work can begin.

ADVERTISEMENT

The centerpiece of Mr. Trump’s plan gives an office, the [Council on Environmental Quality](#), within the White House, the authority to coordinate actions and direct how environmental reviews are performed. Much of the plan’s inspiration lies in a report, [“Two Years Not Ten Years,”](#) issued in 2015 by [Common Good](#), a nonpartisan research and advocacy group.

The report estimated that the typical six-year delay in starting large building projects costs the country \$3.7 trillion in lost economic activity, more than twice the amount needed to address the most urgent infrastructure needs. Along with roadblocks to speedy federal approval, the report blamed delays on such factors as fear of litigation and overly broad environmental reviews on all levels of government.

“They have embraced some of the goals and core ideas” in our report, said Philip K. Howard, who heads Common Good and is a lawyer at Covington & Burling in Manhattan. He had been a member of [President Trump’s Strategic and Policy Forum](#), which disbanded in August after Mr. Trump’s remarks about the racial violence in Charlottesville, Va.

[An analysis by the Congressional Research Service](#) found that some of the claims in Common Good’s report, including the \$3.7 trillion estimate, lacked a statistical basis, though the group had defended its work.

Infrastructure experts say that a lack of public and private funding, rather than bureaucratic delays, is the principal reason infrastructure projects stall. (In its budget proposal, the Trump administration has issued a [six-page fact sheet](#) about infrastructure funding, including private investment.) Still, they agree that the permitting process can be improved and streamlined. In addition to federal reviews, states and local

governments must also approve major proposals — frequently a fraught process — and residents and other interest groups often use the courts to block or delay construction.

Politicians Want It Their Way, Or No Way

Image



A New Jersey Transit train arriving at Penn Station. Credit Dave Sanders for The New York Times

Long-overdue maintenance this summer to the train tracks leading to Pennsylvania Station in Manhattan came against the backdrop of a much more ambitious project that never happened.

The plan, known as Access to the Region's Core, or ARC, would have created a new tunnel underneath the Hudson River for New Jersey Transit trains. First unveiled during the 1990s, it was promoted as the nation's biggest public transportation infrastructure project and was supposed to cost \$9 billion, create thousands of construction jobs and was funded by the federal government, New Jersey Transit and the Port Authority of New York and New Jersey.

After years of environmental reviews, drilling of the ARC tunnel was underway in 2009. But construction stopped for a reason that has doomed other projects — disagreements among the various governments. In this case, it was New Jersey Gov. Chris Christie, who originally supported the tunnel, killed it in 2010 for what he cited were issues related to potential cost overruns.

Today, nearly a decade and a thousand train delays later, the concept behind the ARC tunnel has re-emerged in a reconfigured form as the Gateway Program, a \$20-billion design that also involves a new rail tunnel below the Hudson River and the rehabilitation of an existing one. It would be used by New Jersey Transit and Amtrak trains. A small portion of tunnel drilling for ARC will be used in Gateway

New York and New Jersey officials support the project, and the environmental review for it took only two years rather than the usual four, said John D. Porcari, the project's interim executive director. If all goes as planned, the Gateway project is anticipated to be completed in 2026.

But there is still one hang-up: The Trump administration has yet to climb onboard.

Exhibit C

[HTTP://WWW.WFUV.ORG/CONTENT/NEW-JERSEY-LAWMAKERS-URGE-PRESIDENT-TRUMP-HELP-FUND-GATEWAY-PROGRAM](http://www.wfuv.org/content/new-jersey-lawmakers-urge-president-trump-help-fund-gateway-program)



JERSEY LAWMAKERS URGE PRESIDENT TRUMP TO HELP FUND GATEWAY PROGRAM

Rendering of the finished North Portal Bridge as part of the Gateway Project
(Photo Courtesy: Gateway Program/NJ Transit)

by

[Aislinn Keely](#)

9.05.18 11:43am

The Northeast Corridor facilitates hundreds of thousands of commutes each day, but lawmakers are concerned a critical piece may be obsolete without federal funding. On Tuesday, lawmakers continued their fight for President Donald Trump to allocate funding for the Gateway Program, an infrastructure project that would rehabilitate a ten mile stretch from Newark to Pennsylvania Station.

In a press conference, New Jersey lawmakers addressed [phase one](#) of the project, which seeks to rehabilitate the Portal Bridge and Hudson Tunnel. Lawmakers gathered at Secaucus, New Jersey, in front of the century old bridge, as trains carried commuters to New York. It was built in 1910, at the same time of the Titanic. Now well over one hundred years old, the bridge exhibits problems closing properly, occasionally requiring maintenance workers to align it using a sledgehammer.

The Hudson Tunnel portion of the project includes the construction of a two-track Hudson River rail tunnel that will directly serve Pennsylvania Station, as well as fixing the serious damage Superstorm Sandy inflicted on the North River tunnel. Like the Portal Bridge, the North River tunnel was built in the early 1900s.

Jerry Zaro, a trustee of the project, gave context on the age of the tunnel, pointing out that it was constructed during the Theodore Roosevelt Administration.

“It was built at the time the Titanic was under construction, and we pray the tunnel doesn’t suffer a similar fate,” he said. “Fully thirteen percent of the New York City labor pool is forced to play transit roulette, betting daily upon whether two ancient slender tunnels will get them to work on time or back home to their families in the evening.”

Lawmakers also focused on the possible economic repercussions of the failing infrastructure. New Jersey Governor Phil Murphy said the bridges could impact 20% of the nation’s gross domestic product (GDP), or production, since it would drastically affect the labor force of New York City businesses.

“Every day replacement of this span is delayed costs an estimated \$150,000, but more importantly every day of delay also costs our commuters and our economy untold amounts of dollars and cents and sanity,” he said

Under the Obama Administration, the Gateway Program procured 50/50 funding, which the Trump Administration has since voided. Since its conception, the project’s price tag could reportedly reach 30 billion dollars in its entirety.

Murphy said New Jersey and New York lawmakers have worked to secure funding and advocated for the project.

“All of us here today have stepped up to the plate, now we just need the federal government to join us at least in the dugout and we will surely welcome them with open arms,” he said

Congressman Albio Sires discussed the meeting he and other advocates for the project had with President Trump. Sires said he and his constituents left the meeting confident, that Trump had expressed they were on the same page. However, the Federal Transportation Agency later downgraded its importance in a letter to the Port Authority, and Trump’s infrastructure plan would leave little room for the billions of dollars the Gateway Project would require.

In the question and answer portion of the event, Murphy said he was still optimistic the president will eventually fund the project.

“I believe at the end of the day, he and his team will get there because it is so obvious,” he said. “It has such a big economic impact on this region and this region is the most important economic region in our country

[Aislinn Keely](#)// Wed, 05/09/2018 - 11:43am

Exhibit D

<http://www.nydailynews.com/news/national/gateway-project-happen-federal-funding-article-1.3879810>

Gateway overseers say tunnel project 'will happen' despite Trump's threat to veto spending bill in Congress

By DAN RIVOLI
MAR 17, 2018 | 1:15 AM

Officials are determined to move forward with the Gateway tunnel even if "the federal government is missing in action," New Jersey Gov. Phil Murphy said.

(Mel Evans/AP)

No funding? No matter.

Officials overseeing the first phase of the Gateway project said Friday that they'll make progress on their own, in the face of opposition from President Trump.

"There's an inevitability to this project — it will happen," said Steve Cohen, chair of the Gateway Development Corp.

The first phase is a new \$1.6 billion replacement of New Jersey's Portal North Bridge and new \$13 billion tunnel under the Hudson River, plus repairs to the current 107-year-old tunnel.

President Trump has indicated he doesn't want to fund the Gateway Project. But Gateway Chair Steve Cohen expects the money will be there because "it can't be allowed to fail." It's seen as critical for the regional economy. [@wchs880](#)
[3:08 PM - Mar 16, 2018](#)

As the project moves along with local funds, there is a vote on a spending bill in Congress next week that could provide funding — an effort that led Trump to threaten a veto of the package.

"One way or another that money is going to be included," Cohen, a former Gov. Cuomo aide, said.

If construction starts late, however, the costs will grow each day — \$1.2 million a day for the tunnel starting mid-2019 and \$150,000 a day for the bridge beginning in mid-2018.

Kathy Wylde, director of the pro-business group Partnership for New York City, urging Gateway officials to "regroup and take a fresh look" at its approach to getting the project complete. (Bryan R. Smith for New York Daily News)

The need for a new crossing was apparent Friday when the Portal Bridge was stuck open, ruining commutes.

"This morning is an example of what happens to commuters and the economy when the federal government is missing in action," New Jersey Gov. Phil Murphy said.

The funding impasse had Kathy Wylde, director of the pro-business group Partnership for New York City, urging Gateway officials to "regroup and take a

fresh look" at its approach to getting the project complete.



The project is currently moving forward with local funds. (Amtrak)

"We've pulled out every stop we can, and I think our congressional delegation has done the same," Wylde said. "We have to take a fresh look." Rep. Pete King (R-L.I.) told the Daily News he'd pleaded the project's case to the President at a St. Patrick's Day event on Thursday in what he described as a "cordial" conversation.

Exhibit E

<https://www.pbs.org/video/transportation-official-stresses-importance-gateway-project-ahp5jz/>

NJTV NEWS

Transportation Official Stresses Importance of Gateway Project

Clip: 05/15/2017 | 5m 52s

John Porcari, interim director of the Gateway Program Development Corporation, spoke about the Gateway Project, which he calls the most urgent infrastructure project in America.

(Link to Video of Media Story)

Exhibit F

<https://www.pbs.org/video/hill-gateway-project-1514821596/>

Doubt on future of the Gateway Project

Clip: 01/01/2018 | 4m 12s

The FTA says it understands the importance of the Gateway Project and it remains open to paths that would enable it.

Aired: 01/01/18

Rating: NR

Video Media Story Link above

Attachment B



**U.S. Department
of Transportation**

General Counsel

1200 New Jersey Ave., S.E.
Washington, DC 20590

Office of the Secretary
of Transportation

9/27/2018

Scott Slesinger
Natural Resources Defense Council
1152 15th Street, N.W.
Suite 300
Washington, DC 20005

File No. 2018-409

Dear Mr. Slesinger:

The purpose of this letter is to acknowledge receipt of your recent request for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. You requested a copy of records that deal with the status and progress of the Hudson River Tunnel Gateway projects between October 1, 2017 and March 31, 2018. (**See Request**)

Please be advised that all FOIA requests will be handled on a first-in/first-out basis. Your request will be addressed in the order it was received. We regret any inconvenience caused by the delay.

Processing fees may apply for FOIA requests as set forth in the Department of Transportation's (DOT) FOIA regulation (49 CFR Part 7.41).

If you have questions concerning your request, please call our FOIA Request Service Center at (202) 366-4542.

Sincerely,

Darlene A. Wallace

Darlene A. Wallace
Office of the Secretary
FOIA Program Assistant